The Meiklejohn Lecture, given at Brown University, May 4, 1983,
by United States Circuit Judge Frank M. Coffin of the U.S. Court of Appeals for the First Circuit

Our Continuing Constitutional Convention: The Three Faces of Freedom

An endearing vignette of Alexander Meiklejohn is given us by another splendid citizen-scholar, Zechariah Chafee, in a 1949 review of Meiklejohn's book, Free Speech: And Its Relation to Self-Government. This is how he began:

> "The first time I saw the author of this book was on October morning forty-five years ago [that is to say, in 1904]. With other Brown freshmen, I was emerging from the daily chapel service to find a solid mass of sophomores waiting for us outside the door. A free fight was starting when Dean Meiklejohn suddenly appeared out of nowhere, right in the center of the fray, wearing a stiff derby hat. His good-humored display of authority stopped the fight, but in the process his derby got several bad dents."[1]

The picture of the dean serenely injecting himself into an imbroglio of volatile students, not deigning to doff his hat, and shortly emerging after quieting the ruckus, at the cost of only a few dents in a durable derby underscores how relatively uncomplicated the crises of earlier times always look to those who live in a later day. Although perhaps it is true that the most violent of latter day campus confrontations could not be so simply dealt with, let no one take a condescending view of what was to become a characteristic of the dean during the sixty long years that remained for him. He waded in.

This habit of wading in, if persisted in long enough by an individual endowed with a mixture of stubbornness, humor, and a certain indifference to the slings and arrows of outrageous fortune, can make a difference. Consider. In Meiklejohn's case the quiet professor and intrepid dean began his first career, that of an educational pioneer and experimenter, by substituting in his classes here the vibrancy of classroom discussion for the set-piece of the lecture. (He might now very well be wincing at the anomaly that, in his name, I am the twenty-first podium predator to prey upon an audience cabined within a lecture format.) In his thirteen years as President of Amherst he attempted to scale the bastions of Academe to implant his banner of a humanistic liberal arts education in place of the stamp of specialized training that suggested the trade or professional school. Here, too, he may be wincing as he observes the overweening anxiety of today's colleges and their students to turn out a product that can command a living wage. Then, invited to go elsewhere by the guardians of orthodoxy, he found himself establishing the Experimental College of the University of Wisconsin in which students would immerse themselves in the culture of Periclean and Platonic Athens during their first year and in that of industrial America during the second. At this point, it is I who wince with envy of those students. This effort also provoked controversy and our Dean from La Mancha moved on, voluntarily this time, to Berkeley and founded the San Francisco School for Social Studies where adult students from widely varied backgrounds studied key problems of the times as they implicated both the Constitution and freedom.

At this point, in 1946, when Meiklejohn was 74 years old, he began his second career as a

[1] 62 Harv. L. Rev. 891.

thinker, writer, and activist in the field of civil liberties. He had, however, begun long ago to establish his credentials, at least by 1920, when he became a founder of the American Civil Liberties Union. As early as 1949, long before it was fashionable, he criticized the House Un-American Activities Committee for probing into the political beliefs and associations of citizens, and later called for its abolition. His specific contribution to thinking about the First Amendment was a challenge to Justice Holmes's view in Schenck v. United States,[2] that government may limit even political speech in cases of "clear and present danger". In his view, this diluted the First Amendment, allowing Congress too wide a leeway to control speech. His view has been labeled "absolutist". It stemmed from his basic conviction that the First Amendment specified not a right of the people, like the Second through the Ninth Amendments, but powers reserved to the people against all abridgement because of the transcendent importance of freedom of expression in areas of public affairs.

The Meiklejohn First Amendment legacy, though not untouched by criticism and dissent, has been sturdy. It was criticized by the leading apostle of "clear and present danger", Professor Chafee, in the review I quoted at the beginning of this lecture. But a year after Meiklejohn's death, in the third lecture in this series, Justice Brennan, speaking in the wake of New York Times v. Sullivan,[3] referred to the view of Professor Kalven that New York Times "in its rhetoric and sweep . . . almost literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official."[4] He also reports a conversation between Professor Kalven and Meiklejohn in the summer of 1964 about the decision. It was, Meiklejohn said, "an occasion for dancing in the streets."[5] Today the capacity of the First Amendment to provoke continued debate is as reliable as Old Faithful and it is premature to ring down the curtain on old "clear and present danger".[6] But Meiklejohn stands as a catalyst for First Amendment discourse during several critically important decades.

Beyond the specific legacy of educational experiments and First Amendment doctrine, there is the larger gift of a long lifetime spent in "wading in" and seeing to it that several generations of Americans thought freshly and deeply about their Constitution and what it meant for them in the times in which they lived. This kind of service still remains to be done for and with your generation, for such is the nature of this country that nothing can be assumed to be finally settled. Jefferson, indeed, had little faith in the permanence of the Constitution; he once suggested that it expire naturally every nineteen years. This would most certainly have been the granddaddy of all "sunset laws". But although the Founders built far better than they could have known, each generation takes part, sometimes quietly, sometimes stridently, in what might be called the Continuing Constitutional Convention.

The issues change. During much of the nineteenth century the new nation was absorbed in territorial expansion and economic growth; constitutional litigation centered on the structure of government, the relations between state and federal power and among the branches of the federal sovereign. Then came the crucible of Civil War and the conflict between the Constitution as interpreted by the Supreme Court and the Constitution as seen by the President and the people, a conflict finally resolved by adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments.

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[2] 249 U.S. 47, 52 (1919).

[3] 376 U.S. 254 (1964).

[4] Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1, 17 (1965).

[5] Id.

[6] See Redish, Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 Calif. L. Rev. 1159, 1194-95 (1982).

