EQUALITY, SOCIAL WELFARE AND EQUAL PROTECTION

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As my contribution to this forum, I thought I would try to make a few tentative distinctions concerning the various tasks judges and commentators seek to assign to the Equal Protection Clause. Approaching it from this perspective spares me the necessity of getting into what one of the earlier speakers described as the more Byzantine details of current equal protection doctrine. Such a discussion would inevitably lead to criticisms of the Judiciary and certain commentators, to comparisons between what some might call the "liberal" and "conservative" approaches, and to discussion concerning the needs of a changing and dynamic society. Each of these topics would be an interesting subject in its own right, but I do not think that extended discussion of any or all of them will get us any closer to a clear understanding of what it is that the Equal Protection Clause is supposed to do.

The problem is this: The Judiciary has not given us a coherent statement of basic equal protection principle. The *operating* principle appears to be open-ended, and it is this "open-endedness" that serves as the basis for much of the criticism. The real question, however, is not whether the principle should be open-ended or self-limiting. The real question is: What *is* the principle?

As a result, conservative criticism of equal protection jurisprudence that focuses solely on outcomes or deficiencies in analytical method are of limited utility, for such criticism attacks the symptoms rather than the basic problem. Without a statement of its own "first principle," conservative criticism can also have a certain open-ended quality of its own, thus leading to fears of politically conservative judicial activism. What is needed, therefore, is a clear distinction between the two main ideals of equality that wend their way through the equal protection cases, and an unambiguous statement of which one is embodied in the Equal Protection Clause.

The first of these equality principles is the equality of individ-

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uals before the law: how the law deals with individuals who are similarly situated in all relevant respects excepting certain personal characteristics over which they may have little or no control. Race and gender are the two most obvious examples of such characteristics. An Equal Protection Clause based on such an equality principle would be designed to eliminate legal barriers or unequal treatment based on such characteristics, and require that other characteristics that are not easily changed (for example, wealth or social status) be deemed irrelevant factors in official decision-making.

The other equality principle might be described as "equality in fact." Although some have described it as "equality of outcome" or "equality of results," I believe it more accurate to address the concept from its starting point: the fact that individuals are unequally endowed with goods, personal qualities and talents, and other intangible characteristics (for example, a "good" education or a "stable" family environment). Like "legal equality for individuals," the ideal of "equality in fact" begins with people as they are, but its goal has little to do with equal treatment; its goal is social welfare. While the ideal of legal equality for individuals seeks to assure equal protection without regard to characteristics declared to be legally irrelevant, social welfare notions of equality may encourage or require the state to take such characteristics into account when it provides goods, services, or opportunities. The reason for the difference in approach is that the social welfare ideal has a very different goal: to effectuate change in individual or group circumstances that are deemed to be socially or morally unacceptable.

Thus, it should be apparent that any discussion of the Equal Protection Clause must begin with a clear identification of which equality principle will serve as the starting point.[1] Because the Equal Protection Clause governs the duty of the state in its dealings with individuals, the "first principle of equality" that gives it meaning will dictate the direction and outcome of future controversies questioning the legitimacy of state-imposed classification schemes. The same process holds true to a

1. For interesting recent discussions of the general meaning of "equality," see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Greenwalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Westen, *To Lure the Tarantula from Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983).

lesser extent for legislatively mandated guarantees of equality that govern relationships of individuals among themselves, such as Titles VI and VII of the Civil Rights Act of 1964.[2] In either case, it is the *starting point*—the governing concept of equality—that is most critical; the remainder follows inexorably because of the incremental nature of case-by-case analysis.

Basic equal protection doctrine presumes that government must have a principled basis for distinguishing among individuals who stand before it. There is a general rule that requires a rational reason for distinguishing among people. There are specific rules, based upon a reading of the constitutional text, that define certain characteristics such as race[3] and religion[4] as illegitimate bases for governmental action. There are still other characteristics, such as gender, illegitimacy, or age, the legitimacy of which is determined by reference to a sliding scale of the rationale for the classification and its impact upon the individual involved. The common thread through all these rules, however, is that each limits the government's ability to discrim-

2. Title VI is codified at 42 U.S.C. §§ 2000d to 2000d-6 (1982); Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1982).

