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Equality

Ken I. Kersch*

Conventional accounts of the path of constitutional equality in the United States conceptualize its development as a trajectory – secular, long-term, and linear. Some find a creedal commitment to equality present, if not realized, from the nation's inception, articulated, for instance, in the Declaration of Independence's pronouncement "We hold these truths to be self-evident, that all men are created equal."[1] Others hold the accommodations and protections the Constitution afforded to chattel slavery or to economic elites, among other failings, to have rendered this pronouncement a nullity, if not a mockery.[2] Still

* Work on this essay was supported in part by Bowdoin College, where I was Tallman Scholar in Government (in residence) in the fall of 2015. I considered some of my themes here in my Tallman Lecture at Bowdoin. I am especially grateful to John Compton and Karen Orren for their insightful comments and suggestions.

[1] See, e.g., Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (Harper and Bros., 1944); Danielle Allen, *Our Declaration: A Reading of the Declaration of Independence in Defense of Equality* (Liveright, 2015); Alexander Tsesis, *For Liberty and Equality: The Life and Times of the Declaration of Independence* (Oxford University Press, 2012); Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (University of Chicago Press, 1959); John Courtney Murray, S.J., *We Hold These Truths: Catholic Reflections on the American Proposition* (Sheed and Ward, 1960). See also Frederick Douglass, "What the Fourth of July Means to the American Negro," in Herbert Storing, ed., *What Country Have I? Political Writings by Black Americans* (St. Martins, 1970); Abraham Lincoln, Gettysburg Address (1863); and the more general observations of Alexis de Tocqueville in the 1830s emphasizing the degree to which the USA's democratic political culture was suffused with an egalitarian ethos. Alexis de Tocqueville, *Democracy in America* (Harvey Mansfield and Delba Winthrop, trans. and eds.) (University of Chicago Press, 2000).

[2] See, e.g., Paul Finkelman, "Making a Covenant with Death: Slavery and the Constitutional Convention," in Finkelman, ed., *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (M.E. Sharpe, 1996). Within the abolitionist movement, the former position is associated with Frederick Douglass and his followers and the latter with William Lloyd Garrison and the "Garrisonians." See also Gordon Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, 1969); Woody Holton, *Unruly Americans and the Origins of the Constitution* (Hill and Wang, 2007).

others acknowledge the initial statement's significance as an articulated abstraction and dimly apprehended aspiration while shifting the primary focus to the unruly, outsider political and social movements that fought to realize its promise: Jacksonian democracy, abolitionism, first-wave feminism, the labor and Granger movements, populism, progressivism, socialism, New Deal liberalism, second-wave Feminism, civil rights, black power, and the gay rights movement, among others. The Civil War Amendments, particularly the Fourteenth Amendment's guarantee that no state shall deprive any person of the "equal protection of the laws," belatedly inscribed the commitment to equality in the Constitution's text.

Some interpreters have read that clause narrowly and formalistically, by the lights of an "anti-classification" or "anti-differentiation" principle that guarantees only formal equality under law. Others have read it broadly and aspirationally, as promising substantive fairness, by the lights of an "anti-subordination" or anti-caste principle rooted in robust understandings of civic equality in fact. In either case, the Civil War Amendments marked a significant stride forward.[3] Progress was an "unsteady march," but the road was at least discernable.[4]

These same accounts map this forward movement along a set of well-known political and legal/doctrinal dimensions. New claims were made for the equality principle's applicability to previously unseen or unacknowledged classifications, once assumed to be natural or self-evidently relevant and rationally related to legitimate public objectives but, in time, newly held to be disturbingly, and perhaps illegitimately, "suspect." Across time, new claims challenged the

[3] For the formalist, anti-classification/anti-differentiation approach, see Andrew Kull, *The Color-Blind Constitution* (Harvard University Press, 1992); Herman Belz, *Equality Transformed: A Quarter Century of Affirmative Action* (Transaction, 1991). For the anti-subordination approach, see Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989); Kenneth Karst, "The Supreme Court, 1976 Term – Foreword: Equal Citizenship under the Fourteenth Amendment," *Harvard Law Review* 91 (1977): 1–68; Ruth Colker, "Anti-Subordination above All: Sex, Race, and Equal Protection," *New York University Law Review* 61 (1986): 1003–66; Cass Sunstein, "The Anticaste Principle," *Michigan Law Review* 92 (1994): 2410–55; Reva Siegel, "Equality Talk: Anti-Subordination and Anti-Classification Values in Constitutional Struggles over *Brown*," *Harvard Law Review* 117 (2004): 1470–1547. For a historian's aspirational understanding of the Civil War Amendments, see Michael Vorenberg, "Bringing the Constitution Back In: Amendment, Innovation, and Popular Democracy during the Civil War Era," in Meg Jacobs, William Novak, and Julien Zelizer, eds., *The Democratic Experiment: New Directions in American Political History* (Princeton University Press, 2003); Hendrick Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" *Journal of American History* 74 (December 1987): 1013–34. See also John W. Compton, *The Evangelical Origins of the Living Constitution* (Harvard University Press, 2014). On the contemporary Supreme Court, the anti-classification approach has been articulated by Chief Justice John Roberts, Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007), and an approach more akin to anti-subordination by Ruth Bader Ginsburg, United States v. Virginia, 518 U.S. 515 (1996).

[4] Philip Klinkner and Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (University of Chicago Press, 2002).

disparate treatment of men without property; the poor; women; and racial, ethnic, sexual, gender, and linguistic minorities. Assessments of the legitimacy of these claims involved an acknowledgment, first, of the fundamental and cognizable likeness of all within the class and, second, of the problematic nature of government's disparate treatment between those within and those outside it. This also entailed the problematizing and, ultimately, the delegitimating of the ostensible public purposes adduced to justify the disparate treatment. Subsequent movement along the path involved the gradual enlargement of the circle of protection – the enforcement of the antidiscrimination principle against an expanding array of governmental and nongovernmental institutions: from the federal government to the states to private entities, including private employers, labor unions, private businesses, clubs, and associations.[5]

While true in many important respects, the smooth, ineluctable logic of this familiar template for understanding rights and liberties involving equality in the American constitutional tradition obscures significant dynamics of US constitutional development. As against these conventional understandings, this chapter proposes a pluralist configurative model concerning constitutional equality involving a dynamically unfolding process operating on three distinct but interacting planes: (1) principled, (2) spatial, and (3) temporal.

The principled dimension frankly recognizes *both* the anti-classification *and* the anti-subordination principles as foundational to the nation's (genuinely) creedal commitment to liberty, equality, and justice under law. It signs onto this dual recognition on both normative and positive grounds: that is, on the grounds that it is both *good* and *it is us* – always has been and likely always will be (put otherwise, this plurally principled [or agonistic] creed is constitutive of the US political and constitutional culture).[6]

[5] This radiating process commonly involved: (1) the renegotiation and redefinition of the boundaries of the public and private spheres in the interest of augmenting the pervasiveness of the new norms and (2) the deconstruction of the boundaries between (or compartmentalization of) allegedly distinctive "types" of rights (political, economic, social), typically as a prelude to disassembling wonted social frames separating matters of public (political/legal) concern from others spheres once held to be most appropriately governed by the norms, traditions, and ministrations of civil society. See Mark Tushnet, "An Essay on Rights," *Texas Law Review* 62 (1984): 1363–1403. As Pamela Brandwein has demonstrated, it also potentially involved a willingness to enforce the principle of the equal protection of the laws in a way that required that states take an active role in meeting those guarantees. That is, it could be used to challenge not just "state action" but state inaction as well. Pamela Brandwein, "The Lost Language of State Neglect," in Ronald Kahn and Ken I. Kersch, eds., *The Supreme Court and American Political Development* (University Press of Kansas, 2006); Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (Cambridge University Press, 2011). See also William Stuntz, *The Collapse of American Criminal Justice* (Belknap, 2011). This, however, was a path untaken. See United States v. Reese, 92 U.S. 214 (1876); United States v. Cruikshank, 92 U.S. 542 (1875).

[6] On "agonistic liberalism," see John Gray, *Isaiah Berlin: An Interpretation of His Thought* (Princeton University Press, 2013).