In the latter part of the nineteenth century and the early decades of this century, the emergence and dominance of the great industries led to deepening debate over the power of government to regulate them. In particular, the early part of this century saw a running battle between welfare legislation and the Contract Clause of the Constitution. With the Contract Clause finally tamed, the New Deal era saw the focus of constitutional adjudication centering on the Commerce Clause. The years following World War II saw the onset of unprecedented constitutional decision making in the twin fields of civil liberties and civil rights.

As we look back, so much seems to have been the inevitable working of fate. But for those living at the time, the issues were hotly contested and always in doubt. Who, living in what we now regard as the somnolent 'Fifties, can forget, following the decision in Brown v. Board of Education, the seriousness with which the doctrine of interposition was advanced and received, the doctrine that a state may reject a federal mandate that it views as encroaching on its rights? Or white citizens' councils? Or the Southern Manifesto? Or the bombing of school houses and judges' homes? Or "Impeach Earl Warren"? The all-too-human answer is that almost all of us can all too quickly forget these events of yesteryear.

But it is wise to recall them, to realize that passionate controversy over the meaning of the Constitution is part of the human condition for all of us, all the time. Such realization is a source of both perspective and strength as we face the Continuing Convention of our time. The agenda includes some 40 proposed constitutional amendments dealing with the social issues of school busing, reproduction, and school prayer, together with at least 30 bills in Congress which would limit or exclude the jurisdiction of federal courts to deal with such issues. All represent the efforts of persons who so strongly believe in their views that they attribute not only moral but often religious potency to them and demand that they be written into our basic charter. In so striving they overlook the fact that our 55 Founding Fathers believed equally deeply in one side or the other of many social issues -- high tariffs or free trade, a national bank or none, and of course for or against drinking, gambling, dancing, and observing the Sabbath. But they held their focus to a structure and its basic method of operation.

So, by and large, have the people subsequently as they have amended the fundamental document. Not only has the total number of amendments in nearly 200 years been held to only 16, but of those all but four had to do with such matters as the structure of government, elections, terms of office, extending the franchise. Only four can be said to involve substantive social issues. Two, the Thirteenth and Fourteenth Amendments, were in essence the constitutional "ratification" of the Civil War.[7] The other two are the Eighteenth and Twenty First Amendments, mandating and then abolishing Prohibition; they should not be forgotten but should be cherished in memory as Exhibits A and B of unwise tinkering.

Because the Meiklejohn Lecture always sails under the flag, "Freedom Under the Constitution", and because the freedom facet of the Constitution reflects its deepest values, the most complex confrontations between society and the individual, and the area of its most dramatic growth, I shall put on my derby hat, wade into your midst, and discuss some ideas that I think you should ponder as you take your places in your generation's Constitutional Convention. I devoutly hope that I shall have more success than did the Constitution itself in this most independent of states. Rather than call the recommended state convention to consider ratification, the Rhode Island legislature decided to submit the matter to all the towns. The Federalists were so offended by this that they, with monumental stupidity, boycotted the process. Professor Goebel described the result:

[7] Spitzer, Wither the Constitution?, Vol. 14, No. 1, The Civil Rights Quarterly, 12, 14 (1982).

> "The thousand copies of the Constitution printed and distributed to the towns were thus incontinently left to the ruminations of the rustics under the guidance of implacable enemies of the new system. The new plan was rejected 2,708-237, a majority which might have recalled to obdurate federalists the scriptural apothegm that 'if the blind lead the blind, both shall fall into the ditch.'"[8]

My theme is the three faces of freedom. By "freedom" I mean, quite simply, the unhindered, unpressured opportunity of an individual to realize his full potential consistent with living in contemporary society. This implies more than freedom from shackles and prison cells. It also means opportunity equal to that of his similarly situated neighbor. And if that is not possible, it means some other and lesser kind of offsetting, compensatory opportunity to get back in the mainstream. We shall first refresh our memories of our deepest libertarian roots, springing from England's gift of centuries and the epiphany of our own Founders in 1787 and 1789. Then we shall savor a kind of freedom never mentioned in the original text of the Constitution -- equality.

Here we shall merely note in passing the age-old debate about the tension between liberty and equality. Like Professor Tribe, we shall take equality as a central force "[w]hether treating [it] as prized because of its indirect role in enhancing freedom, regarding it as a crucial but independent variable, or viewing it as dangerous because of its asserted tension with liberty."[9] I know that some scholars, like Peter Westen, conclude that "[E]quality ... is an idea that should be banished from moral and legal discourse as an explanatory norm."[10] For such, the necessary and sufficient predicate is the existence of an individual right; if one individual possesses a right, so should another, not because he is "equal" but because he is an individual. But for Ronald Dworkin, "[I]ndividual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights."[11] An apparent and formidable convert to this position is Justice Stevens, who recently wrote, in dissent (after quoting Dworkin quoting Mill): "For an essential attribute of the liberty protected by the Constitution is the right to the same kind of treatment as the State provides to other similarly situated persons."[12]

One of the nice things about being an American, at least so far, is that we do not have to choose between liberty and equality. As Professor Samuel P. Huntington has written, "In Europe these two values are commonly thought to be inherently opposed to each other. From Plato on, political theorists saw the extension of equality as ultimately involving the destruction of liberty, as society becomes homogenized and leveled, paving the way for the rise of the despot. . . . Few American have shared [the] fear that the expansion of equality would signal the death-knell of liberty. ... In the United States [liberty and equality] . . . developed in conjunction with, not in opposition to, each other, representing not so much the political values of opposing social classes as the opposing political values of a single middle class.[13] I therefore do not think in extreme terms, where a monarch's license might be microscopically inhibited by incrementally adding to

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[8] Vol. 1, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, Julius Goebel, Jr., N.Y.: MacMillan, 1971, p. 359.

[9] Lawrence H. Tribe, American Constitutional Law, N.Y.: The Foundation Press, Inc., 1978, p. 991.

[10] Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 542 (1982).

[11] Dworkin, Taking Rights Seriously, Cambridge: Harvard University Press, 1977, p. 274.