3. U.S. CONST. amend. XII, XIV, & XV.

4. U.S. CONST. amend. I. The constitutional law governing matters of religion is in severe disarray, and detailed discussion of the question is beyond the scope of these comments. Insofar as religion or its exercise becomes the determinative factor in the course of government conduct relating to individuals, the record of the federal government is mixed. Religious discrimination is prohibited in employment, including federal employment (*see* 42 U.S.C. § 2000e-2(d) (1982); Exec. Order 12,106, 44 Fed. Reg. 1053 (1979); Exec. Order 11,590, 36 Fed Reg. 7831 (1971); Exec. Order 11,478, 34 Fed. Reg. 12,985 (1969)), but it is the only type of illegal discrimination based on the constitutional text that is *not* prohibited in federally funded programs. *See* 42 U.S.C. 2000d (1982); Watkins v. Mercy Medical Center, 364 F. Supp. 799 (D. Idaho 1973), *aff'd* 520 F.2d 894 (9th Cir. 1975) (Title VI does not include a prohibition of religious discrimination). *Cf.* 20 U.S.C. § 1681 (1982) (prohibiting, with limited exceptions, gender discrimination in educational programs receiving federal financial assistance); 29 U.S.C. § 794 (1982) (prohibiting discrimination against an "otherwise qualified handicapped person" on the basis of that handicap by any program receiving Federal financial assistance). *But see* 42 U.S.C.A. § 300a-7(d) (1985) (special rule for religiously-based views on abortion in certain federally-funded programs). Religion is also the *only* characteristic on the basis of which the Supreme Court itself has mandated discrimination in the distribution of public funds in the face of a legislative effort to provide equal treatment for individuals who exercise their right to practice religion. *See* Aguilar v. Felton, — U.S. —, 105 S. Ct. 3232 (1985) (New York City may not use federal educational aid funds to pay the salaries of teachers in parochial schools); Grand Rapids School District v. Ball, — U.S. —, 105 S. Ct. 3216 (1985) (neither Congress nor the State of Michigan may constitutionally require or permit the provision of on-site remedial or enrichment educational services identical to those offered children in the public schools to children whose parents exercised their constitutional right to choose a religious education, because of the *appearance* of a "symbolic union of government and religion," even though "no evidence of specific incidents of religious indoctrination" had been proved).

inate among those who must deal with it.[5]

This is the point where the necessity for differentiating between the two alternative concepts of equality mentioned above becomes apparent. Without a clear definition of what is meant by the term "inequality," the concept of illegal "discrimination" has no fixed meaning.[6] It is only by reference to a constitutional "first principle" that these terms acquire a precise, substantive legal content. If the principle is one that requires equality of *protection*, differential treatment on the basis of legally irrelevant characteristics would be difficult to justify. If, on the other hand, the first principle is one that emphasizes equality in the social welfare sense, it would be perfectly legitimate to speak of the "need" for protection as a prerequisite for receiving it.

Considered from this perspective, it seems clear to me that the first of the approaches, individual equality before the law, is one that most clearly captures the core principle of the Equal Protection Clause. The command of the Clause is straightforward: A state must provide equal protection to each person within its jurisdiction. It must protect each person who must deal with it without regard to characteristics deemed to be legally irrelevant, and it may require that its citizens do so as well.

But it is the second concept of equality, equality-in-fact, which forms the basis of many current civil rights debates. It takes many forms, and has occupied a fair amount of debating time within the Civil Rights Commission. This version of equality posits the role of government to be that of the architect of the social welfare, a provider that can—indeed, often must—differentiate among the inherently different needs of individuals and groups within the population at large. The difficulty for equal protection analysis arises when the two roles, protector and provider, are confused.

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5. The Equal Protection Clause of the Fourteenth Amendment speaks in terms of a State's duty to all those who are "within its jurisdiction," not just to the citizens of that State.

6. An interesting perspective on this issue is presented in Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615 (1983), in which the authors point out that the creation of "safe" voting districts for minorities alleged to be required by the Fourteenth Amendment and the Voting Rights Act may conflict with what they describe as the "political equality norm," which would restrict legislative or judicial ability to gerrymander for political or social purposes.

