From Black and White to High Definition Equal Protection

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FROM BLACK AND WHITE TO HIGH DEFINITION EQUAL PROTECTION*

Seth F. Kreimer**

During the last two generations, we have witnessed two successive transformations in equal protection, one in the area of race, and one in the area of gender. I take it as my task during the next few minutes to speculate on where comparable constitutional evolution might emerge during the beginning of the twenty-first century.

In exploring this issue, I submit that, in large part, demography is destiny. Both the constitutional revolution in racial equality and the transformation in the law of gender equality were conditioned by broader changes in the structure of our society and there is every reason to expect the pattern to continue.¹

Neither the constitutional issues of race nor sex are on the verge of disappearing. Indeed, the issue of racial disparity in American society has proven more refractory than any but the most hardened pessimist would have predicted twenty years ago. But the twenty-first century will raise new challenges as well, and it is on some of these issues that I want to focus. Therefore, let me sketch three demographic trends involving immigration, families, and the aging of American society, and lay out some of the questions the trends are likely to raise in the next decades.

I. IMMIGRATION

America has always been, to one degree or another, a nation of immigrants. During the period between 1921 and 1965, however, restrictive federal policies cut immigration to a relative trickle. By contrast, during the last two decades, immigration has approached the peak levels of the early twentieth century. During the first decade of the twentieth century, 10 million im-

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¹ During the 1950s and 1960s, the American constitutional system began to wrestle with the problem of uprooting the Jim Crow system and beginning to address the legacy of slavery. The issues in the courts were prefigured and conditioned by the great migration of African-Americans from South to North during the decades preceding Brown v. Board of Education, 347 U.S. 483 (1954), as well as by the experience of the nation in World War II.

During the 1970s and 1980s, the constitutional problem of applying guarantees of equality to the status of women came to the fore in a variety of areas. Here, again, the constitutional issues reflected secular trends in society; during the decade before, medical technology began to provide women with unprecedented control of their reproductive capacities, while at the same time, women moved out of the home and into the workplace.

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migrants passed through Ellis Island. By the time the twentieth century closes, America will have absorbed 20 million immigrants in twenty years.\(^2\) Even if we were to end immigration immediately, this would constitute the beginning of a social transformation. Today, we inhabit a society with a larger proportion of foreign-born residents than any time since the beginning of the Great Depression. In 1970, 5% of American residents had been born abroad; today, 24.5 million American residents—more than 9% of the total population—are foreign born.\(^3\) And immigration is likely to continue.

The pressure of this new wave of immigration has generated three overlapping groups that are likely to seek constitutional protection. The first group, American residents who speak languages other than English, came to the Supreme Court this Term in \textit{Arizonans for Official English v. Arizona}.\(^4\) To set the case in context, we should realize that, in 1972, American schools educated 250,000 children in bilingual or English as second language programs; in 1992, the number swelled to 2.5 million. Today, well over 10 million American residents speak primary languages other than English.

Arizona had, by voter initiative, adopted English as its "official language." The Arizonan initiative further had forbidden its officials to transact business in other languages. This potentially excluded linguistic minorities from a variety of public services and information. The Ninth Circuit's decision in \textit{Arizonans}, invalidating the initiative, had focused on the First Amendment right of officials to speak to the public in an understandable fashion, as well as the public's correlative right to receive information. It was informed by concerns that the members of the excluded public constituted constitutionally protected political and racial minorities.\(^5\)

The Supreme Court dismissed \textit{Arizonans} on standing grounds,\(^6\) but it seems entirely plausible that the issue of the treatment of linguistic minorities will come to the courts again in the next decade. Twenty-one states currently have "official English" provisions in their fundamental laws and efforts are underway to adopt such provisions in numerous of other states and localities around the country. The New York Regents' recent decision regarding testing in foreign languages, and the ongoing debate on bilingual education are likely to push the federal courts to resolve the tension between aspirations

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2. During the 1980s, legal immigration added over 8.5 million residents to the American population. A comparable number of documented immigrants are predicted to arrive in America during the 1990s. Combined with undocumented immigrants, the 1990’s immigration exceeds the 10 million who arrived through Ellis Island during the first decade of the century.


