

# WHAT IS EQUALITY? ARGUING THE REALITY AND DISPELLING THE MYTH: AN INQUIRY IN A LEGAL DEFINITION FOR THE AMERICAN CONTEXT

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The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger than anybody else. All this equality was due to the 211<sup>th</sup>, 212<sup>th</sup>, and 213<sup>th</sup> Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General.<sup>1</sup>

Equally fallacious is the doctrine of equality, of which much is said, and little understood. That one man in a state, has as good a right as another to his life, limbs, reputation and property, is a proposition that no man will dispute. Nor will it be denied that each member of a society, who has not forfeited his claims by misconduct, has an equal right to protection. But if by equality, writers understand an equal right to distinction, and influence; or if they understand an equal share of talents and bodily powers; in these senses, all men are not equal. Such an equality would be inconsistent with the whole economy of nature. In the animal and vegetable world, however strong the general resemblance in the individuals of a species, each is marked with a distinct character; and this diversity is one of the principal beauties of creation, and probably an important feature in the system. There are, and there must be, distinctions among men . . . they are established by nature, as well as by social relations. Age, talents, virtue, public services, the possession of office and certain natural relations, carry with them just claims to distinction, to influence and authority. Miserable, indeed, would be the condition of men, if the son could disengage himself from the authority of his father; the apprentice from the command of his master; and the citizen from the dominion of the law and the magistrate.<sup>2</sup>

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1. KURT VONNEGUT, JR., *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7 (Dell Publ'g 1998).

2. Noah Webster, An Oration on the Anniversary of the Declaration of Independence, in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 1220, 1229 (Charles S. Hyneman & Donald S. Lutz eds., Liberty Press 1983) (1802). Webster continued his commentary in a footnote to this discourse on equality by stating the following:

## I. INTRODUCTION

The opening quotation of this essay is taken from Kurt Vonnegut's 1961 short story entitled *Harrison Bergeron*. The tale portrays the aggressive efforts of a futuristic United States to establish and maintain a society in which all persons are equal—and if they are not, they will be made equal. Now, in many ways, this does not appear to be a bad idea or improper objective of the government. At first blush, it would seem only appropriate to conclude that in many respects every person ought to be considered the equal of all others—especially when we consider what the *Declaration of Independence* asserts is a self-evident truth “that all

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No doctrine has been less understood or more abused, than that of political *equality*. It is admitted that all men have an equal right to the enjoyment of their life, property and personal security; and it is the duty as it is the object, of government to protect every man in this enjoyment. The man who owns a single horse or cow, has as strong a claim to have that property protected, as the man who owns a ship or a thousand acres of land. So far the doctrine of *equal rights*, is vindicable. But that all men have an equal claim to distinction and authority, is contradicted by the opinions and practice of people in every country. Whatever absurdities men may write, publish and repeat, respecting natural and political equality; in practice, they are usually correct, and would always be so, if they could be left to act from their unbiased sentiments. All men naturally respect age, experience, superior wisdom, virtue and talents . . . and when they are to make appointments, they pursue this natural sentiment, and select men who are best qualified for the places. If most men should be asked, are you qualified for the office of chief magistrate[,] . . . of judge[,] . . . of ambassador[,] . . . of president of a college[,] . . . of commander of a ship of war? They will acknowledge their unfitness . . . they abandon all claims to these distinctions. But the same men will maintain that they have all an *equal right* to suffrage; that is, to an *equal* influence in government. But all men are not equally competent to judge of proper characters to fill offices. This is however not the main objection to the principle. Government is chiefly concerned with the *rights of person* and *rights of property*. Personal rights are few, and are not subject to much difficulty or jealousy. All men are agreed in the *principle* of protecting *persons*, and differ very little in the *mode*. But the *rights of property*, which are numerous, and form nineteen twentieths of all the objects of government, are beyond measure intricate, and difficult to be regulated with justice. Now if all men have an equal right of suffrage, those who have *little* and those who have *no* property, have the power of making regulations respecting the property of others . . . that is, an equal right to control the property with those who own it. Thus, as property is *unequally* and suffrages *equally* divided, the principle of equal suffrage becomes the basis of *inequality of power*. And this principle, in some of our larger cities, actually gives a *majority of suffrages* to the men who possess not a *twentieth of the property*. Such is the fallacy of abstract propositions in political science! In truth, this principle of *equal suffrage* operates to produce extreme *inequality of rights*, a monstrous inversion of the natural order of society . . . a species of oppression that will ultimately produce a revolution.

*Id.* at 1229-30 n.

men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>3</sup> Of course, the difficulty in extending this presupposition without limitation is that in some ways, people are different from one another, as Webster properly notes in the second opening quotation.

As Webster indicates, some people may be more adept at debate and discourse;<sup>4</sup> others may display prowess in sports; still other individuals may excel in musical talent. But, in Vonnegut’s short story, to level the playing field where disparity exists, the Office of the United States Handicapper General (HG) has been established to ensure that each person is equal with all others, regardless of whatever differences naturally occur. But how does the HG, the Honorable Diana Moon Glampers, accomplish this monumental task of leveling the playing field for one and all? With the objective clear and her determination uncompromised, the chore is quite easy. Under the programs established and enforced by the HG, the intellectually gifted receive periodic transmissions from electronic receivers that rudely and without warning interfere with their thoughts; exceptional ballet artists are weighted down with heavy bags of birdshot; the handsome and the beautiful, in order to conceal their inequality, are masked.<sup>5</sup> If they were not equal before government intervention, they are after it. Everyone is and must remain the same in spite of the many facts to the contrary.

And to this culture (or an excuse for one), young Harrison Bergeron, age fourteen, objects. He is considered a genius; he is athletic; he is handsome; and, he is gifted. And because he is considered a danger to society as determined by the law (particularly Amendments CCXI, CCXII, and CCXIII of the Constitution), he is imprisoned with the most ingenious fetters devised by HG Glampers. Harrison’s brief escape from imprisonment ends with his death at the hands of the HG, whose exaggerated, Kafkaesque sense of equality produces tragedy as its offspring.<sup>6</sup>

Vonnegut’s tale of Harrison Bergeron frames many questions about equality and inequality. Paradoxically, Noah Webster’s 1802 oration on the anniversary of the *Declaration of Independence* provides an historical foundation for Vonnegut’s story. Webster’s commentary on

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3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

4. Webster, *supra* note 2, at 1229.

5. VONNEGUT, *supra* note 1, at 7-8.

6. *Id.* at 10-11, 13.

equality reveals insights into a political and legal concept that has often inspired debate. Webster sensibly concedes that in certain regards, people are equal; however, in other contexts, distinctions among people reveal the diversity of talents, interests, and competencies.<sup>7</sup> Webster suggests that these distinctions emerge from two sources: the nature of each individual person and the constructs of society that are produced by its legal system.<sup>8</sup>

As one ponders more acutely the subject of equality given these introductory remarks, the inescapable question emerges about the meaning of equality itself. Related issues follow that raise other questions about whether there are, can, or should be limitations regarding the equality of human beings. While it is unlikely that any essay (much less a book or treatise) could provide a definitive explanation to these queries, the present task is geared toward providing some basic insight about the meaning of human equality in a legal context—particularly in the United States, given the history of the Framers' efforts that were "conceived in liberty and dedicated to the proposition that all men are created equal."<sup>9</sup> It is within this country that the notion of equality has received and continues to receive prominent attention; however, it is frequently misunderstood by those familiar with its application in the American legal system, for the meaning of this important legal term can be ambiguous and elusive.

Thus, it becomes necessary to understand what equality in a legal sense means and what it does not. This essay will propose that the legal concept of equality must have a foundation in authentic human nature, i.e., the reality of "human beingness" objectively, not subjectively, determined. This necessitates an understanding of the physical and metaphysical nature of human beings and must expand the quest beyond the constrictions of positive law. For the term *equality* to have durable meaning, it must be understood in the context of human nature—its diversity, its restrictions, and its imperfections. Moreover, it requires an appreciation of what the Framers of the Republic had in mind as they established the legal structures of the nation. To ignore these indisputable points would facilitate caprice not only in an idea but also in an important legal concept cherished by most Americans.

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7. Webster, *supra* note 2.

8. *Id.*

9. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), reprinted in 1 DOCUMENTS OF AMERICAN HISTORY 429 (Henry Steele Commager ed., Meredith Publ'g Co. 7th ed. 1962).

Knowing that equality has been a part of the legal discourse in the United States from its beginning, we may be surprised by the fact that our Constitution sparingly treats the subject.<sup>10</sup> The sparse provisions that do address this matter have little to say about the equality of citizens, persons, or members of the human race.<sup>11</sup> The text makes points about other issues that do not have much bearing on the meaning of equality that individuals—powerful and not, wealthy and not, influential and not—believe is important in their lives. The subject of equality is first addressed in Article I, Section 3, which deals with placing senators “equally” into three classes.<sup>12</sup> In the same section, it is stated that the Vice President of the United States shall be President of the Senate with no voting power unless the Senate is “equally” divided on the matter before it.<sup>13</sup> Article II, Section 1, provides for the electors of the President, “equal” to the number of representatives and senators to which each state is entitled.<sup>14</sup> The same section provides the method for breaking a tie if two or more candidates for President have an “equal” number of electoral votes.<sup>15</sup> The same provision also addresses the procedure for breaking a tie that may result in the selection of the Vice President.<sup>16</sup> Finally, Article V states that no State shall be deprived of “equal suffrage” in the Senate without its consent.<sup>17</sup>

Equality does not appear in the part of individuals until the Fourteenth Amendment (adopted in 1868): no person is to be denied “equal protection of the laws.”<sup>18</sup> The Twenty-Third Amendment (1961) also addresses equality in the context of the rights of the District of Columbia and its citizens in the Electoral College.<sup>19</sup> Otherwise, the text of the Constitution is silent about equality. The interpretive and legislative processes that exist under the Constitution, however, have immensely broadened the exposure of this important term. For example, the Supreme Court’s decision in *Brown v. Board of Education*,<sup>20</sup> and civil rights legislation like the Civil Rights Act of 1964<sup>21</sup> and the

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10. See U.S. CONST.

11. See U.S. CONST. art. I, § 3, art. II, § 1, art. V, amend. XIV, § 1, amend. XXIII, § 1.

12. U.S. CONST. art. I, § 3, cl. 2.

13. U.S. CONST. art. I, § 3, cl. 4.

14. U.S. CONST. art. II, § 1, cl. 2.

15. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

16. *Id.*

17. U.S. CONST. art. V.

18. U.S. CONST. amend. XIV, § 1.

19. U.S. CONST. amend. XXIII, § 1.

20. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

21. 42 U.S.C. §§ 1981-2000h-6 (1981 & Supp. III 1985).

Americans with Disabilities Act of 1990,<sup>22</sup> provide illustrations of judicial and legislative efforts that attempt to define the legal meaning or understanding of equality. It is unlikely, however, that the political or legal processes involved in the legislative and judicial activity that addressed the question have displayed a great deal of care in understanding and explaining the meaning of equality so that it has a coherent understanding throughout the legal system of the United States.

The notion of equality as a source of personal human rights is hard to find in the text of the Constitution. As previously noted, however, the *Declaration of Independence* (*Declaration*) contains the following important and unequivocal phrase:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>23</sup>

Those responsible for setting the course of a new nation as it separated from England unambiguously had the idea of equality in mind; moreover, they believed that it was the proper role of the servant government to secure the *right* to equality.<sup>24</sup> The charge of the *Declaration*, however, said nothing about defining the meaning of this right, which has often proved to be a difficult, unsatisfying task, as legislation and adjudication dealing with affirmative action to protect “equality” have demonstrated in recent years.<sup>25</sup> This is due to the fact that the meaning of the term (as it applies to persons) has evaded a clear and consistent legal definition.

Could this result be due to the fact that the drafters of the *Declaration* expressed the view that the source of human equality is not

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22. 42 U.S.C. §§ 12101-12213 (2000).

23. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

24. However, as Walter Berns reminds us, southerners like John C. Calhoun and Alexander H. Stephens asserted that this equality claim was a “self-evident lie” and denounced their fellow southerner, Thomas Jefferson, for making the claim. WALTER BERNs, TAKING THE CONSTITUTION SERIOUSLY 15-16 (1992).

25. See, e.g., Scott D. Gerber, *The Court, The Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067, 1074 (2008) (discussing the conflicting views of Justice Clarence Thomas and Professor Mark Tushnet).

of human origin—it is the Creator who made us all? Because of their understanding of the source of human equality, the notion of equivalence put forward by the *Declaration*'s drafters could not be comprehensively defined by human effort alone, but could be both descriptive of what the Creator made *and* prescriptive about the truth needed to protect what the Creator has made.

This brings to the meaning of equality a resource that is not affected by human limitation or imperfection; this is the metaphysical dimension of human equality that is immune from human ways that might otherwise corrupt its essence that the drafters of the *Declaration* wanted to acknowledge through this organic law, i.e., the organizing or constituting set of law that enables a people to establish a government and its laws.<sup>26</sup> It now becomes the modest object of this essay to provide some greater clarity to this crucial concept's legal meaning as the drafters of the *Declaration* and the Framers of our republican democracy may have considered it.

## II. ROADMAP

To facilitate this brief study, I propose to examine equality by succinctly considering its treatment in the context of the historical authors upon whom the Framers relied for their basic education in political philosophy and jurisprudence (Part I). The investigation will then consider the appropriation by the Framers of these views on equality as they designed and established our republican democracy (Part II). The essay will subsequently explore the consideration of equality in several important contexts that have emerged within debates in the United States: voting (suffrage); property and privilege; race; and sex (Part III). It will then consider how contemporary thinkers have contributed to the understanding of equality in the present age (Part IV). With the historical and contemporary contributions in mind, the essay will then synthesize this body of perspectives on equality into a basis for providing a sustainable and practical theory of equality (Part V).

## III. HISTORICAL BACKGROUND

As outlined below, many of the Framers of the American Experiment were well-read in the political and legal philosophy that ranged from the writers and thinkers of ancient Greece and Rome to

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26. BERNIS, *supra* note 24, at 23.

those of their days. These philosophical works molded the Framers' thinking and stimulated their debates as they began to forge a new nation and its legal system.

We begin with one of the most influential contributors, Aristotle, whose understanding of equality reached the frequent conclusion that it is an expression of justice.<sup>27</sup> Of course, Aristotle was not a supporter of unrestrained egalitarianism; he acknowledged and supported a system that accepted slavery and other forms of servitude condemned by most people today.<sup>28</sup> Thus, inequality, according to Aristotle, had to be considered as a kind of injustice: as a thinker concerned with moderation of extremes,<sup>29</sup> he believed that equality is a mean—something that requires neither too much nor too little.<sup>30</sup> Aristotle illustrated his thesis by comparing the work of those in different occupations: the farmer, the doctor, the builder, and the shoemaker.<sup>31</sup> Each of these persons contributes to the good of society, and the work of each is essential so that the members of the society may prosper and live in harmony with one another.<sup>32</sup>

But can it be said that their respective contributions, when compared and contrasted with one another, must be considered the equal of the other? Clearly not, and this is why Aristotle explained that certain inequalities exist among people (for example, between parent and child or between ruler and subject).<sup>33</sup> What provides the distinction between equality within the political community—where justice requires it to be in proportion to merit and quantitative equality is secondary— and equality in the context of friendship—where quantitative equality comes first and proportion to merit is secondary?<sup>34</sup> The issue of proportion enters the philosopher's consideration of what makes the work of one person equal to the other. Given the role of proportionality, harmony

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27. See ARISTOTLE, *NICOMACHEAN ETHICS* 134-43 (J.E.C. Welldon trans., London, MacMillan & Co. 1897)(n.d.).