[12] Hewitt v. Helms, 51 U.S.L.W. 4124, 4130 (U.S. Feb. 22, 1983) (Stevens, J., dissenting).

[13] Huntington, American Politics: The Promise of Disharmony, Cambridge: Harvard University Press, 1981, pp. 16-17.

a serf's privileges. I claim a more modest ground. As we think about liberties and rights and contemplate a situation where some can exercise their right to vote and others cannot, I venture the simple proposition that this inequality cannot be distinguished from the obverse of liberty, that is to say, bondage. Gains made under the banner of equality are, in such a case, gains for freedom.

The third face of freedom is fairness. This is a fuzzy, rubbery word, at its outermost limits meaning equality itself. I use it in a narrow sense, possibly its deepest sense, as meaning doing the absolute, irreducible minimum for someone who has made a sacrifice for or, for reasons beyond his control, has been disadvantaged by society, so that he will not feel alienated and abandoned by that society but will still feel that he is a part of it, has a stake in it, and a fealty toward it. There is an instinct for fairness deep in our psyche, not unrelated to our instinct for survival. The Supreme Court acknowledged this instinct when it referred to "the concepts of equal protection and due process. [as] both stemming from our American ideal of fairness.[14]

These three facets of freedom differ not only in thrust and nuance but they occupy different time frames. When we speak of the liberty value, we refer generally to ancient English and colonial history. In speaking of equality, we hearken to more recent times. And when we speak of fairness, we are venturing into the future. Each quality, moreover, achieves its optimum realization or support through a different sector of our constitutional system.

I. Liberty

The core of freedom is something we take for granted and seldom discuss -- the very foundations of our charter. These consist of certain fundamentals without which any catalogue of rights or liberties lacks substance. How the mixture came about I do not know, but there was a beneficent fusion of our English heritage and something else. From England we took the hard-won principles of majoritarianism, the exercise of basic powers by popularly elected representatives of the majority, but with certain rights guaranteed to individuals, beginning with Magna Carta, and assured by independent judges.

There were two other principles which were peculiarly our own. England had a trio of power centers -- King, Peers, and Commons. This, however, was not in any real sense a separation of branches or balance of powers. Each force was infiltrated by members of all parties or persuasions. It remained for the Americans to extract the bitter lessons of partisanship from their reading of English politics. Although the Fathers drew heavily on Montesquieu's concept of separation of powers, while drastically changing the specifics, they abjured completely his reliance on "Virtue" as a centripetal force of government. Instead, they were influenced, if not overinfluenced, by reading the English political pamphlets of the 18th century in which the anti-government party spared no rhetorical venom in castigating and calumniating the administration in power. The result, as Bernard Bailyn has written, was a "deeply bred belief that faction was seditious, a menace to government itself, and the fear, so vividly conveyed by the radicals and the virulent anti 'Robinarchs' in England, that the government was corrupt and a threat to the survival of Liberty."[15] Accordingly, largely through Madison's influence, the concept of self-interested people contriving against each other was translated into our ingenious, effective, if Byzantine and frustrating system of separation of powers and checks and balances based on distrust of the human manipulator.

Having adopted this approach, the Founding Fathers, consciously or unconsciously, had

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[14] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[15] Bernard Bailyn, The Origins of American Politics, N.Y." Vintage Books, 1970, p. 105.

no place to go to except a written Constitution. The Rube Goldberg blueprint of levers, catches, holds, springs, weights could not be entrusted to simple memory. Moreover, our Founders had in mind that Magna Carta, not being part of the unwritten British Constitution, wound up being enacted by Parliament 32 times, which meant that it had fallen out of the Constitution 31 times. Our Founders wanted a greater degree of visibility, and assurance against both subtle encroachment and captious change. The reason why these few basic structural features are the foundation stones of liberty has not been better expressed than by that Founding Father whose symbolic paternity exceeds all others. Here is what Washington said in his Farewell Address:

> "In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of governments, as of other human institutions -- that experience is the surest standard, by which to test the real tendency of the existing constitution of a country -- that facility in changes upon credit of mere hypothesis and opinion, exposes to perpetual change, from the endless variety of hypothesis and opinion; and remember, especially, that for the efficient management of your common interest, in a country as extensive as ours, a government of as much vigour as is consistent with the perfect security of liberty, is indispensable. Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian."

The immensity and specificity of the libertarian superstructure erected on this foundation by the Founders are surely not appreciated by most of us. But they had five centuries of English history and two of colonial history to consider. And they read and remembered well. There are some 24 liberty-assuring provisions in the original document and no fewer than 30 additional rights in the first ten amendments. When we add the nine rights vouchsafed in the post-Civil War amendments, we reach a total of 63 freedom-enhancing provisions formally contained in our great charter, 85 per cent of which were contributed at the very beginning.[16]

The large tapestry of English history provided the unspoken frame of reference for the Constitution makers. The bright colors were reflections from Magna Carta -- not the story of the document itself but of the way in which, despite itself, it came to stand for rights far beyond that limited contract between a king and his privileged barons. The Great Charter spoke in terms of preventing the deprivation of "liberties" and "free customs" except by judgment of one's "peers" or by "the law of the land". No matter that this was first a contract only with the Barons, nor that "liberties" meant property rights received from the king, nor that "free customs" meant the right to levy tolls, nor that "peers" meant social equals, nor that "law of the land" meant a trial by battle or trial by the ordeal of a red-hot iron. Shrouded in antiquity, mired under bad scholarship for centuries, Magna Carta became the weapon for those who would trim the king's power. And always at bottom it stood for the proposition that there was a law above the king.

