

# Equal Protection and the Idea of Equality

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## Introduction

Few subjects are more central to contemporary constitutional law than the equal protection of the laws.<sup>1</sup> As well, few subjects are more central to legal, political, social, and ethical philosophy than the idea of equality itself.<sup>2</sup> Undeniably, the crucial term “equal” in the context of the equal protection of the laws must bear some significant relation to some central meaning of the idea of equality. There must be a linkage, of whatever sort, between the equal protection of the laws and the idea of equality itself.

Oddly, though, the most crucial Supreme Court discussions on equal protection bear only modest indication, either direct or indirect, explicit or implicit, and however diluted, of any of the leading historic, traditional, or contemporary understandings of the idea of equality itself.<sup>3</sup> This odd state of affairs calls for some explanation, if not also for a remedy.

The problem is thus not that the Court adopts, if only implicitly, some historic or traditional understanding of the idea of equality, as opposed to any of the leading contemporary theories of equality. That practice would raise only standard questions of the proper methods of constitutional interpretation, including the role of originalism.<sup>4</sup>

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1. *See infra* Part I.

2. *See infra* Parts II, III, IV, V, VI. This is not necessarily to equate any form of equality with justice. Until we adopt some theory to the contrary, some forms of inequality may be just and some equalities may be unjust. *See* Shlomi Segall, *Why Egalitarians Should Not Care About Equality*, 15 ETHICAL THEORY & MORAL PRAC. 507, 508 (2012). Nor will the various conflicting forms and measures of equality sort themselves out without some further principle. *See* S.I. BENN & R.S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 132 (1959).

3. *See infra* Part I; *see also* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996) (arguing that the courts should forego strict adherence to stare decisis if reliance on outdated principles of previous cases would fail to do justice in the cases before them).

4. For contemporary discussions of one or more forms of originalism in constitutional adjudication, *see*, for example, JACK M. BALKIN, LIVING ORIGINALISM (2011); ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL

The problem is instead deeper. The focus is not on a struggle between historic and contemporary meanings of equality. The focus is instead on the fact that the Court seems uninterested in—and is typically uninfluenced, even indirectly, by—any prominent understandings of the meaning and the normative implications of the idea of equality. It is thus not that the Court typically relies on what some would consider an obsolete, unjustified, or otherwise defective theory of the idea of equality.<sup>5</sup> It is rather that the Court does not rely, even implicitly, on *any* coherent broader understanding of equality.

This does not mean that the Court's equal protection discussions cannot be creatively tied, at points, to one or more coherent understandings of equality. A number of these more or less implicit, fragmentary, unsustained, or ambiguous linkages are discussed below.<sup>6</sup> Realistically, it would be impossible for the Court to discuss equal protection without borrowing any of the terms, concepts, and categories in which the idea of equality is more widely discussed. The problem is that the Court, across cases and within individual cases, neither develops nor genuinely relies upon any consistent general understanding of the descriptive and normative meaning of equality. To this extent, crucially, the Court's equal protection case outcomes and opinions do not benefit from available understandings of equality.

On occasion, what the Court says can indeed be classified as falling within one or more broad theories of equality. But, especially of late, most of the Court's attention in equal protection cases is focused instead on first fitting the case into some sort of judicial framework, typology, or scale; then on discerning the appropriate judicial test to be applied; and finally on determining whether the classification at issue passes or fails that judicial test.<sup>7</sup> Adopting, defending, and applying broad elements of a coherent, descriptive, and normative understanding of the underlying idea of equality itself are not commonly on the Court's agenda.

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ORIGINALISM: A DEBATE (2011); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

5. Cf. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383–84 (Harcourt, Brace & World 1965) (1936) (discussing the dependence of civil servants, politicians, and agitators on earlier academics and their theories upon the influence of “some academic scribbler of a few years back”).

6. See *infra* Part I.

7. See *infra* Part I.

This typical judicial neglect of articulated theories of equality results in judicial opinions that beg important questions, or that leave important arguments addressed unconvincingly, or not at all. Judicial opinions on equal protection can thus to a degree seem insular, formulaic, merely institutional, conventionalized, and ultimately arbitrary—not fully responsive to our underlying jurisprudential concerns. In this way, the power, authority, and legitimacy of the Court’s equal protection jurisprudence will eventually suffer.