28. See ARISTOTLE, *POLITICS*, bk. 1, ch. 5, *reprinted in* THE BASIC WORKS OF ARISTOTLE 1127, 1132 (Richard McKeon ed., Random House 1941).

29. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 27, at 134-43.

30. *Id.* at 140-143. "But the justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality; not according to that kind of proportion, however, but according to arithmetical proportion. . . . [T]his kind of injustice being inequality, the judge tries to equalize it," balancing by penalty or otherwise rectifying the wrong with that which reconciles the wronged to the wrongdoer. *Id.*

31. *Id.* at 151-52

32. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 27, at 151-52.

33. ARISTOTLE, *POLITICS*, bk. 1, ch. 12, *supra* note 28, at 1143.

34. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 27,, at 144-49.



and equilibrium are also crucial to Aristotle's understanding of equality. Another crucial consideration for Aristotle follows: it is not the impulse of individuals that can rule or determine what is just between and among people because the equality that will result is the product of man's "tyrannical instinct"; rather, equality must be viewed as the "rational principle" that is applied by the objective and sensible magistrate, who is the guardian of both justice and equality.<sup>35</sup>

In his *Politics*, Aristotle acknowledged that, in many facets of human life and activity, there are, and there will be, profound differences among people and the activities that they can or cannot pursue due to their individual natures.<sup>36</sup> It is therefore the obligation of the rule of law (and the role of the magistrate who is its administrator) to assure that the inequalities (injustices) found among people do not destroy the *polis*.<sup>37</sup> As he did in *Nichomachean Ethics*, here he relied on the mean to balance the equality of proportion and the equality of quantity, both of which are essential to the good of all—the common good.<sup>38</sup>

In ancient Rome, Emperor Marcus Aurelius was taken with the idea of equality—something that he thought about but did not necessarily practice toward the budding Christian community. In his *Meditations*, he argued that an acceptable polity sustains "the same law for all."<sup>39</sup> This principle sets the foundation for equality of rights and freedoms that any wise monarch would respect.<sup>40</sup> But who is the wise monarch or governor was a question of great interest to Thomas Hobbes, who examined the subject some years later.

In Part I of *Leviathan*, Hobbes formulated his understanding of human anthropology and concluded that, in spite of greater strength in one person or keener intellectual capacity in another, all are equal in the sense that they can compensate for their personal deficiencies so that the weaker can devise plans for neutralizing the stronger who threaten them; in other contexts, the less mentally adept are capable of outfoxing the most clever.<sup>41</sup> Recognition of this capability leads people to fear one another and prompts them to cede their natural liberty—which fuels

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35. *Id.* at 142–44.

36. ARISTOTLE, *POLITICS*, *supra* note 28.

37. *Id.* bk. 3 ch. 16, at 1201–02.

38. *Id.* bk. 5 ch. 1, at 1234.

39. MARCUS AURELIUS, *MEDITATIONS* bk. 1, *reprinted in* 12 GREAT BOOKS OF THE WESTERN WORLD 253, 254 (George Long trans., Mortimer J. Adler & Wallace Brockway, eds., William Benton 1952) (n.d.).

40. *Id.*

41. See THOMAS HOBBS, *LEVIATHAN* 63 (J.M. Dent & Sons Ltd. 1947) (1651).

interpersonal competition—to the state (Leviathan), for the purpose of mutual security.

Hobbes's fellow countryman, John Locke, continued the investigation of human equality and suggested in his *Second Treatise of Government* that there is a natural state of equality among people where, in theory, all power and authority are reciprocal and no one has more or less than the other.<sup>42</sup> However, this theoretical perspective did not prevent Locke from acknowledging that each person, due to differences in age, social standing, wealth, etc., cannot be the precise equal of others in all regards.<sup>43</sup> Following the lead of Hobbes, he recognized the need for a state or government to intervene in order to compensate for and protect against these inequalities that could lead to the disadvantage of some persons.<sup>44</sup>

In *The Social Contract* (1762), Jean-Jacques Rousseau likewise presented the case arguing for recognition of natural equality<sup>45</sup> when he began this short political work with the assertion that “Man is born free; and everywhere he is in chains.”<sup>46</sup> It seems for Rousseau that there is a natural equality that emerges from each person's freedom. This freedom, however, encounters some kind of restraint, which is the product of natural competition and differences that people exhibit and

42. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT* 4 (J.W. Gough ed., The MacMillan Company 1956) (1689).

43. *Id.* at 28-29. As Walter Berns has noted, the Lockean notion of equality that influenced Jefferson was that humans are “[n]ot equal in all respects, or even in most respects, but equal in the one respect that matters here, their natural rights.” BERNs, *supra* note 24, at 70.

44. LOCKE, *supra* note 42, at 65-66.

45. With regard to “natural equality,” John Trenchard and Thomas Gordon had this to say in their *Cato's Letter No. 45*:

Whoever pretends to be naturally superior to other Men, claims from Nature what she never gave to any Man. He sets up for being more than a Man; a Character with which Nature has nothing to do. She has thrown her Gifts in common amongst us; and as the highest Offices of Nature fall to the Share of the Mean as well as of the Great, her vilest Offices are performed by the Great as well as by the Mean: Death and Diseases are the Portion of Kings as well as of Clowns; and the Corpse of a Monarch is no more exempted from Stench and Putrefaction, than the Corpse of a Slave.

JOHN TRENCHARD & THOMAS GORDON, *Of the Equality and Inequality of Men, No. 45, in CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* 308 (Ronald Hamowy ed., Liberty Fund 1995) (1721). Thus, we are evocatively reminded that today's pauper can be tomorrow's plutocrat; and today's plutocrat can become tomorrow's pauper.

46. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 3 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762).

exercise. To overcome the shortcomings of these natural conditions, people enter society and subject themselves to sovereign authority for individual and mutual protection. This is necessary because the equality of rights of persons and their sense of justice lead them to conclude that natural self-preference, which inevitably leads to conflict, requires the moderating influence of a sovereign authority that governs its subjects in a reciprocal, that is, even, fashion.<sup>47</sup> Rousseau, moreover, recognized that there is also a natural inequality among people, and this recognition had prompted him to write his earlier work, *A Dissertation on the Origin and Foundation of the Inequality of Mankind*.<sup>48</sup> Here he identified two basic inequalities that exist among people: the first kind is a natural or physical type, e.g., the differences and distinctions in age, strength, health, and mental capacity; the second kind of inequality resides in the social, political, and economic statuses that differentiate one person from another.<sup>49</sup>

The works of these historical figures influenced the Framers of our republican democracy. At this point, it will be useful to examine how the Framers appropriated these influences in planning the American experiment. Particular attention will be given to the role of equality within the theoretical underpinnings and their functional execution in the emerging Republic.

#### IV. THE WORK OF THE FRAMERS

This section examines how the Framers addressed and provided for equality in the American society that they were establishing for the new nation dedicated to the self-evident truth that “all men are created equal.” As previously noted, this essay concentrates on the American appropriation of the notion of equality, and this phrase, as incorporated into the *Declaration of Independence*, suggests that it is some power (man’s Creator, not the human person) who makes people equal to one another in some essential way.

In the colonial period leading up to the *Declaration of Independence*, equality was a topic of discussion among many who would participate in the foundation of the American Experiment. The gifted Renaissance-personality Benjamin Franklin, in correspondence to

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47. *Id.* at 28-32.

48. JEAN JACQUES ROUSSEAU, ON THE ORIGIN AND FOUNDATION OF THE INEQUALITY OF MANKIND (G.D.H. Cole trans., The Great Books Foundation 1955) (1755).

49. *Id.* at 22.

John Waring, passed along observations he made during a tour of the northern colonies in 1763 that provide some insight into the meaning of equality (particularly on racial grounds, which I will consider in a separate section of Part V).<sup>50</sup> He wrote to Waring with his impressions collected from his visitation of a “Negro school.”<sup>51</sup> Franklin’s experience led to his conclusion that these children’s “Apprehension seems as quick, their Memory as strong, and their Docility in every Respect equal to that of white Children. You will wonder perhaps that I should ever doubt it, and I will not undertake to justify all my Prejudices, nor to account for them.”<sup>52</sup> Franklin confessed that his earlier views on equality were otherwise and that he may even have had some lingering doubt questioning the equality of blacks.<sup>53</sup> Yet, once he got to see not only potential but existing abilities, he reached “a higher Opinion of the natural Capacities of the black Race . . . than . . . [he] had ever before entertained.”<sup>54</sup>

Observations similar to these circulated among some of the most influential writers and politicians of the day. These opinions began to affect encouragingly the minds of influential members of society, including those within the political and social elites, that there is a reality to the claim of the equality of human beings. For example, George Mason’s efforts in drafting the *Virginia Declaration of Rights* (paralleling language that would appear in the *Declaration of Independence*) included two pertinent provisions on equality. The first asserted that all “men”<sup>55</sup> are by their nature “equally free and independent,” and enjoy “certain inherent rights,” which include the enjoyment of life and liberty, the means of acquiring and possessing

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50. Letter from Benjamin Franklin to John Waring (Dec. 17, 1763), in *10 THE PAPERS OF BENJAMIN FRANKLIN*, at 396 (Leonard W. Labaree ed., Yale Univ. Press 1966).

51. *Id.* at 395.

52. *Id.* at 396.

53. *Id.*

54. Letter from Benjamin Franklin to John Waring (Dec. 17, 1763), *supra* note 50, at 396.

55. I will leave for another day an investigation of whether the use of the term “man” or “men” intentionally or exclusively referred to the male members of the human race and excluded its female members. My inclination is that for the most part these terms, as was the traditional sense, referred to both men and woman and were the equivalent of the Latin word *homo*, meaning human being or person, and not the Latin word *vir*, a person of the male gender (usually an adult). In the context of the literature of the 18<sup>th</sup>, 19<sup>th</sup>, and most of the 20<sup>th</sup> centuries, the English term *man* or *men* had an inclusive meaning that incorporated or referred to both male and female genders.

property, and pursuing and obtaining happiness and safety.<sup>56</sup> The second provision provided that no one should be treated unequally (due to unique traits or because of social or economic status) or be given privilege in holding public office.<sup>57</sup> To reinforce this second provision, Mason concluded that public offices such as those of legislator, magistrate, and judge were not to be held or retained through any hereditary claim.<sup>58</sup> The conclusion would follow that people were equally entitled to hold these offices regardless of family or other ties.

For Mason, equality was also essential to the proper exercise of the franchise and other rights of citizens.<sup>59</sup> The *Virginia Declaration of Rights* additionally contained a provision on equality concerning the free exercise of religion “according to the dictates of conscience” even though there was a mutual duty “to practice Christian forbearance, love, and charity” toward others.<sup>60</sup> This element regarding religious equality could be interpreted, however, as having a more restrictive application adversely affecting the interests of some confessions while preferring those of others.

As mentioned a moment ago, the work of Mason is reflected in the *Declaration of Independence*, which includes the famous passage: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,” more fully quoted above.<sup>61</sup> This formula has had a great impact on political thought since the *Declaration’s* promulgation. While it is not itself a juridical instrument, as is the Constitution, the *Declaration* has nonetheless contributed to understanding how the Constitution and the legal framework it has established are to be interpreted and applied.<sup>62</sup> Of special importance here is the assertion that the notion of equality is a

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56. George Mason, *Final Draft of the Virginia Declaration of Rights*, in 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 287 (Robert A. Rutland ed., Univ. of N.C. Press 1970) (June 12, 1776) [hereinafter THE PAPERS OF GEORGE MASON].

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

*Id.*

57. *Id.*

58. *Id.*

59. THE PAPERS OF GEORGE MASON, *supra* note 56, at 288.

60. *Id.* at 289.

61. THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

62. See, e.g., SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 17 (1995).

self-evident truth (which largely reflects the natural law environment in which the Constitution's framers were nurtured). The nature of this truth is that it escapes the manipulation by the law-maker, the state, or anyone else because it is authored by God. This self-evident characteristic of the truth of equality can be seen in the writings of other influential persons of the early years of the new nation "dedicated to the proposition" that all men are created equal.

One primary example is John Adams, who was a principal advocate for the adoption of the 1787 Constitution; in his efforts seeking adoption of our basic law, he wrote and published *A Defence of the Constitutions*.<sup>63</sup> One important theme that Adams examined in his "*Defence*" is the existence and role of an aristocracy in society and its influence on the political life of society and its members. He suggested that the evolution of an aristocracy typically begins with the accumulation of wealth that subsequently empowers its members to control the participation and functioning of government.<sup>64</sup> In short order, there emerges an erroneous belief that the members of the aristocracy belong to "a superior order of beings," which undermines the proposition that people are, at least in some fundamental respects, equal.<sup>65</sup> He noted that equality cannot be preserved in a society that maintains an aristocracy.<sup>66</sup> Adams suggested that the now independent nation could remain robust and maintain "the power of the people by the equilibrium" of the Constitution, which ensures for one and all certain safeguards of equality, such as trial by jury and the preservation of "their share in the legislature."<sup>67</sup> Other guarantees, such as the writ of habeas corpus and the freedom of the press, would reinforce in diverse ways, the equality of each member of the sovereign people.<sup>68</sup>

In his critique of Turgot's eighteenth century work promoting the notion of a single legislative body for France, Adams revealed his understanding that people are not equal in certain contexts such as age, sex, size, strength, industry, courage, patience, wealth, knowledge,

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63. JOHN ADAMS, *A Defence of the Constitutions of Government of the United States of America, Against the Attack of M. Turgot, in his Letter to Dr. Price, Dated the Twenty-Second Day of March, 1778*, in 4-THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 271 (Charles Francis Adams ed., Little, Brown & Co. 1851) (1787) [hereinafter ADAMS, *A Defence of the Constitutions*].

64. *Id.* at 381.

65. *Id.*

66. *Id.*

67. ADAMS, *A Defence of the Constitutions*, *supra* note 63, at 382.

68. *Id.* at 382.

temperance, wit, and wisdom, for “there are inequalities which God and nature have planted there, and which no human legislator [or, I add, administrator such as Diana Moon Glampers] ever can eradicate.”<sup>69</sup> These are naturally occurring characteristics which distinguish one person from another. In spite of these distinctions, what was important to the idea of equality for Adams was the moral and political equality of “rights and duties” of citizens without hereditary privileges or dignities.<sup>70</sup> He realized that the acquisition of wealth and the accident of birth can give a person stature that would exacerbate natural inequalities (differences) so that a political and legislative process could be skewed in favor of those who have been privileged in these regards; it is the law of the Constitution, however, that ensures a major equality of access, by the franchise and by the ability to hold office, to a government that minimizes the influence of privilege and the preferences it can generate.<sup>71</sup> As Adams stated, “every office is equally open to every competitor, and the people must decide upon every pretension to a place in the legislature, that of governor and senator, as well as representative, no such airs will ever be endured.”<sup>72</sup>

Another matter that can maximize the political and moral equality of which he spoke was the importance of education and proper influences that instilled the virtues<sup>73</sup> and honor essential to the Republic that was about to be established.<sup>74</sup> Any difficulties presented by natural inequality could be compensated for and moderated “if . . . judiciously managed in the constitution.”<sup>75</sup> In Adams’ view, the failure to consider these matters in the text would herald “the destruction of the commonwealth.”<sup>76</sup> In his estimation, the Constitution would guarantee protection from any threat of an aristocracy whose interests, he thought,

69. *Id.* at 392.