The spatial dimension accounts for the USA's distinctive constitutional architecture and geography, structured by diverse jurisdictional spaces situated in an "overgrown" landscape rich in shared, overlapping, and oppositional powers and institutions.[7] This jurisdictional and institutional hyper-pluralism provides an almost infinite array of beachheads for diverse claims and claimants, and opportunities for enforcement, and resistance, all with some plausible claim to legitimacy.[8]

Finally, contention over principle and jurisdiction (or space) takes place, in the nature of things, across time – time in which concepts, ideologies, and ideas develop, are adopted, and are discarded; institutions evolve, flourish, and decay; processes are fashioned, are instituted, operate, and are played out; events occur in disparate registers at different rates, altering and in some cases transforming the institutional, ideational, political, and social landscapes; and enterprising agents, in ordinary or contentious politics, pursue their objectives.[9]

In sum, so far as equality is concerned, both claim-making and official recognition and enforcement of claims against purportedly discriminatory public and private actors take place in a variegated landscape of jurisdictional and institutional space, characterized by multiple orders that both operate independently and intercur.[10] Both claim-makers and governing institutions and officials have recourse to diverse, even contradictory conceptual logics involving anti-classification and anti-subordination principles, both considered legitimate in the broader legal and political culture. Both claim-making and official recognition and enforcement of those claims are, more-over, subject to time's vicissitudes and dynamics, which occasion complex patterns of settlement and change.[11]

Over the course of US constitutional development, any relatively settled time period will be structured by a multiplicity of *equality configurations*. These micro- and macro-regimes instantiate institutional settlements following a

[7] See Karen Orren and Stephen Skowronek's description of the American polity as resembling "downtown Tokyo." *The Search for American Political Development* (Cambridge University Press, 2004), 22–23.

[8] See Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953–1993* (University of Kansas Press, 1994), on the application of "polity" (structural/jurisdictional) versus "rights" principles by the US Supreme Court.

[9] See Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge University Press, 2004); Ken I. Kersch, "The Talking Cure: How Constitutional Argument Drives Constitutional Development," *Boston University Law Review* 94 (May 2014): 1083–1108. See also Samuel Huntington, *American Politics: The Promise of Disharmony* (Belknap, 1981).

[10] See Orren and Skowronek, *Search for American Political Development*; Karen Orren and Stephen Skowronek, "Beyond the Iconography of Order: Notes for a New Institutionalism," in Lawrence Dodd and Calvin Jillson, eds., *The Dynamics of American Politics* (Westview, 1994).

[11] See Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press, 2004).

robust moment of claim-making during which the equality claims of some square off against potentially countervailing equality, democracy, and liberty claims of others in ways that implicate the countervailing conceptual logics of the polity's diverse jurisdictional spaces. As such, the development of constitutional equality in the United States is consistently characterized by a dynamic that involves the repudiation of formerly countervailing, historically sanctioned, and (in the abstract, at least) normatively desirable, if not sacrosanct, rights claims. These have included claims involving "states rights" (rights of sovereign self-determination of subsidiary political units), property rights, free association and free expression, and religious liberty. Because the principles underlying these countervailing claims are typically held – over the long term and in the broader polity – as not only valued and valuable but, indeed, still in force, such reconfigurative dynamics are systematically erased from the "whiggish" stories of progress that are inherent in conventional readings of history and historical change.[12]

The equality configurations structuring these settlements are durable in that they lock in particular adjudications of this contestation, rendering them stable and path dependent. But they are not unalterably or irreversibly so. As such, the pluralist configurative understanding of constitutional equality I advance here is consistent with "regime politics" models of constitutional development subject to "punctuated equilibria."[13] It does not, however, assume that the regime enforces a hegemonic, cross-cutting ethos or governing order concerning equality. The regime settlement is itself pluralistic, inhabiting the fragmented institutional spaces of the US constitutional order. So, for instance, the anti-classification principle may be held to govern certain regulatory spaces in the public or private spheres, while the anti-subordination principle may be enforced in others, while in still other spaces, other normatively desirable principles (such as majoritarian democracy, private property rights, religious liberty) may be afforded precedence to either of these equality principles.

In particular time-delimited cases, claimants and/or adjudicators will insist that either one or the other is the "true" or proper understanding of constitutional equality or that other normatively desirable principles take precedence over equality considerations. But in the distinctively variegated and pluralistic American constitutional order, multiple settlements inevitably exist simultaneously, applying different equality configurations as the foundational ordering frameworks for the polity's diverse social, political, and

[12] Kersch, *Constructing Civil Liberties*.

[13] Institutions can be knocked off paths and new possibilities opened by "exogenous shocks" such as crises (such as wars and violence, economic collapses, high-profile scandals), political challenges (whether from an opposition party or social movements), "slow-moving" abrasions of intercurrent orders, or other dynamics of incremental change, such as those common to common law legal systems. See Pierson, *Politics in Time*; Orren and Skowronek, *Search for American Political Development*; Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921).

constitutional spaces. Within these spaces, particular equality configurations, operating as micro-regimes, temporarily and provisionally govern particular spaces – whether it be the fifty states, the workplace, the public school, the street, the family, the household, religious institutions, land ownership, public employment, or some other domain. These may be either consonant with or antagonistic to the configurations (regimes) that govern other spaces: there is no reason to believe that one form of configuration will structure all of the polity's significant social spaces in a pervasive manner, across the board.[14]

A PLURALIST CONFIGURATIVE HISTORY: OUTLINE AND DEVELOPMENTAL OVERVIEW

Rights configurations concerning constitutional equality structure both the routine adjudication of normative claims involving equality within a governing regime and the governing frameworks in which this contestation takes place. These configurations are innumerable. While some micro-configurations structure more delimited jurisdictional spaces, others are prominent, overarching, and well known. The most robust big-picture equality claims (national-level party politics) from the early republic through the Jacksonian era involved economic concentrations and the exclusions wrought by economic power. These inequalities were implicated in contention over a range of national constitutional and public policy issues including federal taxation, universal (white) male suffrage, the National Bank, internal improvements, bankruptcy law, the embargo, the tariff, the autonomy of business corporations, monopolies, and the terms of admission of new states. Appealing to the core principles of the contemporary anti-classification principle (as vouchsafing not equality of result but the equality of opportunity promised by an abstracted equal treatment under law), Andrew Jackson's bank veto message (1832) characteristically recognized that "[d]istinctions in society will always exist under every just government," that "[e]quality of talents, of education, or of wealth can not be produced by human institutions," and that "[i]n the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is entitled to protection by law ...." In his very next breath, however, Jackson insisted that the shibboleth of equal treatment under law should not blind anyone to the ways in which appeals to equality can serve to mask class interest, privilege, and subordination – that is, the dynamics of power. "[W]hen the laws undertake to add to these natural and just advantages artificial distinctions ... the humble members of society ... who have neither the time nor the means of securing like favors to themselves, have a right to

[14] See generally Elmer E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* (Holt, Rinehart and Winston, 1960). Dynamics of norm or policy diffusion will be common features of such an order.

complain of the injustice of their Government," Jackson propounded, invok-ing the purportedly contrary anti-subordination principle. For President Jack-son, the pursuit of class equality – which, for him, focused on "the [humble] farmer, mechanics, and laborers" – meant instituting robust majoritarian democracy with an expanded (universal, white male) suffrage, operated on a "winner-take-all" model: when the people rule, the equality of the common man will govern, with equal privileges for all, as opposed to special privileges for the few.[15]

In its time and place, the Jeffersonian egalitarianism advanced by Jacksonian democracy at the national level counseled a respect for government generally, and the national government certainly ("Its evils exist only in its abuses"), but also a heavy emphasis on the constitutional limitations placed on the federal government and a corresponding securing, as against the federal government, of the powers of the states – that is, a relatively strict adherence to the jurisdictional boundaries set by the USA's constitutionally specified federal structure. The general government's "true strength," Jackson maintained, "consists in leaving individuals and states as much as possible to themselves."[16]

Later, this understanding of the relationship between the anti-subordination principle and the arrangement of authority within the US constitutional system was reversed. The late-nineteenth-century Populist Movement, arising from the country's rural Midwestern and southern periphery in response to the social and economic upheaval wrought by industrial and finance capitalism, expressly invoked Jefferson in its push to "restore the government of the Republic to the hands of the 'plain people' with which class it originated," a restoration Populists held to be "identical with the purposes of the National Constitution." This meant stronger government where power was authorized but a government largely limited by the Constitution's terms, thus entailing a large dose of constitutional formalism.[17] Once the Populists and (later) the Progressives captured legislatures, however, the forces pursuing the advancement of the anti-subordination principle in the economic sphere began to deemphasize the constitutional limitations of government, arguing that equality was best furthered by majoritarian presumptions at both the state and federal levels. "Progressive" constitutional theory critical of the aggressive exercise of the judicial review power by courts, as articulated, for instance, by James Bradley Thayer and Oliver Wendell Holmes, Jr., in turn placed a heavy emphasis on the claims of democracy, anchored in the idea of the civic equality entailed by popular rule, as against the countervailing claims of a ruling elite. A powerful state, as Herbert

[15] See generally John Gerring, *Party Ideologies in America, 1828–1996* (Cambridge University Press, 1998) See also Joseph Fishkin and William E. Forbath, "The Anti-Oligarchy Constitution," *Boston University Law Review* 94 (2014): 669–696.