Below, this Article documents this important phenomenon, and offers a partial diagnosis, along with a positive recommendation that in turn carries its own tragic limitations. This Article first surveys a number of important and representative Supreme Court equal protection cases that cumulatively illustrate the lack of meaningful, consistent, genuine reliance by the Court on any coherent descriptive or normative theory of equality.<sup>8</sup> This Article then suggests a possible explanation for this important disconnect between equal protection jurisprudence and any systematic approach to equality itself: that the sheer proliferating variety and complexity of plausible approaches to the idea of equality<sup>9</sup> make general judicial reliance on any approach increasingly difficult and increasingly intellectually irresponsible.<sup>10</sup> Judicially adopting any approach to the idea of equality is an understandably intimidating prospect.

Only a few of the major complications involved in judicially endorsing a theory of equality, or of any broad segment thereof, can be mentioned in any limited space. This Article refers first to the riotous disorder around the question of sufficient underlying grounds, bases, or justifications for judging or treating persons equally.<sup>11</sup> It then presents several of the distinct typologies of

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8. See *infra* Part I. By way of a very rough comparative benchmark in the area of liberty, the Supreme Court has used the specific term “paternalism” or “paternalistic” in the same paragraph as the word “speech” in thirteen cases. I used the (disjunctive) query: “paternalistic” or “paternalism” in the same paragraph as “speech” in the Supreme Court database. At the time, this Westlaw search generated thirteen results, which seemed to me to indicate at least some level of Supreme Court awareness of some such issue or issues in that parallel context. Search of the Westlaw Supreme Court database as of June 20, 2015.

9. See JORGE LUIS BORGES, *THE LIBRARY OF BABEL*, in *COLLECTED FICTIONS* 112, 112–18 (Andrew Hurley trans., Viking Penguin 1998) (1944) (discussing some of the costs and complications of expanding alternatives of equality).

10. For a sense of some of the proliferating complications, see *infra* Parts II, III, IV, V, VI.

11. See *infra* Part II.

egalitarian theories, where each typology contributes to the proliferating available options with no evident simplification or resolution.<sup>12</sup>

As it turns out, at one level of particularity or another, the roles of various forms of luck; of responsibility and proximate cause; of free will and determinism; and of forgiveness, bankruptcy, and insurance are often thought to bear importantly on choices among egalitarian theories.<sup>13</sup> But these matters themselves have each reached levels of hopeless complexity,<sup>14</sup> further limiting their judicial appeal in the context of equal protection.

This Article then introduces several contending basic families of approaches to the idea of equality, including relatively strict or demanding approaches to distributional equality,<sup>15</sup> along with what are more technically known as prioritarianism<sup>16</sup> and sufficientarianism,<sup>17</sup> each in their various forms. The question of what counts as a theory of equality is also very briefly raised in the contexts of utilitarian schools of thought,<sup>18</sup> theories focusing on the concept of needs,<sup>19</sup> theories focusing on what persons are said to deserve,<sup>20</sup> and theories focusing less centrally on distributional matters and more on patterns of dominance and oppression.<sup>21</sup>

All of these unresolved complications, along with others not referenced herein, should account for the reluctance on the part of the courts to broadly endorse any particular understanding of equality. But this means that the courts are denying their equal-protection judgments and opinions the persuasiveness, cogency, consistency, legitimacy, and authority that can be derived from a coherent underlying view of what equality itself implies. This is a high price to pay.

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12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part IV. For more detailed discussion of some of the complications of free will, responsibility, and determinism, see R. George Wright, *Criminal Law and Sentencing: What Goes With Free Will?*, 5 DREXEL L. REV. 1 (2012) [hereinafter Wright, *Criminal Law and Sentencing*].

15. See *infra* Part V.

16. See *infra* Part V.

17. See *infra* Part V.

18. See *infra* note 211 and accompanying text.

19. See *infra* note 141 and accompanying text.

20. See *infra* note 141 and accompanying text. For a discussion of free will and responsibility, see *infra* Part IV.

21. See *infra* note 152 and accompanying text.

Is it possible, though, to cut through the various intimidating complications and seize upon some attractive, easily understandable, and related concept that could help guide and justify equal protection decision-making? In its conclusion, this Article suggests that the best available such candidate, overall, might be the family of ideas encompassing notions such as community, solidarity, fellow-feeling, extended sympathy, and fraternity, all expanded to encompass at least the members of the relevant geographical unit.<sup>22</sup> A substantial obstacle to adopting such an approach, however, is the historical and constitutional strength of individualist and libertarian objections.<sup>23</sup> Even indirectly, any general constitutional reliance on a conception of community, in elaborating the idea of equality, would cut against the grain of the Constitution's unfortunate, almost complete lack of weighty communitarian elements.<sup>24</sup>

On that basis, this Article now takes up the Equal Protection Clause's typically fitful relationships with anything like a coherent theory of equality.