70. *Id.*

71. See ADAMS, *A Defence of the Constitutions*, *supra* note 63, at 395.

72. *Id.* at 395. Of course, in obvious senses this conclusion is misleading, for women and slaves were denied the right to participate, especially through voting, in the political process.

73. *Id.* at 396. These virtues are, I submit, vital to understanding the meaning of equality. I will develop this point in my concluding synthesis. However, at this stage, the reader should be aware that the virtues of which I speak are courage, justice, wisdom, forbearance (temperance), prudence, and fortitude.

74. As Adams wrote, “If vice and infamy are thus rendered less odious, by being familiar in a family, by the example of parents and by education, it would be as unhappy as unaccountable, if virtue and honor were not recommended and rendered more amiable to children by the same means.” *Id.*

75. ADAMS, *A Defence of the Constitutions*, *supra* note 63, at 397.

76. *Id.*

could be properly exercised in the Senate “by separating them from all pretensions to the executive power, and by controlling in the legislative their ambition and avarice, by an assembly of representatives on one side, and by the executive authority on the other. Thus you will have the benefit of their wisdom, without fear of their passions.”<sup>77</sup>

Like Adams, who was concerned with the progress of the adoption of the Constitution and its impact on bringing fulfillment to the idea of equality (at least on some levels) to the American people, others involved in drafting the provisions regarding a chamber in the national legislature (similar to a House of Commons in which the members were popularly elected) were active in expressing their views pertaining to equality. Eldridge Gerry spoke of the problems instigated by “pretended patriots” who wished to reduce the salaries of public officers.<sup>78</sup> Of course, while this would be a proper objective if one were solely concerned with avoiding candidates seeking public office on grounds of personal enrichment caused by the “excess of democracy,”<sup>79</sup> this policy, if implemented in the Constitution, would have another effect: it would encourage only people of means to seek public office since the remuneration would be a pittance incapable of allowing the office holder to support one’s self and a family that would be dependent on the office holder’s income. On the one hand, the “leveling spirit”<sup>80</sup> of a provision minimizing salaries for national public service could rely on the justification that no one should be enriched by holding government office. On the other hand, this would likely preclude equality for a large class of people by denying them the means to give up their existing occupation in order to seek and hold public office.

Virginia’s George Mason recognized another problem with various proposals that could deny people political equality in certain contexts. One particular concern of his focused on the size of the House of Representatives: although some of the drafters opined that the popularly elected house of the Congress should remain small,<sup>81</sup> Mason argued that the larger the House of Representatives, the more protected would be the equality of the common citizen.<sup>82</sup> A bigger lower house would be more

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77. *Id.* at 414.

78. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Ferrand ed., Yale Univ. Press 1937) (1787) [hereinafter FARRAND’S RECORDS].

79. *Id.*

80. *Id.*

81. See, e.g., 11 Documentary History of the First Federal Congress: Debates in the House of Representatives 825-26 (Charlene Bangs Bickford et al. eds., 1992).

82. FARRAND’S RECORDS, *supra* note 78, at 48-49.



likely to sympathize with “every part of the community.”<sup>83</sup> The strengthening of equality would also be increased by the fact that more populous areas would have a larger number of representatives who would have greater opportunity to take stock of the divergent interests of different classes of people, even within relatively small geographic areas.<sup>84</sup>

During the same debates almost a month later, the southerner Charles Pinkney expressed parallel concerns dealing with the makeup of the upper house of the Congress.<sup>85</sup> At this time, he also made a subtle but important suggestion about equality when he employed the term “freeman” in his discussion of the relative insignificance of rank and fortune.<sup>86</sup> Given the context of his reference to freemen (i.e., those not held in slavery or some other servitude), he stated that a greater likelihood for equality existed in the new United States than could be found in any other part of the world:

[A]n equality which is more likely to continue—I say this equality is likely to continue, because in a new Country, possessing immense tracts of uncultivated lands, where every temptation is offered to emigration & where industry must be rewarded with competency, there will be few poor, and few dependent—Every member of the Society almost, will enjoy an equal power of arriving at the supreme offices & consequently of directing the strength & sentiments of the whole Community. None will be excluded by birth, & few by fortune, from voting for proper persons to fill the offices of Government—the whole community will enjoy in the fullest sense that kind of political liberty which consists in the power the members of the State reserve to themselves, of arriving at the public offices, or at least, of having votes in the nomination of those who fill them.<sup>87</sup>

Whether he saw the possibility of those who had not yet become “freemen” also being relocated in these areas—thereby augmenting equality for them—is another question. But in Pinkney’s estimation, the different classes of people (he recognized three: land owners and farmers; merchants; and “professional men”), nonetheless, were equal “in the political scale” because their differences (inequalities) made them dependent on one another, thereby reinforcing a mutuality

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83. *Id.* at 48.

84. *Id.* at 48-49.

85. *See id.* at 397-400.

86. FARRAND’S RECORDS, *supra* note 78, at 398, 400.

87. *Id.* at 398.

(equality in an interdependent relationship) in society.<sup>88</sup> Once again, we can recognize the persuasive influence of Aristotle.<sup>89</sup>

James Madison, to some extent, revised the elements of the classes of society introduced by Charles Pinkney. Madison viewed society as consisting of creditors and debtors; farmers; and merchants and manufacturers.<sup>90</sup> He noted that there is an important distinction, based on discrepancies of wealth, between the rich and the poor.<sup>91</sup> He did not, however, think that these distinctions would have as sizeable an impact on the American polity as they had on European society. He acknowledged that, as the population of America grew, the proportion of its citizenry that would "labour under all the hardships of life, and secretly sigh for a more equal distribution of its blessings" would necessarily increase, giving lower classes more political power in a representative government.<sup>92</sup> Alexander Hamilton expressed similar views that acknowledged inequalities in property: they would "exist as long as liberty existed."<sup>93</sup> Unlike Madison, Hamilton was less enthusiastic about the promises to be found in republican democracy.

In 1791, after the Constitution had been in operation for a couple of years, James Wilson offered his reflections about equality in a series of lectures on the law.<sup>94</sup> He opined that prior to the establishment of any civil government, all are equal; however, this equality does not mean that they are equal in regards to virtues, talents, dispositions, or acquirements.<sup>95</sup> Distinctions among people concerning these attributes can nevertheless be beneficial to society because they generate a need for interdependence or mutual respect and reliance.<sup>96</sup> Once again, we see a parallel to the thoughts of Aristotle who spoke of the

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88. *Id.* at 402-03.

89. *See supra* note 28 and accompanying text.

90. FARRAND'S RECORDS, *supra* note 78, at 422. In Federalist Essay No. 10, Madison offers a critique of the "theoretic politicians" who cannot recognize these distinctions: "Theoretic politicians, who have patronized this species of government [i.e., 'pure democracy'], have erroneously supposed, that, by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions." THE FEDERALIST NO. 10, at 60-61 (James Madison) (Henry B. Dawson ed., 1888).

91. FARRAND'S RECORDS, *supra* note 78, at 422.

92. *Id.*

93. *Id.* at 424.

94. JAMES WILSON, *Of Man, as a Member of Society*, in 1 THE WORKS OF JAMES WILSON 227 (Robert Green McCloskey ed., Belknap Press of Harvard Univ. Press 1967) (1791) [Hereinafter WORKS OF WILSON].

95. *Id.* at 240.

96. *Id.*

interdependence of the doctor, farmer, and shoemaker.<sup>97</sup> As Wilson stated, “these varieties render mankind mutually beneficial to each other, and prevent too violent oppositions of interest in the same pursuit.”<sup>98</sup> A part of the fabric of human society identified by Wilson is the reality that, notwithstanding these differences among people, there is and must be two interrelated equalities: that of rights, and that of obligations—for “the natural rights and duties of man belong equally to all” in accordance with the laws of God and nature.<sup>99</sup>

Nathaniel Chipman reflected Wilson’s sentiments in his 1793 *Sketches of the Principles of Government*.<sup>100</sup> He understood that the equality essential to the success of a republic is the synthesis of “free and equal enjoyment of the primary rights” and the “right which men have of using their powers and faculties, under certain reciprocal modifications, for their own convenience and happiness.”<sup>101</sup> Essentially, the definition of equality depends on the measure to which each person claims that the right of his exercise is conditioned or regulated by the responsibility to respect the corresponding claims of the other members of society (reciprocity).<sup>102</sup> This dichotomy of interrelated rights and responsibilities molds the exercise of secondary rights such as the “freedom of acquisition, use, and disposal” of property.<sup>103</sup> The existence of any monopoly over the exercise of this second category of rights would threaten the nascent Republic by promoting an aristocracy.<sup>104</sup> The essence of Chipman’s definition of equality can be taken from his own words:

Let us not, in a Republic, attempt the extreme of equality: It verges on the extreme of tyranny. Guarantee to every man, the full enjoyment of his natural rights. Banish all exclusive privileges; all perpetuities of riches and honors. Leave free the acquisition and disposal of property to supply the occasions of the owner, and to answer all claims of right, both of the society, and of individuals. To give a stimulus to industry, to provide solace and assistance, in the last helpless stages of life, and a reward for the attentions of humanity, confirm to the owner the power of directing, who shall succeed to his right of

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97. See *supra* note 31 and accompanying text.

98. WORKS OF WILSON, *supra* note 94, at 241.

99. See *id.* at 241.

100. NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT (Rutland, Vt., J. Lyon 1793).

101. *Id.* at 178.

102. *Id.*

103. *Id.*

104. See CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT, *supra* note 100, at 181.

property after his death; but let it be without any limitation, or restraint upon the future use, or disposal. Divert not the consequences of actions, as to the individual actors, from their proper course. Let no preference be given to any one in government, but what his conduct can secure, from the sentiments of his fellow citizens. Of property, left to the disposal of the law, let a descent from parents to children, in equal portions, be held a sacred principle of the constitution. Secure but these, and every thing will flow in the channel intended by nature. The operation of the equal laws of nature, tend to exclude, or correct every dangerous excess.<sup>105</sup>

Here we need to take stock of the contribution to the understanding of equality that appears in the exchange of correspondence between John Adams and Thomas Jefferson in July of 1813.<sup>106</sup> Adams wrote to Jefferson complaining about “aristocrats” whose birth and wealth team up to eclipse virtue and talent.<sup>107</sup> A few days later, given the context of the French Revolution, the rise of Napoleon to power, and Jefferson’s experience in France, Adams again wrote to Jefferson reminding the Virginian that he thought France would succeed in establishing a republican democracy.<sup>108</sup> Adams had expressed his skepticism about Jefferson’s optimism for France based in part on Adams’s belief that a large majority of the French population was illiterate.<sup>109</sup> Adams professed his belief that democracy and the kinds of equality it embraces would be doomed if most of the common citizens could neither read nor write. Adams’s sardonic view is expressed in this statement:

I have never read Reasoning more absurd, Sophistry more gross, in proof of the Athanasian Creed, or Transubstantiation, than the subtle labours of Helvetius and Rousseau to demonstrate the natural Equality of Mankind. Jus cuique [“Justice for everyone”]; the golden rule; do as you would be done by; is all the Equality that can be supported or defended by reason, or reconciled to common Sense.<sup>110</sup>

In October of 1813, Jefferson replied to Adams; he presented his belief that there is a “natural aristocracy among men” established on the

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105. *Id.*

106. Letter from John Adams to Thomas Jefferson (July 9, 1813), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 350 (Lester J. Cappon ed., Univ. of N.C. Press 1959) [hereinafter THE ADAMS-JEFFERSON LETTERS].

107. *Id.* at 352.

108. Letter from John Adams to Thomas Jefferson (July 13, 1813), in THE ADAMS-JEFFERSON LETTERS, *supra* note 106, at 354-55.

109. *Id.* at 355.

110. *Id.*

different virtues and talents that they possess in different measure, which made those gifted with these attributes better suited for taking leadership in the management of society.<sup>111</sup> Interestingly, Jefferson viewed distinctions based on wealth and birth as an “artificial aristocracy.”<sup>112</sup> In his opinion, however, the modern means of warfare, such as firearms, have enabled the weak to be placed on a level with the strong, making this traditional distinction of inequality less important in the consideration of differences among people.<sup>113</sup> Jefferson, who assisted in the drafting of the religious freedom legislation for Virginia several decades earlier, further noted in this correspondence that the liberty protected by the religious freedom legislation would eliminate or neutralize the “aristocracy of the clergy” whose influence under a state church could be excessive.<sup>114</sup> In closing this letter, Jefferson expressed that, in spite of points of disagreement, he remained united with Adams in “perfect harmony” to achieve a constitution, albeit imperfect, in order to procure the “happiest and securest” circumstance for the nation.<sup>115</sup>

Adams replied to Jefferson in November 1813, and he conveyed his agreement with Jefferson’s point about a natural aristocracy that is founded on virtue and talents.<sup>116</sup> But Adams, the careful thinker that he was, opened one area for disagreement by stating the need to know what is meant by “talents,” for some may be inherent to the person and some may be acquired through education or marriage.<sup>117</sup> The need for clarification on this point would have a strong bearing on the meaning of equality. Adams was probably skeptical of the distinction Jefferson

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111. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 106, at 388.

112. *Id.*

113. *Id.*

114. *Id.* at 390.

115. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 106, at 391.

116. *Id.* at 397-402.

117. *Id.* at 398. As Adams noted:

Pick up the first 100 men you meet, and make a Republick. Every Man will have an equal Vote. But when deliberations and discussions are opened it will be found that 25, by their Talents, Virtues being equal, will be able to carry 50 Votes. Every one of these 25, is an Aristocrat, in my Sense of the Word; whether he obtains his one Vote in Addition to his own, by his Birth Fortune, Figure, Eloquence, Science, learning, Craft Cunning, or even his Character for good fellowship and a bon vivant.

*Id.*

made between the “natural” and the “artificial” aristocracy.<sup>118</sup> Moreover, Adams thought that any artificial aristocracy, as Jefferson explained it, would be momentary and could not endure because of the rivalries and jealousies that would likely arise among its members.<sup>119</sup> Whatever is durable in an artificial aristocracy is, in fact, attributable to virtue and talents and, therefore, really a natural aristocracy, according to Adams.<sup>120</sup> But in spite of any differences, Adams thought that he and Jefferson were, for the most part, in agreement about the mischief that can be associated with an aristocracy, because they both disapproved of hereditary honors or preferences that were legally recognized; but he also believed that such honors could not be established and maintained in the United States probably due to the Constitution’s prohibitions against granting titles or establishing a nobility.<sup>121</sup>

With this initial background, it would now be appropriate to examine the evolution of the idea of equality in specific areas in which the theme of equality has played a significant role. The topics examined in this next segment of the investigation frequently emerge in the debates on policies geared to promoting equality. Moreover, they relate to most of the issues addressed by the Framers, which were the subject

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118. Letter from John Adams to Thomas Jefferson (Nov. 15, 1813), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 106, at 400. As Adams wrote:

Your distinction between natural and artificial Aristocracy does not appear to me well founded. Birth and Wealth are conferred on some Men, as imperiously by Nature, as Genius, Strength or Beauty. The Heir is honours and Riches, and power has often no more merit in procuring these Advantages, than he has in obtaining an handsome face or an elegant figure. When Aristocracies, are established by human Laws and honour Wealth and Power are made hereditary by municipal Laws and political Institutions, then I acknowledge artificial Aristocracy to commence: but this never commences, till Corruption in Elections becomes dominant and uncontrollable.

*Id.*

119. *Id.*

120. *Id.* at 400.