[16] Andrew Jackson, Bank Veto Message (1832).

[17] People's Party Platform (1892); M. Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877–1917* (University of Chicago Press, 1999); Charles Postel, *The Populist Vision* (Oxford University Press, 2007). See Gerard Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (University of Kansas Press, 2007).

Croly would have it, was under modern conditions indispensible to the project of remedying pervasive structural economic inequality.[18]

Even as this general macro-configuration took shape, however, new reform imperatives[19] were brewing that would ultimately prompt the construction of a new constitutional architecture concerning equality. The Progressive movement sided with the governing claims of legislatures and administrative agencies on grounds of both democratic legitimacy and institutional competence and expertise. New theories of democracy – most prominently, the Deweyian pragmatism that had motivated and structured key strains of progressivism – helped construct and privilege new theories concerning the freedom of speech, especially of outsiders to, or vocal opponents of, the decisions made by government officials and popular majorities. These ultimately informed and underwrote a constitutional jurisprudence enforced by counter-majoritarian courts emphasizing the value of equal voice, regardless of content or viewpoint.[20] Invoking the Fourteenth Amendment's equal protection clause and the First Amendment's free exercise clause, racial and religious minorities began to demand equal legal and civic status. Both types of claims were recognized and then implemented by courts, legislatures, and executives at both the state and federal levels.[21]

[18] James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893): 129. Lochner v. New York, 198 U.S. 45 (1905) (J. Holmes, dissenting); Herbert Croly, *The Promise of American Life* (Macmillan, 1909).

[19] Kersch, *Constructing Civil Liberties*. New refusals – doubling down on particular commitments and understandings in a more conservative spirit – might also arise, in particular contexts, and will: political actors will react negatively to bad experiences, which motivate them to staunchly resist particular policies and reform imperatives to vindicate core, traditional principles and traditions or emphasize one core value (e.g., liberty, property) over drives toward innovation. See Kim Lane Scheppele, "Aspirational and Aversive Constitutionalism: The Case for Studying Constitutional Influence through Negative Models," *I-CON* 1 (2003): 296–324. See also Richard Primus, *The American Language of Rights* (Cambridge University Press, 1999).

[20] Abrams v. United States, 250 U.S. 616 (1919) (J. Holmes, dissenting); West Virginia v. Barnette, 319 U.S. 624 (1943); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (using equal protection analysis to resolve free speech issue); Carey v. Brown, 447 U.S. 455 (1980) (using equal protection analysis to resolve free speech issue); Texas v. Johnson, 491 U.S. 397 (1989); Ward v. Rock Against Racism, 491 U.S. 781 (1989); R.A.V. v. St. Paul, 505 U.S. 377 (1992). See Erwin Chemerinsky, "Content Neutrality as a Central Problem of Freedom of Speech: Problems of the Supreme Court's Application," *Southern California Law Review* 74 (2000): 49–64.

[21] On Fourteenth Amendment equal protection as applied to race, see, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886); Shelley v. Kraemer, 334 U.S. 1 (1948); Brown v. Board of Education, 347 U.S. 483 (1954); City of Richmond v. Croson, 448 U.S. 469 (1989); Adarand v. Pena, 515 U.S. 200 (1995). See Hugh Davis Graham, *The Civil Rights Era: Origin and Development of National Policy, 1960–1972* (Oxford University Press, 1990); John Skrentny, *The Minority Rights Revolution* (Belknap, 2002). On First Amendment free exercise considered through the prism of equality, see Lamb's Chapel v. Center Moriches, 508 U.S. 384 (1993); Rosenberger v. University of Virginia, 515 U.S. 819 (1995); Good News Club v. Milford, 533 U.S. 98 (2001); Locke v. Davey, 540 U.S. 712 (2004); Christian Legal Society v. Martinez, 561 U.S. 661 (2010). See generally U.S. v. Carolene Products, 304 U.S. 144, fn. 4 (1938).

Considered in this way, it is clear that concerns for constitutional and civic equality overspill the legalistic category of the Supreme Court's Fourteenth Amendment equal protection jurisprudence. Clearly, claims involving constitutional equality played a major role in popular disputes over public policy well before the words "equal protection" were added to the Constitution's text. And even after the adoption of the equal protection clause, Americans often linked equality claims to other sorts of principled claims, including those involving economic and civil liberties. Within the Supreme Court, the Fourteenth Amendment's equal protection clause, read by the lights of an anti-classification principle proscribing "class legislation," was a pillar of nineteenth-century economic liberties jurisprudence, with race, sex, and other modern classifications rarely figuring in the period's major decisions.[22] Similarly, in the contemporary (post–New Deal) era, equality considerations are plainly implicated in the Court's jurisprudence concerning other liberties, including those involving Congress's power to regulate interstate commerce (which was pioneered by New Deal policy initiatives to enforce anti-subordination principles in the economic sphere) and the individual rights provisions of the First Amendment (to say nothing of the criminal process provisions of the Bill of Rights, which were revised pursuant to a reform imperative concerning race).[23]

PRINCIPLE IN TIME: POWER, JUSTICE, AND EQUALITY THROUGH A DEVELOPMENTAL LENS

From a developmental perspective, the problem of constitutional equality involves a consideration of normative requirements in and across time. A core social-political problem facing morally aspirational societies like the United States is the problem of justice, requiring that each person be afforded his *due*.[24] The reality of power, however, rooted in human appetites and wants – the greed, envy, partiality, bigotry, and pride inherent in human nature – poses a problem for justice.[25] As a society moves forward in time, the many who act upon these desires get and leverage what they get to get more, seeking, winning, and accumulating power. In this way, political and economic development in free, liberal capitalist societies conduces to the uneven distribution – the concentration – of political, economic,

[22] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Duke University Press, 1995).

[23] See Kersch, *Constructing Civil Liberties*; Lucas A. Powe, Jr., *The Warren Court and American Politics* (Harvard University Press, 2000); Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press, 2001).

[24] See Aristotle, *The Nichomachean Ethics*, Book V (Lesley Brown, ed.; David Ross, trans.) (Oxford University Press, 2009). This, importantly, is different from a requirement that each is entitled to *the same*. See US Constitution, Preamble; Sotirios Barber, *Welfare and the Constitution* (Princeton University Press, 2003).

[25] See, e.g., Thomas Hobbes, *Leviathan* (Richard Tuck, ed.) (Cambridge University Press, 1996).

and social power. As such, development in these societies generates "structural" inequalities: it is a hothouse for the germination of new obstacles to justice not present at earlier stages of development. Because, on balance, people in free societies will privilege their own needs and those of the groups to which they belong to those of other individuals and groups, development perpetually gives rise to new theoretical problems concerning the relationship of power to justice.[26]

These problems are dealt with in the unique guises in which they present themselves across time in a changing institutional and political context. This means that every moment in time inherently raises questions about the ways in which existing institutions meet the problems that concentrations of power pose for justice. The result is a collective determination, arrived at deliberately or ipso facto, that currently existing institutions are successful or at least adequate in meeting the requirements of justice or that these institutions are sufficiently settled, and perhaps sacrosanct, and that justice is best, albeit imperfectly, served by the institutional status quo. Or, alternatively, it is determined that reform, if not revolution, is imperative to advance equality in the service of justice. This second determination is possible because human beings are also capable of sympathy, empathy, critical reflection, and moral aspiration. They can see and recognize injustice and are capable of benevolence, selflessness, and sacrifice in organizing around a "reform imperative" in challenging it.[27] Political theory tells us that the situation is further complicated by the fact that problems of political (and constitutional) equality are commonly problems of groups. Partiality and selfishness are to be expected in pluralist polities because selflessness and magnanimity are rare between groups, perhaps even more so than between individuals: human collectivities are inherently morally obtuse. As Hobbes recognized long ago, social and political aggregations pose a challenge to the realization of more inclusive loyalties and higher collective aspirations.[28]

Over time, the "moral attitudes" of powerful or privileged groups will diverge from those of disempowered groups. The former, often self-deceptively, will

[26] Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (Louisville, KY: Westminster John Knox Press, 2013)[1932], 1–3, 16, 11 ["MMIS"]. See also James Madison, *Federalist* 51. I draw extensively in the discussion that follows on the political thought of Reinhold Niebuhr and, to a lesser extent, John Dewey.