## I. What Does Equal Protection Law Say to Us About Equality?

It would be odd if the law of equal protection bore absolutely no relationship to any of the major contending approaches to the idea of equality itself. This is not to suggest that judges deciding equal protection cases typically, consciously attend to any theory of equality. Perhaps the courts instead absorb limited elements of equality theories in an indirect, inexplicit way. The process may be akin to that implied by John Maynard Keynes's reference to practical decision-makers—civil servants, politicians, and agitators—who are unknowingly influenced by “some academic scribbler of a few years back.”<sup>25</sup> As we shall eventually see, however, relationships between the dominant law of equal protection and the most respected theories of equality itself are typically murky and limited, where they do not actually conflict.<sup>26</sup>

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22. See *infra* Part VI.

23. See *infra* Part VI.

24. See *infra* Part VI. For a more detailed discussion, see R. George Wright, *Homelessness and the Missing Constitutional Dimension of Fraternity*, 46 U. LOUISVILLE L. REV. 437 (2007) [hereinafter Wright, *Homelessness*].

25. KEYNES, *supra* note 5, at 383.

26. See *infra* Parts II, III, IV, V, VI.

The text of the Fourteenth Amendment relies upon, but does not tell us much about, any intended meanings of the idea of equality.<sup>27</sup> Fourteenth Amendment equality must logically be susceptible to being legally protected or denied,<sup>28</sup> but it is equally obvious that we have no textual guidance as to any relevant forms of protection and denial.<sup>29</sup>

The Equal Protection Clause can, to begin with, be interpreted in what we might call a narrow, minimalist, formalistic way.<sup>30</sup> Thus the Supreme Court has declared that the Equal Protection Clause “announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle.”<sup>31</sup> This formula leaves open the breadth of possible remedies when equal governance, in the sense of impartial or evenhanded governance, has been denied. But it does appear to rule out the possibility that impartial and evenhanded governance, in the relevant sense, could ever give rise to an equal protection violation.<sup>32</sup>

How the courts then define “impartial” and “evenhanded” governance in turn reflects the breadth<sup>33</sup> or narrowness<sup>34</sup> of the state responsibility<sup>35</sup> that is recognized under what is known as the state action doctrine.<sup>36</sup> The narrower (or the broader) the scope of the unequal social and economic circumstances for which

27. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *see infra* Part II.

28. *See infra* Part II.

29. *See infra* Part II.

30. *See, e.g.*, CASE R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 9–10 (1999) (discussing the composition of the current Court and classifying the justices as “minimalist” or “maximalist”).

31. N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979). On the other hand, rules inevitably classify, thereby creating at least two possible classes.

32. *See id.*

33. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (opting for a relatively broad view of what constitutes a “state action” for which the state may bear responsibility under the Fourteenth Amendment).

34. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) (opting for a relatively narrow view of state responsibility); DeShaney v. Winnebago Dep’t of Soc. Servs., 489 U.S. 187, 196 (1989) (same).

35. *See* R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U. L. REV. 685 (1989) [hereinafter Wright, *State Action*].

36. For instructive cases on the scope of state action and of state responsibility under the Fourteenth Amendment, *see, for example*, Jackson v. Metro. Edison Co., 419 U.S. 345, 351–53 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721–22 (1961). Typically, the presence of state action parallels the 42. U.S.C. § 1983 requirement of action under the color of state law. *See* West v. Atkins, 487 U.S. 42, 49 (1988).

the state is considered to bear at least partial responsibility, the narrower (or the broader) the corresponding scope of circumstances in which a government may be said to have violated the impartial and evenhanded governance requirement.<sup>37</sup> Whether explicitly or not, the courts must inescapably take some stand on, say, whether unequal distributions of income and wealth reflect state action and thus raise a possible equal protection issue.<sup>38</sup> The proper scope of governmental and personal responsibility remains controversial.<sup>39</sup>