121. Under Article I, Section 9, clause 8, the United States is forbidden to grant titles of nobility; under Article I, Section 10, clause 1, the states of the United States are forbidden to grant titles of nobility. As Adams stated:

You suppose a difference of Opinion between You and me, on the Subject of Aristocracy. I can find none. I dislike and detest hereditary honours, Offices Emoluments established by Law. So do you. I am for ex[c]luding legal hereditary distinctions from the U.S. as long as possible. So are you. I only say that Mankind have not yet discovered any remedy against irresistible Corruption in Elections to Offices of great Power and Profit, but making them hereditary.

Letter from John Adams to Thomas Jefferson (Nov. 15, 1813), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 106, at 401.

of this Part II. Specifically, these issues address equality regarding the following: the suffrage; property and privilege; racial matters; and sex.

V. CONSIDERATIONS ABOUT EQUALITY IN IMPORTANT CONTEXTS—  
SUFFRAGE, PROPERTY AND PRIVILEGE, RACE, AND SEX.

*A. Equality Concerning the Suffrage*

As has already been noted in the discussion of the concerns of some of the Framers, issues surrounding the nature of equality are important regarding the question of who can exercise the right to vote. Just before the *Declaration of Independence* was promulgated, the essayist with the *nom-de-plume*, Democraticus, published an article on June 6, 1776, stating that the “original right” of man is the right to equality.<sup>122</sup> In due course, the political rights associated with equality enable each person to “execute his own laws, which alone can secure the observance of justice.”<sup>123</sup> The principle of equality inheres in each member of communities and legitimates government and the laws it makes by providing consent to the laws by which the community members are bound.<sup>124</sup> If it is not possible for people to make their own laws by themselves, it becomes essential to deputize representatives of the people, who shall legislate for them based on the trust given them by “full, equal, [and] free” elections.<sup>125</sup> Moreover, a “full representation” [universal franchise] is essential in order to avoid the negative influence of corruption, and as Democraticus stated:

To this end, the Representatives should be the unbiased choice of the people, by ballot, in which no man should make interest, either directly or indirectly, for himself or his friend, under the penalty of a heavy fine, and an exclusion from the House of Representatives forever; for it is generally found that the people will choose right if left to themselves. To check the aristocratick principle, which always inclines to tyranny, it will be necessary to keep the Representatives dependant on the people by annual elections; and perhaps it may be thought a further improvement to establish a limited kind of rotation, as a sure and certain means of diffusing the Government into more

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122. Democraticus, *Loose Thoughts on Government*, in 6 AMERICAN ARCHIVES 730 (4th ser., M. St. Clair Clarke and Peter Force eds., Washington, D.C. 1846) (1776).

123. *Id.*

124. *Id.*

125. *Id.* at 731.

hands, and training up a greater number of able statesmen.<sup>126</sup>

Democraticus was prudent and recognized the need to install a second legislative power, consisting of the “ablest men in the nation,” that could check the popularly elected body; moreover, there would be a third authority, i.e., an executive, resting in a single person responsible for “the despatch and execution of business.”<sup>127</sup> Of course, the author of this pamphlet understood the need for an independent judiciary “for civil and criminal matters, to whom every member in the State ought to be subject, even unto death.”<sup>128</sup>

The *Pennsylvania Evening Post* replicated the essence of Democraticus’s claim by agreeing that equality is essential to the “essence of liberty” in that the equality of the franchise enables people to choose and replace their rulers.<sup>129</sup> “Be freemen then, and you will be companions for gentlemen annually.”<sup>130</sup>

Around this time, colonies such as Massachusetts were writing or revising their State constitutions. The drafters of the Massachusetts Constitution of 1780 struggled in 1778 with the adoption of a provision on equal suffrage. A draft provision called for granting the franchise to every free male over the age of twenty-one; however, specifically excluded were “negroes, Indians and mulattoes.”<sup>131</sup> Women, who were

126. Democraticus, *supra* note 122, at 731.

127. *Id.*

128. *Id.*

129. As the opinion stated:

A poor man has rarely the honor of speaking to a gentleman on any terms, and never with familiarity but for a few weeks before the election. How many poor men, common men, and mechanics have been made happy within this fortnight by a shake of the hand, a pleasing smile and a little familiar chat with gentlemen, who have not for these seven years past condescended to look at them. Blessed state which brings all so nearly on a level! What a clever man is Mr.—says my neighbour, how agreeable and familiar! He has no pride at all! He talked as freely to me for half an hour as if he were my neighbour—there! I wish it were election time always! Thursday next he will lose all knowledge of—, and pass me in the streets as if he never knew me. . . . Thus the right of annual elections will ever oblige gentlemen to speak to you once a year, who would despise you forever were it not that you can bestow something upon them.

Editorial, PENNSYLVANIA EVENING POST, Apr. 27, 1776, reprinted in 1 THE FOUNDERS’ CONSTITUTION 11, 11 (Philip B. Kurland & Ralph Lerner eds., Univ. of Chicago Press 1987), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch15s11.html> [hereinafter THE FOUNDERS’ CONSTITUTION].

130. *Id.*

131. *The Rejected Constitution of 1778 (Mass.)*, in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 190, 192-93 (Oscar & Mary Handlin eds., 1966) [hereinafter CONSTITUTION OF 1780].



not mentioned at all, were also excluded. There were additional restrictions of the suffrage that included payment of taxes (with the proviso that legal excuse would not prohibit exercise of the franchise) and a one year residency requirement.<sup>132</sup> Of course, this did not help women or freemen who happened to be “negroes, Indians [or] mulattoes.” The provision finally adopted two years later stated in Chapter I, Section III, Article IV that:

Every male person, being twenty-one years of age, and resident in any particular town in this Commonwealth for the space of one year next preceding, having a freehold estate within the same town, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to vote in the choice of a Representative or Representatives for the said town.<sup>133</sup>

The prohibition against men who were negroes, mulattoes or Indians was removed, presumably making them “equal” in the exercise of the franchise—at least in the Commonwealth of Massachusetts.

The States effectively controlled the franchise for the longest time; thus, it was not until the Civil Rights Amendments,<sup>134</sup> the Nineteenth Amendment (1920),<sup>135</sup> and the Twenty-Sixth Amendment (1971)<sup>136</sup> that Federal standards were put into place in piecemeal fashion addressing particular concerns about equal access to the franchise. The cumulative result of these Amendments opened the franchise to a much broader range of people than those allowed to vote under the States’ laws.

### *B. Property and Privilege*

As discussed in Part IV, above, the Founders expressed concern about the impact on the ideal of equality that would result from property

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132. *Id.*

133. *Id.* at 454-55. Returns on the draft Article IV dealing with the franchise underwent revision in large part due to objections received by various communities such as Northampton, which replied to the original proposal:

Also we greatly disapprove of the fourth article of the third section of the first chapter, intituled house of Representatives, as materially defective, and as rescinding the natural, essential, and unalienable rights of many persons, inhabitants of this Commonwealth, to vote in the choice of a Representative or Representatives, for the town in which they are or may be inhabitants; and we beg leave to propose that the following addition should be made to the said fourth article . . .

THE FOUNDERS’ CONSTITUTION *supra* note 129, at 15, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch15s26.html>.

134. U.S. CONST. amend. XIII, amend. XIV, amend. XV.

135. U.S. CONST. amend. XIX.

136. U.S. CONST. amend. XXVI.

holding and privilege associated with birth and family ties. Perhaps with thoughts of discouraging the immigration to America of those seeking fortune and nothing else, Benjamin Franklin asserted the necessity of being honest about what newcomers should expect in the former English colonies.<sup>137</sup> As he stated: "These are all wild Imaginations; and those who go to America with Expectations founded upon them will surely find themselves disappointed."<sup>138</sup> Furthermore, there was need to caution against those who might migrate "in hopes of obtaining a profitable civil Office in America."<sup>139</sup> It would seem to follow from what Franklin stated that public office should be open to nearly everyone, and it should be considered as a service to the common good, not a method for self-aggrandizement.

As a complement to Franklin's thoughts, Jefferson wrote to James Madison in October of 1785 while Jefferson was in France. Noting his own inability to live in the countryside of France, where the court would stay at great length with the King, he related his encounter with a poor working woman trying to support herself and her children on day wages.<sup>140</sup> The experience of this encounter prompted Jefferson to reflect on the unequal division of property, "which occasions the numberless instances of wretchedness [he] had observed in this country and is to be observed all over Europe."<sup>141</sup> Jefferson's conclusion about the cause of this "wretchedness" was that the unequal distribution of wealth had led to its permanent or long-term concentration in a few hands.<sup>142</sup> While one could find skilled tradesmen and some people of modest means throughout Europe, there was a numerous class "who cannot find work."<sup>143</sup> Jefferson concluded that a major reason for their poverty was the fact that there was much uncultivated land that was reserved to the

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137. BENJAMIN FRANKLIN, *Information to Those Who Would Remove to America*, in 8 THE WRITINGS OF BENJAMIN FRANKLIN 603 (Albert Henry Smyth ed., 1907) (1782).

138. *Id.* at 604.

139. *Id.* at 605. As Franklin further stated:

If he has any useful Art, he is welcome; and if he exercises it, and behaves well, he will be respected by all that know him; but a mere Man of Quality, who, on that Account, wants to live upon the Public, by some Office or Salary, will be despis'd and disregarded. The Husbandman is in honor there, and even the Mechanic, because their Employments are useful.

*Id.* at 606.

140. Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 681 (Julian P. Boyd et al. eds., Princeton Univ., Press 1953) [hereinafter PAPERS OF JEFFERSON].

141. *Id.*

142. *Id.*

143. *Id.* at 681-682.

idle interests (often hunting) of the wealthy.<sup>144</sup> This deprived many people of some rudimentary claim to economic equality. While Jefferson realized that “an equal division of property is impracticable,” he nevertheless explored ways that might relieve some of this burden, such as a progressive taxation scheme.<sup>145</sup> Progressive taxation could minimize the deleterious effect of the long-term concentration of wealth and capital in a few hands. Jefferson’s remarks about progressive taxation would ultimately be accepted in his native land, thus providing a greater sense of equality when economic matters are under consideration.

We return to the thoughts of Noah Webster, whose pragmatic view reinforced the notion that “political power depends mostly on property.”<sup>146</sup> While landed families and individuals clearly existed in the United States, it was Webster’s inference that the abilities of the emerging middle class would make merchants and those with a trade the “equals” of the landed gentry; moreover, he concluded that the growing wealth of this new middle class could “ballance the influence of the landed property.”<sup>147</sup> He opined that commerce was “favorable to freedom” and “fatal to despotism.”<sup>148</sup> In addition, republican democracies such as the United States require a fundamental law favoring equality of property—this does not require that every citizen have “exactly an equal portion of land and good,” but it requires that the government regulate descendants’ estates so as to favor equality in distribution and the avoidance of perpetuities.<sup>149</sup> Laws mandating these results would reduce the likelihood of fears, actual and potential, of oppression by a privileged, propertied class. Webster was perceptive enough to realize the potential for mischief in his own suggestion: if

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144. PAPERS OF JEFFERSON, *supra* note 140, at 682.

145. *Id.* Jefferson further noted:

Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on. If, for the encouragement of industry we allow it to be appropriated, we must take care that other employment be furnished to those excluded from the appropriation.

*Id.*

146. Noah Webster, *Miscellaneous Remarks on Divisions of Property, Government, Education, Religion, Agriculture, Slavery, Commerce, Climate and Diseases in the United States*, in THE FOUNDERS’ CONSTITUTION, *supra* note 129, at 56, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch15s44.html>.

147. *Id.*

148. *Id.*

149. *Id.*

laws were to require equal distribution of estates, this could tend to make farms and other property inherited by generational succession smaller and smaller with the passing of generations, thereby rendering them incapable of providing subsistence to families.<sup>150</sup> However, this equality provision could also be viewed in a beneficial way, since it would provide an incentive for westward migration and the development of new settlements, as long as the lands in the western territories would be affordable by those participating in the westward migration.<sup>151</sup>

No stranger to the phenomena described by Webster was John Adams, who wrote to Thomas Jefferson in July of 1814, complaining that property would continue to accumulate, particularly in families, for as long as chattels and land existed.<sup>152</sup> In his view, Adams considered the French Revolution a reaction to this phenomenon as it existed in Europe.<sup>153</sup> Jefferson subsequently corresponded with Joseph Milligan and argued that one should not be too hasty in condemning the accumulation of property because it, in another sense, treated people equal in opportunity by rewarding those who had little or nothing but were industrious and acquired wealth. Jefferson clearly had his eyes on the growing Republic in the New World rather than on the *ancien regime* in Europe: Jefferson understood that this environment would produce “the guarantee to every one of a free exercise of his industry, and the fruits acquired by it.”<sup>154</sup> Jefferson agreed with Webster that the law of intergenerational succession must ensure equality: “the best corrective is the law of equal inheritance.”<sup>155</sup> But this perspective did little to make equal those who had little to pass on to succeeding generations and those who had much. Nevertheless, those in the first category must have opportunity (which also brings up the question of equality) to produce wealth independent of land ownership. The

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150. Noah Webster, *Miscellaneous Remarks on Divisions of Property, Government, Education, Religion, Agriculture, Slavery, Commerce, Climate and Discezes in the United States* (1790), in *THE FOUNDERS' CONSTITUTION*, *supra* note 108, at 44, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch15s44.html>.

151. *Id.*

152. Letter from John Adams to Thomas Jefferson (July 16, 1814), in *THE ADAMS-JEFFERSON LETTERS*, *supra* note 106, at 437.

153. *Id.* at 437-438.

154. Letter from Thomas Jefferson to Joseph Milligan (Apr. 6, 1816), in 14 *THE WRITINGS OF THOMAS JEFFERSON* 466, (Andrew A. Lipscomb & Albert Ellery Bergh eds., The Thomas Jefferson Memorial Ass'n 1905).

155. *Id.*

adoption of the Sixteenth Amendment in 1913 has roots in these solutions.<sup>156</sup>

### C. Race

The issue of race has previously been introduced in this essay, and it was a crucial element of the equality debate in the United States even before adoption of the Constitution. As colonies became the States of a federal republic, the matter of race remained in the minds of many, regardless of the region of the nation from which they came or to which they owed their local or regional allegiance. By way of illustration, the question of race and the accompanying issue of equality provoked Patrick Henry to write to Robert Pleasants in early 1773.<sup>157</sup> Ironically, Henry was a slave owner who had himself purchased and retained slaves, yet he was strongly inclined to agree with the Quakers that the “abominable practice” had to be abolished because it was “as repugnant to humanity as it is inconsistent with the Bible and destructive to Liberty.”<sup>158</sup> How could people be considered equal before man and God if some were free and others were held in bondage? Yet Henry was also prudent enough to realize that the institution could not be done away with quickly; therefore, it was essential to “treat the unhappy victims with lenity” as that is the “furthest advance we can make toward Justice.”<sup>159</sup>

Another slave-owning Virginian who had considerable reservations against slavery was Thomas Jefferson. In his notes on the debates preceding the *Declaration of Independence*, he mentioned how the proposed clause censuring the slave trade was stricken “in complaisance to South Carolina & Georgia.”<sup>160</sup> Perhaps with these debates in mind in 1779 (during the Revolutionary War) Alexander Hamilton suggested a proposal to John Jay to be presented to South Carolinian slave owners that they contribute to the establishment of several “battalions of negroes; with the assistance of the government of that state, by contributions from the owners in proportion to the number they

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156. See U.S. CONST. amend. XVI.

