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INEQUALITY "FROM THE TOP": APPLYING AN ANCIENT PROHIBITION TO AN EMERGING PROBLEM OF DISTRIBUTIVE JUSTICE

Richard Delgado*

INTRODUCTION

Two constitutional provisions, the equal protection and due process clauses, provide generalized protection when the government distributes burdens or benefits—when it gives something to, or takes something away from, citizens.¹ In addition, a number of special provisions—the bill of attainder clause,² the takings clause,³ and the antislavery amendments⁴—shield persons against particular forms of governmental taking.

Does the Constitution contain anything analogous to these special protections that limits the government in connection with *giving*? Ordinary due process and equal protection, of course, prohibit grants, exemptions, and other forms of governmental largesse that serve no rational purpose whatsoever—that amount, in short, to simple favoritism.⁵ And the establishment clause⁶ and doctrine of unconstitutional conditions⁷ prohibit grants to reli-

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1. U.S. CONST. amends. V, XIV; *see id.* amends. VI, VII (criminal due process).

2. *Id.* art. I, §§ 9–10.

3. *Id.* amend. V ("nor shall private property be taken . . . without just compensation").

4. *Id.* amends. XIII, XIV, XV. The thirteenth amendment, forbidding slavery, also applies to private action.

5. *Mathews v. De Castro*, 429 U.S. 181, 185 (1976); *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *see also Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

6. U.S. CONST. amend. I (Congress forbidden to pass laws establishing religion).

7. *See Shapiro v. Thompson*, 394 U.S. 618 (1969); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-22, at 310-17 (1978).

gious groups and grants that require the recipient to relinquish a fundamental right.

But suppose the government wishes to confer an unconditional, substantial, and enduring benefit on a few favorites and can point to a plausible reason for doing so. In the case of slavery, it was argued that maintaining a permanently disadvantaged class to perform menial labor allows music, literature, and science to flourish and is thus justifiable on utilitarian grounds.⁸ This argument was, of course, rejected; even if the unhappiness of the slave purchases a greater gain to the rest of society, considerations of fairness and humanity forbid such a trade-off. If deliberate creation of a small, super-privileged class appeared to promote utility, should it, too, be rejected for the same reasons? Relatively little commentary⁹ and only a handful of cases have addressed this question.

Recent developments suggest it will soon require attention, however. Commentators, including a presidential commission, have warned that selective distribution of biological benefits, such as organ transplants, life extension, cloning, or "Nobel Prize sperm banks" could cause irreversible shifts in the distribution of wealth and influence in society and should be opposed for that reason.¹⁰ Analyses of President Reagan's economic program have found that program to be creating a new elite and a perpetual underclass.¹¹ Two United States Supreme Court decisions, one

8. Hare, *What is Wrong With Slavery?*, 8 PHIL. & PUB. AFF. 103 (1979); see J. RAWLS, A THEORY OF JUSTICE 158-60, 325-32 (1971).

9. See R. UNGER, LAW IN MODERN SOCIETY 179-80 (1976) (observing that most forms of hierarchy are hard for law to reach); Note, *Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 HARV. L. REV. 1850 (1981) [hereinafter cited as *Insemination*]; Note, *Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning*, 47 S. CAL. L. REV. 476 (1974) [hereinafter cited as *Reproduction*]; Comment, *Titles of Nobility and the Preferential Treatment of Federally Employed Military Veterans*, 19 WAYNE L. REV. 1169 (1973) [hereinafter cited as *Titles of Nobility*].

10. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *SPlicing LIFE: A REPORT ON THE SOCIAL AND ETHICAL ISSUES OF GENETIC ENGINEERING WITH HUMAN BEINGS* (1982); see also *Insemination*, *supra* note 9; Almond, Cart & Harvey, *Athletes Depriving Children in Need of Drug?*, L.A. Times, Nov. 12, 1983, pt. III, at 1, col. 1 (scarce human growth hormone, needed to treat dwarfism, being purchased by athletes seeking gains in performance); *Plan to Sell Kidneys for Transplants Draws Fire*, L.A. Times, Sept. 24, 1983, pt. 1, at 5, col. 1 (furor over entrepreneur's disclosure of intention to buy human organs for transplant) [hereinafter cited as *Plan to Sell Kidneys*]; *infra* notes 179-87 and accompanying text (discussion of hypothetical program to distribute biological benefits).

11. See generally THE REAGAN EXPERIMENT (J. Palmer & I. Sawhill eds. 1982) [hereinafter cited as EXPERIMENT]; see also sources cited *infra* note 64 (inequality and governmental favoritism on the increase in American life). At least one group of foreign observers believes that American hierarchy is here to stay. Debrett's, which publishes the directory of Britain's nobility, recently announced its intention to pub-

dealing with educational quotas,¹² the other with an Alaskan distribution of mineral wealth,¹³ grapple, if only obliquely, with some of these issues.

These developments suggest that it is time to focus on what equality requires when it is not a taking that is at stake, but a giving. Until recently, it seemed safe to assume that a relatively caste-free society, with adequate provision for upward mobility, could be assured merely by protecting those at the bottom of the socioeconomic ladder from outright oppression by those at the top and in the middle.¹⁴ Over the course of a century, legislation and case law were developed to lighten the competitive burden minorities, women, and the poor bore and to assure that the government did not take things—property, liberty, dignity, life—from them without just cause.¹⁵

But equality may be eroded in two ways, not just one. Unless we recognize that the government's power to enrich A, while ignoring B, can cause inequality between A and B just as surely as its power to impoverish B directly, we risk repeating the error of the universal story's herdsman whose goats were stolen while he attended to another danger.¹⁶ This Article focuses on this more insidious—because less visible—and less thoroughly analyzed source of inequality. Part I reviews current Supreme Court doctrine dealing with giving. Part II proposes a new test for official giving, based on two little-used constitutional provisions—the antinobility clauses¹⁷—and traces their history and development.

lish *Debrett's Texas Peerage*. This will be the first of ten volumes devoted to "the untitled aristocracy" in the United States. Peters, *Tilting at Windmills*, WASH. MONTHLY, Oct. 1983, at 4, 6-7.

12. *Regents of the University of California v. Bakke*, 438 U.S. 265, 287-99 (1978) (Powell, J., plurality opinion) (affirmative action quota for blacks held impermissible in part because system would distribute scarce resource—space in medical school class—on basis of class membership rather than individual merit).

13. *Zobel v. Williams*, 457 U.S. 55 (1982), discussed *infra* notes 39-42, 62-63 and accompanying text.

14. See *Plyler v. Doe*, 457 U.S. 202, 213, 219-20 (1982) (equal protection clause is aimed at preventing creation of a permanent underclass). But see C.W. MILLS, *THE POWER ELITE* (1956) (wealthy and powerful groups may exert disproportionate influence on government); sources cited *infra* note 123.

15. See generally D. BELL, *RACE, RACISM AND AMERICAN LAW* (1980) (summarizing legal developments in civil rights legislation in areas of housing, employment, voting rights, and protection from police brutality and mob action).

16. In an African folk tale, a young boy is left in charge of a herd of goats. The elders warn him to be especially careful that jackals do not attack the herd during the night. The boy remains awake until dawn; the jackals do not come. The next day, the boy becomes bored and amuses himself by playing a counting game. While he is engrossed in his game, thieves from another tribe steal the herd. The moral of the story, which seems to have parallels in the folk wisdom of most cultures, is that it is easy to become so mesmerized by one danger that one overlooks a second, equally serious threat.

17. The clauses read: "No Title of Nobility shall be granted by the United States

Parts III and IV address the strengths and weaknesses of an anti-nobility approach. A final section illustrates analysis under the approach through examples.

I. JUSTICE IN GIVING

Since virtually abandoning substantive due process as a ground for invalidating socioeconomic legislation,¹⁸ the Supreme Court rarely has struck down governmental programs that distributed bounty—licenses, money, exemptions, monopolies, or other benefits—unequally. Most exceptions could be explained by standard political-process concerns, such as exclusion of a suspect class¹⁹ or impact on a constitutional right.²⁰ When neither of these was present, the Court generally has rejected challenges, invoking a number of now-familiar maxims.²¹

*New Orleans v. Dukes*²² and *Kotch v. Board of River Port Pilot Commissioners*²³ illustrate the deferential review the Court affords a governmental program when an individual challenges its distribution of an ordinary benefit. In *Dukes*, a state statute excluded pushcart vendors from New Orleans' French Quarter but exempted vendors who had operated in the Quarter for eight years or more.²⁴ An excluded vendor challenged the statute under the equal protection clause. Since the statute neither burdened fundamental rights nor classified on the basis of suspect characteristics such as race, the Court declined to act as a "super-legislature" by reviewing the desirability of the legislation;²⁵ it asked only

...," U.S. CONST. art. I, § 9; "No State shall . . . grant any Title of Nobility . . .," *id.* § 10.

18. *United States v. Darby*, 312 U.S. 100 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 442 (2d ed. 1983) [hereinafter cited as *CONSTITUTIONAL LAW*]; L. TRIBE, *supra* note 7, § 8-7.

19. *In re Griffiths*, 413 U.S. 717 (1973); see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); L. TRIBE, *supra* note 7, §§ 16-12 to -14, at 1010-18, 1052-60.

20. *Sherbert v. Verner*, 374 U.S. 398 (1967); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); L. TRIBE, *supra* note 7, §§ 10-8, 16-7 to -12, at 510, 1002-11.

21. *E.g.*, *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (courts will not overturn decisions of a political branch merely because they think them unwise); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (laws not unconstitutional because they lack mathematical nicety or logical precision); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (same); *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 423 (1952) (court does not sit as "super-legislature" to weigh wisdom of legislation); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (legislation upheld "if any state of facts reasonably can be conceived that would sustain it").

22. 427 U.S. 297 (1976) (per curiam).

23. 330 U.S. 552 (1947).

24. 427 U.S. at 298.

25. *Id.* at 303-04.

whether the exemption for eight-year vendors was rationally related to reducing congestion in the French Quarter.²⁶ Finding such a relationship, the Court upheld the statute.²⁷

In *Kotch v. Board of River Port Pilot Commissioners*,²⁸ the Supreme Court upheld a Louisiana statute which required persons who wished to qualify as river pilots to apprentice themselves to a licensed pilot. Evidence showed that licensed pilots almost invariably selected friends and family members as apprentices, so that river pilot jobs remained in family circles for generations.²⁹ Despite its overtones of nepotism and racial favoritism, the Court upheld the Louisiana scheme, finding that the state might have instituted it for legitimate reasons.

The many cases in the *Dukes-Kotch* mold have led some to generalize that, outside the special situations named earlier, the government is free to distribute largesse as it pleases.³⁰ A small group of decisions suggests otherwise. In these decisions, the Court invalidated distributions that did not classify on the basis of suspect criteria, infringe on a fundamental right, or lack any rational basis. Indeed, nothing about the persons excluded or the benefit distributed explains the invalidation; the Court struck down the distribution because of its effect on the class benefited or on society as a whole.

*Morey v. Doud*³¹ concerned an Illinois statute requiring any firm selling or issuing money orders in the state to obtain a license and submit to regulation. The statute exempted one firm, American Express, by name. When other firms in the money order business challenged the statute, the Supreme Court struck it down.³² In explaining its unusual action, the Court acknowledged the state's power to make regulatory discriminations for legitimate reasons, such as preventing currency abuse or assuring the fiscal

26. *Id.* at 304-05.

27. *Id.* at 303-04.

28. 330 U.S. 552 (1947).

29. *Id.* at 554-55.

30. *E.g.*, CONSTITUTIONAL LAW, *supra* note 18, at 444-48. In some of the cases, a disappointed person excluded from a benefit sues to be included. *E.g.*, *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding welfare ceilings). In other cases, the challenger sues not to be included in a distribution, but to stop the giveaway altogether. *E.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (*per curiam*). In the absence of a suspect class or a fundamental interest, courts generally treat both types of cases in the same way—by applying a minimum rationality test. This Article is principally concerned with cases of the second type—ones in which someone sees the government providing a valuable benefit to a small group and wants to have it stopped, rather than to have himself or herself included.