One alternative but no less murky formulation states that “the equal protection of the laws is a pledge of the protection of equal laws.”<sup>40</sup> If “equal laws” can indeed mask and legitimize gross social and economic inequalities, this formulation seems to lend itself to undue manipulation. Ironically, the very case endorsing this potentially formalistic language, *Yick Wo v. Hopkins*, is best known for an element of realism.<sup>41</sup> *Yick Wo* realistically and insightfully authorizes, at least in extreme cases, not only the consideration of the text of a rule, or of the enactors’ intent, but of the gross disparities and objectionable intent in the implementation and administration of a facially impartial rule.<sup>42</sup>

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37. See *West*, 487 U.S. at 49; *Jackson*, 419 U.S. at 351–53; *Burton*, 365 U.S. at 721–22.

38. For broad policy discussions on wealth and income inequality, see, for example, JOSEPH E. STIGLITZ, *THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM* (2015) [hereinafter STIGLITZ, *THE GREAT DIVIDE*]; JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2013). For discussions of generational inequalities, see ED HOWKER & SHIV MALIK, *JILTED GENERATION* (2010); DAVID WILLETTS, *THE PINCH* (2011).

39. See, e.g., LARRY MAY, *SHARING RESPONSIBILITY* (1992) (arguing that individuals share responsibility for harms in their communities); *PERSPECTIVES ON MORAL RESPONSIBILITY* (John Martin Fischer & Mark Ravizza eds., 1994) (providing an exceptionally useful collection of views on the scope of governmental and personal responsibility); see also R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* (2007) (examining responsibility in the context of criminal law); MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY* (2009) (analyzing “causation” as a central element of responsibility). But see BRUCE N. WALLER, *AGAINST MORAL RESPONSIBILITY* (2011) (presenting a distinctively skeptical approach to standard views). For an overview of some of these basic controversies, see Wright, *Criminal Law and Sentencing*, *supra* note 14.

40. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

41. See *Yick Wo*, 118 U.S. 356.

42. See *id.* at 373–74; see also *Allen v. City of Sacramento*, 183 Cal. Rptr. 3d 654, 673 (Cal. Ct. App. 2015) (“Even when a law is nondiscriminatory on its face, equal protection is violated if the law is applied in a manner that discriminates against a particular group.”).

The requirement of “equal laws”<sup>43</sup> has been qualified as requiring not that all persons be classified, judged, or treated alike, but merely that relevantly similar persons, or persons in relevantly similar circumstances, be treated alike.<sup>44</sup> Persons who are considered “unlike,” or not similarly situated, thus need not be treated alike.<sup>45</sup> At least the initial judgments as to who counts as relevantly similar, or dissimilar, rests with legislators.<sup>46</sup>

The basic idea of treating like cases alike, and unlike cases unlike, has a distinguished pedigree.<sup>47</sup> Whether justice precisely requires such a universal principle has been doubted.<sup>48</sup> But even if we assume the applicability of such a principle in equal protection cases, the principle in itself provides little useful guidance.<sup>49</sup> It simply requires the production of some reason for treating any group less favorably than any other group, with no further guidance as to what should count as a sufficient reason for any form or degree of inequality.<sup>50</sup>

In theory, the reason presented in order to justify unequal treatment could be subjected to demanding, rigorous judicial scrutiny on the merits. But the courts often decline to impose such scrutiny, even with regard to matters of obvious practical

43. *Yick Wo*, 118 U.S. at 369.

44. See *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); see also *Allen*, 183 Cal. Rptr. at 672 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)) (“Equal protection under the federal and California Constitutions requires equal treatment of persons similarly situated.”).

45. See *Plyler*, 457 U.S. at 216; *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (“The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”).

46. See *Plyler*, 457 U.S. at 216.

47. See ARISTOTLE, *THE NICOMACHEAN ETHICS* 84–86 (David Ross trans., Oxford Univ. Press 2009) (c. 350 B.C.E.); ARISTOTLE, *POLITICS BOOK III* (c. 350 B.C.E.), reprinted in *THE POLITICS OF ARISTOTLE* 116–18, 127–32 (Ernest Barker ed., 1962).

48. See, e.g., Norman C. Gillespie, *On Treating Like Cases Differently*, 25 PHIL. Q. 151 (1975) (arguing that there is a moral, logical, and reasonable basis for treating like cases differently); David A. Strauss, *Must Like Cases Be Treated Alike?* 2 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 24, 2002) (“The principle ‘treat like cases alike’ has no independent moral force.”).