157. See Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773) in DOUTHAT MEADE, PATRICK HENRY: PATRIOT IN THE MAKING 299 (J. B. Lippincott Co. 1957).

158. *Id.*

159. *Id.* at 300.

160. Thomas Jefferson, Notes of Proceedings in the Continental Congress (June 7 to Aug. 1, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 1760-1776, at 314 (Julian P. Boyd ed., 1950).

possess.”<sup>161</sup> Hamilton held the view “that the negroes will make very excellent soldiers, with proper management.”<sup>162</sup> Hamilton reasoned that the practicality of the plan was based on the fact that “their natural faculties are probably as good as ours.”<sup>163</sup> This was a guarded admission about their equality to contribute to the war for independence. Moreover, with this plan’s implementation, there could follow greater recognition that the black is, in fact, the equal to the white in areas essential to good citizenship—coming to the defense of one’s country. Hamilton realized, of course, that this proposal would encounter “opposition from prejudice and self-interest.”<sup>164</sup> He further noted that if those supporting the revolution did not pursue this plan, “the enemy [i.e., Great Britain, which would legally outlaw slavery in 1833 with the Slavery Abolition Act] probably will.”<sup>165</sup> Hamilton provided a critical insight about equality when he concluded with the recommendation that recruiting blacks into the Continental Army would not only secure the fidelity of the black soldier and animate his courage, but would also positively influence the citizenry to being disposed to the emancipation of those in slavery.<sup>166</sup>

Writing to Rufus King in March of 1785, Timothy Pickering questioned the likelihood of success for Article I, Section 9, Clause 1 of the Constitution that would begin the taxation of the slave trade after 1808, with the objective of ending slavery.<sup>167</sup> Pickering knew that if the Constitution permitted continuation of the slave trade, albeit with a sunset provision for 1808, this would generate problems for the future; as he said: “It will be infinitely easier to prevent the Evil at first, than to eradicate or check it at any future time.”<sup>168</sup> He foresaw the political difficulties surrounding the admission of new States: would they be slave or free? Pickering’s own words make the case for equality and for reinforcing doubt about the sunset provision:

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161. Letter from Alexander Hamilton to John Jay (Mar. 14, 1779), in 2 THE PAPERS OF ALEXANDER HAMILTON 17 (Harold C. Syrett ed., Columbia Univ. Press 1961) [hereinafter 2 PAPERS OF HAMILTON].

162. *Id.*

163. *Id.* at 18.

164. *Id.*

165. 2 PAPERS OF HAMILTON, *supra* note 161, at 18.

166. *Id.*

167. Letter from Timothy Pickering to Rufus King (Mar. 6, 1785), in 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING 45 (Charles R. King ed., G. P. Putnam’s Sons 1894).

168. *Id.*

To suffer the continuance of slaves until they can gradually be emancipated in States already overrun with them may be pardonable, because unavoidable without hazarding greater evils; but to introduce them into countries where none now exist, countries which have been talked of—which we have boasted of—as an asylum to the oppressed of the Earth—can never be forgiven. For God's sake, then, let one more effort be made to prevent so terrible a calamity.<sup>169</sup>

After the adoption of the 1787 Constitution, James Madison discussed the suggestion of an African Colony for Freed Slaves.<sup>170</sup> In his opinion, for a successful emancipation of the slaves, there would need to be a place of relocation (probably West Africa) because it would be unwise to assume that blacks could be successfully incorporated into society due to “the prejudices of the Whites.”<sup>171</sup> Madison's perspective on the desirability of expulsion of the blacks from the territory of the United States (including its frontier) betrayed his view that inequality would prevail regardless of how robust the defense of the idea was made that blacks could be successfully incorporated into a white society upon their emancipation.<sup>172</sup> St. George Tucker thought that slavery “exists whenever there is an inequality of rights, or privileges, between the subjects or citizens of the same state, except such as necessarily results from the exercise of a public office.”<sup>173</sup> Other forms of discrimination intensified the racial inequality of the African during this period. These included making it an offense for a black to resist a white; excluding blacks from being competent witnesses in civil and criminal trials; reselling emancipated slaves for debts of their masters incurred prior to their emancipation; and requiring free blacks to be registered in towns where they lived or worked.<sup>174</sup> Tucker presented the irony of the new nation that declared “all men are by nature equally free and independent” and yet still tolerated “a practice incompatible” with the unalienable right of natural freedom.<sup>175</sup> He spared no words in decrying

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169. *Id.* at 46.

170. James Madison, Memorandum on an African Colony for Freed Slaves (Oct. 20, 1789), in 12 THE PAPERS OF JAMES MADISON 437-38 (Charles F. Hobson et al. eds., Univ. Press of Virginia 1979).

171. *Id.*

172. *Id.*

173. St. George Tucker, *A Dissertation on Slavery*, in *Blackstone's Commentaries* app. at 36 (1803), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch15s56.html>.

174. *Id.* at 37.

175. *Id.* at 41-42.

slavery as irreconcilable with the principles of democracy.<sup>176</sup> For him, this was a principle of the natural law that could not be disputed:

[T]he law of nature . . . teaches us this equality, and enjoins every man, whatever advantages he may possess over another, as to the various qualities or endowments of body or mind, to practise the precepts of the law of nature to those who are in these respects his inferiors, no less than it enjoins his inferiors to practise them towards him. Since he has no more right to insult them, than they have to injure him. Nor does the bare unkindness of nature, or of fortune condemn a man to a worse condition than others, as to the enjoyment of common privileges. It would be hard to reconcile reducing the negroes to a state of slavery to these principles, unless we first degrade them below the rank of human beings, not only politically, but also physically and morally.<sup>177</sup>

Yet, Tucker was prudent and practical enough to acknowledge that a general emancipation would likely be perilous to the new nation. For there to be hope for success in freeing the blacks, there would first need to be an event that would condition the members of the white and black races for the aftermath. As he noted, "The early impressions of obedience and submission, which slaves have received among us, and the no less habitual arrogance and assumption of superiority, among the whites, contribute, equally, to unfit the former for freedom, and the latter for equality."<sup>178</sup> It would be essential, therefore, to plot some "middle course" that would at the same time dissolve the "grievous bondage" while safeguarding "the innocent descendants of their former oppressors."<sup>179</sup> Vital to the success of this enterprise were time, nature, and a sound policy, which Tucker outlined in some detail.<sup>180</sup>

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176. *Id.* at 54.

177. Tucker, *supra* note 173 at 54-55.

178. *Id.* at 69.

179. *Id.* at 76.

180. As Tucker stated:

1. Let every female born after the adoption of the plan, be free, and transmit freedom to all the descendants, both male and female.
2. As a compensation to those persons, in whose families such females, or their descendants may be born, for the expence and trouble of their maintenance during infancy, let them serve such persons until the age of twenty-eight years: let them then receive twenty dollars in money, two suits of clothes, suited to the season, a hat, a pair of shoes, and two blankets. If these things be not voluntarily done, let the county courts enforce the performance, upon complaint.
3. Let all negroe children be registered with the clerk of the county or corporation court, where born, within one month after their birth: let the person in whose family they are born, take a copy of the register, and deliver it to the mother, or if she die, to the child, before it is of the age of twenty-one years. Let any negro claiming to be free, and above the age of puberty, be considered as of the age of twenty-eight



Interestingly, Tucker did not favor banishing the black to a new colony in West Africa or anywhere else; however, he was also opposed to efforts that would incorporate them into white society of the present States.<sup>181</sup> Tucker thought that settling blacks into “some other climate,” such as the new western frontier, would be a sensible course of action.<sup>182</sup> In that fashion, both blacks and whites emigrating to the western frontier might see themselves as equals, thereby convincing the rest of the nation that they are equal insofar as race is concerned.

While abhorring the institution of slavery, John Adams reflected a sentiment similar to Tucker’s that the “abolition of slavery must be

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years, if he or she be not registered as required.

4. Let all the negro servants be put on the same footing as white servants and apprentices now are, in respect to food, raiment, correction, and the assignment of their service from one to another.

5. Let the children of negroes and mulattoes, born in the families of their parents, be bound to service by the overseers of the poor, until they shall attain the age of twenty-one years. Let all above that age, who are not house-keepers, nor have voluntarily bound themselves to service for a year before the first day of February annually, be then bound for the remainder of the year by the overseers of the poor. To stimulate the overseers of the poor to perform their duty, let them receive fifteen per cent. of their wages, from the person hiring them, as a compensation for their trouble, and ten per cent. per annum out of the wages of such as they may bind apprentices.

6. If at the age of twenty-seven years, the master of a negro or mulattoe servant be unwilling to pay his freedom dues, above mentioned, at the expiration of the succeeding year, let him bring him into the county court, clad and furnished with necessaries as before directed, and pay into court five dollars, for the servant, and thereupon let the court direct him to be hired by the overseers of the poor for the succeeding year, in the manner before directed.

7. Let no negro or mulatto be capable of taking, holding, or exercising, any public office, freehold, franchise, or privilege, or any estate in lands or tenements, other than a lease not exceeding twenty-one years. . . . Nor of keeping, or bearing arms, unless authorised so to do by some act of the general assembly, whose duration shall be limited to three years. Nor of contracting matrimony with any other than a negroe or mulattoe; nor be an attorney; nor be a juror; nor a witness in any court of judicature, except against, or between negroes and mulattoes. Nor be an executor or administrator; nor capable of making any will or testament; nor maintain any real action; nor be a trustee of lands or tenements himself, nor any other person to be a trustee to him or to his use.

8. Let all persons born after the passing of the act, be considered as entitled to the same mode of trial in criminal cases, as free negroes and mulattoes are now entitled to.

*Id.* at 77-78 (internal footnote omitted).

181. Tucker, *supra* note 173, at 79.

182. *Id.*

gradual, and accomplished with much caution and circumspection.”<sup>183</sup> Otherwise, insurrection could be incited at the expense of “innocent blood.”<sup>184</sup> Adams believed that the nation was facing other threats that were growing, whereas the practice of slavery was “fast diminishing.”<sup>185</sup> James Madison displayed a similar view: any general emancipation of slaves had to be gradual and “equitable and satisfactory” to the slaves and their former masters, and it must be premised on the consent of both; moreover, in order to succeed with a minimum of problems, emancipating the slaves would have to take account of the “existing and durable prejudices” that were to be found within the nation.<sup>186</sup> For any plan to merit serious consideration, it must permanently remove the former slaves “beyond the region occupied by or allotted to a White population.”<sup>187</sup> This latter point indicated Madison’s own predisposition that the two races could not live harmoniously in the same communities because he believed that the blacks would, in spite of their emancipation, be relegated to positions that degraded them of equality in political, social, and economic matters.<sup>188</sup> He further opined that the nation itself would have to bear the cost of compensating the former slave owners, since it was the nation that would ultimately profit from this action.<sup>189</sup> Purchasing lands for resettlement would, of course, raise considerably

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183. Letter from John Adams to George Churchman and Jacob Lindley (Jan. 24, 1801), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 92 (Charles Francis Adams ed., Little, Brown & Co. 1854).

184. *Id.*

185. Adams catalogued the threats to the nation as follows:

That sacred regard to truth in which you and I were educated, and which is certainly taught and enjoined from on high, seems to be vanishing from among us. A general relaxation of education and government, a general debauchery as well as dissipation, produced by pestilential philosophical principles of Epicurus, infinitely more than by shows and theatrical entertainments; these are, in my opinion, more serious and threatening evils than even the slavery of the blacks, hateful as that is. I might even add that I have been informed that the condition of the common sort of white people in some of the Southern States, particularly Virginia, is more oppressed, degraded, and miserable, than that of the negroes. These vices and these miseries deserve the serious and compassionate consideration of friends, as well as the slave trade and the degraded state of the blacks.

*Id.* at 92-93.

186. Letter from James Madison to Robert J. Evans (June 15, 1819), in 8 THE WRITINGS OF JAMES MADISON 439 (Gaillard Hunt ed., 1908).

187. *Id.* at 440.

188. *Id.*

189. *Id.* Madison calculated that the cost of compensation would be in the vicinity of 600 million dollars assuming that one and a half million slaves would bring the per capita cost of 400 dollars each. Letter from James Madison to Robert J. Evans (June 15, 1819) in 8 THE WRITINGS OF JAMES MADISON, *supra* note 186, at 442-43.

the cost to the nation. Thus, these economic burdens could have the effect of delaying not only emancipation but the declaration of equality that would necessarily have to accompany it.

As the Missouri Compromise began to enter consideration and punctuate the political debate, the aging Thomas Jefferson (who acknowledged his impending death, “content to be a passenger in our bark to the shore from which I am not distant”) addressed John Holmes on this important but divisive issue.<sup>190</sup> Jefferson confessed that he had not paid much attention to matters of public affairs for some time because he assumed that they were in competent hands; however, the compromise involving the admission of new states into the Union rang “like a fire bell in the night” and awakened Jefferson “with terror.”<sup>191</sup> Jefferson saw that the Missouri Compromise would be ominous for the Union’s well-being since it would exacerbate rather than mollify the passions surrounding the question of slavery.<sup>192</sup> As he said, having the wolf by the ears, “we can neither hold him, nor safely let him go.”<sup>193</sup>

Jefferson’s wolf would reveal itself to the nation in the Supreme Court’s 1857 decision in the matter of *Dred Scott v. Sandford*.<sup>194</sup> Chief Justice Taney succinctly presented the matter when he said:

The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people [of the United States], and are constituent members of this sovereignty? We think they are not[,] . . . and can, therefore, claim none of the rights and privileges which [the Constitution] provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings . . . .<sup>195</sup>

However, Taney’s view met resistance with Justices McLean and Curtis whose vigorous dissents reflected the ever deepening division within the nation on the equality of the members of the black race.<sup>196</sup>

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190. Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in 12 THE WORKS OF THOMAS JEFFERSON 158 (Paul Leicester Ford ed., G. P. Putnam’s Sons 1904-05).

191. *Id.*

192. *Id.*

193. *Id.* at 159.

194. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

195. *Id.* at 404-05.

196. In particular, Justice Curtis made these revealing remarks in his dissent:

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry,

The Presidential election debates between Stephen Douglas and Abraham Lincoln reflected this schism.<sup>197</sup> In one of the 1858 debates, Senator Douglas argued that, in spite of the equality claim made in the *Declaration of Independence*, the “negro is not and never ought to be a citizen of the United States . . . [because] this Government was made on the white basis by white men, for the benefit of white men and their

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except to show, that before they were made, no such restrictions existed; and colored in common with white persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place of vindicate their memory. As I conceive, we should deal here, not with such disputes, if there can be a dispute concerning this subject, but with those substantial facts evinced by the written Constitutions of States, and by the notorious practice under them. And they show, in a manner which no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.

*Id.* at 574-75 (Curtis, J., dissenting).

197. Professor Peter Westen has argued that Lincoln and Douglas overlooked some important aspects of equality:

Lincoln and Douglas misperceived the derivative meaning of equality in moral and legal discourse and, misperceiving it, allowed it to confuse their debate. They professed to disagree about whether blacks and whites were ‘created equal.’ Yet in reality their disagreement was not about equality or inequality at all. They agreed that blacks and whites were prescriptively equal in some respects, and unequal in other respects. Their real disagreement was not about equality, but about the content of the prescriptive standard that ought to determine the equality or inequality of blacks and whites in one particular respect—their capacity for enslavement. Lincoln and Douglas overlooked that assertions of equality and inequality in law and morals have no meaning apart from the content of the prescriptive rules they necessarily incorporate by reference. Blacks and whites cannot be declared descriptively or prescriptively equal without reference to some descriptive or prescriptive standard for measuring their identity or nonidentity. Yet once such a standard obtains, relationships of equality or inequality ensue automatically.

Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 623-24 (1983).

posterity forever, and should be administered by white men and none others.”<sup>198</sup> He believed that the authors of the *Declaration of Independence* were referring only to “white men, men of European birth and European descent, and had no reference either to the negro, the savage Indians, the Fejee, the Malay, or any other inferior and degraded race, when they spoke of the equality of men.”<sup>199</sup> Lincoln, on the other hand, believed that the *Declaration of Independence* “does mean to declare that *all* men are equal in some respects; they are equal in their right to ‘life, liberty, and the pursuit of happiness.’”<sup>200</sup>

To this day, the debate about race equality continues, perhaps not in concept but in how it is to be recognized. Equality may no longer be the issue so much as how it is to be implemented and acknowledged. At this point, I now turn to the issue of sexual equality, which has gained its share of the public debate and imagination.

#### *D. Sexual Equality*

The consciousness about sexual equality was less prominent in the early political discourse about the emerging American republic. Nonetheless, Abigail Adams was not reticent to raise and discuss the matter of equality of the sexes with her husband, John Adams, in correspondence from March of 1776.<sup>201</sup> She delved into the subject matter by first suggesting that liberty could not be strong in those “who have been accustomed to deprive their fellow Creatures of theirs.”<sup>202</sup> In order to avoid any confusion about what she was speaking, since revolution against Great Britain was in the wind, she referred to the Golden Rule of Scripture (i.e., *Matthew* 7:12) of doing unto others as you would want them to do unto you.<sup>203</sup> The question of sexual equality was then introduced in the context of the events leading to the

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198. Stephen A. Douglas, Speech at the Third Joint Debate at Jonesboro (Sept. 15, 1858), in *POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN A. DOUGLAS, IN THE CELEBRATED CAMPAIGN OF 1853*, in *ILLINOIS* 116 (Follett, Foster & Co. 1860) [hereinafter *THE LINCOLN-DOUGLAS DEBATES*].

199. *Id.*

200. *Id.* at 63 (emphasis added).

201. Letter from Abigail Adams to John Adams (Mar. 31, 1776), in *THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY, 1762-1784*, at 120 (L. H. Butterfield et al. eds., 1975).

202. *Id.*; see also EDITH B. GELLES, *FIRST THOUGHTS: LIFE AND LETTERS OF ABIGAIL ADAMS* 14-30 (1998).

203. “So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets.” *Matthew* 7:12.

*Declaration of Independence*, which would presumably require the enactment of new laws for the states declaring independence against England. As she expressed to her husband, “in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors.”<sup>204</sup> To further the cause of sexual equality, she exhorted that, as legislation was enacted, the law makers not put “unlimited power in the hands of the Husbands” warning that “all Men would be tyrants if they could.”<sup>205</sup> Whether in jest or not, she concluded by declaring that “the Ladies . . . are determined to foment a Rebellion, and will not hold ourselves bound to any Laws in which we have no voice, or Representation.”<sup>206</sup> She was undoubtedly familiar with what the male members of the species had said in the *Declaration* against continued British rule in the colonies.

### *E. Summation*

This brief historical presentation provides a foundation for considering how the question of equality and debates about it within specific contexts affected the development of the Republic and the evolution of its laws—legislative and judge-made—that have formulated the meaning of equality in the contexts of voting, property, race, and sex. At a minimum, this historical overview illustrates that the idea of equality, as generally understood by the drafters of the *Declaration* and the Framers of the Constitution, could not develop a precise definition of how members of the human race could be identical with one another in all respects. Such a claim, I believe, was not their intention, because they acknowledged two things: that this was not their objective, and that this was impossible to assert given the diverse ways in which humans actually differ from one another. I shall now turn to an examination of how contemporary thinkers have contributed to the understanding of equality in the present age. An underlying question that should be kept in mind as one proceeds through the next section is this: does equality require certain results for those making particular claims, or is it sufficient that there be only an equality of opportunity for pursuing claims, including the areas just examined of voting, property, race, or sex?

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204. Letter from Abigail Adams to John Adams (Mar. 31, 1776), *supra* note 207, at 120.

205. *Id.* at 121.

206. *Id.*

## VI. PRESENT DAY CONSIDERATIONS

While present day jurisprudential investigations of equality were not elements of the mosaic forming the meaning of equality in the legal framework of the early Republic, it is helpful to take stock of how legal philosophy of the present age defines or explains the concept of legal equality, for these thoughts may refine our interpretation of the Framers' understandings. Moreover, they have influenced how theorists and practitioners have understood legal equality and how they have attempted to implement it, albeit imperfectly.

In 1970, John Rawls published his seminal work, *A Theory of Justice*, which has had and continues to have a powerful impact on democratic legal theory since its publication.<sup>207</sup> Much of Rawls's work is taken up with an exploration of equality and what it means. We first encounter Rawls tackling issues regarding equality in his examination of equality of opportunity (an issue of great concern to twentieth and twenty-first century western jurisprudence) and procedural justice. This issue raises the question: must people have everything alike, or may the requirements of equality be met sufficiently if they all have some reasonable opportunity to obtain what they want from life? Inevitably, a second issue follows: does the legal system afford each person uniform or identical treatment whenever he or she has some matter that must be resolved by the legal system?

After his identification of the original position and first principles, Rawls commenced an investigation of equal opportunity by presenting the illustration of sharing a cake.<sup>208</sup> The person who gets to cut the cake cannot take the first piece; assuming that the number of pieces duplicates the number of people (numerical equality in its pure form), the person who cuts the cake must take the last piece.<sup>209</sup> Rawls argued that the person who gets to slice the cake will, at a minimum, cut it into equal (i.e., uniform) portions, thereby assuring that he will get the "largest share possible."<sup>210</sup>

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207. JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press 1971). In his book, *POLITICAL LIBERALISM*, Rawls continued to examine the issue of equality, but he reiterated that "[e]ach person has an equal claim to a fully adequate scheme of equal basic rights . . ."

JOHN RAWLS, *POLITICAL LIBERALISM* 5 (Columbia Univ. Press 1993).

208. RAWLS, *A THEORY OF JUSTICE*, *supra* note 207, at 85.

209. *Id.*

210. *Id.*

Rawls subsequently identified a “tendency to equality,”<sup>211</sup> where “[t]hose who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out.”<sup>212</sup> Here Rawls indicated the existence or the real possibility of disparity or inequity, but then implied that self-improvement of personal situations due to the exercise of skills and talents is not the issue as long as this exercise simultaneously guarantees the improvement of those who are without similar skills (the favor of nature) but will benefit from the implementation of those who possess them.

For Rawls, considerations about equality afford the need to investigate the constitutional or juridical structure of the political community—and here, the question of equal influence or equal access to office arises.<sup>213</sup> Rawls acknowledged that this does not define “ideal citizenship” nor require all to take an active part in political affairs.<sup>214</sup> He analogized the “ship at sea” with the “ship of state”: based on the assumption of the common good (and, in this regard, it would seem that the good of one is tied to the good of all), the passengers and crew trust in the captain’s exercise of authority to guide the ship through rough seas to safe harbor.<sup>215</sup> Thus, those who lead the state are similarly trusted to deliver this vessel, its passengers, and their cargo to its safe destination—the safe delivery of one ensures the safe delivery of all. They are equal in the sense that, by literally being in the same boat, they are treated in the same fashion as far as safely reaching their common destination is concerned, even though they may have diverse accommodations and responsibilities.

Rawls continued by considering the issue of equality with regard to justice.<sup>216</sup> He reflected the thoughts of earlier writers, such as Aristotle, by linking justice with equality.<sup>217</sup> While this is not a novel concept, as has been seen throughout this essay, Rawls elaborated his intricate scheme of justice and equality by considering “moral persons who are entitled to equal justice.”<sup>218</sup> Who constitutes “moral persons” is never fully addressed. Nevertheless, this approach requires consideration of

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211. *Id.* at 100-01.

212. RAWLS, A THEORY OF JUSTICE, *supra* note 207, at 101.

213. *Id.* at 223.

214. *Id.* at 227.

215. *Id.* at 233.

216. RAWLS, A THEORY OF JUSTICE, *supra* note 207, at 505.

217. *Id.*

218. *Id.*



two fundamental points: (1) the moral person is capable of having and is assumed to possess and exercise a rational plan of life that is the conception of one's good; and (2) the moral person is capable of having and is assumed to have a sense of justice, which inevitably will take stock of the interests of others.<sup>219</sup> He based these interrelated points on the assumption that moral persons share a public life involving the possession and exercise of "common institutions," which are the means by which the moral persons achieve goals (often dealing with "natural rights") that ensue from the original position.<sup>220</sup> Rawls imposed a regulatory scheme into the justice-as-equality thesis when he acknowledged that differences between moral persons, which exist due to their diverse capacities, would otherwise result in problematic variances in the exercise and enjoyment of basic rights and liberties.<sup>221</sup> However, "justice as fairness denies this [result]: provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice."<sup>222</sup> Nonetheless, for Rawls, minimal requirements for defining moral personality "refer to a capacity and not to the realization of it."<sup>223</sup>

It would seem that Rawls might accept Hart's pronouncement of "treating like cases alike; different cases differently."<sup>224</sup> In fact, Rawls suggested that this will be the case as long as "[t]he real assurance of equality lies in the content of principles of justice and not in . . . procedural presumptions."<sup>225</sup> He acknowledged the existence of "men's different productive skills and capacities for satisfaction."<sup>226</sup> Thus, like many of his predecessors going back to Aristotle, he accepted the reality of natural or innate distinctions that differentiate one person from another. This leads to another aphorism he reached: "[t]hose who can give justice are owed justice"—and this seems to take into account differences in capacities of where people find themselves in the variety of positions that exist within society.<sup>227</sup>

Ronald Dworkin also considered equality in his major jurisprudential study, *Law's Empire*.<sup>228</sup> Dworkin realized that the idea

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219. *Id.*

220. RAWLS, A THEORY OF JUSTICE, *supra* note 207, at 505.

221. *Id.* at 507.

222. *Id.*

223. *Id.* at 509.

224. H.L.A. HART, THE CONCEPT OF LAW 158 (1961).

225. RAWLS, A THEORY OF JUSTICE, *supra* note 207, at 507.

226. *Id.* at 508.

227. *Id.* at 510.

228. RONALD DWORKIN, LAW'S EMPIRE (1986).

of equality can manifest itself in different contexts, e.g., equality regarding property<sup>229</sup> and equality pertaining to welfare.<sup>230</sup> Dworkin acknowledged that, in spite of government interference, certain inequalities will persist because some people are more talented than others vis-à-vis skills, knowledge, physical makeup, etc.<sup>231</sup> As this presentation demonstrates, this is not a new discovery. Inevitably, Dworkin based his theory of equality on compatibility rather than competition—the former is crucial to explaining the divisions and distinctions that exist among people. As he stated, “compatible conceptions explain the division naturally and systematically, while competitive theories can explain it at best only artificially and improbably.”<sup>232</sup> The issue of racial “equality” surfaces in his chapter ten on the Constitution and the work of his super-magistrate, Judge Hercules. In this part of Dworkin’s investigation, the idea of “law-as-integrity” exercises a vital role,<sup>233</sup> and the responsibility of legal interpretation becomes paramount. While not abandoning Hercules when problems with this anti-democratic figure surfaced, Dworkin turned to the citizen addressing law’s empire (and what is equality) when he concluded his major work:

Law’s attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have.<sup>234</sup>

But there are problems with Dworkin’s approach. A paramount one is how does one resolve the disagreements, especially with regard to the understanding of equality that will surface when different views of the “interpretive spirit” are encountered? In this regard, one need only think of the problematic language of Justice Kennedy in his dictum in *Planned Parenthood v. Casey*: there is “a promise of the Constitution that there is a realm of personal liberty which the government may not enter”<sup>235</sup> and “[a]t the heart of liberty is the right to define one’s own

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229. *Id.* at 296-97.

230. *Id.* at 297.

231. *Id.* at 298.

232. DWORKIN, *supra* note 228, at 299.

233. *Id.* at 410.

234. *Id.* at 413.

235. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

concept of existence, of meaning of the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>236</sup> Neither Professor Dworkin nor Justice Kennedy acknowledged the potential for this (inevitable) conflict and how it will be resolved when it arises. And will it arise? Is it a version of Hobbes’s state of nature where people are free but where everyone is the enemy of the other?<sup>237</sup> The answer is as obvious as it is inevitable: when the subject knows no master but itself, conflict and collision will result.

But others have provided insight that can be used to resolve the problems that emerge from works like those of Rawls and Dworkin. For example, John Coons and Patrick Brennan, in their exceptional analysis of equality, have provided a needed remedy to the problems unanswered by Rawls and Dworkin.<sup>238</sup> In part, they rely on the insightful work of the Canadian philosopher/theologian Bernard Lonergan, S.J.<sup>239</sup>

At the outset, Coons and Brennan have provided a framework for examining and understanding human equality. First, they have argued that “equality is a relation; if you do not believe in relational reality, you cannot believe in equality.”<sup>240</sup> I take this to mean that the claim to equality, which any person manifests, cannot be addressed without taking account of all similar claims of other people—other moral persons.<sup>241</sup> The second criterion identified by Coons and Brennan is that

236. *Id.* at 851.

237. THOMAS HOBBS, *LEVIATHAN* (A.P. Martinich ed., Broadview Press 2002). Hobbes stated:

Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth, no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.

*Id.* at 96.

238. See John E. Coons & Patrick M. Brennan, *Nature and Human Equality*, 40 AM. J. JURIS. 287 (1995). Professors Coons and Brennan subsequently elaborated their thesis in a book several years after their seminal article was published. See JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* (1999).

239. Coons & Brennan, *Nature and Human Equality*, *supra* note 238, at 320-30.

240. *Id.* at 290.

241. Elsewhere, I have presented the argument that justice is the right relation between or among people and their respective interests. See Rev. Robert John Araujo, S.J., *Justice as*

the relation, once identified, must be grounded on “some host property” that is shared or possessed by the persons who are involved.<sup>242</sup> Their third criterion is that the host property in this relation is of crucial (fundamental) importance to the self-identity of the persons and generates a “capacity that is a primary medium of self-perfection.”<sup>243</sup> Their fourth criterion follows: this capacity of self-perfection has the objective of achieving the “real good” of other people in addition to obtaining what is good for one’s self.<sup>244</sup> In other words, the good for one’s self (in this context, my claim to equality) must be considered in the context of the good for all others—and their respective claims for equality. The good (the claim to equality) then, in a sense, is reciprocal and universal. Their final criterion pertaining to this capacity of seeking or rejecting the real good of others “must also be uniform both in possession and in degree; that is, if human equality is to hold, all rational persons must have it and have it to the same extent.”<sup>245</sup> This is critical to the sense of equality that takes into account distinctions among people and yet satisfies the ideal that, in some vital respects, they are equal notwithstanding their differences in capacities and interests.

The key that underlies these criteria is the natural law, which rests on “an order of good and evil that holds apart from human preference and obligates the individual.”<sup>246</sup> This is traditionally viewed as the transcendent, moral, and objective order of things that remove them from the inevitable conflicts that I have associated with the *Casey* dictum.<sup>247</sup> What is good (or evil) is determined by the necessary consideration of all human interests, not just some, and by how they must be considered in relationship with one another. The inter-relationship between people is essential to their respective individual interests in achieving good. The good for one is dependent or contingent on the good of the other. One might consider this an application of the principle of the *suum cuique*.<sup>248</sup> This intersection of these common

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*Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 PEPP. L. REV. 377 (2002).