5. \textit{Yniguez v. Arizonans for Official English}, 69 F.3d 920 (9th Cir. 1995).

for national unity and the claims of new Americans to inclusion as equals within the mainstream of our society.7

The second group which is likely to seek protection from the courts is comprised of legal residents who are not citizens. Of 24.5 million foreign-born American residents, only 8 million are naturalized citizens.8 If fiscal austerity continues to constrict public services and benefits, and if the employment market continues to tighten in some sectors of the economy, the next decade is likely to showcase continued efforts to use lack of citizenship as basis for excluding otherwise eligible permanent residents from public benefits. So, too, efforts to bar non-citizens from other economic opportunities may gain renewed prominence during the next decade, justified by the same reasoning. A generation ago, in Graham v. Richardson,9 a unanimous Supreme Court held that alienage was a suspect classification and barred states from discriminating on the basis of citizenship in the provision of public benefits and most employment.10 By contrast, five years later, Matthews v. Díaz11 held that the federal government was free to exclude non-citizens from Medicare, a decision justified on the basis of federal interests in restricting immigration.12 As foreshadowed by an insistent majority of the Court in Adarand Constructors, Inc. v. Pena,13 the next decade is likely to include renewed pressure to maintain consistency in the constitutional obligations of state and federal governments.14

Finally, the growth in the population of undocumented aliens during the years following the 1986 amnesty, to an estimated 5 million in 1996, has triggered a series of backlashes. Most concretely, efforts to enforce American immigration laws by arrest and deportation have grown increasingly harsh, putting further stress on Fourth Amendment rights and rights to judicial review. In California, Proposition 187, which excluded undocumented aliens from access to public services such as education and public health benefits, is likely to replicate itself in other areas. At the federal level, Congress has entertained efforts to revoke the Fourteenth Amendment’s guarantee of birthright citizenship for children of resident aliens. A decade and a half ago, in Plyler v. Doe,15 a fragmented Court held that Texas could not exclude the children of undocumented aliens from its public school system.16 The plurality reasoned that Texas’ public policy threatened to create a “permanent caste of undocumented resident aliens” barred from the mainstream of

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10. Id. at 383.
12. Id. at 69.
14. Id. at 213-18.
16. Id.
American society. Proposition 187 and its clones will bring the issue to the Court again in the next decade, with potentially fateful consequences.

II. FAMILIES

In addition to influences from without, the reconfiguration of traditional family relations is transforming American society from within. Half of the marriages in 1997 are likely to end in divorce and unmarried parenthood has lost its legal, as well as much of its social, stigma. Between unmarried parenthood and divorce, the proportion of children in single parent families has risen from roughly 14% in 1970, to 30% in 1995. Even in two parent families, full-time stay-at-home parenthood and the “family wage” has become a minority pattern.

Single parent families are more brittle than families with two parents; on average, they have less emotional and economic resources with which to withstand pressures and shocks, and to take care of children. The state, therefore, increasingly is called upon to provide supports to bolster the family structure and to intervene when that structure breaks down. As compared to even a decade ago, many more children today end up in the care of state-sponsored institutions on a part-time or full-time basis. The state intervenes more often and more directly in family relations. And today, more children end up in the custody of state agencies. As one benchmark, the foster care system of 1997 houses almost half a million children, while in 1985, that number reached only 250,000. If, as some predict, the restructuring of the current welfare system drives a million more children into poverty, we can also expect the number of children in state custody to expand. If states respond to the void left by recent federal initiatives seeking to decrease the preference for family preservation, the ranks of children in state care will swell still further.

The breakdown of traditional family relations may have a number of constitutional consequences during the next decade. First, the courts will be called on to ensure the protection of children. In *Deshaney v. Winnebago County Department of Social Services*, the Supreme Court disavowed a constitutional obligation to preserve the welfare of children against parental violence or neglect as a matter of substantive due process. For children in foster care, pre-school, or after-school programs, however, *DeShaney* does not eliminate judicial scrutiny. Moreover, the equality of protective serv-

17. Id.
19. Id. at 195-203.
ices remains a constitutional issue after *DeShaney*. Both opinions are important, because, particularly for the 20% of American children who live in poverty, often there will be no voice of authority to speak for children except the courts.

Second, the courts will be called upon to protect the family. A generation ago, the Warren and Burger courts successively established constitutional limits on the authority of the state to interfere with the relations of traditional nuclear families, of extended families, and of unmarried parents. The current Court shows no signs of retreating from those limits. This Term, in *M.L.B. v. S.L.J.* a 6-3 opinion authored by Justice Ginsburg invalidated a Mississippi transcript fee requirement that effectively barred indigents from appealing terminations of their parental rights. The opinion used doctrines of equal protection dating from the Warren Court era to establish a mother's right to "defend against the State’s destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication" despite her indigence.

As families dissolve and reconfigure under contemporary economic and social pressures, we are likely to see more plaintiffs seeking to invoke constitutional protection from states’ efforts to force family relations into politically acceptable patterns. The most prominent, though perhaps not the most prevalent, of these issues is likely to focus on the state's treatment of family members who are gay or lesbian.

Last Term, in *Romer v. Evans*, the same six member *M.L.B.* majority struck down a Colorado state constitutional amendment depriving gay and lesbian citizens of access to all protection under state and local human rights law. *Romer* is a notoriously opaque case, representing anything from the

21. 489 U.S. at 197 n.3; cf. *Nabozny v. Podlesny*, 92 F.3d 446, 457-58 (7th Cir. 1996) (finding school’s refusal to protect gay student actionable). *But see* *Soto v. Flores*, 103 F.3d 1056, 1058 (1st Cir. 1997) (finding refusal to prosecute violence against women not actionable).