31. 354 U.S. 457 (1957), *overruled*, *City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) (*per curiam*); *see infra* notes 44, 176-78 and accompanying text (discussing Supreme Court opinion overruling *Doud*).

32. 354 U.S. at 469.

integrity of firms in the money order business.³³ Nevertheless, the Court found the statute impermissibly created a "closed class" whose advantage would be perpetual and unreviewable.³⁴ The Court did not state why such classes should not be created.

In *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison*,³⁵ the Supreme Court struck down state legislation that permitted foreign insurance companies to sell policies only through licensed resident agents. The statute defined "resident agent" to include salaried employees of mutual insurance companies, but not those of stock companies.³⁶ A stock company that wanted to sell insurance through salaried employees challenged the statute on equal protection grounds. The Court agreed with the state that there are significant differences between mutual insurance and stock companies but found that the state's decision to benefit one at the expense of the other did not bear any relation to those differences.³⁷ As with *Doud*, the Court did not explain why the state could not be permitted to aid one type of company and not another; it merely found that such "[d]iscriminations of an unusual character" warrant judicial suspicion.³⁸

In the recent decision of *Zobel v. Williams*,³⁹ the Supreme Court struck down an Alaskan program to distribute surplus wealth resulting from mineral income. The program would have distributed the proceeds according to the number of years a citizen had resided in the state.⁴⁰ Chief Justice Burger's opinion pointed out that the distribution would create fixed, "permanent classes . . . a result [that] would be clearly impermissible."⁴¹ Although the state argued that its distributional scheme had a number of rational bases, including rewarding its citizens for loyalty, none could justify a reward system based on "permanent classes."⁴² The Court did not explain why such classes were undesirable, perhaps thinking the reason self-evident.

These equal protection decisions, taken together, suggest an unarticulated principle of heightened scrutiny that comes into play when the Supreme Court reviews certain types of state-sponsored giving. The principle seems to operate even when a distributional program does not trench on a traditionally protected

33. *Id.* at 465-68.

34. *Id.* at 467-68.

35. 301 U.S. 459 (1937).

36. *Id.* at 460.

37. *Id.* at 463.

38. *Id.* at 462.

39. 457 U.S. 55 (1982).

40. *Id.* at 56.

41. *Id.* at 64.

42. *Id.*

interest or exclude a suspect class.⁴³ Its contours are not easy to draw: It seems to result in invalidation of programs that confer benefits permanently and unreviewably; that establish groups apt to be perceived as privileged or "special"; and that create closed classes.

Such decisions may, of course, be simple anomalies.⁴⁴ But I do not think so: They correspond to strongly held intuitions about the way we want our society to function. Two existing legal doctrines, the public purpose doctrine⁴⁵ and the principle of equal respect for persons,⁴⁶ come close to capturing the spirit of the decisions just described but ultimately fail fully to explain them. The public purpose doctrine requires that the state spend only for the public good, a requirement easily met; courts have stretched to find public purposes in the most dubious spending schemes.⁴⁷ Moreover, the distributional programs in *Doud*, *Harrison*, and *Zobel* did not lack public purposes; they merely advanced them in

43. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring) ("When Congress deprives a small class of persons of vested rights that are protected—and, indeed, even enhanced—for others who are in a similar though not identical position, I believe the Constitution requires something more than merely a 'conceivable' or a 'plausible' explanation for the unequal treatment.").

44. Indeed, when the Supreme Court overruled *Morey v. Doud*, 354 U.S. 457 (1957), in *City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) (per curiam), it treated the earlier decision as an aberration, *id.* ("needlessly intrusive judicial infringement on the State's legislative powers"), failing to come to grips with its earlier intuition about the dangers posed by closed classes possessing special privileges. See *infra* notes 176–78 and accompanying text (concluding that *Doud's* overruling, while a close case, was correct).

45. See generally *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874); Opinion of the Justices, 211 Mass. 624, 98 N.E. 611 (1912).

46. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 182, 272–74 (1977); Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 272 (1983) [hereinafter cited as *Equality*]; Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1121–30 (1983).

47. *Bowker v. Baker*, 73 Cal. App. 2d 653, 167 P.2d 256 (1946) (public transportation for students attending parochial schools); *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 291 N.E.2d 807 (1972) (bond-lease scheme to set up industrial parks); cf. *Hawaii Hous. Auth. v. Midkiff*, 104 S. Ct. 2321 (1984) (public use doctrine in eminent domain proceedings given very broad interpretation, coterminous with state police power; moreover, courts will not second-guess state legislature's finding that a given purpose is public).

For a discussion of the view that a "public interest/public good" model of judicial review would require more intense scrutiny of state action than courts generally apply, see Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Governmental Legitimacy*, 53 IND. L.J. 145 (1977–1978). Current thinking allows a wide scope for economic experiments and even nest-feathering by pressure groups, regulators, and politicians. Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 LAW & CONTEMP. PROBS. 179 (1981); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); see A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* chs. 6, 13 (1957).

ways the Court found unacceptable.⁴⁸ Equal respect for persons⁴⁹ seems no more fruitful. The constitutional bases from which the principle derives are aimed at preventing oppressive treatment of persons and classes at the bottom of society;⁵⁰ they do not currently reach state action aimed at benefiting those at the top.⁵¹ Further, challenges under these principles are unlikely to prevail unless a challenger can show that review should be strict; with most giving programs, this will not be the case.

Since existing specialized doctrines seem incapable of dealing with unjust governmental giving, three possibilities remain. Improper state giveaways could be dealt with, as in the past, through sporadic invalidations invoking general principles of equal protection and due process. This approach has dangers: it gives a court a great deal of discretion and results in unpredictable jurisprudence, *viz.*, the unexpected and poorly explained overruling of *Doud* in *New Orleans v. Dukes*. Alternatively, courts could develop a new layer of doctrine within the equal protection or due process clause. This approach, too, has difficulties—these clauses already bear a great deal of weight; their elasticity seems to be approaching a limit.⁵² A final approach consists of identifying a

48. See *supra* notes 31–42 and accompanying text.

49. See *Equality*, *supra* note 46, for a leading statement of this principle; see also R. DWORKIN, *supra* note 46; Shiffrin, *supra* note 46. The principle holds that every citizen is entitled to be treated in a way that respects his or her basic humanity and individuality.

50. L. TRIBE, *supra* note 7, §§ 7–2, 16–1, –15, at 416–21, 992–93, 1019–22 (due process and equal protection, the main legal anchors for principle of equal respect, see *Equality*, *supra* note 46, are primarily aimed at avoiding exploitation of the powerless by the powerful).

51. The philosophic bases of the principle of equal respect are somewhat more expansive than its legal anchors, however, and may be able to generate a theory of the type needed. See I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 11–13, 20, 36–49 (T. Abbott trans. 1949) (1st ed. Riga 1785) (persons to be treated as ends, not means); I. KANT, *Critique of Judgment*, in *THE PHILOSOPHY OF KANT* 347 (C. Friedrich ed. 1949) (man is the end of nature, the creature to whom all other things and creatures are subservient and to whom ultimate respect is due); see also R. DWORKIN, *supra* note 46, at 179–81; C. FRIED, *AN ANATOMY OF VALUES* 40–60 (1970); Shiffrin, *supra* note 46. Persistent Western liberal themes that emphasize each person's uniqueness and value could support any of the three identified alternative approaches to controlling unequal state largesse below. See generally Shiffrin, *supra* note 46, at 1127–30.

52. *E.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 41–43 (1972). As is often the case with articles of this type, there is a tension between arguing that judicial currents make the development of new doctrines plausible and yet asserting that existing case law is inadequate to cope with the problems under consideration. See Warren & Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890). A physical metaphor illustrates this tension. Equality-protecting doctrine may be compared to a river whose flow has suddenly increased. A present dam is inadequate to contain its waters. Either the dam will need to be ex-

new constitutional source capable of generating values and doctrine to deal with unjustified giving. The remainder of this Article is concerned with this final approach.

The most promising such source appears to be the anti-nobility clauses of Article 1, sections 9 and 10, of the United States Constitution.⁵³ Enacted after relatively little discussion at the Constitutional Convention⁵⁴ and invoked only infrequently thereafter,⁵⁵ the clauses provide a plausible source from which courts could develop doctrines to deal with official giving. Although ostensibly aimed only at preventing government from issuing honorific titles, such as count or king, the clauses have been used to invalidate more tangible acts of official favoritism.⁵⁶

In addition to lower court decisions that invoke the anti-nobility clauses directly, three United States Supreme Court decisions have mentioned them in concurring or dissenting opinions, suggesting their possible revival as sources of equality-protecting doctrine. In 1980, in *Fullilove v. Klutznick*,⁵⁷ the Court upheld a set-aside provision in the Public Works Employment Act. Justice Stewart, in a dissenting opinion, declared, "The Framers . . . lived at a time when the Old World still operated in the shadow of ancient feudal traditions [T]hey set out to establish a society that recognized no distinctions among white men on account of their birth."⁵⁸ As authority for this proposition, Justice Stewart cited the federal antinobility clause.⁵⁹ In *Mathews v. Lucas*,⁶⁰ a 1976 case concerning illegitimate children's right to receive survivors' insurance benefits, a dissenting opinion urged that the federal antinobility clause forbids economic distinctions based on birth.⁶¹ Finally, in 1982, in *Zobel v. Williams*,⁶² four concurring Justices invoked the clauses to disapprove Alaska's fiscal giveaway. In a footnote, Justices Brennan, Marshall, Blackmun, and Powell charged Alaska's degrees-of-citizenship approach with establishing a latter-day nobility, observing that "[t]he American

panded or a second dam built. At times, building a new dam will be the most economical and effective solution. Because equal protection has expanded rapidly, has attracted criticism as overextended, and was originally designed for another purpose, the development of a new constitutional structure seems a better way of coming to grips with state-created elites than does expanding current law.

53. See *supra* note 17.

54. See *infra* notes 79-90 and accompanying text.

55. See *infra* notes 91-100 and accompanying text; see also *infra* notes 57-63 and accompanying text (dicta invoking antinobility clauses).

56. See *infra* notes 91-100 and accompanying text.

57. 448 U.S. 448 (1980).

58. *Id.* at 531 n.13 (Stewart, J., dissenting).

59. *Id.* The clause is reprinted *supra* note 17.

60. 427 U.S. 495 (1976).

61. *Id.* at 520 n.3 (Stevens, J., dissenting).

62. 457 U.S. 55 (1982).

aversion to aristocracy developed long before the Fourteenth Amendment and is . . . reflected . . . in the Constitution. See Art. I, § 9, cl. 8 ('No Title of Nobility shall be granted by the United States')."⁶³

It thus appears that no clearly articulated doctrine limits governmental discretion in the bestowal of favors and grants; that the Supreme Court from time to time has behaved as though doctrine exists; and that the antinobility clauses are possible sources for the creation of explicit doctrine. If, as I believe, governmental enrichment of favored groups is likely to increase,⁶⁴ then investigation of the reach and application of these clauses is in order. Part II examines the history of the clauses in an effort to ascertain their core meaning.

63. *Id.* at 69 n.3 (Brennan, J., concurring).

64. This prediction is based on a number of things. First, I detect impatience with the problems of the poor on the part of a segment of the American political elite, a conviction that "now it's our turn." See Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135 n.12 (1982); Tumulty, *Reagan Success: Curbing Social Spending, But Liberals, Minorities Oppose Him on "Fairness" Issue*, L.A. Times, Feb. 8, 1984, pt. 1, at 1, col. 4.