242. Coons & Brennan, *Nature and Human Equality*, *supra* note 238, at 290.

243. *Id.*

244. *Id.*

245. *Id.*

246. Coons & Brennan, *Nature and Human Equality*, *supra* note 238, at 294.

247. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) and discussion, *supra* text accompanying note 235..

248. See *infra* note 258 and accompanying text.

interests is “the *objectivity* of the good.”<sup>249</sup> Perhaps the work of Mother Teresa of Calcutta and her Missionaries of Charity serves as an illustration of this point. Mother Teresa would often mention that she and her sisters would take in the poorest of the poor—even if they could not give those who were about to die much in the way of material things, they were able to give the dying their friendship and companionship as the dying left this life for the next.<sup>250</sup> Each person who dies can be in relation with another, and this would make the poorest of the poor surely equal to most others who die in similar fashion in the company of family or friends. In death they become equal in worth and respect, thereby manifesting what the United Nations Charter states in its Preamble about “the dignity and worth of the human person.”<sup>251</sup> Could it also be that the street beggar who dies in the hands of such company is the superior of the plutocrat who dies alone with no one to offer comfort and consolation?

At this stage, I suggest that Coons and Brennan are on to something that offers a crucial insight into the thinking of the Founders regarding the topic of equality. Their criteria that take into account the inextricable correlation of individual and shared interests would enable the Framers’ notions about equality to succeed. The Coons-Brennan understanding of equality provides a promising template (what they eventually label as “the objectivity of the natural law reconceived as authentic subjectivity”<sup>252</sup>) that could provide the antidote to the misconstrued notion of equality advanced by the likes of Diana Moon Glampers.<sup>253</sup>

The constructive and valuable perspective that Coons and Brennan initiate is supplemented and complemented by the work of Johannes Messner.<sup>254</sup> For him, equality must be considered as a social principle that provides, and possibly guarantees, all members of society the right to enjoy a legal status that is not conditioned or determined by their natural differences as compounded by the social and political power or

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249. Coons & Brennan, *Nature and Human Equality*, *supra* note 238, at 294 (emphasis in original).

250. Conversations with Sister Luca, M.C., Superior of the Missionaries of Charity in Rome, academic year 2006-07. From 2005 to 2007 I was a chaplain to the Missionaries while I was working in Rome, and the information to which I refer has its common source in these ongoing discussions.

251. U.N. Charter pmb., available at <http://www.un.org/aboutun/charter/>.

252. Coons & Brennan, *Nature and Human Equality*, *supra* note 238, at 319.

253. See VONNEGUT, *supra* note 1, at 7.

254. See, JOHANNES MESSNER, *SOCIAL ETHICS; NATURAL LAW IN THE WESTERN WORLD* (J. J. Doherty trans., B. Herder Book Co. 1965).

influence that some individuals or groups possess but others do not.<sup>255</sup> Like Coons and Brennan, Messner introduced and relied on an objective standard that takes account of each subjective standpoint. Thus Messner stated, "Men are alike in the essential nature; in their individual nature they are unlike."<sup>256</sup> Here we have another coherent challenge that confronts the Glampers view of equality. Messner argued that because of their physical and mental differences, people strive for diverse objectives that are personal in nature, but they must do so with regard to the fact that they cannot do this in isolation from one another because they are integrated by society and exist through social cooperation.<sup>257</sup> As Messner argued, social justice (or justice within society) cannot mean the same to each person; it must mean to each his due, which is the nucleus of the *suum cuique* that explains and accepts the idea that people are simultaneously equal and different.<sup>258</sup> Nonetheless, their claims to rights and their portion of the common stock must be assessed in the context of the claims of others to these objectives.

Another contemporary perspective that one must consider is that of John Finnis.<sup>259</sup> Finnis, like others, has relied on the concept of proportion introduced by Aristotle and considered earlier in this essay.<sup>260</sup> As is the case with other political and legal philosophers, equality for Finnis is a fundamental element in the notion of justice.<sup>261</sup> Especially with regard to matters of the common stock and its distribution, "all members of a community *equally* have the right to respectful consideration."<sup>262</sup> I take here the reference to "respectful consideration" to mean that the consideration must take into account the claims of each and every moral person, and these considerations must respect the claims of each along with those made by everyone else. But the end of justice is not simply achieving equality; rather, it is obtaining the common good, which takes into account the interests of one and all.<sup>263</sup> This enables the flourishing of all members of the community or society to define the common good while retaining the differences that

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255. *Id.* at 330.

256. *Id.*

257. *Id.*

258. MESSNER, *supra* note 254, at 331.

259. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (Oxford Univ. Press 1980).

260. As Finnis suggests, it is important when thinking about equality to "avoid misunderstanding and over-simplification [and] . . . it may be better to think about *proportionality*, or even of *equilibrium* or balance." *Id.* at 163 (emphasis in original).

261. *Id.* at 162-63.

262. *Id.* at 173 (emphasis in original).

263. FINNIS *supra* note 259, at 174.

distinguish one from another: the musical from the non-musical; the athletic from the non-athletic; the reflective from the impulsive, etc. Thus, as Finnis stated: “there is no reason to suppose that this flourishing of all is enhanced by treating everyone identically when distributing roles, opportunities, and resources.”<sup>264</sup> Once again, the contrived notion of equality imposed by the Handicapper General<sup>265</sup> falls out of favor.

John Lucas, writing around the same time as Finnis, offered a further contribution that questions the validity of the Glampersian view.<sup>266</sup> He offered a note of caution by indicating that although there may be some similarities between justice and equality, they are not the same concept having various names; nevertheless, they are connected with one another, and “sometimes arguments of justice lead to egalitarian conclusions.”<sup>267</sup> By way of illustration, Lucas relied on Saint Matthew’s Gospel account of the vineyard owner and his hiring of laborers.<sup>268</sup> You may recall that the vineyard owner, having need for laborers, went to the market place over the course of the day to hire men to work in his vineyard.<sup>269</sup> At the end of the day’s work, he paid each the same daily wage.<sup>270</sup> Those who labored for the better part of the day objected on the grounds that they had toiled for many more hours than those hired at the end of the day, and they bore the burden of the heat whereas the last-hired did not.<sup>271</sup> But the vineyard master reminded those who complained about this perceived inequity that they were not cheated because each got a fair day’s wage.<sup>272</sup> Moreover, could not the owner be generous if he so chose, as he insists?<sup>273</sup>

With this background, Lucas argues that if justice were based precisely on the same treatment, “the complaint of those who had laboured through the heat of the day would have been unintelligible” even if we agree with their plight—but justice is not the same as equality.<sup>274</sup> Nevertheless, there remains a connection, for in treating like cases alike and different cases differently, decisions must be rational to be just; and for people to be considered equal in some critical sense that

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264. *Id.*

265. *See* VONNEGUT, *supra* note 1, at 7.

266. JOHN R. LUCAS, *ON JUSTICE* (Oxford Univ. Press 1980).

267. *Id.* at 171.

268. *Id.* at 172; *Matthew* 20:1-15.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Matthew* 20: 1-15.

273. *Id.*

274. LUCAS, *supra* note 266, at 172.

takes account of the things that distinguish one from another, equality must also be tested by reason and logic.<sup>275</sup> The exaggerated egalitarian sentiments of Doris Moon Glampers<sup>276</sup> are, for Lucas, a form of totalitarianism that must be rebutted.<sup>277</sup> Lucas made his point concrete by relying on the nutritional requirements of people with different needs (for example, the infant, the lumberjack, and the Olympic athlete): they are equal in their shared requirement for food, but they are unequal in how much each needs to satisfy their individual requirements.<sup>278</sup> The totalitarian prescription that demands that each receives the same allotment of food is unreasonable: equality cannot be just if it is to be allocated with mathematically identical portions, but it will be just if it complies with egalitarian apportionment that takes into account the differences and distinctions of their respective requirements.<sup>279</sup>

This is the type of circumstance that Lloyd Weinreb attempted to address when examining claims to equality that occur in areas in which discriminatory treatment is the target of therapeutic legislation.<sup>280</sup> In an American legal context, the device of affirmative action has been considered, used, and critiqued in the quest to achieve “equality” for members of groups that have been viewed as marginalized or discriminated against in the past. One often hears the justification that “affirmative action” levels the un-level playing field in which some participants carry the assumed advantage of never having been marginalized, whereas other participants have been burdened by the lack of advantage.<sup>281</sup>

Weinreb explained that while this tension or conflict is “rooted in our history,” it is, in reality, an “abstract contradiction” between the notions of liberty and equality.<sup>282</sup> But there is more than contradiction that needs to be addressed. There is also an incoherence that becomes “intractable” because the competing individuals or groups, whose interests are pitted against one another, present arguments that intensify the conflict without offering sound solutions to the problems, which are

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275. *Id.*

276. See VONNEGUT, *supra* note 1, at 7.

277. LUCAS, *supra* note 266, at 174.

278. LUCAS, *supra* note 266, at 182.

279. *Id.*

280. LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* (Harvard Univ. Press 1987).

281. See, e.g., Ward Connerly, *Is It Time to End Race-Based “Affirmative Action”*, 1 U. ST. THOMAS J. L. & PUB. POL’Y 56 (2007).

282. WEINREB, *supra* note 280, at 232.



shared even if the perspectives are not.<sup>283</sup> Weinreb offered no solution to the incoherence and the ongoing conflict other than suggesting that “the community as a whole bear the cost of remedying the injustice” for any individual who experiences frustration in achieving “equality.”<sup>284</sup> For him, this represents a utilitarian solution that “will not relieve the sense of injustice of those whose personal well-being suffers.”<sup>285</sup> In this regard, one need only think of the *DeFunis* or *Bakke* reverse-discrimination cases.<sup>286</sup> Weinreb concluded that there is no correct principle of equality for these situations; as he argued, “the effects of principles applied in the past, which are now perceived to be wrong, can be undone only by the application of principles that also appear to be wrong.”<sup>287</sup> For him, this utilitarian approach, while not the best, is one practical solution that diminishes the burden of injustice for any individual or group that claims unequal treatment that is prized but not enjoyed.<sup>288</sup> But I must hasten to add that this solution, while somewhat pragmatic, is incapable of a just resolution of competing claims about equality because it does not consider and resolve conflict by deciding how each individual claim must be addressed in relation to all others.

## VII. A SYNTHESIS OF PERSPECTIVES ABOUT EQUALITY: A SUSTAINABLE AND PRACTICAL THEORY FOR THE AMERICAN EXPERIMENT

It may appear to the reader that this is a bold, overconfident endeavor on the author’s part to attempt that which is unachievable. This is not my intention. Rather, it is my hope to provide a humble effort—a catalyst—to bring some greater sense of the meaning of a central legal concept that permeates the law of our national culture and beyond, and which has a foundation in the *Declaration of Independence*. This important idea, i.e., *equality*, is frequently relied upon to justify a

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283. *Id.* at 232-33.

284. *Id.* at 233.

285. WEINREB, *supra* note 280, at 233.

286. *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (addressing the contentions that a white law school candidate who was denied admission at a state university law school was discriminated against by an affirmative action admissions policy used in the admissions process; however, a decision on the merits was not reached in that Mr. DeFunis was admitted to the school during the litigation); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (addressing the legality of two admissions policies at a state university medical school, one of which was an affirmative action admissions policy; although the Supreme Court found that the special admissions program was invalid, the school could nonetheless take into account race as a factor in its future admissions decisions).

287. WEINREB, *supra* note 280, at 233.

288. *Id.*

strong legal claim to some position, and other words fail in convincing the culture that it must correct an unwarranted treatment of human beings that emphasize their differences and ignore their similarities. It would seem that there is nothing wrong with relying on the argument of equality to do this; however, we must remember that this approach was used to rationalize the regime of Diana Moon Glampers.<sup>289</sup> And this is why the ideas of legal equality must be understood as carefully and completely as possible. What follows represents an effort to increase this understanding.

The justification for a complete understanding of equality is that the law is based, presumably, on reason—reason well-founded on the strong base of tested logic *and* fact.<sup>290</sup> But when the law deviates from this necessary path so that the logical justification is thin and the tribute that ought to be paid to reality is absent, the law becomes purely positivist—the law is whatever the law-maker says it is based on whatever the lawmaker, without any external reference, concludes is necessary to achieve some objective. The law is the law and must be obeyed not because it makes sense and improves the lot of each member of society but because it is what the lawmaker has declared to be the norm to which all must adhere. The objective correlation between reason and fact is substituted with the whim of the lawmaker. One example of this is the skewed juridical system enforced by HG Glampers.<sup>291</sup> While her scheme may be considered extreme and viewed purely as the product of Vonnegut's imagination, there is evidence from the present day that it exists where a tortured, artificial equality is claimed and enforced through legal mechanisms that mask or deny the facts and the logic that, in some respects, people are not and cannot be equal.<sup>292</sup>

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289. See VONNEGUT, *supra* note 1, at 7.

290. For a useful examination of the factual role in assessing equality, see Patrick McKinely Brennan, *Arguing for Human Equality*, 18 J. L. & RELIGION 99, 122 (2002).

291. See VONNEGUT, *supra* note 1, at 7.

292. For example, at the outset of the majority opinion in *Goodridge v. Department of Public Health*, Chief Justice Margaret Marshall offered two important observations which, by themselves, appear to reflect widely held non-controversial views. The first is that marriage is a "vital social institution." 440 Mass. 309, 312 (2003). Her second is the recognition that the "exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society." *Id.* A few short phrases later, however, the majority opinion in *Goodridge* intrepidly declared that the Commonwealth of Massachusetts "has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples." *Id.* This assertion supplies the need to reconsider her claim about the "exclusive commitment of two individuals" in marriage. What appeared to be an innocent statement is not. By emphasizing the Massachusetts constitution's affirmation of "dignity and equality of all individuals," the majority acknowledged that it was engaging in a radical departure of legal

Allow me to present some illustrations of my point. While many people enjoy sports as either amateur participants or cheering fans, we would, out of necessity, have to acknowledge that in basketball, the overwhelming majority of people are not the equal of Michael Jordan. In tennis, they are not the equal of the Williams sisters. With regard to football, they are not the equal of Tom Brady. Most people probably like music, but they are not the equal of Mozart. Many enjoy literature and theater, but they are not the equal of William Shakespeare. Most like art, but they are not the equal of Michelangelo. As we properly come to acknowledge that the claim of equality has its limitations required by reason and fact, no one should assert that the law can make us precisely equal in these contexts. It simply cannot do that without becoming a totalitarian, positivist system. This type of egalitarianism is unsustainable because it conflicts with logic and with the certainty of natural distinctions. The hallmark of the strongly positivist machinery that fabricates the artificial, unsustainable, and irrational sense of equality is this: the law (and, therefore, its objectives) is whatever the lawmaker says it is, reality and reason to the contrary. The differences and distinctions that exist among human beings are real and unmistakable, and should not be forced into some kind of strained, artificial, irrational, and unsustainable notion of “equality.”