If one recalls Anatole France's famous statement that the "majestic equality" of the law "forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread,"[7] it will be noted that it deliberately describes an extreme concern for equality and excludes concern for social welfare. At the other extreme is the notion that individuals who are members of racial, gender, or other "characteristic-defined" groups are entitled to preferential treatment by the law because historical patterns of discriminatory treatment have left all members of their group at a disadvantage. In this view, it makes no difference that the individual who is harmed by the preference given the other has done no wrong. Equality before the law is subordinated to the social welfare principle in order to ameliorate the effects of past deprivation or discrimination. Racial quotas are the prime example of such reasoning.

In my view, the distinction between the protector and provider roles of government is an important one. Lumped together under the rubric of "equality"—or worse, "fairness"—they become indistinguishable. The result is that too much power flows into the hands of government. As Judge Winter correctly pointed out, the Equal Protection Clause is a limit on the power of government to impose disabilities or to grant benefits on the basis of characteristics that must be deemed irrelevant to the relationship between government and the individual. By its terms, it requires the government to be a protector that does not discriminate among individuals on the basis of those characteristics.

By contrast, an approach to equal protection based on a provider role *requires* the government to focus on characteristics relevant to social welfare goals, and to dispense benefits accordingly. Arguable inconsistencies with constitutional standards are then resolved in favor of the goals, rather than the individuals involved.

The public debates and cases dealing with class-based concepts such as quotas and goals and timetables, as well as the more general question of whether minorities are the only "intended beneficiaries" of civil rights legislation,[8] illustrate that

7. A. FRANCE, LE LYS ROUGE (1894), *quoted in* J. BARTLETT, FAMILIAR QUOTATIONS 655 (15th ed. 1980).

8. *Compare Statement of the United States Commission on Civil Rights Concerning* Firefighters v. Stotts, in UNITED STATES COMMISSION ON CIVIL RIGHTS, TOWARDS AN UNDERSTANDING OF *STOTTS* 58 (Clearinghouse Publication 85) ("While more needs to be achieved,

much of the distinction between the protector and provider roles has already been lost. It is argued that race is a legitimate criterion for obtaining or retaining certain government jobs.[9] Failure by a federal contractor to have in effect an affirmative action plan is sufficient to bring an administrative action charging discrimination in employment against the contractor.[10] Thus, the social goal of congruence between the percentage of minorities in the workforce of a given employer and the percentage of minorities in the relevant labor market is exalted to the status of law.[11] Certain individuals, including two of my colleagues on the Civil Rights Commission, have urged or implied that civil rights laws were not really intended to protect all Americans, but only those who have suffered discrimination.[12]

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we trust that the tide has begun to turn decisively against preferential treatment, such as quotas, on the basis of race, national origin, and gender, and in favor of evenhanded civil rights enforcement for *all* Americans.") *with Statement of Commissioners Blandina Cardenas-Ramirez and Mary Frances Berry*, in UNITED STATES COMMISSION ON CIVIL RIGHTS, TOWARDS AN UNDERSTANDING OF *STOTTS* 63 (Clearinghouse Publication 85) [hereinafter cited as *Cardenas-Ramirez Statement*] ("Civil Rights laws were not passed to give civil rights protection to *all* Americans, as the majority of this Commission seems to believe. Instead they were passed out of a recognition that some Americans already had protection because they belonged to a favored group; and others, including blacks, Hispanics, and women of all races, did not because they belonged to disfavored groups.") (emphasis in original).

9. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, — U.S. —, 104 S. Ct. 2576 (1984); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978); Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (W.D. Mich. 1982), *aff'd* 746 F.2d 1152, 1156 (6th Cir. 1984), *cert. granted*, — U.S. —, 105 S. Ct. 2015 (1985) (interest justifying use of race includes, among other things, providing minority teachers as role models for minority students "because societal discrimination has often deprived black children of other role models").

10. Office of Federal Contract Compliance Programs Regulations, 41 C.F.R. §§60-2.2 (1984).

11. A finding that there is an insignificant number of minorities in a given employer's workforce, coupled with the finding that there are or have been qualified minority applicants in the relevant labor pool, does, in my view, raise questions concerning the employer's conduct. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (statistical disparities between the numbers of minority long-haul truck drivers and available minority applicants, along with evidence of specific instances of discrimination, sufficient to support a finding of systematic employment discrimination; victims entitled to relief include those who did not apply for the positions in question but would have done so but for the illegal practices); McDonnell Douglas Co. v. Green, 411 U.S. 792 (1973) (company may refuse to rehire black former employee for reasons unrelated to race, but the employee may also seek to demonstrate that the company's proffered reasons are merely a pretext for a racially discriminatory decision). The points made in the text, however, go to the question of *what* such a disparity shows, and to the propensity of a social welfare concept of equal protection to exalt its goal over the goal of equality of individual protection, thus permitting the use of percentages or timetables in an inflexible, legalistic manner.