Thus, although there has been a long-term trend toward equalization of wealth in the United States, D. NORTH, GROWTH AND WELFARE IN THE AMERICAN PAST 166-67 (2d ed. 1974), this trend may be reversing itself. See *infra* text accompanying notes 118-19, 194-211; R. REICH & I. MAGAZINER, MINDING AMERICA'S BUSINESS—THE DECLINE AND RISE OF THE AMERICAN ECONOMY (1982) (U.S. responded to worldwide economic decline, in part by cutting social programs; U.S. expenditures for social welfare among lowest of major industrialized nations); see also Special Issue, *The Richest People in America*, FORBES, Fall 1983; Peters, *supra* note 11, at 6-7 (publisher of registry of titled British nobility will print series of directories devoted to "the untitled [American] aristocracy," beginning with a volume on Texas); MacDougall, *Worldwide Inequality: Gap between Rich, Poor Is Widening*, L.A. Times, Oct. 21, 1984, pt. 1, at 1, col. 1; Crutsinger, *America's Top 2% Hold 30% of the Wealth, Study Finds*, Philadelphia Inquirer, Oct. 10, 1984, at C1, col. 1 (federal study, in progress, of distribution of U.S. wealth); Samuelson, *Fashionable Fears Notwithstanding, the Middle Class is Not Vanishing*, L.A. Times, Jan. 22, 1984, pt. IV, at 3, col. 3 (wealthiest sector of population increasing its wealth vis-à-vis middle class and the poor; in particular, pretax income of wealthiest fifth of families "has reached levels not seen in decades"); Kinsley, *The Price of Equality: One Problem Ends, Another Begins*, L.A. Times, Dec. 27, 1983, pt. II, at 5, col. 1 ("Prosperity will look different next time . . . there will be a wider spread of incomes. We are becoming a less equal society . . ."; author attributes this in part to current economic policies, which favor the rich); Kinsley, *Few of the Rich Really Earned Their Status*, L.A. Times, Oct. 12, 1983, pt. II, at 7, col. 3; cf. Will, *An American House of Lords*, NEWSWEEK, June 4, 1984, at 92 ("This country needs a homegrown peerage, which would be harmless without being useless.").

Any movement toward hierarchy could, of course, be greatly accelerated by selective distribution of biological commodities such as life extension, intelligence-enhancing potions, cloning services, and the like. See *supra* notes 9-10 and accompanying text; *infra* notes 179-87 and accompanying text.

II. THE ANTINOILITY CLAUSES: ORIGINS AND CASE LAW

A. *Early History*

The antinobility clauses were part of an American reaction to feudalism, a system of government and land tenure that still survived on the Continent. To understand the significance that the early colonists placed on these clauses, it is helpful to understand the basic elements of feudalism, the system against which they rebelled. Feudalism was "a form of society . . . [that] pushed to extremes . . . the element of personal dependence . . . with a specialized military class occupying the higher levels in the social scale; an extreme subdivision of the rights of real property . . . and a dispersal of political authority amongst a hierarchy of persons"⁶⁵

Under feudalism, vassals ("free men") provided services to the lords in return for physical protection.⁶⁶ Over time, these relationships became hereditary.⁶⁷ Within the ruling class, the system of obligations became complex, as superior kings and lords granted titles and offices to those of lower rank in return for service and loyalty.⁶⁸ At the bottom of the hierarchy, the serfs worked the land and remained tied to particular parcels of property.⁶⁹ Long before the American Revolution, the binding element of English feudalism had shifted from military protection to governmental status, as monarchs cemented relationships with nobles and local gentry by offering them places in the English administrative government.⁷⁰ By the close of the seventeenth century, "[p]olitics in England were . . . controlled by an oligarchy of great landed nobles and country squires plus wealthy commercial and banking families often related to the nobility."⁷¹

65. F. GANSHOF, *FEUDALISM* at xv (1964).

66. *E.g.*, D. HAY, *THE MEDIEVAL CENTURIES* 38 (1964).

67. *Id.*

68. *Id.* at 38-41.

69. *Id.*

70. *E.g.*, J. STRAYER, H. GATZKE & E. HARBISON, 1 *THE COURSE OF CIVILIZATION* 352 (1961).

71. 2 T. WALLBANK, A. TAYLOR & G. CARSON, *CIVILIZATION* 36 (5th ed. 1965). There were other differences between continental feudalism and English nobility. On the Continent, the privileges and title of nobility were transmitted to all of a noble's descendants in perpetuity. J. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 153 (11th ed. 1960). The privileges often included exemptions from taxes and arrest, land rights, and a monopoly of military commissions. LORD MONTAGU OF BEAULIEU, *MORE EQUAL THAN OTHERS* 143-44 (1970). The English nobility enjoyed few of these privileges; those they did retain were confined to one member of the family at a time and passed to the eldest son. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 408-10 (2d ed. 1968); 2 *id.* at 260; *see also* LORD MONTAGU OF BEAULIEU, *supra*, at 143-44; MORRIS, *Primogeniture and Entailed Estates in America*, 27 *COLUM. L. REV.* 24 (1927).

Although English peers lacked some of the privileges of their Continental coun-

When the American colonies were first settled, the English governors attempted to extend feudal relations there.⁷² The English monarchs considered land in America to be crown property and granted fiefdoms to favored nobles.⁷³ At least one colonial leader called for the creation of an American aristocracy, patterned after that in England, in which power would be wielded by wealthy individuals occupying seats in an American council like the House of Lords.⁷⁴ Others feared the colonists would not tolerate a permanent form of nobility and called for a modified nobility "for life."⁷⁵

Those who supported the idea of an American nobility were very much in the minority. Thomas Paine derided the English monarchy for placing persons of little merit in positions of authority.⁷⁶ He called hereditary succession "an insult and imposition on posterity" and declared that "all men being originally equals, no one . . . could have a right to set up his own family in perpetual preference to all others . . ."⁷⁷ Jefferson even opposed the institution of fee tail in property law, believing that allowing families to pass property "from generation to generation in the same name" created a "Patrician order," devoted to royal interests.⁷⁸

The Framers agreed that the Constitution should prohibit titles of nobility. In the *Federalist*, Hamilton wrote:

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.⁷⁹

Elsewhere, Madison saw the prohibition of nobility as perhaps the "most decisive" proof of "the republican complexion of this sys-

terparts, they had significantly more political clout. LORD MONTAGU OF BEAULIEU, *supra*, at 155 ("The peerage . . . had few legal privileges, but no continental nobility had anything like its political power.").

72. J. BASSETT, *A SHORT HISTORY OF THE UNITED STATES* 76 (2d ed. 1924).

73. *Id.*

74. J. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* 58 (1943). For a discussion of the history of early proposals to establish a feudal system in the colony of Maryland, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 52-54 (1975); L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* ch. 1 (1955).

75. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 278 (1967).

76. T. PAINE, *Common Sense*, in *SELECTIONS FROM THE WRITINGS OF THOMAS PAINE* 13 (S. Mittell ed. 1935).

77. *Id.*

78. T. JEFFERSON, *Autobiography 1743-1790*, in *1 THE WRITINGS OF THOMAS JEFFERSON* 1, 49 (P. Ford ed. 1892). Primogeniture, the practice of leaving one's estate to the oldest son, had been abandoned by several colonies even before the Revolution and was abandoned by the rest shortly thereafter. L. FRIEDMAN, *supra* note 74, at 57-58.

79. *THE FEDERALIST* No. 84, at 577-78 (A. Hamilton) (J. Cooke ed. 1961).

tem."⁸⁰ Another colonial writer defended the clauses against the charge of ineffectuality since their predecessor in the Articles of Confederation had not deterred the Cincinnati, an organization of Revolutionary War officers, who allegedly were threatening to make themselves into a nobility.⁸¹ The writer answered that the antinobility clauses were "agreeable to the general sentiment of the citizens" and that if the Cincinnati truly wanted to install themselves as a form of nobility, a constitutional prohibition was the best way to stop them.⁸²

The intensity of colonial opposition to nobility is indicated by the controversy that arose in Congress over what title to bestow on the office of President.⁸³ The question arose when Congress was drafting a reply to George Washington's inaugural address; among the suggestions were "His Excellency" and even "His Highness, the President of the United States and Protector of their Liberties."⁸⁴ The controversy raged for weeks in Congress and in the newspapers. Some argued that the President needed an exalted title to assure proper respect from other countries; others replied that it violated the spirit of the new republic.⁸⁵ Congress finally addressed the reply "To the President of the United States."⁸⁶

Against this background, the antinobility clauses evoked little dissent.⁸⁷ The Continental Congress incorporated a prohibition against titles of nobility in every draft of the Articles of Confederation except the first.⁸⁸ The first draft of the Constitution circulated at the Constitutional Convention provided that "[t]he United States shall not grant any title of nobility."⁸⁹ This portion of the Constitution became law virtually without change.⁹⁰

80. *Id.* No. 39, at 253 (J. Madison).

81. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 373, 379, 390-91 (M. Jensen ed. 1978) (letter published in Connecticut Journal in October 1787).

82. *Id.* at 390.

83. S. BLOOM, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 373-82 (1935).

84. *Id.* at 375-76.

85. *Id.*

86. *Id.* at 377-78. Some colonial leaders even urged George Washington to be a king, a suggestion he quickly rejected. *See, e.g., Equality, supra* note 46, at 258.

87. DRAFTING THE FEDERAL CONSTITUTION 711 (A. Prescott comp. 1941); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 183 (M. Farrand ed. 1911) [hereinafter cited as M. FARRAND].

88. 1 U.S. CONTINENTAL CONGRESS, SECRET JOURNALS OF THE ACTS AND PROCEEDINGS 294, 305, 352 (1821) (Articles of Confederation).

89. DRAFTING THE FEDERAL CONSTITUTION, *supra* note 87, at 706.

90. *See supra* note 88 and accompanying text. The Framers emphasized preserving equality of political access. The Constitution repeatedly refers to the political equality of all citizens. The Preamble, for example, declares that "We the People of the United States . . . do ordain and establish this Constitution for the United States

B. Case Law

In addition to the Supreme Court dicta discussed earlier, a number of lower court opinions have mentioned the antinobility

of America." "We the people" deliberately identified as the source of political power the citizenry, rather than the states or, as in England, the King. See, e.g., 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 434-35 (1941).

Elsewhere the document contains restrictions created to prevent persons from becoming too powerful. Members of Congress are not permitted to hold offices in the government simultaneously with their elected positions, U.S. CONST. art. I, § 6, cl. 2, and neither congressmen nor office holders can be appointed to the Electoral College, *id.* art. II, § 1, cl. 2. Each citizen is guaranteed all the privileges and immunities of citizens of the other states. *Id.* art. IV, § 2, cl. 1. The fifth, sixth, and seventh amendments give each citizen the right of due process and the right to trial by jury in criminal and certain civil suits.

Members of the House are elected "by the People," the qualifications for voting in such an election being the same as those required to vote for the most numerous branch of the state legislature. *Id.* art. I § 2, cl. 1. During the Constitutional Convention some suggested that the right to vote for Representatives should be restricted to landowners, because landless persons might sell their votes. 2 M. FARRAND, *supra* note 87, at 201-03. Franklin responded that it was important not to "depress the virtue [and] public spirit of our common people," which had helped to win the war. 2 M. FARRAND, *supra* note 87, at 204. The motion was defeated by a vote of seven states to one. 2 M. FARRAND, *supra* note 87, at 206. Madison later proclaimed that "[t]he electors are to be the great body of the people of the United States," the poor and humble as well as the wealthy and distinguished. THE FEDERALIST No. 57, at 385 (J. Madison) (J. Cooke ed. 1961). A motion to have senators elected by direct vote by the people was defeated, however. 1 M. FARRAND, *supra* note 87, at 151, 156. Indirect election by the state legislature was recommended as affording "a convenient link" between the state and federal systems, and as giving the states a direct role in the formation of federal government. THE FEDERALIST No. 62, at 416 (J. Madison) (J. Cooke ed. 1961).

The Framers' concern for equality also shows in the minimal qualifications they required of federal legislators. Members of the House of Representatives need only be 25 years old, citizens for seven years, and state residents at the time of election. U.S. CONST. art. I, § 2, cl. 2. Senators must be 30 years old and citizens for nine years. *Id.* § 3, cl. 3. During the Convention, Charles Pickney, although opposed to "undue aristocratic influence," moved that property qualifications be established for members of the federal branches to insure that those office holders were "independent and respectable." 2 M. FARRAND, *supra* note 87, at 248. His suggestion was soundly defeated. *Id.* at 249.