But an interlocutor might respond, contending that most law found even within a democracy is positive and generally serves democratic societies in a satisfactory but imperfect manner. Most lawyers, judges, legislators, and informed citizens would likely join in a consensus on this point. In virtually all democratic societies, lawmaking is the law that the lawmaker posits. That is true, but this method is not the positivism and totalitarianism of which I speak, where the culture and citizenry have no critical, objective evaluation of what the lawmaker says is the law. Yet, we must be mindful that democratic institutions,

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norms and the definition of marriage when it asserted that its “decision marks a change in the history of our marriage law.” *Id.* From the very outset, this decision does *not*, as the majority contended, foster human dignity and equality. Rather, it artificially manufactured a rule conferring marital status and its attendant benefits that is a revolutionary alternative to the tradition and convention of marriage, i.e., the legally recognized association of two persons of the opposite and complementary sex. The only way to overcome this major obstacle to the campaign for same-sex marriage and its underlying equality claim was to put aside the natural and historical definition of marriage and manufacture a new one that would satisfy the “equality” claim. This judicial fiat of the Massachusetts court would be consistent with the quest of Doris Glampers to enforce artificial equality that disregards reason and fact.

including those with which we are familiar in the United States, are not insulated from the positivism that fortified Diana Moon Glampers's policies and her authority to implement and enforce them. As a prelude to my several subsequent essays, I point to two areas in which the exaggerated claim to equality is made. The first is the equality argument advanced by those with pro-abortion views (a woman is denied "equality" with men if she cannot have the absolute right to abortion). The second is the argument advanced by those who advocate for same sex marriage, which will ensure "equality" to homosexual couples.

A positivist system can produce law that has a strongly subjective dimension regulated only by the mind of the lawmaker and is conditioned only by what the lawmaker sees as the end of the human purpose.<sup>293</sup> This positivist system, moreover, can reflect the "dominant prejudices of the moment" rather than display the objective and moral compass that must guide democratic societies.<sup>294</sup> This quandary was illustrated by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, where a majority of the court asserted that "civil marriage is an evolving paradigm" and redefined marriage to include unions between homosexual couples.<sup>295</sup> It is the positivist state, and the mind that guides it, whose law is geared to some end or result without asking or being worried by what happens along the way. This approach to lawmaking is a tool of the positivist regime. The common problem with the positivist system is that if it goes unchecked by the application of right reason, as addressed by Hart in his discussion of the extreme positivism of the Nazi regime: "Wicked men enact wicked rules which others will enforce."<sup>296</sup> Hart was a strong advocate of positive

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293. For a development of this point, see Robert John Araujo, S.J., *Conscience, Totalitarianism, and the Positivist Mind*, 77 MISS. L. J. 571 (2008).

294. CHRISTOPHER DAWSON, *The Modern Dilemma*, in CHRISTIANITY AND EUROPEAN CULTURE: SELECTIONS FROM THE WORK OF CHRISTOPHER DAWSON 118, 127 (Gerald J. Russell ed., The Catholic Univ. of America Press 1998).

295. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 339 (2003). The majority did state in footnote 29 that:

Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.

*Id.* at 337 n.29. The court's dictum, however, would not impose any restriction on the Massachusetts legislature from enacting such a law to this effect. Given the current state of politics in Massachusetts, this could easily happen.

296. HART, *supra* note 224, at 206.

law, but I believe he would find the Glampers regime (like the one of the National Socialists) equally problematic.

To conclude on a more hopeful note, there exists a response to exaggerated legal regimes guided by the illogic and authoritarian power of extreme positivism. The insights of our Framers and those who followed in their footsteps provide a welcome reply to the regime of Diana Moon Glampers and her contrived expression of equality.<sup>297</sup> As we consider the Framers' thoughts, we begin to see that equality, a most significant component of democratic legal institutions as shaped by the American experiment, has rational and factual limitations in application. But the positivist may still insist: this lump of coal and this polished gem are the same since they are both forms of carbon deposits; therefore, they must be of equal value. But are they? Can they be? In one sense they are both examples of carbon-based minerals as the positivist claims. But they are not equal when one considers their different qualities and the desirability they produce in the market place. Each is a carbon-based rock to be sure, but they are not equal to one another in spite of what the law may say or insist about them as each being the "equal" of the other.

When it comes to members of the human family, each is equal to the other in having aspirations for the future and in desiring the opportunities to fulfill these hopes. Moreover, there must be some sense of equality in the ability to make claims to the common stock of the things that are essential to sustaining human existence. This is a truth about human nature, which the drafters of the *Declaration of Independence* asserted when they said that "all men are created equal."<sup>298</sup> Nonetheless, we are not equal in how we perceive these objectives. Moreover, we are not equal in possessing the talents and skills that enable us to pursue the many activities found within human existence, for some of us may have to expend a great effort to attain what it might take another little, if any, exertion to attain. And now we must think about the categories of ideas that lead to a sounder understanding of what is equality in a legal sense when the idea of human equality is under consideration.

Let us begin with the ancient notion of Aristotle concerning justice and proportion. His idea that each member of the community has something to contribute to society or the ability to contribute is relevant to my synthesis. The desire to make the contribution provides one foundation to substantiate equality. What one contributes distinguishes

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297. See VONNEGUT, *supra* note 1, at 7.

298. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

one from the other because what one can contribute and how one contributes varies. Each person is distinct in his input or in his capability of participation. Aristotle's vital insight is that it is not individual caprice or "tyrannical instinct" that can determine what is just, but rather, "rational principle" that is applied by those charged with being guardians of both justice and equality.<sup>299</sup> It is reason tempered by empirical fact and metaphysical nature that convincingly demonstrates that there are distinctions among people based on merit, claim, and ability. On merit, Mozart's music is superior to mine; the lumberjack's claim to more food exceeds that of the infant; regarding ability, the Olympic athlete will reach the end of the race course before the octogenarian. This does not mean that one is superior in all regards; it means that there are differences that the law must understand and respect. The obese child and the elderly person may share the same weight, but this does not make them the equal of the other in most meaningful contexts. Marcus Aurelius—"the same law for all"<sup>300</sup>—and H.L.A. Hart—treating like cases alike, different cases differently<sup>301</sup>—bring some practical counsel in how to apply these important notions of Aristotle.<sup>302</sup>

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299. ARISTOTLE, NICOMACHEAN ETHICS bk. 5 ch. 6, *supra* note 27, at 1013.

300. AURELIUS, *supra* note 39, at 254.

301. HART, *supra* note 224.

302. In both contexts of Aristotle and Hart, the thoughts of Giorgio Del Vecchio provide a frame of reference:

After all these considerations, we are in a position to ask ourselves just what is meant by the constantly repeated formulas: 'The law is equal for all' and 'All citizens are equal before the law.' It is evident that if these sayings are taken literally, especially the first, they would lead to the most absurd consequences, as though both innocent and guilty should meet with the same treatment, or children and adults. But their real meaning is that no one in the state is above the law, no one is *legibus solutus*; and that the ancient privileges such as hereditary nobility have been abolished, all citizens must now be considered as being at the same level. The value of these formulas is rather limited, for they refer to the laws in general, and laws may be unjust. Yet even unjust laws have a general application.

Giorgio Del Vecchio, *Equality and Inequality in Relation to Justice*, 11 NAT. LAW FORUM. 36, 46 (1966). In his treatise, *On Laws and God the Lawgiver*, Francisco Suarez brings up in this context the idea of "distributive equity." As he states:

There remains to be proved only the assertion regarding . . . distributive equity. As to this factor, it is manifestly essential to the justice of law; since, if a law is imposed upon certain subjects, and not upon others to whom its subject-matter is equally applicable, then it is unjust, unless the exception is the result of some reasonable cause . . . .

FRANCISCO SUAREZ, *A Treatise On Laws and God the Lawgiver* bk. 1ch. 9, at 16, *reprinted in* 2 CLASSICS OF INTERNATIONAL LAW, SELECTIONS FROM THREE WORKS 117 (Gwladys L. Williams et al. trans., Oxford Univ. Press 1944) (1612).

As discussed in Part I, Thomas Hobbes was quite aware of what made people different in various human attributes. Yet, in spite of these differences or distinctions, they are or could be equal in determination to achieve the same or similar objectives regardless of their dissimilarities. Notwithstanding human diversity, an individual who was handicapped could devise a means of leveling the playing field so that what could be achieved easily by another but only with great difficulty by himself could, nevertheless, be attained. The Lockean contribution to this follows: in spite of human distinctions, it is the notion of reciprocity that leads to “no one having more than another”<sup>303</sup> in the sense that those with more have duties or responsibilities to those who have less.<sup>304</sup> He calls this the “obligation to mutual love amongst men.”<sup>305</sup> As previously noted, the Rousseauian view of natural equality and the need to regulate individuals’ appetites that would invade legitimate claims to equality was also available to the Framers.<sup>306</sup>

It appears that in the contexts of these authors with whom the American Framers were well-acquainted, the reality of differences that distinguish one person from another (making them unequal) is offset by reciprocal duties that they owe to one another (making them equal). It is Leviathan’s or the government’s responsibility to ensure that this balance is established and protected by using objective logic that takes account of the need to acknowledge simultaneously the similarities and the differences possessed by each member of the human family—and this seems to accord with the role of the state as articulated by the drafters of the *Declaration of Independence* when they said “Governments are instituted” to secure these rights.<sup>307</sup>

We begin to see how these ideas affected the thoughts, writings, and proposals of the American Framers whom I have already investigated. Acknowledging their differing views on general principles—race, sex, privilege, and property—their thoughts intersected on these points of common ground: people (men and women, members of different races and social and economic classes) are different in many ways. These differences are a fact of life and human nature. But these differences cannot exclude them from participation in those characteristics of human life that are shared by each member of the

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303. LOCKE, *supra* note 42, at 4.

304. *Id.*

305. *Id.*

306. ROUSSEAU, *supra* note 46, at 28-32.

307. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

human race: the desire and the right to live until natural death; the aspiration for a prosperous future; the hope to leave a legacy that includes having a family, etc. Variety in expression is not the problem, the expectation or demand of uniformity is.

The *Declaration of Independence* is clear in this regard when it speaks of being endowed by the Creator—not by man, not by society, not by the state, not by special interest groups, not by political parties, not by corporations, not by international organizations—with unalienable claims and rights that include “Life, Liberty and the pursuit of Happiness.”<sup>308</sup> Moreover, this endowment by God (not by man, not by the state) is a self-evident truth. It is true and self-evident because its source, its guarantor, is an objective, transcendent and moral standard that escapes the vagaries of human whim or caprice.<sup>309</sup> But it is whimsical human nature that denies self-evident truth just as it is human caprice that tries to mask the distinctions and diversity of “human-beingness” with artificial and exaggerated claims of equality. Any justifiable claim to equality is not from human authorship; it is, as the drafters of the *Declaration* stated, from elsewhere. But even if the source of equality is from elsewhere, it is within the competence of man, through the exercise of reason, to recognize this truth that becomes self-evident as one thinks more and more about equality. The source of the truth about equality is beyond human definition and control; however, the product of the source can be recognized by people should they take the time to realize that it is something that transcends their ingenuity and control.

These truths were self-evident—i.e., discoverable by the application of objective human reason—to many of the Framers and others

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308. *Id.*

309. In this regard, I think Professor John Coons has made a remarkable contribution that helps define the legal meaning of equality not just in the American context but the global, human context. He states:

Now, a countless number of things truly relate to one another as equals; yet among this horde there is one specific relation of equality that can be attributed to humans alone. It is theirs exclusively, because it is a relation based in a uniquely human property—that is, in a capacity shared by us but not by the rest of creation. This ‘host property’ (my term) is the moral freedom that is peculiar to members of our kind. We are equal to one another precisely because of our shared free individual capacity either to seek the good and the true or, instead, to ‘do it my way.’ There are correct ideas and correct possible outcomes, and we can choose to give them our allegiance, our intelligence and our energy.

John E. Coons, Book Review, 19 J.L. & RELIGION 491, 493 (2003-04) (reviewing JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE’S POLITICAL THOUGHT (Cambridge Univ. Press 2002)).



establishing a republican democracy in the United States. They are self-evident because they are known through the exercise of right reason—a reason that takes the thinker beyond self-interest, bias, and the constriction of isolated autonomy endorsed by the problematic dicta from *Planned Parenthood v. Casey*,<sup>310</sup> which was referred to earlier. They are true because they reflect that which is undeniable about authentic human nature (that which is shared by each member of the human family) and transcends human whim and caprice.

## VIII. PRELIMINARY CONCLUSIONS

Based on the preceding discussion, it is plausible to state that equality of human beings exists at certain fundamental levels—the most basic would be something guaranteed, albeit vaguely, in the essential equality of the right to live and to flourish, albeit in a variety of expressions. This collection of elements would be essential for making a fundamental argument for equality that is legally justifiable in the American context and beyond. It would not guarantee that the manifestation of these elements would be the same for each claimant; however, each claimant would be entitled to offer a reasonable claim that he or she is entitled to be the equal of all others in the right to live and to seek what is needed to thrive within reasonable bounds. It is also the equality to remain free from unwarranted intrusion into one's existence—as long as this exercise does not interfere with anyone else's fundamental claims to enjoy human existence. There is also equality to be free to come, know, and enjoy the truths about human nature, including the truth to live in the midst of others and be respected as a member of the same human family. There is, finally, the role of equality as the guarantor of expectations, opportunities, and claims. It is the guarantor not of what some human may assert or demand, but of what the Creator, identified by the drafters in the *Declaration of Independence*, has given to each member of the human family where their sameness and uniqueness are simultaneously recognized and protected. Regardless of one's status, most members of the human family sooner or later ask the same questions and wish for the same fundamental benefits of life that are authentic to human nature. In this, they are very much alike. How they think about these matters and what they do about them are often asymmetrical. By way of illustration, I refer to Gilbert and Sullivan's *H. M. S. Pinafore*. In this operetta, the

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310. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

able-bodied seaman turns out to be of noble birth (“a regular patrician”); the captain of the great ship is but a mere commoner (“of low condition”).<sup>311</sup> By way of confession by the nurse, poor little Buttercup, it is disclosed that the identities of the two have been switched because she mixed them up when she “was baby farming.”<sup>312</sup> Even though Gilbert and Sullivan critique the class consciousness of the Victorian era, they demonstrate something relevant to equality—each of the babes could have been the noble captain as easily as they could have been the common tar. As Buttercup reminds us, “things are seldom what they seem; skim milk masquerades as cream . . . .”<sup>313</sup> This illustrates the point made by Coons and Brennan about the “capacity that is a primary medium of moral self-perfection.”<sup>314</sup>

In the present age, we often hear claims made about “inclusiveness” that are deemed essential by some advocates to make each person “equal” with all others, notwithstanding the diversity that differentiates among them in some significant ways. This kind of equality, however, tends to be contrived. It reflects an effort to make the basketball fan the equal of Magic Johnson; the teen would-be-rock composer the equal of Beethoven. The argument for these equalities is false and unsustainable because it removes the claim to equality from the two foundational pillars of fact and the transcendent or metaphysical nature of the human person. It represents an attempt to do away with distinction and employs a form of the Glampers approach/method and a misuse of the law that grants a license to equality in spite of what reason and reality declare that it is not.

As earlier mentioned, it is my objective to explore further the argument and claims that I present in this essay by examining equality in two important areas: abortion and marriage. With these future essays, I hope to further illustrate—by employing concrete examples—that for people to be the equal of one another, the matter in which equality is claimed must be true; moreover, the truth of the claim can be known, i.e., self-evident, through the exercise of objective reasoning, which avoids the constriction of subjective determinations asserted in *Casey*.

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311. ARTHUR SULLIVAN & WILLIAM S. GILBERT, *H.M.S. PINAFORE* act II.

312. *Id.*

313. *Id.*

314. Coons & Brennan, *supra* note 238, at 290.