12. The reasoning is that the "majority" needs no protection, and that the law was intended only for those that did. *See Cardenas-Ramirez Statement*, *supra* note 8. This reasoning has several key deficiencies. First, the law speaks in neutral terms, and the history of civil rights laws shows that the intent of Congress was to incorporate minorities

Each of these developments is a clear example of the confusion between the duty to protect without regard to irrelevant characteristics ("minorities deserve equal protection") and the provider-based notion that equal status for minorities can only be reached by taking those characteristics into account in the dis-

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into the social mainstream, not to set them apart for special treatment through quotas or other forms of what has come to be called "reverse discrimination." *See, e.g.*, Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J. L. PUB. POL'Y 627, 640-42 (1985) (legislative history of Title VII shows that Congress intended to prohibit use of racial preferences in hiring). Second, the concept of "majority" breaks down under scrutiny. Each individual is a minority of one, and those who would collectively deny an individual equal treatment on legally irrelevant grounds such as race are the only relevant "majority." Thus, the view of Justices Brennan, White, Marshall, and Blackmun that only "invidious" discrimination is constitutionally prohibited, *Bakke*, 438 U.S. at 356-62 (Brennan, J., concurring in part and dissenting in part), rests on the implicit assumption that other forms of discrimination—the "benign" forms that are intended to help those who need it—are permissible notwithstanding their detrimental impact on other innocent individuals. The concept of "benign" discrimination is, therefore, a social welfare concept that undercuts equality before the law to achieve its asserted purpose of assisting those in need. If minority group members require assistance to overcome the effects of past "invidious" discrimination against their group, excesses such as quotas that have a negative impact on other innocent individuals should be excused whenever the new victim can prove that he too is a member of a group that has suffered invidious discrimination in the past. *Id.*

My colleagues on the Civil Rights Commission, Mary Frances Berry and Blandina Cardenas-Ramirez, also subscribe to a view of equality based on a social-welfare principle. Non-minorities (except women), in their view, do not need legal protection, but certain minority groups and women do. *See* CARDENAS-RAMIREZ STATEMENT, *supra* note 8. The problem is that such a view ignores both the language of the Fourteenth Amendment and the operation of such a theory in practice. Their view, of course, is that mine ignores history and the present conditions that are the legacy of past discrimination. *See id.* ("If we are ever to achieve the real equality of opportunity that is the bright hope and promise of America, we must not deny our history and present conditions by substituting illusion for reality."). But a commitment to the equality of individuals is not inconsistent with a commitment to social welfare, and the clear differentiation of the two concepts permits a focus on both the different substantive and procedural steps necessary to each.

More importantly, individuals who are not members of recognized minority groups also need assistance when the law uses their race, religion, sex, or national origin as a criterion for unequal treatment. For individuals who neither discriminated nor have been shown to have benefited from discrimination against a specific individual, the imposition of a race-specific detriment is identical in purpose and effect to "invidious" discrimination based in immutable characteristics: It uses an irrelevant characteristic to advance one person over another.

Wholly apart from the intriguing question of who counts as a "disadvantaged minority," *see, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 533-40 (1980) (Stevens, J., dissenting); *Bakke*, 438 U.S. at 361-62 (Brennan, J., concurring in part and dissenting in part); Kolbert, *White Officers Seek Minority Status*, N.Y. Times, Dec. 6, 1985, at B16, col. 4 (noting that several police officers have attempted to change their status from "white" to "Hispanic" to take advantage of a racial quota for promotion within the New York City Police Department, and that to do so they must present proof of ethnicity that meets the standards of the Federal Equal Opportunity Commission that define the races), the fact that such questions can seriously be asked illustrates the validity of the initial point: that constitutional and legal guarantees of equal rights take on very different meanings when infused with different "first principles" of equality.

tribution of benefits among innocent parties ("minorities need assistance").[13]

As I pointed out earlier, the lack of a self-limiting "first principle" of equality will lead to indefensible results in a legal process that relies on case-by-case analysis. In fact, a legal process based on reasoning by analogy and reliance on stare decisis guarantees an ever-expanding application of an open-ended first principle, for there is nothing but the point of absurdity to provide a limit. The result can be the subordination of important social policy, including equal protection itself, to the inexorable "progress" of a legal process not confined at its starting point. Several examples will illustrate the point.