[27] See J. David Greenstone, *The Lincoln Persuasion: Remaking American Liberalism* (Princeton, 1993).

[28] Reinhold Niebuhr, *The Children of Light and The Children of Darkness: A Vindication of Democracy and a Critique of Its Traditional Defense* (Charles Scribner's Sons, 1944)["CLCD"], 122; MMIS, 47, 272, 267–68. See also Hobbes, *Leviathan*. The group nature of modern US politics, of course, has been recognized by modern political science, dispassionately, approvingly, and critically. See, e.g., Arthur Bentley, *The Process of Government: A Study of Social Pressures* (University of Chicago Press, 1908); Robert Dahl, *A Preface to Democratic Theory* (University of Chicago Press, 1956); Grant McConnell, *Private Power and American Democracy* (Knopf, 1966); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (W.W. Norton, 1969).

identify their special, personal interests with universal values and the general public interest. They will go to great lengths to do so, seeking to prove these consonances through elaborate intellectual demonstrations that what is best for them personally – the privileges they have claimed – are products of the natural order and the just reward for the application in the economic, political, and social spheres of their uniquely serviceable character, merit, and effort.[29]

Thus equality, where it exists in pluralistic and morally aspirational liberal capitalist polities, tends to be an in-group commitment, afforded only rarely as a matter of course to out-groups, even in relatively enlightened (large) communities. Rivals of roughly equivalent privilege and power are treated as members of the club – respected as worthy opponents in the game – and those of lesser status as the subject of (appropriate) philanthropy.[30]

Given the nature of contemporary constitutional debates in the United States, in which historically informed constitutional theories are sometimes attacked as fatally positivist and without foundations,[31] it is worth underlining that while the framework set out earlier is "historicist" and "relativist," it does not entail a denial of "timeless" moral principles (including justice and the natural equality of man) and foundational eternal truths (like "human nature"). Nor does it downgrade their status as fundamental or even "God given." It simply recognizes and accounts for the fact that those principles live and are applied in the real world, to real human beings, alive in a certain place, time, and context – in the world, if you will, as God created it. So too with the problem of justice.[32]

THE HISTORICAL TRAJECTORY: THE EVOLUTION OF EQUALITY IN THE ANGLO-AMERICAN POLITICAL TRADITION

Although space does not permit a full survey, this section will attempt to situate the American debate over equality within the much longer stream of Anglo-American – and European – thinking about power and justice. One of the most perceptive modern commentators on this subject was the twentieth-century

[29] MMIS, 117. Niebuhr – a vocal anti-communist – observes that this is the mirror image of the equally erroneous communist view that unequal rewards are always unjust.

[30] MMIS, 13. On the clubby membership dynamic, see also C. Wright Mills, *The Power Elite* (Oxford University Press, 1956).

[31] Ken I. Kersch, "Constitutional Conservatives Remember The Progressive Era," in Stephen Skowronek, Stephen Engel, and Bruce Ackerman, eds., *The Progressives' Century: Democratic Reform and Constitutional Government in the United States* (Yale, 2016); Ken I. Kersch, "Beyond Originalism: Conservative Declarationism and Constitutional Redemption," *Maryland Law Review* 71 (2011): 229–82.

[32] In this sense, contra the Kantian idealism of much of the constitutional theory in this era (John Rawls, Ronald Dworkin), which shares much with natural law/natural rights approaches (Harry Jaffa, Robert P. George, Randy Barnett), this approach is Humean – and, given Hume's extensive influence on the Founders, thus has a robust "originalist" pedigree. See James Harris, *David Hume: An Intellectual Biography* (Cambridge University Press, 2015).

Protestant theologian Reinhold Niebuhr. Niebuhr was particularly attentive to the ways in which ideas concerning equality have been shaped by tectonic shifts in social organization. In what follows, I draw on Niebuhr (and, to a lesser extent, the works of John Dewey) in tracing four distinct historical stages: from bourgeois liberalism to "free market" industrial capitalism to the era of the modern state and, finally, the era of civil rights. As we shall see, American constitutional doctrine in the area of equality was not forged in a vacuum; rather, it emerged from a prolonged encounter with the practical problems entailed in justifying, or else challenging, entrenched forms of social, political, and economic authority.

Bourgeois Liberalism

Individual liberty (freedom) in its modern sense was forged under particular historical conditions involving opposition by rising claimants to the cultural, social, economic, and political dominance and subordination instituted and sustained by feudal institutions. In the emergent "bourgeois" society, the demand for middle-class (economic, then political) liberty was made by a vital advancing class understanding the conditions of its own liberation as universal: the freedom achieved in opposition to the feudal order's oppressions was understood as an end in itself. The era's established authority, rooted in claims of divine right and will, reinforced the status quo. Those challenging this monolith appealed to inalienable claims inherent in the rebelling individuals – to pre-political, natural, individual rights. In this way, the revolt against society's limiting hierarchies and associations was theorized as a set of claims confirming the inherent rights of the individual to be free from any and all associations, except those he entered into through his own free (individual) will. Government existed both as a product of this consent (the state of nature and the subsequent social contract) and to preserve the individual's rights, which were his by nature. In moving from claims on behalf of the natural rights of individuals to the establishment of new forms of government, bourgeois liberalism promised to reconcile what Niebuhr described as the "two dimensions of human existence ... man's spiritual stature [inherent in his status as an individual] and his social character [his status as a member of the community]"; that is, "the uniqueness and variety of life, [and] ... the common necessities of all men." Henceforth, the core political questions would be held to involve the relationship between liberty and order, that is, bringing the claims of the individual and those of the community into proper relation.[33]

[33] John Dewey, *The Public and Its Problems* (Henry Holt, 1927) ["PP"], 86–87; CLCD, 2–4, 6–7, 42–43, 52–53. See also John Locke, *Second Treatise of Civil Government* (1689); Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth Century England and America* (Cornell University Press, 1990); Louis Hartz, *The Liberal Tradition in America* (Harcourt, Brace, 1955). Recent work in analytic constitutional theory has brought us right back to this very same point. See, e.g., James Fleming and Linda McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* (Harvard University Press, 2013). See Ken I. Kersch, "Bringing It All Back Home?" *Constitutional Commentary* 28 (Fall 2013): 407–19.

At this early stage, the potential menace of individual rapacity and anarchy – alien concepts, other than theoretically – was hardly considered. The reform imperative that stimulated the invention of bourgeois liberalism called for the removal of political fetters from economic activity: as such, this moment's anti-subordination imperative was realized through the new protections that would be afforded by governments to "natural" economic liberties. The emergent theory justifying this reform did not regard new concentrations of economic power as significant threats under the new order, which had, after all, reversed the then-extant dynamics by undermining feudal and then mercantilist controls. The rivalrous interaction of free, self-seeking individuals in the market, the theory assumed, would keep potentially overweening economic power roughly in check, with a broader view informed by "enlightened self-interest" serving as a stopgap in cases of periodic maladjustment between the interests of the individual and those of the community. As Niebuhr put the point, bourgeois liberalism's "serene confidence in the possibilities of social harmony" was derived both from the genuine achievements of a commercial culture (wealth creation, economic growth, and scientific and technological advance) and from the illusions natural to that culture.[34]

This new liberalism, however, assumed a natural equilibrium of economic power in the community that in the long run simply did not hold. Economic power accumulated, and those who got leveraged what they got to get more. The strong took advantage of the weak. Under the sway of this stage's reigning creed and their understanding of their place within it, the powerful made what they understood to be sensible demands upon the community that the broader community increasingly apprehended as inordinate.[35]

"Free Market" Industrial Capitalism in the Nineteenth-Century United States

Like feudalism before it, bourgeois liberalism lent itself to unique aggrandizements of power. In nineteenth-century England and the United States, the commercial classes converted the precepts of a liberating, anti-hierarchical liberalism into a set of dogmas holding the emancipated to be imbued with special virtues uniquely qualifying them to rule in ways neatly coinciding with their interests.[36] They called for the removal of political restraints upon economic activity and sharp constitutional limits on state power (often justified with

[34] PP, 86–87; CLCD, 2–4, 6–7, 42–43, 52–53. See also Adam Smith, *The Wealth of Nations* (1776).

[35] CLCD, 23, n. 4., 26, 76, 114; Reinhold Niebuhr, *The Irony of American History* (University of Chicago, 1952) ["IAH"], 92–95.