Equality influenced the terms of office of the national legislature: two years for representatives, U.S. CONST. art. I, § 2, cl. 1; six years for senators, *id.* § 3, cl. 1. According to Madison, a relatively short term for representatives insured that officers "should have an immediate dependence on, [and] an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." THE FEDERALIST No. 52, at 355 (J. Madison) (J. Cooke ed. 1961). The longer term for senators would provide stability and consistency and permit the senators time to learn the affairs of state more fully. *Id.* No. 62, at 418-20.

Many new state constitutions also contained provisions against inequality or special privilege. See R. HARRIS, THE QUEST FOR EQUALITY 18-19 (1960). These political provisions for grounding governmental power in "the people" and providing against official privilege made clear that a noble class or caste was utterly alien to the Founders' notion of government.

clauses, and three have invoked them to invalidate or refuse state action. In 1872, the Alabama legislature gave two named individuals the right to operate a gaming business if they contributed to the state's school fund. In *Horst v. Moses*,⁹¹ the Alabama Supreme Court struck down the law in part for contravening the state's antinobility clause. According to one justice, that clause prohibits government from granting any privilege "to an order of persons . . . at the expense of the rest of the people," even though it is not hereditary or accompanied by a formal title.⁹² "[T]he objection . . . arises more from the privileges supposed to be attached, than to the otherwise empty title or order."⁹³ Thus, although the state might benefit a single property owner through eminent domain or charter one corporation but not another,⁹⁴ it could not make discriminations that are completely divorced from the public good and intended only to enrich.⁹⁵

In *Eskra v. Morton*, an American Indian sought review of a Board of Indian Affairs ruling that her illegitimacy would prevent her from inheriting her mother's property. In a 1975 decision, the Seventh Circuit reversed,⁹⁶ noting that attachment of an official stigma at birth would constitute a badge of *ignobility*, in contravention of the nobility clauses.⁹⁷

A final decision, *In re Jama*,⁹⁸ arose when a citizen applied to a New York court to change his name from "Jama" to "von Jama." The petitioner testified that his father had told him the family name formerly was "von Jama" but that after immigrating to the United States the family had dropped the prefix. He told the court he wished to emphasize his Germanic heritage and that without the prefix his friends and acquaintances assumed that he was Slavic. The court rejected his request partly on antinobility grounds. "True Americanism," the court declared, prohibits

any political divisions resting on race, religion or pigmentation of skin "Von" . . . is a prefix occurring in many German and Austrian names, especially of the nobility. The court cannot think of a greater nobility than being an American This is the law of the land and declaratory for our own public

91. 48 Ala. 129 (1872), *writ dismissed*, 82 U.S. (15 Wall.) 387 (1872).

92. *Id.* at 142.

93. *Id.* The court went on to say that the antinobility clauses "preserve the equality of the citizens in respect to their public and private rights."

94. *Id.* at 142-43.

95. *Id.* at 143-44 (such discrimination violates not only the antinobility clauses, but "natural law" as well).

96. 524 F.2d 9 (7th Cir. 1975).

97. *Id.* at 13 n.8. The court also held the discrimination violated the equal protection clause. *Id.* at 13-14.

98. 51 Misc. 2d 9, 272 N.Y.S.2d 677 (N.Y. Civ. Ct. 1966).

policy.⁹⁹

The court rejected the petitioner's arguments as "puerile, if not pathetic."¹⁰⁰

C. *Summary and Proposed Test*

Constitutional history indicates the Framers intended the clauses to forbid the award of actual titles of nobility, as well as governmental creation of elite classes with unique material advantages and privileged political access. As such, the clauses responded to a deeply felt revolutionary ideal: that before the government, at least, all citizens were to count as equals. Three courts have invoked the clauses directly as grounds of decision. Although one of the decisions seems aberrant,¹⁰¹ the other two are less easily dismissed. Finally, the Supreme Court has mentioned the clauses in a number of dissenting or concurring opinions, most recently in 1982.¹⁰² Combining the constitutional history, case law, and Supreme Court dicta yields criteria for determining when the clauses have been violated, as well as a set of ancillary policies for use in borderline cases. Under the proposed test, a court will find state action unconstitutional if it

1. Confers an actual title of nobility, or
2. Confers all or many of the following indices of nobility:
 - (a) significant and enduring advantages of wealth and political influence;
 - (b) significant and enduring advantages with respect to the exercise of basic human faculties, especially those concerned with speech and thought;¹⁰³
 - (c) perception by others as special or superior;
 - (d) membership in a "closed" class, i.e., one that will resist entry by outsiders regardless of merit.¹⁰⁴

The criteria mirror, to some extent, those for strict review under *Carolene Products* "footnote four" reasoning,¹⁰⁵ although

99. *Id.* at 10, 272 N.Y.S.2d at 678.

100. *Id.* at 10, 272 N.Y.S.2d at 678. The vehemence of the court's language seems odd, given that Mr. Jama stood to gain no material or political advantage from changing his name. At issue was solely his desire to possess an aristocratic-sounding name.

101. *See supra* note 100.

102. *Zobel v. Williams*, 457 U.S. 55 (1982).

103. *See Insemination, supra* note 9; *Reproduction, supra* note 9. Both commentaries argue that creation of biological elites violates the spirit of antinobility clauses—that the Framers would have regarded such programs as unconstitutional had they foreseen them.

104. Requirements 2(a), 2(b), and 2(d) create, in effect, an "irreversibility" criterion.

105. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (implying strict review appropriate for laws that impair political processes or single out mem-

their application will of course differ. In close cases, courts may advert to a group of subsidiary concerns that, while not central to the Framers' intentions, nevertheless played a role in the discussion that led up to the clauses' enactment. These additional concerns include: encouraging political diversity; preventing demoralization of the populace; guarding against corruption of those unfairly enriched; and preserving upward mobility and entrepreneurial spirit.¹⁰⁶

Just as they protect the disenfranchised,¹⁰⁷ legislatures could enact measures to prevent establishment of the super-enfranchised. Nobility itself then would be prohibited directly by the Constitution, while enumerated "badges and incidents of nobility" would be prohibited by statute.¹⁰⁸

Courts presumably would apply a strict standard of review to

bers of discrete and insular minorities for unfavorable treatment). Other authorities have added the elements of stigma and immutability, *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).

The proposed criteria for nobility are triggered when state action creates a group that evidences three reverse characteristics—*viz.*, it receives favorable (not unfavorable) treatment, it is seen as ennobled (not stigmatized), and it is politically powerful (not impotent)—and two characteristics in common (insularity and permanence) with groups that currently receive heightened judicial protection.

When state action ennobles at the *expense* of blacks or other suspect classes, my test should combine with current equal protection doctrine to yield an even higher level of judicial scrutiny than is available under existing doctrine.

106. J. GARDINER, *An Oration, Delivered July 4, 1785, at the Request of the Inhabitants of the Town of Boston*, in CELEBRATION OF THE ANNIVERSARY OF AMERICAN INDEPENDENCE 13 (Boston 1785); T. NORTON, THE CONSTITUTION OF THE UNITED STATES 89 (1922); M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 113-14 (1970); I. K. ROWLAND, THE LIFE OF CHARLES CARROLL OF CARROLLTON 247 (1898); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 73 (1969); Lobsenz, *Bakke, Lochner and Law School: The New Nobility Clause versus a Republican Form of Medicine*, 32 ME. L. REV. 1, 13 (1980) (quoting George Clinton's remark that colonists' attitude toward aristocracy was one of intense "spirit of resentment"). Hamilton also warned that concentrating the power to make appointments to offices in a small group could be used to dominate the rest of the government (as occurred in England, *see supra* notes 65-78 and accompanying text). THE FEDERALIST No. 77, at 518-19 (A. Hamilton) (J. Cooke ed. 1961); *see infra* notes 201-03 and accompanying text. For an indication that some of these antinobility concerns retain their vitality, see *Hawaii Hous. Auth. v. Midkiff*, 104 S. Ct. 2321, 2330 (1984) (upholding power of state to redistribute land held pursuant to feudal scheme established by early Polynesian monarchs: "The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligarchy traceable to their monarchs Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.").

107. *See* D. BELL, *supra* note 15 (discussing civil rights legislation enacted under thirteen and fourteenth amendments).

108. *See infra* Part VB; *see also infra* notes 188-192 and accompanying text (further discussion of use of the clauses in sustaining antinobility legislation).

challenges brought under the clauses.¹⁰⁹ The constitutional prohibition is absolute,¹¹⁰ and the judicial decisions and dicta interpreting the clauses have treated them as stating an absolute or near-absolute standard.¹¹¹ As a corollary, governmental action that violates the criteria of nobility would be required to meet a "least ennobling alternative" test: that government cannot achieve its objective by means less offensive to the clauses and their values.

A later section of this Article illustrates analysis under the proposed test by applying the criteria to a number of hypothetical and actual cases. First, however, the Article considers reasons why the clauses should be revived and some likely objections to their revival.

III. REASONS FOR REVITALIZING THE ANTINOILITY CLAUSES

Revitalizing the antinobility clauses offers a number of doctrinal advantages: The clauses can unify and explain the otherwise anomalous decisions described in Part I;¹¹² they offer a symmetrical counterpart to constitutional doctrine aimed at protecting the disadvantaged;¹¹³ and they provide a textually grounded constitutional norm, under which courts would develop case law aimed at preventing certain types of evil.¹¹⁴ Assigning an explicit role to the clauses would lessen the likelihood that courts will sporadically and unpredictably invalidate legislation because it offends unstated preferences.¹¹⁵

History and political theory also support revitalization. Until recently, American society has not needed doctrine to curb ennoblement. The principal dangers to equality were attitudes and practices that ruthlessly subjugated Blacks, Hispanics, Indians,

109. See *supra* note 43 and accompanying text.

110. U.S. CONST. art. I, § 9 ("No Title of Nobility shall be granted"); *id.* § 10 ("No State shall . . . grant any Title of Nobility") (emphasis added). A strongly ennobling effect should be enough to trigger the test; proof of intent should not be necessary. See *supra* notes 39–42, 57–63, 91–97 and accompanying text (cases and dicta finding violation of antinobility clause in absence of explicit intent to ennoble); *supra* notes 76–86 and accompanying text (framers opposed institution of nobility because of its pernicious effects on representative government).

111. See *supra* notes 57–63, 91–100 and accompanying text. The cases are devoid of any "balancing" as occurs under the standard applied in connection with most constitutional rights.

112. See *supra* notes 31–42 and accompanying text. For example, the Illinois statute in *Doud* would be seen as creating a permanent, closed class with significant advantages and a legislative imprimatur of superiority, while conferring on the class a valuable material benefit.

113. See *supra* note 105.

114. See *supra* notes 107–09 and accompanying text.

115. This was one of the main reasons for sharply reducing judicial supervision of ordinary socioeconomic legislation. See *supra* notes 18, 24–26, 28–29 and accompanying text.

women, and the poor.¹¹⁶ Civil rights legislation and changes in national consciousness have begun to reduce the magnitude of these threats.¹¹⁷ The principal danger to a just society today may no longer be deliberate, systematic oppression of those at the bottom of the social heap, but purposeful enrichment of those at the top coupled with indifference to the rest.¹¹⁸ With a stagnant or slow-growing economy, it is no longer necessary to oppress the underclass to maintain a sharp cleavage between the haves and the have-nots; instituting arrangements that preserve and nurture privilege will serve.¹¹⁹ Moral and political intuitions hold that nonmerit-based social stratification is undesirable.¹²⁰ Legal doctrine should evolve accordingly.¹²¹

The principal alternatives to the antinobility clauses for preventing state-created nobility are either ineffectual or costly. Inaction only allows increasing hierarchy to become entrenched. Civil insurrection is implausible. Challenges could be brought under the equal protection and due process clauses or the public purpose doctrine, but as was observed earlier, they are unlikely to

116. See D. BELL, *supra* note 15; Black, *supra* note 105.

117. D. BELL, *supra* note 15 (legislation and case law aimed at curbing external manifestations of discrimination).

118. See *infra* notes 201-15 and accompanying text (growing governmental indifference to the poor and minorities); see also N.Y. Times, Mar. 1, 1970, at 1, col. 5 (Nixon's adviser Daniel Patrick Moynihan calls for "benign neglect" of civil rights issues).