In *Bradwell v. Illinois*,[14] the Supreme Court upheld the right of a state to deny women admission to the practice of law. Although gender is irrelevant to an individual's qualifications to practice law, reliance on an open-ended notion of equality permitted the Court to subordinate equal *protection* to then-common social welfare ideals that held that a woman's only legitimate place was in the home. By contrast, Justice Rehnquist's opinion for the Court in *Michael M. v. Superior Court of Sonoma County*[15] properly rejected a rapist's plea that the Court should invalidate California's statutory rape laws on the grounds that it punished only the male sex partner. A reading of the Equal Protection Clause without regard to its concern for the protection of individuals from discrimination based on *irrelevant* characteristics would have subordinated an eminently rational judgment by the California Legislature that the gender of the underage child may be relevant to a decision of whether to provide special protection.

The point of all this is that confusion of the protector and provider roles allows governmental elites, especially unelected federal judges, to claim a constitutional basis for their own vision of correct social policy, and to discriminate in the name of equality. Government statistics or policies that focus only on certain minority groups and their distribution across society

13. Assistant Attorney General Cooper has presented a useful series of arguments against this approach by focusing on the way in which the meaning of legal "remedy" has changed. The change he described in his comments in this symposium underscores the point made here: There has been a departure from an ideal based on equal *protection*. *See* 9 HARV. J. L. & PUB. POL'Y 77 (1986).

14. 83 U.S. (16 Wall.) 130 (1873).

15. 450 U.S. 464 (1981).

perpetuate the myth that others do not suffer discrimination and need no protection. Worse, they effectively limit the availability of certain legal remedies to those who are on the government's list.[16] Equality was the rationale used to obliterate important legal distinctions between married and unmarried persons in *Eisenstadt v. Baird*,[17] but its true motivation was judicial disapproval of substantive law.[18] And *Fullilove v. Klutznick*[19] approved distribution of governmental largesse because of explicit racial and national origin categories without any inquiry into the over- or under-inclusiveness of the categories named.[20]

16. E.E.O.C. guidelines currently require that employee demographics be kept only in the following classifications: "White," "Black," "Hispanic," "Asian or Pacific islander," or "American Indian or Alaska Native." *See* 29 C.F.R. §1602.20 (1984). The guidelines do not carry the force of law and are, therefore, not binding on employers or judges. Nonetheless, the Supreme Court has indicated that they are to be given "great deference." Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). A discussion of the importance of demographic statistics is beyond the scope of these comments, and is noted only to point out the inherent difficulty that lack of such data creates for individuals who seek to prove a prima facie statistical case of religious or national origin discrimination. *See, e.g.*, Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (fired employee could not obtain from employer information concerning the numbers of Jews and homosexuals hired as the company did not gather such information; company was able to overcome employee's prima facie showing of religious and sexual preference discrimination by proving that the dismissal was due to employee's unauthorized use of company phones for personal business).

17. 405 U.S. 438 (1972) (invalidating a statute that made it more difficult for single persons to obtain contraceptives than for married persons).

18. In a brief criticizing the Solicitor General's citation of *Eisenstadt* as an "equal protection" case, Professor Laurence Tribe has written: "Virtually every commentator on the case, including the very authors the Government cites in its brief, has recognized that [*Eisenstadt v.*] *Baird* cannot be defined in standard "equal protection" terms but rests unavoidably on the premise that there exists a special freedom to obtain and use contraceptives—a freedom that goes beyond the marital relationship and the privacy of the home." Brief *Amicus Curiae* of Senator Robert Packwood, Thornburgh v. American College of Obstetricians & Gynecologists, U.S. Supreme Court, No. 84-495 (October Term 1985) (pending) (citation omitted). Professor Tribe's comments underscore the point made here: that an open-ended "first principle" of equal protection will permit the justices to define substantive disagreements with legislative will as matters of "equal protection," thus giving them an asserted justification for striking the policy in the name of equality.

19. 448 U.S. 448 (1980) (upholding congressionally mandated set-asides for minority businesses in the Public Works Act of 1977).