[36] See, e.g., William Graham Sumner, *What the Social Classes Owe to Each Other* (Harper and Bros., 1883); Andrew Carnegie, "Wealth," *North American Review* 148 (June 1889): 653–65; Herbert Spencer, *Social Statics, of the Conditions Essential to Happiness Specified, and the First of Them Developed* (John Chapman, 1851); PP, 204. See also Carol Nackenoff, *The Fictional Republic: Horatio Alger and American Political Discourse* (Oxford University Press, 1994); Hartz, *Liberal Tradition in America*.

reference to the anti-classification conception of equality). While liberal political and economic theorists like William Graham Sumner and constitutional theorists like Christopher Tiedemann stridently condemned the active use of governmental power to advance private interests – Sumner called it "jobbery," underwriting "plutocracy," and Tiedemann held it to be (unconstitutional) "class legislation" – the actual liberal regime ended up proscribing the use of governmental power where it might have been leveraged to equilibrate increasingly cavernous economic power disparities (such as between employers and employees in the emergent wage labor system) and standing down when it was enlisted to advance the interests of the already powerful and well connected.[37] The effect of this under industrial capitalism was to render unprecedentedly coercive concentrations of economic power with significant implications for social well-being largely outside of social control.[38] Classical liberal theory – pioneered in its more ideological laissez-faire version not by Adam Smith and John Locke, empiricists who might have been more sensitive to actual historical developments, but by the more doctrinaire, scientistic French physiocrats like Turgot, Condorcet, and Quesnay (whom Smith criticized as dogmatic) – did not account for the inordinate and disproportionate development of economic power.[39] At its most naïve and self-serving, the ideology posited, as an afterthought, a superintending dogma that the general welfare is advanced by imposing the fewest possible limits on economic activity. As such, the interests of the profit-seeking individual or corporation and the public interest were, by definition, one and the same.[40] These understandings were, in turn, reflected in the jurisprudence of the late-nineteenth- and early-twentieth-century US Supreme Court.[41]

Over time, the accumulation of social power by those who initially won and succeeded was leveraged through relentless enterprise to secure new conquests,

[37] See, e.g., Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (W.W. Norton, 2011).

[38] MMIS, 14–15.

[39] See CLCD, 108–9. Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment* (Harvard University Press, 2013); Martin Albaum, "The Moral Defenses of the Physiocrats Laissez-Faire," *Journal of the History of Ideas*, 16 (1955): 179–97.

[40] MMIS, 8–9, 33; CLCD, 29. Some have held this to be a later development, not attributable to the original physiocrats, but nevertheless ensconced by the nineteenth century. See Thomas P. Neill, "The Physiocrats' Concept of Economics," *The Quarterly Journal of Economics*, 63 (1949): 532–53.

[41] IAH, 99. See, e.g., *Slaughterhouse Cases*, 83 U.S. 36 (1873) (J. Field, dissenting); Munn v. Illinois, 94 U.S. 113 (1877) (J. Field, dissenting); Lochner v. New York, 198 U.S. 45 (1905) (J. Holmes, dissenting). See also Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Little, Brown, 1868); David J. Brewer, "The Nation's Safeguard," in *Proceedings of the New York State Bar Association, Sixteenth Annual Meeting* (New York State Bar Association, 1893).

greater gains, and the acquisition of even more property – unimpeded save by would-be state coercion in the interest of justice.[42]

Contentious Politics and the Countervailing Power of the Modern American State

The sense of many late-nineteenth and early-twentieth-century Americans that they were living by the dictates of inordinate economic (and, in turn, social and political) power paralleled the dynamics that had first occasioned the birth of liberal individualism. The new claimants, as Niebuhr put it, had lost confidence in their power to navigate the world as self-determining individual agents; they felt themselves to be "not . . . individual[s], as more privileged persons are . . ."[43] Their grievance was accentuated by the cognitive dissonance inherent in their sense of growing powerlessness as individuals at the very moment which celebrated to the point of myth the agency, power, and value of the self-directed individual.[44] It was precisely this predicament that was registered first by the Granger movement, then by Populists, and, in turn, by the labor movement and the Progressives, the last of whom began calling for a more active government focused on creating the conditions for giving all Americans a "Square Deal."[45] Its understandings were ultimately incorporated into the constitutional reasoning of Supreme Court justices like John Marshall Harlan and Charles Evans Hughes, who were willing to rethink the entrenched dogmas of their wonted analytical frameworks by accepting, for instance, the plausibility of a legislature's determination that employer and employee did not stand on the equal footing assumed by the prevailing doctrine of "liberty of contract."[46]

In their initial incarnations, these rising claimant movements commonly appealed to the countervailing sensibilities of fraternity and solidarity – that

[42] While this diagnosis and prescription are largely synonymous with the "Madisonian" diagnosis of the political problem posed by faction and the institutional solution of simultaneously empowering and limiting government (see, e.g., George Thomas, *The Madisonian Constitution* [Johns Hopkins, 2008]), Niebuhr argued that Madison's *Federalist* 10 attached "too great a significance . . . to inequality of faculty as the basis of inequality of privilege." What Madison did not recognize was that "unequal [economic] power . . . is a social and historical accretion." CLCD, 65–66. "Differences in faculty and function do indeed help to originate inequality of privilege." But "they never justify the degree of inequality created, and they are frequently not even relevant to the type of inequality perpetuated in a social system." MMIS, 114. The situation in the late-nineteenth- and early-twentieth-century United States was particularly egregious in this regard. CLCD, 98–100.

[43] MMIS, 176–77; CLCD, 57.

[44] PP, 95–97. See also Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (Doubleday, 1913).

[45] Croly, *Promise of American Life*; Theodore Roosevelt, *The New Nationalism* (The Outlook Company, 1910).

[46] Lochner v. New York, 198 U.S. 45, 69 (1905) (J. Harlan, dissenting); West Coast Hotel v. Parrish, 300 U.S. 370, 493–394 (1937) (C. J. Hughes, for the Court). See also PP, 62–63.

is, to the claims of community. When legislatures targeted by Populist, Progressive, and labor movement reformists moved to mitigate power imbalances through group-oriented regulatory and social reform legislation (e.g., antitrust laws, rate regulation, legal support for unionization, the removal of sanctions for strikes and boycotts, workplace health and safety laws, minimum wage and maximum hours laws, mothers' and old-age pensions), their animating paradigm clashed with the then regnant liberal individualist jurisprudence predominating on the courts. Opponents of reform – from Supreme Court Justice Stephen J. Field to legal commentators like Tiedemann – apprehended and anathematized the novel forms of regulation as not only aberrant but heretical in their purported hostility to individual liberty.[47]

This clash was thought to be – or at least described as – existential, and it fueled considerable violence and resistance.[48] Confronting strikes, boycotts, sabotage, and even, at the extremes, targeted assassinations (by anarchists), liberal individualists identified the status quo with social peace, order, and the rule of law. They identified their antagonists with violence, strife, disorder, lawlessness, class warfare, and anarchism.[49] Because liberal individualists saw themselves as defending common sense morality and basic decency, they rarely hesitated to call upon the state's police powers to defend society from the forces of nihilism and immorality. The police power, in turn, was described as neutral and impartial, though it is clear, at least in hindsight, that it was closely aligned with the forces of the status quo.[50]

[47] MMIS, 176–77. See Munn v. Illinois, 94 U.S. 113 (1877) (J. Field, dissenting); U.S. v. E.C. Knight, 156 U.S. 1 (1895); Pollack v. Farmers' Loan and Trust Co., 157 U.S. 429 (1894) (Argument of Joseph H. Choate, for appellant). See generally Joseph Postell and Johnathan O'Neill, eds., *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era* (Palgrave Macmillan, 2013).

[48] See Robert Justin Goldstein, *Political Repression in Modern America, 1870 to the Present* (Schenckman Publishing Co., 1978); Nick Salvatore, *Eugene* V. *Debs: Citizen and Socialist* (University of Illinois Press, 1982); David Rabban, *Free Speech in Its Forgotten Years, 1870–1920* (Cambridge University Press, 1999); William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton University Press, 1994).

[49] See, e.g., Rabban, *Free Speech in Its Forgotten Years;* Victoria Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton University Press, 1993); Daniel Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (University of Illinois Press, 1995); MMIS, 129–31. See also Emma Goldman, "Anarchism: What It Really Stands For," in Goldman, ed., *Anarchism and Other Essays* (Mother Earth, 1910).

[50] MMIS, 129–31. See *In re Debs*, 158 U.S. 564 (1895). Liberal individualists, of course, understood their own violence as provoked, defensive, and in the service of law and order – and, hence, justified. See also Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (Oxford University Press, 2016).