119. See R. REICH & I. MAGAZINER, *supra* note 64; cf. Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2028 (1983) ("When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'").

120. See U.S. CONST. amends. XIII, XIV (forbidding slavery, requiring equal protection of the laws); The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal . . ."); *supra* notes 76-90 and accompanying text. But see P. EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION 251-53 (1968) (framers counted on conservative elements of the new government, plus constitutional protection of private property, to protect rule by wealthy).

121. When an outside force threatens equality, a major ordering principle of our political system, the law should be ingenious about fashioning a remedy. When antimonopolistic legislation first was proposed, for example, the evils of price-fixing and other anticompetitive activities must have been obvious. But the idea that federal legislation could redress these evils must have seemed at first implausible. Antitrust and antinobility values seek both to curb undesirable concentrations of power and to maintain a free market of goods or of social-political contributions. The willingness of courts and legislators to construe a broad grant of power under the commerce clause to sustain antitrust legislation, e.g., McLain v. Real Estate Bd., 444 U.S. 232 (1980); Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting), suggests that a similar construction might sustain antitrust's social-political counterpart, the prohibition of nobility. See also Reich, *The New Property*, 73 YALE L.J. 733 (1964) (governmental engagement in creating system of licenses, subsidies, and other benefits triggers need for new legal protections).

succeed.¹²² A political solution, "voting the rascals out," is too uncertain—any class satisfying the test for nobility could manipulate politics and public opinion decisively;¹²³ moreover, its members' advantages might easily come to be seen, over time, as natural or deserved.¹²⁴

Finally, legal protection of political and social equality is expanding.¹²⁵ Since the antinobility clauses are aimed at protecting against one kind of inequality, the case for revitalization gains strength from currents already in motion in the areas of equality and equal protection. One area, with significant ties to the antinobility principle, where this expansion can be seen is the "one man—one vote" controversy over congressional redistricting. In *Wesberry v. Sanders*,¹²⁶ the Supreme Court considered a challenge to a Georgia congressional district that was over twice as large as the average district in that state. The Court held that Article I section 2 requires that "as nearly as is practicable one man's vote . . . is to be worth as much as another's."¹²⁷ After reviewing the article's history, the Court justified its decision through the Framers' concern for election "by the People." The Court reasoned that permitting state legislators to create unbalanced congressional voting districts would defeat the Framers' intent: "The House of Representatives . . . was to represent the people as individuals, and on a basis of complete equality for each voter."¹²⁸

Five years later, the Court showed how serious it was about upholding this principle. In *Kirkpatrick v. Preisler*,¹²⁹ the Court

122. See *supra* note 47 (political and economic theorists find broad tolerance for nest-feathering behavior by official bodies). Moreover, without a fundamental interest or a suspect or quasi-suspect class, the equal protection standard of review is "mere rationality," with maximum judicial deference given to the legislature. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (1938); see also *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating, under substantive due process clause, maximum hours legislation for bakers). *Lochner* ushered in the era of substantive due process. The current Court decisively has abandoned this position. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); L. TRIBE, *supra* note 7, at 442–55.

123. See *supra* notes 103–05 and accompanying text (criteria for antinobility clauses); C.W. MILLS, *supra* note 14; CHILDS, *Pressure Groups and Propaganda*, in *THE AMERICAN POLITICAL SCENE* 205 (E. Logan ed. 1936); Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001 (1976); *Now Is the Time For All Good Men . . .*, *TIME*, Jan. 5, 1968, at 44.

124. See sources cited *supra* notes 103–04, 123.

125. See *infra* notes 126–42 and accompanying text. But see *supra* note 52 and accompanying text (equal protection unlikely to expand sufficiently to take account of state created elites).

126. 376 U.S. 1 (1964).

127. *Id.* at 7–8.

128. *Id.* at 14.

129. 394 U.S. 526 (1969).

held that the "as nearly as practicable" standard required states to try to achieve actual mathematical equality.¹³⁰ *Wesberry* and *Preisler*, then, indicate that, at least in this context, the Court views equality as a precise, achievable concept, not just an idle dream or goal. The antinobility clauses, too, are aimed at achieving equality of political access. Where official ennoblement threatens this value, similar grounds for concern arise.

At the end of the nineteenth century, the Supreme Court had distinguished between political equality, guaranteed by the Constitution, and social equality, which received no constitutional protection. In *Plessy v. Ferguson*,¹³¹ the Court upheld a Louisiana statute requiring separate but equal railway accommodations for blacks and whites. Any inequality arising from such arrangements, the Court reasoned, was not forbidden by the Constitution, which could not challenge "the general sentiment of the community" concerning blacks' social inferiority.¹³² Justice Harlan vigorously dissented, urging that "in view of the Constitution . . . there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."¹³³

*Brown v. Board of Education*¹³⁴ later vindicated Harlan's view. Since *Brown*, the Supreme Court has used the fourteenth amendment to eliminate many remaining vestiges of state-imposed social inequality.¹³⁵ A theme running through post-*Brown* cases is that denial of social rights leads to unacceptable stigmatization and, ultimately, a caste system. In this respect the Supreme Court has considerably surpassed the colonial intention.¹³⁶

Case law and commentary have strengthened or urged equal protection for newly recognized groups, such as women,¹³⁷ illegitimates,¹³⁸ aliens,¹³⁹ the young,¹⁴⁰ and homosexuals.¹⁴¹ The contin-

130. *Id.* at 531-32.

131. 163 U.S. 537 (1896).

132. *Id.* at 551 (quoting *People v. Gallagher*, 93 N.Y. 438, 448 (1883)).

133. *Id.* at 559 (Harlan, J., dissenting).

134. 347 U.S. 483 (1954).

135. Soon after *Brown*, the Supreme Court enjoined segregation in other public facilities. *E.g.*, *Schiro v. Bynum*, 375 U.S. 395 (1964) (municipal auditorium); *Gayle v. Browder*, 352 U.S. 903 (1956) (city buses); *Mayor & City Council v. Dawson*, 350 U.S. 877 (1955) (public beaches and bath houses).

136. Although the colonists objected to a formal, systematic establishment of nobility, many of them had no objection to the exclusion of women, slaves, Indians, or adherents of nonconforming religions from full social membership. *Equality, supra* note 46, at 252-54, 267-69.

137. *E.g.*, *Reed v. Reed*, 404 U.S. 71 (1971).

138. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977); *Levy v. Louisiana*, 391 U.S. 68 (1968).

139. *See Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game*

uing vitality of equal protection suggests that the antinobility clauses, which protect similar values, may be ready for expansion.¹⁴²

IV. ARGUMENTS AGAINST REVITALIZING THE ANTINOBLITY CLAUSES

Several objections could be raised to an antinobility attack on governmentally created elites. One might argue that antinobility analysis could be used to strike down practically every governmental action or program, that it would require affirmative obligations on behalf of the poor, and that it could not be effectuated by courts or any other branch of government.

The objection that antinobility analysis would sweep too far does not seem serious. Invalidation requires extreme, systematic favoritism;¹⁴³ programs that aid particular persons, industries, or geographical regions only moderately would not fall within the clauses' reach.¹⁴⁴ Programs that confer substantial benefits, but on a one-time-only, nonperpetuating basis (like patents), would likewise not be reached.¹⁴⁵ A similar line-drawing difficulty arises with nobility's opposites: slavery and takings. At its core, human slavery is easily recognized and morally condemned, as is uncom-

Comm'n, 334 U.S. 410 (1948); *Oyama v. California*, 332 U.S. 633 (1948). *But see* *Foley v. Connelie*, 435 U.S. 291 (1978) (state law may exclude aliens from service as state troopers, who perform a governmental function).

140. *See* L. TRIBE, *supra* note 7, § 16-29 (discussing possibility that young are a suspect class).

141. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

142. *E.g.*, *Equality*, *supra* note 46, at 245-46, 272-80 (pointing out that each expansion of political rights has been accompanied by rhetoric of equality); *see also* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11-17 (1979) (judiciary's role in articulating "public values"). *But see supra* note 52 and accompanying text (equality-protecting doctrine, although rigorous, unlikely to be able to expand to handle antinobility concerns).

143. *See supra* text accompanying notes 103-05.

144. Thus, a decision to build a bridge or military installation in one community rather than another, to award a construction contract to one firm rather than another, or to rescue one troubled industry but not another, would be insufficient to trigger nobility clause concerns. Nor would most "private bills," or congressional or presidential awards and medals trigger those concerns. A governmental decision to clone leading scientists probably would do so. *See infra* text accompanying notes 179-85.

145. These programs would not meet criteria 2(a), 2(b), and 2(d). *See supra* text accompanying notes 103-04; *cf.* D. HAGMAN & D. MISCZYNSKI, *WINDFALLS FOR WIPEOUTS: LAND VALUE, CAPTURE, AND COMPENSATION* (1978) (proposing that persons and industries that benefit from governmental programs that enhance land value be required to pay compensation for this benefit). *But see* J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 145 (1978) (Andrew Jackson vetoed bill to charter the United States Bank on ground that our political traditions forbade "titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful").

pensated governmental confiscation of property. Both areas present, at their fringes, close cases (Is the baseball draft slavery? Is a governmental zoning regulation that impairs the value of private property a taking?).

But vagueness and uncertainty at the periphery¹⁴⁶ have not deterred us from enacting a system of simply stated rules aimed at core evils. No one believes that the thirteenth amendment and the takings clause do not belong in the Constitution; the only questions concern their outermost bounds. The same trade-off should be made in the case of nobility: The benefits we derive from a general rule prohibiting nobility make uncertainty over difficult cases¹⁴⁷ acceptable. Judicial experience can fill in the principle's exact boundaries.

A second objection is that the antinobility clauses might require the government to undertake affirmative obligations toward the poor. To equalize opportunity and access to resources, might not the government be compelled to recognize the "right" of every citizen to health services, education, and other commodities necessary to social mobility? No; the antinobility clauses would be triggered only if the government distributed these commodities so inequitably as to satisfy the proposed test for ennoblement.¹⁴⁸ No prohibition would arise if the government did not distribute the commodity at all (for example, by leaving distribution to the private market) or distributed it evenhandedly. The antinobility clauses would prevent the government only from concentrating power and resources in an elite class. They would neither require nor prevent governmental efforts to aid the poor.

A final group of objections center on the idea that even if a violation of the antinobility clauses were shown, no decision-maker could order relief. Courts could not hear complaints, it might be argued, because of problems of standing, separation of powers, and political questions. These hurdles aside, the judiciary surely is in no mood to invent what would in effect be a new fun-

146. See *Butler v. Perry*, 240 U.S. 328 (1916) (public work on roads and bridges not slavery); *Robertson v. Baldwin*, 165 U.S. 275 (1897) (seamen's contracts not slavery); *United States v. Crocker*, 420 F.2d 307 (8th Cir. 1970) (military draft not slavery); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966) (court order that attorney represent an indigent not slavery); see also *Pollock v. Williams*, 322 U.S. 4 (1944) (finding illegitimate peonage in state statute); *Bailey v. Alabama*, 219 U.S. 219 (1911) (same); *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970) (baseball draft not slavery), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

147. See *Titles of Nobility*, *supra* note 9 (considering whether federal veteran's preference for civil service positions amounts to establishment of nobility).

148. See *supra* notes 103-05 and accompanying text (proposed criteria for antinobility clauses). This conclusion avoids a "ratchet" effect, in which entitlements to the poor, once enacted, can never be abolished. Under the proposed test they may be abolished, but not in a manner that creates a noble class elsewhere in society.

damental interest. Moreover, a complaint taken to Congress or the executive branch, the very arms of government charged with the violation, would be futile.