The dark colors in the English tapestry were supplied by the Tudors and Stuarts in the 16th and 17th centuries when the legal firmament was lighted chiefly by the baleful glow of the Star Chamber and the Court of High Commission where the rack, the gibbet, and the Tower were the chief instruments of justice. Over 60 pamphlets and the ten volume set of Emlyn's State Trials were in a number of private libraries and particularly on the shelves of Franklin's Library Company of Philadelphia in Carpenters' Hall. They told of Sir Thomas More, convicted and beheaded for his silence in 1535; of the stubborn Puritan minister John Udall who wrote booklets critical of centralized church authority sentenced to death after a trial in 1590, which, as Irving

[16] Brant, The Bill of Rights, Indianapolis: Bobbs-Merrill, 1965, pp. 12, 15.

Brant observed, "reads like a Bill of Rights in reverse";[17] of the straitlaced William Prynne who wrote unflatteringly of the Queen's appearance on the stage, an act deemed by the Star Chamber in 1634 to merit two pillories, the slitting of the miscreant's nose and the cutting off of one ear, life imprisonment, and, as if that were not enough, a fine; of John Lilburne who, accused of importing Puritan books from Holland, insisted on refusing to incriminate himself and on confronting his accusers, and was rewarded in 1637 by being gagged at the pillory and whipped 200 times from Fleet Street to Westminster; and of William Penn, indicted in 1670 for speaking to some Quakers on a London street, and of juror Edward Bushell, one of twelve who were kept by the judge confined all night without food, drink, fire or even a chamberpot for refusing to convict Penn.

The Founding Fathers, well aware of these excesses of arbitrary power, dealt with most of them in the Constitution, sharply defining treason, abolishing bills of attainder and ex post facto laws, requiring juries for the trial of crimes, and prohibiting the suspension of the writ of habeas corpus except in direst emergencies. What remained to be considered were the possible excesses of power which a national government might commit. And here the former colonists, in insisting upon a Bill of Rights, went beyond the mother country whose common law, to take one example, contained no protection for religion, speech, or the press. The First Congress proceeded to insulate what Madison called "the great rights" in "those cases in which the government ought not to act, or to act only in a particular mode."[18] And so they set the standards for search and seizure, forbad double jeopardy, self-incrimination, denial of assistance of counsel, cruel and unusual punishment, and required indictment by grand jury, speedy public trials of crimes by jury, confrontation of witnesses, due process of law, and compensation for the taking of private property.

With the exception of the increment to the arsenal of Constitutional liberties accomplished by the Thirteenth, Fourteenth, and Fifteenth Amendments, outlawing slavery, barring states from abridging privileges and immunities of citizens, violating due process, denying equal protection, and denying the right of a citizen to vote by reason of race, color, or previous servitude, and the extension of suffrage to women in 1919, the next significant step in the evolution of liberty under the Constitution began in the 1920's with the invocation of the Fourteenth Amendment to apply to one after another of the amendments in the Bill of Rights to restrict and limit state power, so that today most of the "great rights" in the First, Fourth, Fifth, Sixth, and Eighth Amendments are as applicable to the states as they are to the national government.

What we have seen in the last 30 years amounts to a history of intense judicial involvement on a case-by-case basis, fine-tuning and in most instances expanding the rights earlier established. The case law relating to each right in the hallowed catalogue -- self-incrimination, right to counsel, double jeopardy, search and seizure, cruel and unusual punishment, free speech and press, free exercise of religion and the non-establishment thereof -- fills law school courses, book shelves, treatises, and loose-leaf services. But we have gone beyond these liberties, all of which have some textual source in the Constitution or its Amendments, to constitutionalize some liberties which time, society, and technology have identified as demanding recognition if the essential spirit and intendment of the Constitution is to be relevantly applied to a contemporary world. Thus the old word "search" has been applied to electronic surveillance. We recognize a freedom of association although "association" is not to

[17] Id. at p. 105.

[18] Quoted by Brant, id., at p. 47.

be found in the First Amendment. So do we forbid unreasonable burdens on the constitutional right to travel, although "travel" is not mentioned in the Constitution. And, most prominently, there has emerged a right of privacy or personal autonomy which now includes the right of a woman to have an abortion in the first trimester of pregnancy.

This, then, is a thumbnail sketch of the liberty facet of freedom under the Constitution. It has taken us back to our most ancient roots, for liberty is our oldest tradition. It permeates our written Constitution and its great amendments. It is a concept that uniquely lends itself to implementation by the courts, since the issue of liberty is posed when society in some form attempts to burden, confine, or otherwise handicap one individual. The individual either defends himself or brings a lawsuit; in either event we have a case or controversy which it is a court's business to adjudicate. Even though this is true, there is an important caveat. Liberties, even though courts may have the last word in sustaining them, often wither on the vine if legislators, administrators, law enforcement officials are callous, indifferent, or defiant. It takes a stubborn and almost inhumanly heroic individual to persist in seeking his constitutional vindication if the local town officials, sheriff, and, above all, potential jurors do not value liberty as did their forefathers.

Liberty -- our oldest heritage, most specifically identified, most capable of vindication by the courts.

II. Equality

Equality as a principal ingredient in our creed was uniquely American. It was not an import. Strange, then, that although given top billing in the Declaration of Independence, it was not mentioned in the original Constitution. Only by implication could we say that it was there, in such clauses as Article I, Section 2, providing that the member of the House of Representatives would be chosen by "the People". Not until the Thirteenth, Fourteenth, and Fifteenth Amendments, following the Civil War, was the concept of equality explicitly made a part of the Constitution.

Perhaps this lag in explicit identification is explained by the conditions of the times. When we became independent, we had a continent in front of us, holding out limitless opportunities to those with the wit, will, and daring, with no hint of scarcity. All one could ask was the liberty to try for the brass ring. So long as one was not shackled, the race was to the swift and the rewards sufficient. There was no need to think about equality; liberty was enough. William Dean Howells put it: "Inequality is as dear to Americans as liberty itself."