49. See George P. Fletcher, *In God’s Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1609–10 (1999). The limitations of such a principle have been debated. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). *Contra* Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

50. Westen, *supra* note 49, at 559–69.



importance.<sup>51</sup> Consider, for example, the test applied by the Court in *Plyler v. Doe* with regard to the public school educational opportunities of undocumented alien children: “If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”<sup>52</sup>

There is much that could be said about both the alienage<sup>53</sup> and the education-oriented<sup>54</sup> aspects of this equal protection principle. For present purposes, though, the point is to notice the weak, undemanding character of the substantial state interest test. Suppose, as a thought experiment, that most of us agreed that undocumented alien children should be allowed access to schools or to any other comparable opportunity as a matter of moral right, moral duty, justice, equality, human rights, dignity, or on any other grounds. But suppose also that, for whatever reason—perhaps merely from weakness, or corruption, or failure of nerve—we then adopt a statute denying the opportunity in question. What judicial tests would be applied in such a case?

Under *Plyler*, the equal protection constitutionality of the statute would depend, crucially, not on our assumed consensus as to what justice requires or on our subjective motivations in adopting the statute. Instead, the crucial consideration would be whether denying the opportunity would more or less predictably promote, to one degree or another, any state interest that could reasonably be viewed as substantial.<sup>55</sup> We live in a world of

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51. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–41 (1985)) (“[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.”); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

52. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Of course, a more typical “legitimate state interest” requirement would be even less demanding.

53. See *id.* at 230–31 (Marshall, J., concurring); *id.* at 231–36 (Blackmun, J., concurring); *id.* at 236–41 (Powell, J., concurring); *id.* at 242–54 (Burger, C.J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 489–90 (1970) (Harlan, J., concurring); *id.* at 490–508 (Douglas, J., dissenting); *id.* at 508–30 (Marshall, J., dissenting).

54. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19–24 (1973); *Dandridge*, 397 U.S. at 485–87.

55. See *supra* text accompanying note 52.

controversial tradeoffs, conflicting interests, and tragic choices.<sup>56</sup> Justice will unavoidably involve substantial costs. There will be tradeoffs between recognizing the above sorts of rights and promoting at least one substantial and otherwise legitimate public interest. The *Plyler* formulation is thus not particularly protective of basic equality. At a minimum, some form of rigorous or strict equal protection scrutiny<sup>57</sup> will be more appropriate for such genuine basic rights cases. Absent some other grounds for strict scrutiny,<sup>58</sup> laws in “the area of economics and social welfare,”<sup>59</sup> whatever their unintended but quite real distributive impact, receive substantial judicial deference.<sup>60</sup>

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56. For example, consider that effectively combatting climate change is often assumed to involve substantial financial costs. See Eduardo Porter, *Counting the Cost of Fixing the Future*, N.Y. TIMES (Sept. 10, 2013), [http://www.nytimes.com/2013/09/11/business/counting-the-cost-of-fixing-the-future.html?\\_r=0](http://www.nytimes.com/2013/09/11/business/counting-the-cost-of-fixing-the-future.html?_r=0); see also GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978) (examining the scarcities that make difficult tradeoffs necessary).

57. For current judicial thinking on the meaning of strict equal protection scrutiny, see *Fisher v. Univ. of Texas*, 133 S. Ct. 2411 (2013).

58. For the genesis of one strand of such possibilities, see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

59. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

60. See *id.* at 485–87. The Court has expressed doubts about the workability of any contrary rule in cases of unequal burdens or benefits, without more. See *Washington v. Davis*, 426 U.S. 229, 248 (1976) (referring in particular to “tax” and “welfare” policies that lack any textual reference to suspect classifications, any intentional discrimination on the basis of a suspect classification, and any violation of fundamental constitutional rights). At the federal level, education is not regarded as a constitutional right. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29, 37–39 (1973)).

However, some states have held that their constitutions require, if not educational equality of opportunity, at least something like a minimal educational opportunity, or a reasonable approach to such equality. See *Conn. Coal. for Justice v. Rell*, 990 A.2d 206, 243–44 (Conn. 2010) (contending that “the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized,” but focusing thereafter on “adequacy” and “minimal adequacy” along several dimensions of educational opportunity (citation omitted)); *Gannon v. State*, 319 P.3d 1196, 1239 (Kan. 2014) (requiring “reasonably equal access to substantially similar educational opportunity through similar tax effort” and holding that “equity need not meet precise equality standards”). But see *King v. State*, 818 N.W.2d 1, 32–33 (Iowa 2012) (holding that education is not a fundamental right under the Iowa constitution).