From Economics to Civil Rights: The Case of Subsequent Subject Classes in US Constitutional Development

The long New Deal restructured the animating logic of the state to account for imbalances of economic power in the interest of justice. The new liberal constitutionalism that authorized and justified this new status quo assimilated its ethos and logic. While initially formulated in the economic realm, it was in turn applied to other areas raising long-standing and significant problems of equality, including, most importantly, race and gender. The main lines of advocacy and debate in both areas had long tracked the (classical) liberal individualism that came to predominate in the economic sphere: appeals were made to timeless natural rights, understood by the lights of the laws of nature, as vouchsafed, for instance, by the Declaration of Independence. The new liberalism and its concerns for the real-world actualities of hierarchical power relations (as sanctioned by natural law theories) set the stage for the possibility of alternative theories concerning constitutional equality. The doctrinal adjustments made to incorporate into constitutional law the historical realities of the relationship between power, justice, and the state in the economic realm came to foundationally structure the New Deal liberal state. Stated otherwise, they became part of its governing logic and ethos and were thus, in turn, subsequently applied by state actors and institutions to other forms of unequal group power.[51]

The ideational landscape, however, was complicated by the developmental trajectory. Many Progressives and their progenitors, starting from strong republican or Christian premises, placed significant if not surpassing emphasis on the claims of community, with some like Lester Ward and Henry Wallace boldly proclaiming the age of the individual to have passed.[52] Others, however, appealed to liberal individualist frameworks, recognizing the realities of power according to the "race of life" metaphor: the race run by free individuals to claim the prize was not fair if some were hobbled or handicapped at the starting line.[53] Herbert Croly and Theodore Roosevelt insisted on a more active, power-cognizant state in

[51] The typically cited harbinger in the Supreme Court's jurisprudence is U.S. v. Carolene Products, 303 U.S. 144, fn. 4. See generally David Plotke, *Building a Democratic Political Order – Re-shaping American Liberalism in the 1930s and 1940s* (Cambridge University Press, 1996); Anne Kornhauser, *Debating the American State: Liberal Anxieties and the New Leviathan, 1930–1970* (University of Pennsylvania Press, 2015); Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (University of Chicago Press, 2004).

[52] Lester F. Ward, *The Psychic Factors of Civilization* (Ginn & Co., 1893) ("How can society escape this last conquest of power by the egoistic intellect? ... There is one power and only one that is greater than that which now chiefly rules society. That power is society itself ... The individual has reigned long enough. The day has come for society to take its affairs into its own hands and shape its own destinies."); Henry A. Wallace, *New Frontiers: A Study of the Mind of America and the Way That Lies Ahead* (Reynal & Hitchcock, 1934) ("The keynote of the new frontier is cooperation just as that of old frontier was individualistic competition.").

[53] Abraham Lincoln, Message to Congress (July 4, 1861); Abraham Lincoln, Speech to the 166th Ohio Regiment (Washington, D.C., August 22, 1864). See Isaac Kramnick, "Equal Opportunity and 'The Race of Life': Reflections on Liberal Ideology," *Dissent* (Spring, 1981): 178–87; Isaac Kramnick, "The Ideals of the Enlightenment," in Kramnick, ed., *The Portable Enlightenment Reader* (Viking Penguin, 1995).

formulating their theory of the "Square Deal," as Woodrow Wilson did in setting out his "New Freedom" and then Franklin Roosevelt in explaining and implementing his "New Deal." Thus, while twentieth-century "New" or "New Deal" liberals routinely advocated for the expansion of state capacities, they also insisted that the claims of the community were important precisely because they were essential to the (re)liberation of the individual.[54]

About the same time, liberals committed to civil rights began to challenge conventional understandings of women's "nature" that had long confined women to the roles of wife and mother and largely excluded them from work outside the home and from political participation in the public sphere.[55] Once more, privilege and power were justified as resulting not from political choices but rather from the dictate of nature's eternal laws. Here, both bourgeois liberal individualism and a cognizance of the dynamics of consolidated group power (as analogized to the former position of labor under industrial capitalism) served potentially liberating functions when husbands, and men more generally, were held to occupy a position in which they could potentially wield tyrannical power (patriarchy as feudal or oligarchic). In this context, full political voice for women as civic equals required both equal voting rights and, in turn, the option (if not reality) of economic independence. Historical developments set the stage for the recognition of the status quo in these regards as fundamentally unjust.[56]

Religious hierarchies, too, began to appear suspect. In the late nineteenth and early twentieth centuries, the mass immigration of Roman Catholics, Jews, and other non-Protestants, together with the leaps-and-bounds advance of scientific rationalism and understandings of human evolution (undermining widespread literal and traditional understandings of the Bible), posed challenges to the authority and privileged status of Protestant Christianity. Niebuhr contemplated the possibilities for a comprehensive solution to this decline in the authority of the country's traditionally constitutive religion(s) that might be consonant with the governing ethos of the New Deal liberal order. He concluded that three approaches to religious and cultural diversity were available to the twentieth-century liberal West. The first, followed by (pre–Vatican II) Roman Catholicism, insists that diversity be overcome and the

[54] See Steve Fraser, *The Age of Acquiescence: The Life and Death of American Resistance to Organized Wealth and Power* (Little, Brown and Co., 2015). This Square Deal understanding is the (unacknowledged) basis and predecessor of the "justice as fairness" understandings of Kantian liberal political theory of the late twentieth century as framed, most prominently, by John Rawls. John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

[55] The boundaries of these roles were reworked for nonwhites: African American women, for instance, often worked outside the home.

[56] CLCD, 76–77; MMIS, 46–47. See Bradwell v. Illinois, 83 U.S. 130 (1873); Jane Addams, "If Men Were Seeking the Franchise," *Ladies Home Journal* 30 (June 1913), 21.

original unity of the one "True Faith" and culture be restored. The second, secularism (akin to the French model of *laicite*), disavows society's traditional religions. The third recognizes religious vitality while supporting and celebrating religious diversity. Where religion is concerned, single-mindedness, if not fanaticism, is common, and humility and tolerance rare (toleration, after all, "requires that religious convictions be sincerely and devoutly held while yet the sinful and finite corruptions of these convictions be humbly acknowledged; and the actual fruits of other faiths be generously estimated"). Niebuhr advocated the third option, which was the option most consonant with the liberal, New Deal order and was, in fact, instituted by the US Supreme Court in its First Amendment doctrine, in decisions initiated, instituted, and implemented under the broader rubric of civil liberties.[57]

When confronted with challenges to white supremacy, many Progressive social scientists found support for racial hierarchy, subordination, and privilege in modern science. But others, drawing from new departures in anthropology, insisted upon racism's irrationality and looked hopefully to education to solve "the problem of the color line."[58] For those fighting for genuine civil equality, the actual historical situation posed innumerable challenges. The dominant, as is usually the case, strived to maintain their place in the social and civil hierarchy.[59] And within that hierarchy, American blacks were both the subject class and race, denied equality "on any terms," whether current incapacity (assuming an inability to act as self-directing liberal individuals) or ascriptive (congenital/genetic) incapacity – whatever it took.[60]

[57] CLCD, 120, 126, 130, 137. Niebuhr was an outspoken critic of "the inflexible authoritarianism of the [pre–Vatican II] Catholic religion." CLCD, 128. Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Ewing, 330 U.S. 1 (1947); Zorach v. Clauson, 343 U.S. 306 (1952); Engel v. Vitale, 370 U.S. 421 (1962); Sherbert v. Verner, 374 U.S. 398 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971); Wisconsin v. Yoder, 406 U.S. 205 (1972); Employment Division v. Smith, 494 U.S. 872 (1990); Lee v. Weisman, 505 U.S. 577 (1992); Rosenberger v. University v. Virginia, 515 U.S. 819 (1995); Good News Club v. Milford, 553 U.S. 98 (2001); McCreary v. ACLU of Kentucky, 545 U.S. 844 (2005). See Kersch, *Constructing Civil Liberties*; Howard Gillman, "Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism," in Kahn and Kersch, *Supreme Court and American Political Development*; Kahn, *Supreme Court and Political Theory*; Powe, *Warren Court and American Politics*. See also Murray, *We Hold These Truths*, setting out the Vatican II Roman Catholic constitutional theory that sought to reconcile traditional Catholic theology with this modern, New Deal liberal understanding; John F. Kennedy, Speech to the Greater Houston Ministerial Association (September 12, 1960).