This was pithy but not so. Equality was so primary a fact of life that the Founders took it for granted. Madison referred to it as "the leading feature of the United States."[19] Charles Pinkney could say without fear of contradiction, "There is more equality of rank and fortune in America than in any other country under the sun; and this is likely to continue as long as the unappropriated western lands remain unsettled."[20] This is why Madison could take a relaxed and even condescending view toward suggestions that the Bill of Rights speak of equality. He referred to them as suggestions that "do no more than state the perfect equality of mankind ... an absolute truth, yet . . . not absolutely necessary to be inserted at the head of a Constitution."[21]

In any event, equality, though at first taken for granted, soon joined the American

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[19] Farrand, I Records of the Federal Convention of 1787, New Haven: Yale University Press, 1966, pp. 400-401.

[20] Id., p. 410.

[21] Brant, id., p. 46.

pantheon of values. As Professor Huntington writes, "The eighteenth-century value of liberty was quickly joined by the Nineteenth-century value of equality."[22] Indeed, so much momentum has the slow starter achieved that Professor Commager prophesied, "It is highly probable that to the next generation the Equal Protection Clause will be, in constitutional and political interpretation, what the Due Process Clause was in the past."[23]

But notwithstanding the Civil War amendments, it was not until 1954 that equal protection became an acknowledged limit on federal power. In Bolling v. Sharpe the Supreme Court invalidated racial segregation in the public schools of the District of Columbia, reasoning that the due process clause of the Fifth Amendment (which said nothing at all about equal protection of the laws, as did the Fourteenth Amendment) necessarily embraced the concept, saying, "[D]iscrimination may be so unjustifiable as to be violative of due process."[24]

Not only was equal protection written into the Fifth Amendment in 1954, but that was the year when the equal protection clause of the Fourteenth Amendment began its adult career, with Brown v. Board of Education. Then followed three other trailblazing educational desegregation cases, Green v. County School Board of Kent County, Va., Swann v. Charlotte-Mecklenberg Board of Education, and Keyes v. School District No. 1, Denver, Colorado. Discrimination in the sale or rental of real property was barred, then discrimination in employment against women or minority persons. Indians, women, the aged, the non-English speaking, the alien, even men found that either the Fourteenth or the Fifth Amendment was their passport to a more unshackled, therefore more free life.

Yet court-enforced equality was merely the tip of the iceberg. For over twenty years the Congress, as well as many state legislatures, had been seized by the driving ideal of equality. There were the Civil Rights Acts of 1957, 1964, and 1968; the Equal Pay Act of 1963; the Voting Rights Act of 1965; the Age Discrimination Acts of 1967 and 1975; the Indian Civil Rights Act of 1968; the bar to discrimination on the basis of sex or vision impairment in the Educational Amendments of 1972; the Rehabilitation Act of 1973 barring discrimination against and requiring affirmative action on behalf of the handicapped; the Equal Education Opportunities Act of 1974; the Equal Credit Opportunity Act of 1974. Add to these the two decades of increasingly comprehensive Executive Orders barring discrimination in employment, housing and other facilities receiving federal assistance.

All of this is evidence of a deep impulse toward equality. Equality itself is beginning to emerge as not a single condition but rather a spacious continuum. The court cases and laws that we have just noted represent what we might term equality in its weakest sense -- the removal of artificially imposed discriminatory barriers. All of us are agreed that equality under the Constitution means that no higher hurdles can be placed in front of A, because he is black, than in front of B, who is white. At the opposite end, almost out of sight, is equality in its strongest sense, absolute equality in the distribution of material resources. It is when this point is approached that equality would most immediately trench upon liberty and would cataclysmically affect such societal forces as incentive, innovation, saving, sacrifice, risk, and leadership. So far equality in the sense of equal treatment for all persons has been recognized only for a limited set of non-economic interests such as voting and access to court processes.

The courts have been the leading actors in charting the headlands of the weakest brand of

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[22] Huntington, Id., p. 17.

[23] Commager, Equal Protection as an Instrument of Revolution, in Constitutional Government in America 467 (1980), quoted by Weston, id., p. 538 n. 4.

[24] Id. at p. 499.

equality in their role of bastions against discrimination; the state and national legislatures have historically taken the leadership in taking whatever steps have been taken in the direction of minimizing the disparity of resource distribution, beginning with the income tax and including affirmative action requirements for recipients of governmental funding or licenses.

The area between the barring of discrimination and the assuring of equal benefit is that of affirmatively providing some, if not "equal", opportunity to share in the social and economic benefits of society. This is where the action is likely to be in the foreseeable future. We are increasingly aware that, where individuals, families, whole ethnic and racial groups have for generations been not only at the bottom of the economic ladder but shut off from education and enterprise, more is required than the simple removal of barriers of discrimination. This job is, by and large, that of the legislative and executive branches of government. Courts act in discrete cases. Their forum lacks the breadth of focus and consequent richness of input, analysis, and prescription suitable for the address of major social problems. Nevertheless in the new breed of broadly based class action suits seeking wide-ranging institutional reform, courts often find themselves entering an arena which closely approximates the legislative.

The result of this tension between the traditional limitations placed on courts and the new demands made on them has been a somewhat opaque, muffled, waffling approach to equality as a goal. When fundamental rights, such as voting, or suspect classifications, such as race, are involved, the courts will subject the law being attacked to the most minute, demanding scrutiny; few emerge alive. But when some lesser interest is at stake, such as economic regulations, courts will wave through any legislation so long as some rational basis can be imagined as supporting it. Few such laws fail to pass the test. In between is the matter of sex. The Supreme Court is ambivalent about this. This is not quite a suspect classification. Yet it is important. So a middle ground has been reached: any law differentiating between the sexes must be supported by a "substantial relationship" between the classification and the end sought to be served by the law. Complicated? Opaque? Perhaps. But this merely reflects the problem of equality, where the major decision makers must be the legislatures and the courts wish to avoid total immersion.

As we shall see, this ground between the prevention of discriminatory barriers and the assurance of equal benefits is the terrain of any future thrusts toward fairness in the provision of minimal opportunity to participate in contemporary society. So far, only the most tentative and basic positions have been staked out.