Aliens, whether documented or undocumented, are persons for equal protection purposes. See *Plyler*, 457 U.S. at 210; *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886). However, there is an anomalous and complex history of classifying Native Americans as “individuals” or as “communities.” See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 360–62 (2001); *Cherokee Nation v. State*, 30 U.S. 1, 15–16 (1831). For additional discussion on the judiciary’s handling of multiculturalism, see WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (2000); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann ed., 1994).

The idea of official evenhandedness is also central to equal protection and related issues involving the categories of the well-off and the poor or otherwise needy. Thus, vagrancy laws<sup>61</sup> can be objected to by courts, not because they tend to stabilize humiliating class divisions, but because they undermine the evenhanded application of the law,<sup>62</sup> and therefore to some degree the rule of law itself.<sup>63</sup> The rule of law, evenhandedly applied to rich and poor alike,<sup>64</sup> is judicially thought to be a sort of “glue” that genuinely helps to hold together a society otherwise presumably fractured by substantial class divisions.<sup>65</sup>

An egalitarian might well wonder, though, whether the rule of law’s assumed ability to help stabilize an economically divided society, as distinct from reducing the severity of those economic divisions, is especially desirable. The rule of law itself is not typically thought to emphasize substantive economic equality, as distinct from various sorts of merely formalist or procedural equality.<sup>66</sup>

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61. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156–57 n.1 (1972) (reciting a Jacksonville vagrancy ordinance that criminalized, among others, “[r]ogues and vagabonds, or dissolute persons who go about begging”).

62. See *id.* at 171 (“Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible.”).

63. See *id.*

64. See ANATOLE FRANCE, *THE RED LILY* 73 (Winifred Stephens trans., 1910) (1894) (providing a distinctly ironic take on the classic paean to legal evenhandedness by denying both the rich and the poor any right to sleep under the bridges).

65. See *Papachristou*, 405 U.S. at 171 (“The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”); *Desertrain v. City of L.A.*, 754 F.3d 1147, 1157 (9th Cir. 2014) (quoting *Papachristou*).

66. For some standard formulations of the idea of the rule of law that reflect this generalization, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270–71 (Paul Craig ed., 2d ed. 2011); LON L. FULLER, *THE MORALITY OF LAW* 33–94 (Yale Univ. Press rev. ed. 1969); Joseph Raz, *The Rule of Law and Its Virtue*, in *LIBERTY AND THE RULE OF LAW* 3 (Robert L. Cunningham ed., 1979). For an example of a substantive-human-rights-oriented understanding of the rule of law, see Lord Bingham, *The Rule of Law*, 66 *CAMBRIDGE L.J.* 67–82 (2007). Of particular interest is the largely formalist or procedurally egalitarian rule of law theory of John Rawls. See JOHN RAWLS, *A THEORY OF JUSTICE* 235–43 (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*]; see also Donald H.J. Hermann, *The Fallacy of Legal Procedure as Predominant over Substantive Justice: A Critique of the “Rule of Law” in John Rawls’ A Theory of Justice*, 23 *DEPAUL U. L. REV.* 1408, 1416–17 (1974) (providing commentary on *A THEORY OF JUSTICE*).

It is judicially argued, though, that while equal protection does not require, for example, subsistence-oriented welfare benefits;<sup>67</sup> such payments “can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.”<sup>68</sup>

There are three important responses to this argument. First, it is not clear that subsistence-oriented welfare benefits make the difference between having a realistic opportunity to meaningfully participate in the broader community life or not.<sup>69</sup> Second, whether such a participatory opportunity is widely available or not, there remains a major gulf between such an opportunity and any broadly shared sense of genuine solidarity, fraternity, or communitarianism.<sup>70</sup> Third, subsistence-oriented welfare payments have little to do with egalitarianism in any reasonably stringent sense.<sup>71</sup> It is certainly possible to characterize any welfare payment of any magnitude as tending to reduce inequality. But as we shall see,<sup>72</sup> modest welfare benefits are best accounted for theoretically not in terms of any demanding approach to equality, but in terms of some alternative, less egalitarian theory.