It would be a mistake to dismiss too quickly the idea that legislatures or executives might abolish a badge or incident of nobility called to their attention. As Paul Brest has pointed out,¹⁴⁹ legislatures as well as courts are responsible for protecting constitutional values. When weighing legislation, they must independently determine whether it meets constitutional standards; they should not abdicate this responsibility with the excuse that "the courts will decide." Once Brest's "conscientious legislator" becomes aware that proposed legislation will offend antinobility values, he or she should be presumed to oppose it. Thus, even if courts declined to hear challenges based on the clauses, a coordinate arm of government might not. The Constitution preserves the right "to petition the *Government* for a redress of grievances."¹⁵⁰ The more that prudential and institutional-competence questions militate against judicial determination of a question, the stronger the case becomes for direct petition to another arm of government.

Allegations of exclusion or demoralization will establish a petitioner's standing.¹⁵¹ Either allegation would satisfy the requirement of injury in fact, and judicial relief will alleviate the harm.¹⁵² Separation of powers and the political nature of relief raise closer questions. The political question doctrine renders nonjusticiable matters that the Constitution expressly relegates to another branch of government, that lack judicially manageable standards, or that invade the province of a coordinate branch of government.¹⁵³ The last-mentioned requirement is an aspect of separation of powers; it assures that courts do not assume a power so great as to "obliterate the division between judicial authority and legislative

149. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

150. U.S. CONST. amend. I, cl. 3 (emphasis added).

151. "Injury in fact" is the principal standing requirement in nontaxpayer suits, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 154 (1970) (injury may be aesthetic or spiritual); L. TRIBE, *supra* note 7, § 3-19.

152. The plaintiff also must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); L. TRIBE, *supra* note 7, § 3-21. If courts found standing an obstacle, Congress could provide for standing by legislation, thus giving courts maximum power to hear cases under article III. See Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980).

153. E.g., *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Baker v. Carr*, 369 U.S. 186 (1962); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); L. TRIBE, *supra* note 7, § 3-16.

power"¹⁵⁴ Since constitutional history and case law, reviewed earlier, do provide standards and since the Constitution does not expressly relegate antinobility concerns to another arm of government,¹⁵⁵ the main political question issue would be whether judicial determination of antinobility claims would impermissibly encroach on legislative or executive freedom of action.

To assess encroachment, courts have considered whether judicial resolution will embarrass another arm of government, confuse national policy, frustrate democratic decision-making, or exhaust a court's political capital unnecessarily.¹⁵⁶ But the core question is judicial competence: a court's ability to translate a constitutional principle into enforceable rights.¹⁵⁷ It is not easy to generalize about how courts would view antinobility claims under this standard. Certainly, many such claims will not require the courts to venture into areas where they have no expertise,¹⁵⁸ like foreign relations¹⁵⁹ or military training.¹⁶⁰ Nor would review be "essentially standardless";¹⁶¹ reasonably precise guidelines may be drawn.¹⁶² When an antinobility claim seeks to restructure society in ways beyond a court's competence,¹⁶³ the court should decline to hear it.¹⁶⁴

An objection might be raised that reinvigorated antinobility clauses would amount, in effect, to a new fundamental interest.¹⁶⁵ Antinobility is not a novel interest. It has been in the Constitution all along; it simply has found few nontrivial applications until lately.¹⁶⁶ A restrained view of courts' role would, if anything, sup-

154. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 142 (1912).

155. *See supra* notes 65-100 and accompanying text.

156. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see Scharpf, Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 566-83 (1966); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 *UCLA L. REV.* 1135 (1970).

157. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Baker v. Carr*, 369 U.S. 186, 226 (1962); L. TRIBE, *supra* note 7, § 3-16, at 73-79.

158. *See infra* text accompanying notes 179-87 (hypothetical program to clone leading citizens, assessment of which is well within judicial expertise).

159. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964); L. TRIBE, *supra* note 7, § 3-16, at 76 n.35.

160. *Gilligan v. Morgan*, 413 U.S. 1 (1973).

161. *Baker v. Carr*, 369 U.S. 186, 226 (1962); L. TRIBE, *supra* note 7, § 3-16, at 78-79.

162. *See supra* text accompanying notes 65-100 (history and case law of antinobility clauses); text accompanying notes 103-05 (criteria for applying clauses).

163. *See infra* text accompanying notes 212-15 (challenge to Reagan administration's program of "supply side" economics).

164. In such a case, the claim may be taken to another branch of government. *See supra* notes 149-50 and accompanying text.

165. The current Supreme Court seems unlikely to invent new fundamental interests. *See* L. TRIBE, *supra* note 7, § 16-30 to -31; Gunther, *supra* note 52.

166. *See supra* notes 91-100 and accompanying text (cases using antinobility law to invalidate gaming license and inheritance prohibition, and to refuse a name

port use of these clauses in appropriate cases. They are, after all, found in the text of the Constitution, unlike the right of privacy, the right to interstate travel, and the right to vote, recent creations of judicial activism not expressly grounded in the Constitution.¹⁶⁷

V. ILLUSTRATIONS OF ANTINOILITY CLAUSE ANALYSIS

Antinobility analysis could be used in three ways: to strike down legislation that establishes nobility, to support legislation aimed at reducing nobility, or to spur nonjudicial reform of programs that offend the values and policies of the clauses.

A. *Antinobility Clauses Applied to Strike Down State Action*

Antinobility analysis would have led a court to invalidate both the Alaskan distributional scheme in *Zobel v. Williams*¹⁶⁸ and the Louisiana provisions for the selection of river pilots in *Kotch v. Board of River Port Pilot Commissioners*.¹⁶⁹ The Alaskan scheme established a set of permanent, closed classes whose members would receive a substantial monetary benefit.¹⁷⁰ The distribution marked the "old timers" as superior to the newcomers, a superiority that might easily confer an edge in state politics.¹⁷¹ These features gave the Alaskan program, in the view of four Supreme Court Justices, an unacceptable ring of nobility.¹⁷² Although the Court struck down the scheme on equal protection grounds, the same result could have been achieved under the antinobility clauses.

In the face of an equal protection challenge, *Kotch* upheld a Louisiana law that antinobility analysis would have struck down. The state's scheme to select river pilots resulted in virtually hereditary occupation of desirable jobs.¹⁷³ The class was narrow—the only way to become a river pilot was to belong to a small circle of

change). *But see supra* notes 62–63 and accompanying text (four justices would use antinobility analysis to invalidate Alaskan surplus distribution).

167. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (right to vote); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to welfare without fulfilling residency requirements); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (rights to interstate, international travel protected); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

168. 457 U.S. 55 (1982), discussed *supra* notes 39–42 and accompanying text.

169. 330 U.S. 552 (1947), discussed *supra* notes 28–29 and accompanying text.

170. *Zobel v. Williams*, 457 U.S. 55 (1982).

171. People in thinly populated, rural communities look favorably on long-term residence and suspiciously on recent arrival. The Alaska program would put an official imprimatur on those attitudes.

172. 457 U.S. at 69 n.3 (Brennan, J., concurring). Justice Marshall, Justice Blackmun, and Justice Powell joined the concurring opinion.

173. *See supra* text accompanying notes 28–29.

family or friends.¹⁷⁴ Especially if (as seems likely) river pilots wield influence in local and state politics, the Louisiana practice fulfilled the requirements of nobility and should have been found to be unconstitutional.¹⁷⁵

*Morey v. Doud*¹⁷⁶ presents a closer case. The Supreme Court's first instincts about the case seem at least partly correct: American Express' monopoly constituted a permanent commercial benefit and established a closed class. Still, American Express is a corporation, not a natural person,¹⁷⁷ and its monopoly did not confer a unique entree into politics. Antinobility analysis would not, therefore, have saved *Doud* from overruling.¹⁷⁸

An easier case is presented by a hypothetical state program to distribute biological benefits. Projected or developing technologies may some day enable humans to extend their lives by many years,¹⁷⁹ preselect their children's characteristics,¹⁸⁰ clone organ systems or entire bodies,¹⁸¹ and enjoy artificially enhanced intelligence and vigor.¹⁸² Currently, the wealthy disproportionately

174. See *supra* text accompanying notes 28-29.

175. *Kotch* thus illustrates a divergence between equal protection and antinobility clause analysis. The distribution scheme in *Kotch* is vulnerable to an antinobility clause attack, yet invulnerable to attack under equal protection. Under current law, the Court reached the right result; there was no suspect class or fundamental interest in *Kotch*, and the scheme probably met the requirement of minimum rationality. Equal protection does not explain what is wrong with the *Kotch* scheme; only the antinobility clause does.

176. 354 U.S. 457 (1957), *overruled*, *City of New Orleans v. Duke*, 427 U.S. 247, 306 (1976) (per curiam), discussed *supra* notes 31-34 and accompanying text.

177. An ennobled corporation seems alien to the framers' intention and ordinary intuitions. True, the American Express shareholders stood to benefit from the corporation's favored treatment, and the directors and managers would gain freedom from regulation. These considerations make *Doud* a close case but ultimately do not, in my opinion, justify invalidation of the law. See *supra* notes 143-47 and accompanying text (line-drawing difficulties).

178. Although equal protection and antinobility analysis might reach the same result, *i.e.*, upholding the scheme in *Doud*, they do so by significantly different routes. Under standard equal protection analysis, *Doud* is an easy case, in which the scheme should be upheld. Favoritism to American Express is not based on a suspect class and does not implicate a fundamental interest. Moreover, it arguably meets the requirements of minimum rationality. Under the antinobility clause, the case is much closer; the scheme is upheld only by virtue of American Express' corporate status and the absence of any political advantage conferred by the gift. See *supra* note 177 and accompanying text.

179. LIFE SPAN: VALUES AND LIFE-EXTENDING TECHNOLOGIES (R. Veatch ed. 1979); *Regulating an Anti-Aging Drug*, 8 HASTINGS CENT. REP. 19 (June 1978); *Immortality Through Science?*, PSYCHOLOGY TODAY, Aug. 1983, at 40-41; *Organs Needed, But Not When Sold*, 124 SCI. NEWS 328 (Nov. 19, 1983) (hearing convened by Sen. Albert Gore to discuss legislation forbidding sale of body parts).

180. M. SHAPIRO & R. SPECE, CASES, MATERIALS AND PROBLEMS ON BIOETHICS AND LAW 326-567 (1981).

181. *Id.* at 46-67, 373-76, 391-93, 416-20.

182. *E.g.*, *Brain Healing: Implanting Fetal Cells in Rats*, TIME, Aug. 8, 1983, at 59; Jarvik, *Effects of Chemical and Physical Treatments on Learning and Memory*, 23 ANN.

consume medical care,¹⁸³ a situation our society tolerates because it results from ordinary market forces and does not contribute greatly to social stratification—some poor persons enjoy good health and physical vigor despite minimal health care, while some wealthy persons, despite the best of care, are sickly and die young.

When first developed, the potent life- and faculty-enhancing commodities mentioned above will probably be more scarce and expensive than ordinary medical care is today.¹⁸⁴ If similarly distributed according to pre-existing wealth, however, they have the potential to produce a rapid, drastic, and probably irreversible widening of the gap between society's haves and have-nots.¹⁸⁵ Public opinion will probably resist private development and sale,¹⁸⁶ yet governmental participation would expose the state to charges that it is establishing nobility. The beneficiaries would receive a substantial and much-desired benefit, the effects may be long-lasting, and the recipients could come to be viewed as naturally and deservedly superior. If their advantages include intelligence, vigor, and other "merit" attributes, they would have easy access to politics and political influence. Unless precautions were taken, the class could become closed: Those who received the initial benefit could obtain further enhancements for themselves and their children and prevent others from doing so. To avoid establishing nobility, as well as irreversibly harming concepts of equality, social mobility, and the uniqueness of the individual, novel

REV. PSYCHOLOGY 457, 478 (1972); McGaugh, *Drug Facilitation of Learning and Memory*, 13 ANN. REV. PHARMACOLOGY 229, 232 (1973); Almond, Cart & Harvey, *supra* note 10, at col. 2 (growth hormone used by professional and amateur athletes to improve performance).

183. Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243, 244-46 (1978); Shapiro, *Who Merits Merit? Problems in Distributive Justice and Utility Posed by the New Biology*, 48 S. CAL. L. REV. 318, 341-47 (1974).

184. M. SHAPIRO & R. SPECE, *supra* note 180, at 829-53; Nelson, *Bionic Man: In Search of New Parts*, L.A. Times, Nov. 30, 1983, pt. I, at 1, col. 1 (high cost of newly developed and projected artificial bodily parts, including intraocular lenses, vascular grafts and valves, hip joints, pacemakers, breasts, knee joints, finger joints, hydrocephalic shunts, bone growth stimulators, cochlae, skin, hearts and heart parts, penile implants, ureters, sphincters, pancreata, ear parts, tendons, ligaments, and bone and blood substitutes).

185. Shapiro, *supra* note 183, at 344-45 (certain biological traits, such as intelligence, energy, imagination, and long life, are "resource attractors," whose possession "leads to still more resource-attractive powers, the cycle spiraling upward indefinitely"); *see id.* at 345-47 ("merit attributes" serve as resource attractors). Selective distribution of resource attractors can lead to biological elites and extreme social stratification. *Id.* at 353-57.

186. *E.g.*, *Plan to Sell Kidneys*, *supra* note 10 (furor when private entrepreneur disclosed his plan to buy and sell organs for transplanting); sources cited *supra* note 10; *see also* M. SHAPIRO & R. SPECE, *supra* note 180, at 754-69; *Reproduction*, *supra* note 9, at 544-45.

modes of distribution would need to be explored.¹⁸⁷

B. *Antinobility Clauses Applied to Support Legislation*

The antinobility clauses do not reach private action, nor do they contain language expressly authorizing Congress to enact implementing legislation. Still, the clauses' history evidences a thoroughgoing constitutional aversion to government by self-perpetuating elites.¹⁸⁸ To supplement their negative commandment, Congress or state legislatures might enact positive legislation, relying on the authority of a constitutional principle, such as equal protection or the commerce clause, that does allow implementation.¹⁸⁹ For example, legislation might prohibit political donations larger than a certain amount or a candidate's contributing more than a certain figure to his or her own campaign.¹⁹⁰ In

187. For example, any distribution could be delayed until all may benefit. Alternatively, benefits could be given only to naturally disadvantaged persons, and the benefit could be confined to bringing them near the societal average. Or benefits could create super-human beings, on condition that those so blessed donate the product of their labors to the public good. *See generally* Shapiro, *supra* note 183, at 337-44; *cf.* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (*quid pro quo* justification for involuntary mental commitment).

This assumes that the technologies have been developed, with the only question being the manner in which their benefits are distributed. Any effort to regulate the *development* of the technologies probably would contravene first amendment rights of the researchers. *See* Delgado, Bradley, Burkenroad, Chavez, Doering, Lardiere, Reeves, Smith & Windhausen, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128 (1983); Delgado & Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349 (1978). It should be noted that the search for alternative methods of distribution is required by antinobility clause concerns but not by standard equal protection analysis. Giving these biological goods only to those who can pay for them would probably not violate equal protection; wealth is not a suspect classification, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), and there is no fundamental right to receive medical treatment. Nor does distribution of scarce resources on the basis of ability to pay offend the requirements of minimum rationality.

188. *See supra* notes 65-90 and accompanying text.

189. The thirteenth and fourteenth amendments confer explicit power on Congress to legislate to enforce the amendments. Because of the close relationship between the antinobility clause and equal protection, and the similarity between the values each protects, *see supra* text accompanying notes 125-42, the power for certain measures aimed at reducing nobility might be found under these other clauses. An equal protection constraint on federal action also has been read into the fifth amendment due process clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Another possible ground for antinobility legislation is the commerce clause; this clause was invoked to validate the 1964 Civil Rights Act in, for example, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). The commerce clause would be an especially appropriate basis in areas where official favoritism threatened economic harm to the nation. *See supra* text accompanying notes 76-78 (colonial objection to nobility based, in part, on belief that nobility is economically inefficient).

190. *See* sources cited *supra* note 123 (wealthy wield disproportionate influence in American politics).

the past, such measures have been found to violate rights of expression or political participation.¹⁹¹ But if enacted to promote antinobility aims, narrowly drawn rules might constitutionally further a compelling interest.¹⁹²

C. *Antinobility Values Used to Support Legislative Reform*

In addition to providing a basis for challenging or justifying legislation in court, antinobility concerns might spur legislative reform of existing programs.¹⁹³ President Reagan's original program of supply-side economics will serve as illustration. In his 1980 presidential campaign, Ronald Reagan announced a comprehensive program of economic reform. His program called for regressive tax cuts and deregulation intended to stimulate spending, industry, and production; elimination or curtailment of social programs; and increased military spending.¹⁹⁴ President Reagan successfully effectuated most of these changes in the first two years of his presidency.¹⁹⁵

Although aimed at improving the economy of the nation as a whole, Reagan's program benefited primarily the wealthy and those engaged in industrial production.¹⁹⁶ Upper-income taxpay-

191. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

192. This is not to say that the antinobility clauses should trump any and every first amendment claim. The clauses, after all, are part of the original Constitution. In cases of direct conflict, the first amendment, coming later as it did, should supervene any clause in that original document. When the two conflict only indirectly, antinobility values should play a part in the balancing process which first amendment analysis generally requires. L. TRIBE, *supra* note 7, §§ 12-2, -20.

193. See *infra* text accompanying notes 213-15 (legislative compared with judicial relief for nobility clause violations).

194. Presidential Message to the Congress, 17 WEEKLY COMP. PRES. DOC. 130 (Feb. 18, 1981); EXPERIMENT, *supra* note 11, at xv, 4-5, 8-10, 19, 31-58, 77, 97-153.

195. EXPERIMENT, *supra* note 11, at 1-2; see *Three Steps Forward, Two Back: A Balance Sheet on Reagan's Efforts to Deregulate America*, TIME, Aug. 20, 1983, at 12 [hereinafter cited as *Three Steps Forward*].

Congress, after a two-year honeymoon, began asserting itself in late 1982, reversing or softening some of the harsher features of Reagan's program. Hess, *The 97th Congress: Retreat from Reaganomics*, San Francisco Sunday Examiner & Chron., Dec. 26, 1982, at A-6, col. 1. Reagan's original program remains a useful example for antinobility analysis, however; indeed, its principal features remain intact.

196. THE REAGAN RECORD 317-44 (J. Palmer & I. Sawhill eds. 1982) [hereinafter cited as RECORD]; *Money Flow*, TIME, Aug. 27, 1984, at 22; Samuelson, *Fashionable Fears Notwithstanding, the Middle Class is Not Vanishing*, L.A. Times, Jan. 22, 1984, pt. IV, at 3, col. 1 (analyzing recent studies of economic trends and finding that pretax income of wealthiest fifth of families "has reached levels not seen in decades"); *Three Steps Forward*, *supra* note 195, at 12-14; Thurrow, *A Rising Tide of Poverty*, NEWSWEEK, July 11, 1983, at 62 [hereinafter cited as *A Rising Tide*]; see also Maitland, *Bar Group Finds Retreat on Civil Rights Under Reagan*, N.Y. Times, Sept. 16, 1982, at A-18, col. 1.

I selected the Reagan program because it is likely to be familiar to most readers and because it has attracted persistent criticism of inequity. I do not intend to exclude the possibility that earlier administrations might be equally culpable. It

ers gained most from the changed income tax structure.¹⁹⁷ Corporate taxes were reduced even more than those of individual taxpayers,¹⁹⁸ and liberalized depreciation allowances permitted businesses to write off substantial sums from their tax returns without showing increased productivity or investment.¹⁹⁹ Estate taxes were reduced.²⁰⁰

In addition to transferring wealth to business and the affluent, the administration provided ready access to political power for these groups. The President selected advisors who are themselves wealthy; a number have been California millionaires.²⁰¹ A high percentage of his appointees to agency and sub-Cabinet positions were wealthy white males from Western states;²⁰² relatively few women, members of racial minority groups, or working-class persons were appointed.²⁰³

As a result of Reagan's economic reorganization, entrepreneurs and high-income persons prospered, while the condition of the poor worsened.²⁰⁴ The incidence of poverty increased to its

could be argued that pre-Reagan regimes, by permitting or encouraging an economy based on high inflation and rapidly rising wages and prices, injured persons on fixed incomes (such as the aged) while enriching speculators and persons in strong unions, thereby contravening the values if not the letter of the antinobility clauses. These questions lie beyond the scope of this Part, the purpose of which is illustration.

197. EXPERIMENT, *supra* note 11, at 8, 21, 116-18, 482-83; RECORD, *supra* note 196, at 22; Havemann, *Poor Lose, Rich Gain Under Reagan, Budget Office Says*, L.A. Times, April 5, 1984, pt. I, at 1, col. 1 (Congressional Budget Office reported that tax and spending cuts enacted under the Reagan Administration have added \$7070 income to families with income of \$80,000, and have cost \$270 in lost income to families with income of less than \$10,000); Rich . . . Poor: *Tax Gap Widens*, L.A. Times, April 5, 1984, pt. II, at 6, col. 1; *Wealthy Reap Third of All Tax Benefits*, L.A. Times, Nov. 21, 1982, pt. I, at 1, col. 3 (top 4.4% of taxpayers prime beneficiaries of tax relief); *see also The Super-Rich Who Paid No Income Tax*, San Francisco Chron., Jan. 8, 1985, at 4, col. 1 (Internal Revenue Service report indicated that number of returns over \$200,000 increased sharply in recent years but portion paying no tax rose as result of new tax loopholes).

198. EXPERIMENT, *supra* note 11, at 8, 110.

199. *Id.* at 8, 110-11, 468; *cf.* Kinsley, *Greed, Envy: God-Given Wealth and Poverty, Reagan Style*, L.A. Times, Feb. 21, 1984, pt. II, at 5, col. 2 (supply-side economics, as practiced by Reagan Administration, not merit based).

200. EXPERIMENT, *supra* note 11, at 468-69. This reduction, of course, largely benefited the wealthy. *Id.*

201. *E.g.*, R. BROWNSTEIN & N. EASTON, REAGAN'S RULING CLASS: PORTRAITS OF THE PRESIDENT'S TOP ONE HUNDRED OFFICIALS (1982) (98 of 100 officials profiled are white, 95 male, 28 millionaires) [hereinafter cited as RULING CLASS]; L. CANNON, REAGAN (1982) (role of California millionaires in financing Reagan's candidacy).

202. Sources cited *supra* note 201; *see* May, *Rights Panel Assails Reagan Appointments*, L.A. Times, June 15, 1983, pt. I, at 1, col. 2.

203. Sources cited *supra* note 202; *The Reagan Brand on the Judiciary*, TIME, Feb. 28, 1983, at 74 ("another glaring absence: new black faces").

204. *E.g.*, EXPERIMENT, *supra* note 11, at 254-69 (prosperity not "trickling down"); *id.* at 460, 477, 480, 482-83 ("changes introduced thus far make the distribution of income less equal and require some sacrifices by low-income families while granting

highest level in 17 years.²⁰⁵ Median family income dropped 3.5 percent in 1981 alone, while that of the poorest sector dropped even more.²⁰⁶ Although Congress eased some of the harsher aspects of Reagan's program in the second and third years of his presidency,²⁰⁷ many remain.²⁰⁸ Some observers have warned that

large tax cuts to high-income families," *id.* at 483); RECORD, *supra* note 196, at 21-22, 317-44; *A Rising Tide*, *supra* note 196; *Bleak Portraits, Two Surveys of Black Privation*, TIME, Jan. 30, 1984, at 15 [hereinafter cited as *Bleak Portraits*]; *What's Fair? A New Study Livens the Issue*, TIME, Apr. 16, 1984, at 23 [hereinafter cited as *What's Fair?*]. Many low-income families lost wage earners as unemployment rose. EXPERIMENT, *supra* note 11, at 470 (original purpose of social cuts was to give poor an incentive to work, but few are able to work, *id.* at 472); *A Rising Tide*, *supra* note 196, at 62; Church, *Facing the Jobs Issue*, TIME, Oct. 25, 1982, at 18.