[58] See, e.g., Franz Boas, "The Instability of Human Types," in Gustav Spiller, ed., *Papers on Interracial Problems Communicated to the First Universal Races Congress Held at the University of London, July 26–29 (1911)* (Ginn and Co., 1912), 99–103; Franz Boas, "New Evidence in Regard to the Instability of Human Types," *Proceedings of the National Academy of Sciences of the United States of America*, 2 (December 15, 1916): 713–18. W. E. B. DuBois, *The Souls of Black Folk: Essays and Sketches* (A.C. McClung and Co., 1903).

[59] CLCD, 138–39; MMIS, 253.

[60] MMIS, 119–20. See Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review* 87 (September 1993): 549–66.

Southern blacks were denied the vote on the grounds of their ignorance and illiteracy but at the same time denied the education that would have remedied this debility. Where blacks, southern and otherwise, were in fact literate and educated, other reasons – or no reasons – were adduced to justify the denial of those same rights; ultimately, subjection itself was the only point. "The real crime of any minority group," Niebuhr insisted, "is that it diverges from the dominant type; most of the accusations leveled at these groups are rationalizations of the prejudice aroused by this divergence. The particular crime of the Negroes is that they diverge too obviously from type," thus presenting the problem of power and the group in its purest form.[61] The same dynamics met immigrants to the United States from unfamiliar regions of the world, like southern and eastern Europe or Asia: the possibility of assimilation was perpetually bedeviled by belief, *tout court*, in northern European superiority.[62] It was this that the Civil Rights Movement fought, ultimately achieving notable victories in all three branches of the federal government and in states as well – victories that implemented new regimes and micro-regimes newly enforcing, in disparate spaces, both the anti-classification and anti-subordination principles.[63]

BEYOND THE "WHIGGISH" NARRATIVE OF CONSTITUTIONAL EQUALITY

In the middle decades of the twentieth century, the familiar characterization of the developmental path of constitutional equality – as unidimensional, linear, and culminating in the establishment and consolidation of the New Deal liberal constitutional order – began to acquire the status of orthodoxy. A good deal of history was buried in the process. Before the 1930s, as we have seen, courts did not have robust equality jurisprudences conceptually and doctrinally distinct from their (usually economic) liberty jurisprudences.[64] And yet claims involving charges of the illegitimate operation of unequal power nonetheless figured prominently in political party and social movement contestation. Given that nineteenth- and early-twentieth-century courts, in their constitutional, common law, and statutory rulings alike, were indifferent if not hostile to these claims,[65]

[61] CLCD, 141. [62] CLCD, 140, 143–44. See PP, 115.

[63] Mark Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (University of North Carolina Press, 1987); Michael J. Klarman, *From Jim Crow to Civil Rights* (Oxford University Press, 2004); Graham, *Civil Rights Era*; Skrentny, *Minority Rights Revolution*; Doug McAdam, *Political Process and the Development of Black Insurgency, 1930–1970* (University of Chicago Press, 1999); Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Harvard University Press, 2014).

[64] See, e.g., Bradwell v. Illinois, 83 U.S. 130 (1873); U.S. v. Susan B. Anthony, 24 Fed. Cas. 899 (1873); Yick Wo v. Hopkins, 188 U.S. 356 (1886); Plessy v. Ferguson, 163 U.S. 537 (1896); Buchanan v. Warley, 245 U.S. 60 (1917).

[65] See, e.g., Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge University Press, 1991); Hattam, *Labor Visions and State Power*;

Populist and Progressive reformers typically advocated for judicial deference to legislatures. Lawmakers, not judges, would be empowered to confront the problem of unequal economic power directly through the enactment of new forms of tax, regulatory, administrative, and social welfare legislation.[66] Once these movements had achieved political victory and launched the New Deal and post–New Deal liberal state, however, the true nature of constitutional equality in the United States – and, in particular, the long history of contestation between conflicting rights claims – went underground. Politicians and theorists with systematizing ambitions alike claimed that their ruling program had all but resolved the purported conflicts between liberty and equality.[67] The regulatory, redistributive, and jurisprudential policies of the liberal Democrats, the constitutional understandings of their judges, and the governing regime they established promised, at long last, a permanently free and equal United States.

This, of course, was not and could never have been true given the nature constitutional principle in the nation's complex, heterogeneous, pluralistic, liberal democratic constitutional order. My own work has documented the ways in which earlier movements concerned with unequal power relations frankly pitted their own claims against the plausible, contending constitutional rights claims of others, both extant and future.[68] The consolidation and construction of the New Deal rendered the resolution of these oppositions automatic, mechanical – a matter of routine administration, the technical business of governance. This new regime was not simply Progressivism carried forward. Rather, it involved the implementation of a complex system of rights administration in which different social spaces – the school; the workplace; the streets; the economic marketplace; the public and private spheres generally; national, state, and local jurisdictions; and so forth – were each configured by bespoke micro-governance regimes, each entailing a distinctive, rank-ordered preferencing of the competing claims democracy (collective self-determination through public deliberation), community (forging a common social identity), or management (instrumental rationalities employed to create the conditions to accomplish specific policy goals) deemed most appropriate for

Rabban, *Free Speech in Its Forgotten Years*; George Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge University Press, 2010). See also Ross, *Muted Fury*.

[66] Ken I. Kersch, "The Gilded Age through the Progressive Era," in Mark Tushnet, Mark Graber, and Sanford Levinson, eds., *Oxford Handbook on the United States Constitution* (Oxford University Press, 2015); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge University Press, 1982); Sanders, *Roots of Reform*; Eldon Eisenach, *The Lost Promise of Progressivism* (University of Kansas Press, 1994); Fraser, *Age of Acquiescence*.

[67] See Rawls, *Theory of Justice*; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977). See Lawrence Lessig, "Post Constitutionalism," *Michigan Law Review* 94 (1986): 1422–70; Bernard Williams, "Why Philosophy Needs History," in Williams, ed., *Essays and Reviews, 1959–2002* (Princeton University Press, 2014).

[68] Kersch, *Constructing Civil Liberties*.

that space.[69] To complicate things further, these regimes did not (necessarily) remain stable: they and the broader New Deal liberal regime, after all, were perpetually moving forward in time, with all the developmental dynamics that process entails: changing institutions and political coalitions, exogenous shocks (wars, economic crises, scandals), and social movement pressures altering the ideational landscape and perceptions of reform imperatives.[70]

As an illustration of these dynamics, consider the case of the labor movement and its relation to the New Deal/Great Society liberal state. Earlier work has mapped the ways in which, under the National Labor Relations Act (Wagner Act), organized labor won broad rights to organize and, in turn, bargain collectively in the workplace under National Labor Relations Board (NLRB) supervision. This triumph, and the new governing order for the workplace it instituted, proudly flew under the banners of both (majoritarian) democracy and equality (the equalization of economic power). But once the next equality reform imperative arrived – racial equality/civil rights – union claims of (democratic) autonomy and power were newly understood as *barriers* to equality. Recognizing this, the courts, in turn, renegotiated – that is, placed new limits upon – labor union democracy and autonomy (power) to allow for the achievement of new goals concerning race discrimination in the workplace.[71]

As part of the project of empowering labor union democracy in the immediate aftermath of the establishment of this new managerial order for the workplace, moreover, the NLRB worked actively and aggressively to manage political speech associated with labor union elections by inventing and applying a "laboratory conditions" model for speech that authorized the active regulatory policing of electoral speech in the interest of ensuring nonemotional, reasoned, and rational discussion and political debate and cleansing the electoral process of manifestations and assertions of unequal discursive power.[72] This managerial

[69] Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press, 1995).

[70] See David Karol, *Party Position Change in American Politics: Coalition Management* (Cambridge University Press, 2009); Edward Carmines and James Stimson, *Issue Evolution: Race and the Transformation of American Politics* (Princeton University Press, 1990); Frank Baumgartner and Bryan Jones, *Agendas and Instability in American Politics*, 2nd ed. (University of Chicago Press, 2009); Gerald Berk, Dennis Galvan, and Victoria Hattam, eds., *Political Creativity: Reconfiguring Institutional Order and Change* (University of Pennsylvania Press, 2013).

[71] Ken I. Kersch, "The New Deal Triumph as the End of History? The Judicial Negotiation of Labor Rights and Civil Rights," in Kahn and Kersch, *Supreme Court and American Political Development* (2006); Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* (Cambridge University Press, 2015); Sophia Z. Lee, *The Workplace Constitution: From the New Deal to the New Right* (Cambridge University Press, 2014). These initiatives were ultimately capped by the enactment of the Civil Rights Act of 1964.