20. *See id.* at 533-40 (Stevens, J., dissenting). Ethnicity or national origin should be distinguished from "alienage," a term used by the Supreme Court to refer to the status of a non-citizen resident of a state. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432 (1982). Citizenship, or lack thereof, is a status conferred by the Constitution itself, U.S. CONST. amend. XIV, §1, or by action of Congress pursuant to Article I, Section 8, Clause 4. As such, it is certainly relevant to governmental action as it relates to individuals, but by dealing with the question as a matter of "equal protection" rather than federal pre-emption, the Supreme Court has once again blurred the distinction between the right to equal protection without regard to *irrelevant* characteristics, and the needs of individuals who do not share a *relevant* characteristic—the status of citizen-

In short, we have reached the point where the government, especially the courts, routinely confuse equal protection and social welfare concerns. The fact that the confusion often stems from legitimate concern for fairness and human need makes the task of re-establishing the distinction even harder than it would be otherwise.

The attempts by the new Civil Rights Commission to distinguish between "civil rights issues" and "social issues," for example, was roundly criticized for trying to revive the distinction between that which is motivated by concern for social welfare and that which is based on the equal protection commanded by the Constitution itself.[21] The underlying issue was whether the mere act of cutting a federal financial assistance program for college students would, without more, raise "civil rights" concerns. The debate within the Commission as well as the media commentary that followed made it clear that the distinction between the *manner* in which federal funds are to be administered and the *amount* available had been lost.[22] *Both* had become "equal protection" issues, and hence issues of "civil rights."

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ship—for opportunities, goods and services provided by states. *See* U.S. CONST. art. IV & amend. XIV. When Congress has provided the authority for the non-resident to reside in the United States pursuant to its power to control immigration and naturalization, pre-emption is the proper analysis. When the immigrant is illegal, however, neither equal protection nor federal pre-emption should restrict state power. *But see* Plyler v. Doe, 457 U.S. 202, 221 (1982) (relying on a social welfare concept of the Equal Protection Clause to invalidate Texas's rule forbidding enrollment of illegal immigrants in the public schools: "We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.").

21. The Commission's original jurisdiction was limited to collection of information concerning legal developments constituting a denial of equal protection of the laws. *See* 103 CONG. REC. 8498, 9023 (1957).

22. At the new Commission's first meeting in January 1984, a debate erupted over whether the Commission should continue to pursue a study of the effect of student aid cuts on minority students. The majority voted to terminate the study because it did not limit its focus to the existence of discrimination in student aid programs; the dissenters focused on the fact that many of these programs were designed to assist minority students, and that cuts in those programs would undercut that intention. This debate, and the decision of the Supreme Court in *Plyler*, *supra* note 20, are two of the clearest examples of how a different "first principle" or definition of equality will lead to both very different policy approaches, and, if not clarified, to confusion among the media and general public. Both sides of the debate use the term "civil rights," but the equality principle that undergirds the respective notions differs.

In this regard, it might be useful to point out that when Congress enacted the Commission's original enabling legislation (Pub. L. No. 85-315, 71 Stat. 635 (1957)), it expressly rejected language that would have authorized the Commission to "investigate the allegations that certain citizens of the United States . . . are being subjected to unwarranted economic pressures by reason of their sex, color, race, religion, or national origin." It also rejected language authorizing the Commission to "study and collect information concerning economic, social . . . developments constituting a denial

Because such attempts to distinguish equal protection from social welfare are met with opposition and charges of "racism" and "insensitivity" to the needs of the poor and minorities, those who are dedicated to the true meaning of the Equal Protection Clause must take every opportunity to remind themselves, their colleagues, and the public that unequal treatment of individuals *by government* is the evil that the Clause seeks to prevent. The real agenda of those who would dilute this principle is the preservation of political power—power to use social welfare notions of equality—and the language of the Constitution—to refashion society in their own image of that which is "just." Professor Kristol was correct when he spoke of the slippery slope becoming a mudslide. It has. But there is a remedy: a clear judicial and legislative understanding of the difference between the constitutional command of equal protection and the laudable social goal of providing for the diversity of human needs.

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of equal protection of the laws under the Constitution . . . ." *See* H.R. REP. No. 291, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. CODE CONG. & AD. NEWS 1966-67.