26. *Id.* at 558.
27. *Id.*
29. *Id.* at 1629.
Court's germinating recognition of social hostility to gays and lesbians as constitutionally invidious, to a broader skepticism of voter initiatives which single out a status-based "solitary class" for exclusion from important state benefits.

In light of Romer, we are also likely to see an emerging line of constitutional litigation regarding efforts directed against families of gays and lesbians. On one hand, in states where gay and lesbian parents cannot adopt, or are deprived of parental rights because of their sexual orientation, Romer will ground challenges to these policies. On the other hand, whether or not Hawaii's same-sex marriage initiative survives, we can safely predict that some same-sex relationships will be granted legal status in some states, just as a number of states presently use second-parent adoptions or joint custody to protect parental relationships in gay and lesbian families. When such particular state sanctioned families migrate to another state, we are likely to see constitutional challenges to the new state's refusal to recognize the legal status of those families.

III. Aging

The third demographic trend that will shape the twenty-first century will be the aging of the American population. On one front, this is simply a function of the size of age cohorts. In 1970, 20 million Americans were age sixty-five or older—10% of the population. Today, the number has grown to 35 million, or 12%. By the time the bulk of the baby-boom population hits retirement age in 2020, 58 million Americans or more are likely to be sixty-five or older, a proportion that will represent almost 20% of the American population. Not only will there be more elderly Americans, but the elderly are likely to live longer. Twenty years ago, only .7% of Americans, or 1.4 million, were eighty-five years or older. Today, this group has more than doubled, to 3.8 million, or 1.4%, and that number, as well as the proportion of the population, is likely to double again during the next fifteen years.

These trends likely will spawn a number of constitutional issues. We clearly can expect that the health care needs for this group likely will grow out of proportion to the group's numbers. On average, individuals over sixty-five consume health care resources at a rate three times that of adults in the twenty-five to fifty bracket. Moreover, the biomedical revolution continues to expand the health care that is technically available. In 1972, for example, 14,000 heart by-pass operations were performed annually in the United States. By 1992, there were over 400,000 such operations performed. There is every reason to believe that the growth of other medical treatment during


31. The expectations of an aging society are also likely to spur further easing of restrictions on immigration as a way of providing additional employees to a work-force that is not being replaced by biological means.
the next decade and a half will be equally expansive. Thus, by the first decade of the next century, we are likely to be faced with a huge demand for life-extending medical expenditures from a group that is moving out of the workforce, a group with a vastly increasing need for long-term care.

If, as seems likely, government continues to step in to meet only part of the funding need, the courts will review a public system that effectively rations life-saving medical care. Already, some lower courts are beginning to impose procedural limitations on the denial of care by publicly financed managed care entities.³² For a generation, the equal protection clause has been read to prohibit states from excluding from health care migrants from other states.³³ In a polarized politics of scarcity, it is easy to imagine calls for constitutional intervention in the likely emerging system of health care rationing.

A second possible constitutional conflict arises from the fact that the diseases characteristic of the aging are not acute, but chronic. Old age is thus likely to bring not only increased medical needs, but increased disabilities and suffering. With an ever growing proportion of the population both suffering and medically needy, there will be the temptation to convince this aging population to end its life, and thus end its drain on the economic system. Already, last Term, the Supreme Court confronted whether states may prohibit physician-assisted suicide, even though states allow voluntary termination of life support.³⁴ The Court rejected constitutional objections to this policy, holding that a state may distinguish between competent refusal of treatment and requests for assisted suicide. The issue during the next twenty years, however, will likely not be whether the state may forbid assisted suicide, but whether the state may selectively encourage it. Indeed, when we recognize that among the hugely expanding group of Americans age eighty-five and older, Alzheimer’s and other dementias are likely to be highly prevalent, the question of what protections will be provided to impaired or institutionalized citizens becomes crucial.

IV. HIGH DEFINITION EQUAL PROTECTION?

The predominant equal protection doctrine with which we enter the twenty-first century has been a doctrine in black and white characterized by a bifurcation between the deferential “rational basis scrutiny” and “strict or heightened” scrutiny of “suspect classifications” of race and gender. This


scheme has proved barely sufficient to meet contemporary issues; it seems unlikely to prove adequate to meet the emerging social stresses of the next generation. Just as our television programs have moved from the black and white of the 1950s, through the color programs of the 1970s, to the High Definition TV of today, as we enter the next millennium, the challenge for the courts will be to move from the black and white deference of “rational basis” or “strict scrutiny,” toward a High Definition Equal Protection doctrine for the 21st century.