[72] Ken I. Kersch, "How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech," *University of Pennsylvania Journal of Constitutional Law* 8 (March 2006): 255–97.

understanding of free speech flatly contradicted the ostensible First Amendment requirements of free speech in other domains that emphasized the foundational value in a democracy of speech that was "uninhibited, robust, and wide-open," with "political" speech of the sort associated with elections the foundational and quintessential category of "high value" speech secured by these norms.[73] Moving forward, both of these models of speech – the managerial (concerned with power inequalities) and the libertarian (concerned with individual autonomy) – remained available for adoption as the governing norm in the polity's diverse social spaces. When the managerial model, as applied to a particular space in the modern liberal pluralist polity, was confronted with First Amendment challenges, courts often held that the matter did not implicate free speech questions at all.

In the aftermath of the New Deal and the "rights revolution," the managerial model concerned with power relations pioneered by organized labor and its state sponsors was adopted and promoted by (many) feminists and civil rights activists, underwriting sharp limits on workplace (and college and university) speech under "hostile environment" understandings of sexual harassment and so-called "hate speech" and calls for the regulation of campaign finance. This is not to say that courts did not reject this managerial model as applied to other spheres, domains, and contexts: they did, to growing effect as Republicans/conservatives drew attention to the managerial nature of particular domains and the ways their governing regimes ran counter to the libertarian model commonly applied in other spheres – a model that was more consistent with the rhetorical ballast underwriting modern free speech doctrine.[74] Such conflicts between equality claims and other legitimate and important rights claims involving, for instance, religious liberty, the freedom of association, property rights, or rights to democratic self-government are endemic to – indeed, constitutive of – the complex, decentralized, rights-suffused, pluralistic, multi-jurisdictional modern liberal US constitutional order.

[73] New York Times v. Sullivan, 376 U.S. 254 (1964). See also Whitney v. California, 274 U.S. 357 (1927) (J. Brandeis, concurring); Palko v. Connecticut, 302 U.S. 319 (1937); West Virginia v. Barnette, 319 U.S. 624 (1943); Brandenberg v. Ohio, 395 U.S. 444 (1969).

[74] See, e.g., Citizens United v. FEC, 558 U.S. 310 (2010); Rosenberger v. University of Virginia, 515 U.S. 819 (1995); Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston, 515 U.S. 557 (1995). See Catherine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press, 1979); Mari Matsuda, Charles Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview, 1993); David E. Bernstein, *You Can't Say That! The Growing Threat to Civil Liberties from Anti-Discrimination Laws* (Cato Institute, 2003); Alan Kors and Harvey Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campus's* (Harper Perennial, 1999); Robert P. George, *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* (Intercollegiate Studies Institute, 2016); Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Regnery, 2015).

CONCLUSION: NATURAL LAW, LIVING CONSTITUTIONALISM, AND THE PURSUIT OF JUSTICE

While a natural law/natural rights framework advanced in the right spirit is of immense value to those committed to liberty, equality, and justice, those who wield it as dogma tend to vitiate both that framework's value and its promise. This is necessarily the case in complex, pluralistic, morally aspirational modern societies like the United States. While individuals and communities may aspire to virtue and justice, most will nevertheless in the end incline toward advancing their own individual interest or that of their associated group (faction), entailing conflict if not violence.[75] The fact that the appeal has been made to the laws of nature and nature's God determines little, since in politics pure reason and morality are applied by actual human beings – creatures of bias, interest, or "Original Sin."[76] When employed in politics, natural rights/natural law principles cannot be offered purely: they are by nature relative and contingent – mediated by virtue of being interpreted and applied by actual human beings in complex contemporaneous contexts. When the question involves the reach and powers of government in free liberal states – limited to preserve the liberty of the individual and strengthened and extended to advance the collective interest of the whole – the precise balance cannot be resolved apodictically.[77]

Put otherwise, moral principles in the abstract and moral principles in politics are not the same thing. Equality is a transcendent principle of timeless natural law. But if the principle of equality is welded too securely to a particular historical understanding of its requirements, it can function as a defense of unwarranted privilege. Political principles, moreover, are not the same thing as particular *applications* of political principles. Specific applications mean different things in different contexts or periods, which are inevitably characterized by different constellations of power and ambition.

In the United States, at least, appeals to pure principle are a coin of the realm, the currency used both to attack and rationalize unjust systems of power. There is no simple formula for deciding when, under particular historical circumstances and conditions, the invocation of the principle is performing one function rather than the other. For this reason, the sanctification of pure principle and the dogmatic claim that a faith in that principle is one's "special possession" – exempting one, one's group, and one's application of the principle from attack for the way that they have (ostensibly) applied it to a particular set of contingent arrangements – ultimately betray the prospects for the future realization the principle itself, and the truths it entails, to public life.[78]

Moral realism thus foists upon the polity the perpetual responsibility of reassessing the balance in public policy between the claims of the individual

[75] MMIS, 257–59. See Madison, *Federalist* 51 ("If men were angels, no government would be necessary.").

[76] CLCD, 72. [77] CLCD, 54, 73. [78] CLCD, 74–75.

and the community. Instead of apodictically applying natural rights theories to politics – or else attempting to reconcile the principles of liberty and equality via a formulation of justice that stands outside of history – commentators would do better to attend to "the indeterminate possibilities of historic vitalities, as they express themselves in both individual and collective terms."[79] Political responsibility, political morality, and political ethics require endless elaboration and accommodation by law.[80] Living constitutionalism provides the space for this elaboration. This process does not, as is sometimes alleged, banish morality and ethics from politics but rather provides space for these ideals and commitments to be realized across the unfolding of political time. Good and effective – indeed, truly principled – governance requires attentiveness to the conditions and problems a society actually faces in a changing interconnected, complex modern social and economic order.[81] As the nation's constitutional institutions (the Presidency, the states and their governments, Congress, the Supreme Court) and its political institutions (political parties, administrative agencies, etc.) move forward through time, while social and economic institutions (the family, the business corporation) change and are changed around them, institutions no longer fill, or fill in the same way, the functions those who created them intended or imagined. Constitutional scholars, to say nothing of constitutional and political actors, *must* confront these changes, since they constitute the setting for actual, lived constitutional and political life.[82]

The point is not simply to observe that conflicts over the meaning of equality are endemic to modern liberal democracies and require resolution as part of the ordinary business of constitutional politics and law. It is that these conflicts are inherently and, from a philosophical and political science point of view, irremediably historical and developmental: they cannot be resolved as a "matter of principle" without undertaking the more grounded task of considering them in their historical, developmental context. Questions of constitutional equality cannot be either understood or resolved in isolation from questions of constitutional history and development.

[79] CLCD, 59. [80] See CLCD, 61.
[81] PP, 46–47. See Graham Wallas, *The Great Society: A Psychological Analysis* (Macmillan Co., 1914).
[82] CLCD, 101. This was no heresy to an earlier generation of seminal Straussian constitutional theorists either. See, e.g., Martin Diamond, "What the Framers Meant by Federalism," in Robert Goldwin, ed., *A Nation of States* (Rand McNally, 1963).

PART II

STRUCTURE

Placing a group of essays on the Constitution under the heading "structure" will, to a modern reader, seem entirely natural. As it turns out, structure as we understand it today is a relatively recent idea, not often encountered before the eighteenth century. To be sure, political theorists as ancient as Aristotle and Polybius classified constitutional "forms" according to how their differing arrangements of rulers and peoples expressed diverse principles of government. By the time of the American framers, "structure" meant something more abstract, more scientific, that is, a stable positioning of parts within any larger whole, no longer a matter of classification but a product of active endeavor. When the author of *The Federalist* writes that the greatest error made by the architects of the Articles of Confederation was in "the structure of the Union," he doesn't attribute the mistake to flawed principles but to a failure to design "the building" correctly. In this regard, the Constitution was a new undertaking in human history: "It seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."[1]

In Supreme Court opinions before the Civil War, the word "structure" appears only sparingly; it is far less frequently used than the word "principles." This gap in usage narrows over time, while "structure" itself broadens its meaning. Originally connoting at the start a permanent framework, in the nineteenth century it takes on a more flexible meaning of *arrangement*; today's understanding includes the idea of coherence and functionality, even integrity.[2] Unvarying, however, in this legal-historical setting is a preoccupation with problems *of* structure, under the name of sovereignty, to refer to the structure's

[1] James Madison, *Federalist* 1 and 14. http://avalon.law.yale.edu/18th_century/fed01.asp.
[2] John Compton and Karen Orren, "Categories of Constitutional Analysis: An Historical Inquiry," paper presented at the meeting of the Law and Society Association meetings, Seattle, 2015.