So this second facet of freedom is newer, only belatedly reflected in the Constitution itself, and far more the domain of those making and executing statutory law than that of the courts. Yet equality springs from the deepest of roots. DeTocqueville entitled one of his chapters of Democracy in America "Why Democratic Nations Show a More Ardent and Enduring Love of Equality than of Liberty".[25] Despite the anomalous defeat of the Equal Rights Amendment, the Fifth and Fourteenth Amendments will continue to be one of the major preoccupations of courts as members of the most justice-oriented society ever known continue to insist on their equal rights and privileges. Indeed, the perdurable adequacy of these clauses and the willingness of courts to apply them was seized upon by many as a reason for rejecting the new amendment.

III. Fairness

So far all is prologue, a matter of interpreting what has happened in 196 years of constitutional development. What I am about to say is both more difficult and more vulnerable, for we shall be taking two sizeable leaps -- one of chronology and the other of concept. We shall

[25] Vol. II, Second Book, Chapter I.

first try to picture the future condition of the society that we are already entering. We shall then be so rash as to prophesy the implications of that future for constitutional doctrine.

I think it is reasonably safe to say that the society of the foreseeable future will be characterized by two distinct features. One is quite negative, the other quite positive. Both pose problems. The first characteristic is scarcity as we leave that Augustan Age, perhaps born of our memory of the Frontier, when we thought all things needed for our material well being were infinite. Now, even looking with blinders only at our own country, we know there are limits to and even likely shortages of raw materials, land, clean air and water, forests, fruitful soil, fisheries, energy, and privacy.

In a graphic, as yet underestimated phrase, Lester Thurow has portrayed some of the implications of our new and unfamiliar condition. We were, "the little rich boy who inherited a vast fortune."[26] Whether we have squandered it or not, we have suffered a relative decline in our standard of living and see other nations exceeding our standard. We face a continuing relative decline. Our future is to be measured by the rules applying to a zero-sum game. "A zero-sum game is any game where the losses exactly equal the winnings."[27] In such a game, the problem of society is that it must make tough loss allocation decisions based on equity rather than on who are the least powerful and thus least likely to protest bearing the loss. Thurow focuses on job opportunities and says, first, that "Economic minorities will never catch up with white males unless they have an equal opportunity at the job opportunities open to white males."[28] His second proposition is that "The lack of employment opportunities is not a temporary, short-run aspect of U.S. economy. It is permanent and endemic."[29]

The global prospect is even more sombre. When we look at this endangered planet, we see the remorseless expansion of population crowding against limited and even diminishing resources and energy, and realize that the less developed world, having reached the first stage of freedom in gaining liberty from colonial domination, now seeks to make freedom meaningful by achieving higher standards of living, We are startled by Robert Heilbroner's prophesy: "What is at bottom a movement of hope and well-being for the inarticulate and inadequate masses of mankind is a fearful threat to the delicate and now gravely exposed civilization of the articulate and advanced few."[30]

The other characteristic of our emerging society, a happier one, is high technology, carrying with it the potential of enriching life through computers, robots, microelectronics, fiber optics, biotechnology. High technology promises to revolutionize education, communication, commerce, industry, health services, and leisure. Possibly no domain of personal or societal life will remain untouched. On one result the experts seem agreed, that the new era will be a post-industrial as well as an information age. Our traditional industrial base comprising industries such as steel, fibers, shoes, clothing, metal parts, ships, and small appliances will be, as Reich and Magaziner point out in Minding America's Business,[31] significantly subtitled The Decline and Rise of the American Economy, increasingly vulnerable to low wage competition from the Third World. Even industries which have recently been characterized by high growth may lose their dominance. An observer such as John Naisbitt, the author of Megatrends, has predicted that

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[26] Thurow, The Zero-Sum Society, N.Y." Penquin Books, 1981, p. 4.
[27] Id. at 11.
[28] Id. at 203.
[29] Id. at 205.
[30] Heilbroner, The Future as History, N.Y.: Harper & Row, 1960, p. 206.
[31] N.Y.: Harcourt Brace Jovanovich, 1982, p. 375.

the role of the United States in the cybernetics industry will be that of designing and producing the software, while countries such as Japan turn out the hardware.[32] Already in the 1970's, only 5 per cent of the 20 million new jobs created were in manufacturing.

We therefore face a society where many things we have taken for granted will be in limited supply and an economy where the future lies with those who are masters of the new technologies. How to survive with dignity as humans and, if possible, with a modicum of joy is our great goal. We are meeting with each other one year in advance of the most advertised future year in our literature, George Orwell's 1984. With relief we realize that we have not quite come to the point where Big Brother can see and listen in on our innermost thoughts and actions. Our language, though debilitated, has not quite plumbed the depths of "Newspeak". But the technologies making possible mass communication, mass influence, value conditioning, taste creation, and all-encompassing cultural conformism are as potent as any Orwell contemplated. My worry is not 1984 but rather that 1990 or 2000 will see some of us laid back, strung out, enjoying the fruits of our high technology education and training, passive, quietistic, and oblivious to great masses of our people who are dislocated, unemployed, uneducated, and bereft of any hope of sharing in the blessings of the new era.

If we are to take this scenario of scarcity and high technology seriously, we shall do well to rethink some of our principles. We have been on a prosperity kick ever since the New Deal -- a half century. Now we are in the parlous situation described by Ronald Dworkin:

> "Liberals [have] avoided the question of what liberalism requires when prosperity is threatened rather than enhanced by justice. They [have] offered no coherent and feasible account of what might be called economic rights for hard times: the floor beneath which people cannot be allowed to drop for the greater good."[33]

He offers this suggestion. If a person is asked or forced to sacrifice for his community for the larger good, "[G]overnment must show how alternative plans or programs will restore the promise of participation in the future.[34] Thurow reaches the same conclusion after seeing the implications of a zero-sum society. In his words, we must have "systems for compensating individuals who legitimately lose when projects are undertaken in the general interest."[35] As examples calling for such compensatory government action he cites proposals to terminate programs such as food stamps, Aid to Families with Dependent Children, and funding higher education for the poor. A modest effort of this nature is the Trade Adjustment Act where, if it is determined that jobs are lost because of foreign competition, retraining funds and relocation services are available for displaced workers. The objective is to enable the disadvantaged and displaced individual to make reentry into the mainstream of society so that he may once again help determine the shape of his future, with the realistic hope that equal benefit may ultimately, in not too long a run, flow to his immediate communities of family, descendants, and race for which he feels especially responsible.[36] Reintegration, participation, mobility, access ---- these are the irreducible goals if we are not to surrender to the prospect of a class-structured, elitist, anti-democratic, and dangerously divided society.