The Reagan administration also made program changes that made it more difficult for low-income persons to escape poverty. These include cuts in low-income assistance programs, EXPERIMENT, *supra* note 11, at 15, 469; RECORD, *supra* note 196, at 13-14, 177-217; Jencks, *Discrimination and Thomas Sowell*, N.Y. REV. BOOKS, Mar. 3, 1983, at 33; support for elementary and secondary education, EXPERIMENT, *supra* note 11, at 16; public legal services, *id.* at 16; *The Return of Unequal Justice?*, TIME, Dec. 27, 1982, at 48; health maintenance organizations, EXPERIMENT, *supra* note 11, at 16; federal aid for college and university students, *id.* at 344-59; school lunch programs, *id.* at 17, 380; *Eating Away at Nutrition*, L.A. Times, Nov. 30, 1982, pt. II, at 6, col. 1; deductions for child care, EXPERIMENT, *supra* note 11, at 17; grants for immunization, *id.* at 18; the Job Corps, *id.* at 18; and nutrition for low-income pregnant women, infants, and children, *id.* at 18, 469-70; *A Rising Tide*, *supra* note 196; Hume, *Food Stamps Cuts Seen as Hurting Poorest Families*, L.A. Times, Apr. 14, 1983, pt. I, at 10, col. 1. Federal enforcement for occupational safety and equal access for the handicapped slackened, CHILDREN'S DEFENSE FUND, AMERICAN CHILDREN IN POVERTY (1984) (increase in child mortality and poverty are traceable, in part, to current administration's economic program); EXPERIMENT, *supra* note 11, at 131-36, 341-42, 344; Jencks, *supra*; *Three Steps Forward*, *supra* note 195, at 12-14; *Bias "Excludes" Blacks, Rights Group Charges*, L.A. Times, June 8, 1983, pt. I, at 1, col. 4; *Administration Hit for Health, Safety Cutbacks*, L.A. Times, May 8, 1983, pt. I, at 23, col. 3; Maitland, *supra* note 196; *Reagan's Bill on Racial Bias Faces Trouble*, Wall St. J., Feb. 1, 1982, at 23, col. 3 [hereinafter cited as *Reagan's Bill*]. For a comparison of U.S. health and social welfare statistics with those of 11 major industrialized nations, see generally R. REICH & I. MAGAZINER, *supra* note 64.

205. EXPERIMENT, *supra* note 11, at 19; *Poor Measures—A Study Chronicles Poverty's Rise*, TIME, March 5, 1984, at 14 (new Census Bureau study showed increase in U.S. poverty and rebutted administration's position that statistical methods used in earlier studies overstated problem); see *What's Fair?*, *supra* note 204 (Census Bureau figures show number of Americans in poverty jumped 30% in three years mainly because of cuts instituted by Reagan Administration); Greenstein, *The Bottom Line on Poverty: Cuts in Aid, Food, Health, Housing Hit Families the Worst*, L.A. Times, Apr. 29, 1984, pt. IV, at 5, col. 1 (same); see also RECORD, *supra* note 196, at 14 (poverty unlikely to drop to 1970's level even if economic growth occurs).

206. EXPERIMENT, *supra* note 11; see *Bleak Portraits*, *supra* note 204; *Typical Income Is Coming Back from a Decline*, Philadelphia Inquirer, Oct. 7, 1984, at 3-A, col. 5 (census study shows 3.5% decline of average family earnings); Conyers, *Justice Dept.'s "Color-Blind" Policy*, L.A. Times, May 15, 1983, pt. V, at 5, col. 2 (income gap between whites and blacks growing).

207. Hess, *supra* note 195; see also *Reagan's Bill*, *supra* note 204.

208. See *supra* notes 11, 204 and accompanying text; Kondracke, *Why Can't Reagan Hear the Hungry?*, L.A. Times, Dec. 28, 1983, pt. II, at 5, col. 1; Havemann, *Welfare Cuts Stir Debate on Impact*, L.A. Times, Dec. 26, 1983, pt. I, at 1, col. 1;

unless additional reform is effected, the distance between the most privileged and least privileged sectors of the population will become unbridgeable.²⁰⁹

Besides prohibiting closed, elite classes with special access to politics, the antinobility clauses serve a number of ancillary goals or values—avoiding loss of political diversity, preventing demoralization, and guarding against corruption of the recipients of governmental largesse.²¹⁰ Critics point to disquieting evidence that each of these dangers has begun to materialize in the Reagan administration.²¹¹

Nordlinger, *Pangs of Hunger Spreading Coast to Coast in U.S.*, L.A. Times, Dec. 20, 1983, pt. 1A, at 6, col. 1. President Reagan's 1984 budget would do little to reverse the harm already done. Rosenblatt, *Cutbacks Focus Mainly on "Poorest" as Outlays Shrink by \$2.8 Billion*, L.A. Times, Feb. 2, 1984, pt. 1, at 15, col. 1 (analyzing proposed budget and finding it "would concentrate on trimming federal funds going to the poorest Americans, while leaving Social Security and Medicare largely untouched"; chart shows increased military spending for 1985 budgets); see Havemann, *Welfare Studies Fault Cuts for Strain on Working Poor*, L.A. Times, Mar. 31, 1984, pt. 1, at 3, col. 1 (discussing studies by GAO and Center for Study of Social Policy indicating that cuts in AFDC have pushed many working poor below poverty line).

209. See sources cited *supra* note 11. Although the Reagan economic program as a whole would seem to infringe on many of the values proposed for the antinobility clause, it is by no means clear that it is vulnerable to equal protection challenge. The program is minimally rational, *but see* Klott, *'Supply-Side' Claims Doubted, Tax Impact Seen Mainly on the Rich*, N.Y. Times, Sept. 18, 1984 at D-1, col. 3; it does not favor a suspect class, since wealth is not a suspect classification; nor does it infringe upon fundamental rights, since the political favoritism it espouses does not undercut the right to vote.

210. See *supra* note 106 and accompanying text.

211. (1) *Loss of political diversity and contributions of commoners.* See *supra* note 202 and accompanying text; *Does It Play in Peoria?*, TIME, Nov. 1, 1982, at 16, 17; *Nader Says Administration Acts to Dismantle Agencies*, L.A. Times, Aug. 31, 1982, pt. 1, at 10, col. 1 (critic laments "sameness of people" in the administration: "You don't see a real maverick . . . You don't see someone who is going to be a hairshirt, someone who's going to be a naysayer.").

(2) *Demoralization.* See *Bleak Portraits*, *supra* note 204 ("dispiriting" impact on poor black families); Taylor, *A Growing Mood of Dismay*, TIME, July 5, 1982, at 42; *As Poor Lose Hope, Our Riches Diminish*, USA TODAY, July 22, 1983, at 8A, col. 1; *Rights Panel Fearful of Violence by Bigots*, L.A. Times, Jan. 12, 1983, pt. A, at 9, col. 2 (seeming unconcern by administration fueling upsurge of racial violence and antisemitism); see also Cimon, *Panel to Study Disparity in Health Care*, L.A. Times, Jan. 8, 1984, pt. 1, at 1, col. 3 (health gap between privileged and underprivileged growing; increasing differences found in longevity and infant mortality).

(3) *Corruption of the recipients of governmental largesse.* The Reagan administration has visibly adopted many of the traditional mannerisms and accoutrements of nobility—ostentatious parties, designer gowns, expensive china, horseback riding, frequent vacations, limousines, and a tendency to speak coldly or condescendingly of the poor and their problems. See Jacobs, *State Gala under September Skies, Reagan's Host Party for Marcoses in the Rose Garden*, L.A. Times, Sept. 20, 1982, pt. VI, at 2, col. 1 (unusually lavish entertainment of visiting head of state); Radcliffe, *Marcos Critics Raise Flack Over U.S. Visit*, L.A. Times, Sept. 20, 1982, pt. VI, at 3, col. 1; see also Abramson, *19 U.S. Agents Reported with Son of Reagan*, L.A. Times, Oct. 30, 1982, pt. 1, at 1, col. 2 (extravagantly escorted vacation trip to England). For Reagan administration attitudes toward the poor, see *Trying to Make Amends*, TIME, Aug. 15,

The Reagan program thus appears to meet many, if not all of the formal criteria of nobility.²¹² It also urgently implicates the values of the antinobility clauses. Any *judicial* challenge to the Reagan program as a whole, or even to major portions of it, would be misconceived, however.²¹³ The relief would be too vast and far-reaching, the court's action too political.²¹⁴ But this does not mean that resurgent nobility is beyond remediation merely because it occurs on a large scale. The unlikelihood of judicial correction makes congressional reconsideration of the harsher aspects of the Reagan program plausible and appropriate. To some extent, this process has already begun.²¹⁵

CONCLUSION

The principal threat to equality may no longer be outright, blatant discrimination against minorities, the poor, and other vulnerable persons and groups. Society is now sensitized to recognize this kind of oppression and can call on an arsenal of legal remedies to stop it. Although the enthusiasm with which state and federal agencies enforce protective legislation varies, most at least do not actively oppose enforcement.

A more immediate, and less recognized, threat to equality is posed by governmental actions that centralize wealth, privilege,

1983, at 10-11 (labelling millionaire Agriculture Secretary's one-week experiment of living on \$58 dollar allowance, "playing poor, a demonstration . . . more patronizing than constructive"); Kurtz, *Official Says Latinos Prefer Overcrowding*, L.A. Times, May 12, 1984, pt. I, at 15, col. 1 (HUD official said figures indicating severe overcrowding in Hispanic families explained by preference—"I'm told that they don't mind, and they prefer, some prefer, doubling up."); Skelton, *Reagan Calls Opponents Anti-Business, Also Says Some of Homeless Choose to Be So*, L.A. Times, Feb. 1, 1984, pt. I, at 6, col. 1; Scherf, *Reagan Appointee Downplays Hunger*, L.A. Times, Dec. 29, 1983, pt. I, at 7, col. 1 (Reagan appointee says that malnutrition not major source of blacks' social problems; black children "may be the best-nourished group in the United States. Don't tell me you're going to correct complex social problems by throwing food at them"); Cmons, *Meese Remarks on Hunger Stir Angry Protests*, L.A. Times, Dec. 10, 1983, pt. I, at 1, col. 2 (spokesman criticized for denying existence of hungry children in U.S.).

212. See *supra* notes 103-05 and accompanying text. One criterion that arguably is not fulfilled is that of a closed class, since a poor person theoretically can work hard, join the class benefited by Reaganomics, and reap the benefits afforded by that program. But see *supra* note 204 (Reagan administration cut programs, such as support for education, job training, and nutrition, that enable the poor to change their social position).

213. To recall, this section's purpose is to illustrate a situation which calls for legislative reform of existing programs. See *supra* note 193 and accompanying text.

214. See *supra* notes 151-67 and accompanying text (justiciability of claims under the antinobility clauses).

215. EXPERIMENT, *supra* note 11, at ii-xii; Havemann, *\$8 Billion Cut in Domestic Aid Sought for '85*, L.A. Times, Jan. 6, 1983, pt. I, at 1, col 5 (congressional pressure to withdraw cuts proposed by Reagan in school lunches, food stamps, and similar programs); Hess, *supra* note 195; *Reagan's Bill*, *supra* note 204.

and power in a small sector of the population, coupled with indifference to those falling outside the inner circle. This Article argued that certain transfers of benefits to a selected few unacceptably impair democratic values. It proposed legal machinery, in the form of the antinobility clauses, to challenge those transfers. The Article reviewed constitutional history and case law to ascertain the clauses' central meaning and distilled a four-part test for their application. It discussed the advantages of such an approach and considered objections to it. The Article concluded by applying antinobility analysis to earlier cases decided on other grounds, to a hypothetical program creating a biological elite, to election law reform, and to President Reagan's supply-side economics.