This approach I call fairness. I do not use the word with the more ambitious and

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[32] Wilck, "Megatrends": finding pieces of the future, Christian Science Monitor, Feb. 17, 1983, p. B10.
[33] Dworkin, Why Liberals Should Believe in Equality, N.Y. Review of Books, Feb. 3, 1983, pp. 32, 34.
[34] Id. at 34.
[35] Thurow, id. at 208.
[36] Dworkin, id., at 34.

sophisticated connotations of John Rawls whose book, A Theory of Justice, presents "the main idea of justice as fairness, a theory of justice that generalizes and carries to a higher level of abstraction the traditional conception of the social contract."[37] If I have had some procrustean difficulty in treating equality as one facet of freedom, you may think I shall have more in presenting fairness as a third and separate face. To many, fairness is merely equality. To be sure, equal treatment is fair treatment. But I am thinking of occasions when equal treatment is not possible or feasible. If there is no pie to be divided equally, but only a slice to be given to A, what else can be done for B so that he will continue to feel he has a stake in the household? How can he be assured of at least a seat at the table?

This seems like a retreat from equality. It is and it is not. It is not and cannot be a retreat from the equality mandated by statutes or in those fundamental matters where the Constitution requires equality. Yet fairness as I define it recognizes that something less than absolutely equal treatment may be forced upon us by a future of scarcity and high technology, This challenge to fairness in a climate composed of both scarcity and the selective compensations of advanced technology makes clear to me what the Constitution is. For the challenge your generation faces is not a narrow call to vote for or against a particular issue, or a specific governmental program to be adopted, or even a decision to be made by the courts. The nature of the challenge illuminates the fact that the Constitution is not merely a document but a reflection of the deeply shared values of our society at any given time. The call you -- and all of us -- face is one to our entire commonweal.

The challenge to values is most importantly directed at all of us, and particularly the generation coming of both age and strength, that we consciously try to change ourselves in three ways: that, while remaining humanists, we equip ourselves with the trained intelligence to cope with science and technology in our vocational and avocational lives; that we simplify our lives, reduce our dependence on consumerism and develop our powers of self-discipline and restraint; and that, above all, we rediscover a compassionate, caring concern for our fellow man.

With the citizenry so committed, most of our state legislators, representatives, and senators will reflect our views. They will be increasingly capable of applying the teachings of science and technology, will be first concerned with the nation and then, unabashedly, the world. They will allocate shortages sensitively and sensibly. They will be alert to enabling all who will to make reentry into productive roles in society.

In this scenario the judiciary ought to play, and with your help will play, a minor role. Courts are by their nature not well equipped to undertake the delicate tasks of balancing interests, spreading costs equitably, satisfying stability, encouraging innovation, subsidizing ingenuity, rewarding persistence and social service. The legislatures of the states and of the national government hold the largest potential for a society dedicated to fairness in the post-industrial age.

Even if there must be recourse to courts, however, it does not follow that the Supreme Court of the country or the federal courts are the only sources of constructive doctrine. The fifty state supreme courts are increasingly widening their perspectives and flexing their muscles. Wisconsin Supreme Court Justice Shirley Abrahamson has recently speculated that "it may well be the state supreme court, not the United States Supreme Court, that will be the significant constitutional law court."[38] Most recently the New Jersey Supreme Court has provided a landmark case embodying the jurisprudence of fairness. Eight years ago that court pioneered in

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[37] Cambridge: Harvard University Press, 1971, p. 3.

[38] Abrahamson, Reincarnation of State Courts, 36 Sw. L. J. 951 (1982).

clamping down on zoning laws that excluded low income people by requiring communities to permit low income housing development for a fair share of the region's need. Now the court goes further and, in a groundbreaking opinion, holds that a community's failure to provide a fair share of a region's low income housing needs abuses the state's police power and violates the due process and equal protection clauses of the state constitution. The court requires municipalities affirmatively to use state and federal subsidies, incentive zoning, and mandatory low income set-aside housing for each development.[39] Pennsylvania, California, and New York are not far behind New Jersey.

Nevertheless, no matter how fairness-oriented the state courts may be, or perhaps because they may be so oriented, looming ahead is the possibility, and I think the probability, that fairness in a very basic sense may become constitutionalized, may become incorporated into the Constitution by decisions of the Supreme Court. The futurist, Alvin Toffler, foresees the impact of what he calls a "Third Wave of Global Change". The first was the agricultural revolution of 10,000 years ago. The second was the Industrial Revolution. This third one is based on the information and biological revolutions, space, ocean, and environmental technologies, and new forms of agriculture. Toffler flatly states: "Equality of opportunity is meaningless in the absence of widespread training and retraining facilities." He asks, "Do all Americans have a right to literacy? If so, that right must now be expanded to include computer literacy and media literacy.[40]

As courts face this complex, highly technological future, characterized by scarcity of material resource, space, and energy, I can foresee an impulse of fairness commanding that, whatever may be the human wreckage tossed up by global or internal economic forces, they cannot turn their backs, for society itself has sponsored the forces that have led to the wreckage. I can foresee the likely port of call. Some years ago the Supreme Court turned down the proposition that every community in a state -- this happened to be Texas -- must be enabled to provide a primary and secondary education equal to that of any other community in the state. The Supreme Court tolerated the inequality, primarily because of the value it placed on the local control of schools. Even though education was a "fundamental interest", it was not fundamental enough to merit the most rigorous brand of equal protection.[41]

This does not seem to me to be a decision embedded in granite. It has been rigorously criticized in terms of the precedents it invoked. It has been accepted in its time because of the immensity of difficulties that absolute equality of education, statewide, would entail. Who, after all, would wish to be responsible for the allocation of education monies within a state? After reviewing this case and, indeed, all of our recent egaliatarian jurisprudence, one respected observer comments:

> "What emerges from the decisions of the past several years, then, is a wavering commitment to maintain for the poor access to criminal justice and the political process; a possible, but not openly professed or entirely consistent, belief in protection for the poor against the most severe forms of deprivation with respect to education, nutrition, and welfare; and a determined, occasionally even

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[39] Southern Burlington County NAACP v. Township of Mount Laurel, 51 U.S.L.W. 2454 (Feb. 8, 1983).

[40] Toffler, Civil Rights in the Third Wave, Vol. 14, No. 2, Perspectives (The Civil Rights Quarterly), 1982, pp. 32, 36.

[41] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 37 (1973). The Court, however, left open the possibility that there might be a constitutionally protected minimum quantum of education where a "charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."

> activist, though again not openly proclaimed, commitment to preserve for the non-poor ways of purchasing distance and distinction from the less fortunate -- to preserve, in effect, plenty of room at the top, without wholly abandoning protection at the bottom."[42]

Then, disturbingly, he adds,

> "Whether the equal protection of the laws can survive this transformation into minimal protection of the laws, with some of us very much more equal than others, remains to be seen. It will depend in part on just how minimal the protection provided at the bottom turns out to be. But it may also depend on the viability of a system that separates liberty from equality, and separates both from fraternity."[43]

The San Antonio case was decided ten years ago. In every sense other than the precisely chronological this was another age, already remote. The new conditions of scarcity, high technology, and ease of alienation have since appeared. The ticket to participation in our emerging society is, more clearly than ever before, general education, vocational training, and, even more specifically, on-the-job learning. And in these days it means most particularly training in computer literacy. So critical are both general education and high technology training to anyone who would play a constructive part in society that I venture the thought that the day will come when the Supreme Court may see that education, vocational training, job instruction and retraining are preconditions to "liberty" if not "life", at least as much as are unhindered voting and access to courts. Should this day come, I would not see it as any vindication of idealism any more than I would see it as a culmination of a deep instinct of national self interest. It would of course be an application of the principle of fairness -- to give redress for sacrifices made or compelled in the interest of society. But, even more, society would have acted in its own self interest, recapturing the energies and loyalties of those who had been in danger of slipping out of all social focus.

Forty-five years ago, in 1938, tremors were heard throughout the land because of a footnote in one of Justice Harlan Stone's opinions, United States v. Carolene Products Co.[44] The Supreme Court in this case upheld a federal statute prohibiting the interstate shipment of filled milk, there being some rational ground for the statute. In other words, the Court's review was light, if not scanty. Cannot most people think up some rational idea to support almost any proposition? But the case is part of history because Justice Stone went on in his fourth footnote to intimate that a more searching inquiry might be called for if a statute were directed at religious, national, racial, that is to say in his words "discrete and insular" minorities whose access to political processes tended to be curtailed. This footnote played a major role in John Ely's important book, Democracy and Distrust.[45] Suffice it for me to say that I think it possible, in the not too distant future, that the Carolene Products footnote will be converted into a headnote of some groundbreaking case to the effect that, like "insular minorities" those who are victims of the economic forces of these wrenching times shall be entitled to high quality, tailored educational and vocational retraining assistance as their key to reentry and full participation in society.

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[42] Tribe, id. at 1135.

[43] Id. at 1136.

[44] 304 U.S. 144, 152-53 n. 4 (1938).

[45] John Hart Ely, Democracy and Distrust; A Theory of Judicial Review, Cambridge, Harvard University Press, 1980.

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It is time to see how far we have come. We began with Liberty, with a capital L, and some 54 small l's that found their way into the Constitution and Bill of Rights, with nine other following after the Civil War. We saw the courts in their glory, fleshing out the substance of these liberties in the 1959's and 1960's. Then we saw how the concept of equality came in first, in the Fourteenth Amendment as a barrier to state power, but, even without formal amendment, how it came to be considered part of the Fifth Amendment applicable to the federal government. Finally, we see dimly the new dimension of freedom, fairness. We have speculated how it will surface in an age of scarcity and high technology.

The faces of freedom, as I have called them, are not important only as disembodied concepts, floating in the air. They illustrate very well the different agents on which the Constitution relies to carry out its mandates. The courts have been the principal guardians of liberty. The legislative and judicial branches have shared honors in making equality as real as it is. But the third and most demanding face of freedom, fairness, requires high fidelity and a sensitive and enduring commitment by people who can insist on representatives sharing their fundamental values.

If people are so motivated, there is a chance that laws will be passed and administrators appointed who will reflect the spirit of the Constitution. Given citizens, legislators, and administrators all consciously and sensitively aware of the meaning of the Constitution in all its depths, you would seldom if ever see an "activist judge". You see him or her chiefly when one of the other partners fails in its perception or will. But the Constitution is the document of all of us. No one agency is exclusive. And for this point I can do no better than end, as I began, by borrowing from your old derby-hatted dean whose basic credo was this:

> There are "<u>four</u> different agencies commissioned by the Constitution to carry on the governing of the United States -- the Electoral, the Legislative, the Executive, and the Judicial. And the greatest among these governing equals is the Electoral."

That is why I speak to you, the young generation who will furnish the judges, the governors, the Congressmen, Senators, and state legislators, and the presidents, but, above all, the citizenry which will determine whether or not freedom has the third face of fairness.