Consider, for example, the principle endorsed at the state constitutional level in the New York welfare case of *Tucker v. Toia*.<sup>73</sup> In *Tucker*, the court recognized a state constitutional

67. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 485–86 (1970) (“[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.”). Rights at the state level vary. See, e.g., *Daugherty v. Wallace*, 621 N.E.2d 1374, 1378 (Ohio 1993) (rejecting a state constitutional right to welfare). But see, e.g., *Tucker v. Toia*, 371 N.E.2d 449, 452 (N.Y. 1977) (“[The New York State Constitution] unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy.”). Nor is there any federal constitutional welfare right in the specific form of minimum-quality housing. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

68. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

69. Compare *id.* at 265 (advocating that welfare benefits create opportunities for meaningful community participation), with Timothy Besley & Stephen Coate, *Workfare Versus Welfare: Incentive Arguments for Work Requirements in Poverty-Alleviation Programs*, 82 AM. ECON. REV. 249, 258 (1992) (addressing the argument that work incentives are necessary to induce welfare-benefit recipients to become productive members of society).

70. This Article takes up the importance of ideas such as broad social solidarity, broad community, and fraternity below. See *infra* Part VI. For background on this topic, see Wright, *Homelessness*, *supra* note 24.

71. See *infra* Part V (comparing and contrasting rigorous egalitarianism with lesser approaches).

72. See *infra* Part V (discussing the available—if often judicially unutilized—approaches known as “prioritarianism” and “sufficientarianism”).

73. *Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977).

“affirmative duty to aid the needy.”<sup>74</sup> The court understandably granted discretion to the legislature in defining the term “needy,” in setting other eligibility requirements, and in specifying benefit amounts.<sup>75</sup> But a legislative refusal to aid any person who the legislature recognized as “needy” was constitutionally impermissible.<sup>76</sup>

Now, there is a sense in which any constitutional requirement of any non-zero welfare benefit intended for poor or needy persons, funded by typical tax mechanisms, can be said to be egalitarian.<sup>77</sup> In this sense, even a dollar transferred from persons near the top of an income or wealth distribution to persons near the bottom of that distribution counts as egalitarian.

But for important purposes, such a minimal transfer is more aptly described in alternative terms, with the idea of egalitarianism being instead reserved for more thorough, rigorous, substantially redistributive programs and power transfers of one sort or another.<sup>78</sup> The state constitutional requirement in *Tucker* could, depending in part on the size of the benefits involved, thus be described as minimalist rather than egalitarian. In this sense, egalitarianism and redistributive minimalism can be seen as naming the extremes on a redistributive continuum.<sup>79</sup>

Between the extremes of rigorous egalitarianism and redistributive minimalism, crucially, are several broad theoretical approaches that can be seen as attempts to correct some theoretical or practical deficiencies of any form of rigorous egalitarianism. These approaches are discussed below.<sup>80</sup>

In the meantime, though, we might simply imagine that the state constitution in *Tucker*, or an equal protection clause in general, could be interpreted to require something more demanding than redistributive minimalism, but less demanding than any form of rigorous egalitarianism. In particular, a welfare rights clause as in *Tucker* could be interpreted, in the awkward

74. *Id.* at 452.

75. *See id.*

76. *See id.* (“[O]ur Constitution . . . unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy.”).

77. For discussion of why a view may or may not count as egalitarian, see IWAQ HIROSE, *EGALITARIANISM* 1–14 (2015).

78. *See* Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL. (Jan. 2, 2013), <http://plato.stanford.edu/entries/justice-distributive/#Strict> (discussing “strict egalitarianism” and the difficulty of determining how to measure the goods that are to be distributed).

79. *See* Edward Feser, *Robert Nozick (1938–2002)*, INTERNET ENCYCLOPEDIA PHIL., [www.iep.utm.edu/nozick/](http://www.iep.utm.edu/nozick/).

80. *See infra* Part V.

jargon of the trade, as "sufficientarian," or less plausibly as "prioritarian."<sup>81</sup> For immediate purposes, sufficientarianism focuses not on equality, but on adequacy or sufficiency, or on whether a group under consideration has "enough" of whatever is being measured.<sup>82</sup> Alternatively, prioritarianism focuses on enhancing the position of those deemed to be abject or ill-circumstanced in some supposedly absolute, non-comparative sense, with no special concern for sufficiency or for minimizing inequality at any cost.<sup>83</sup>

Without immediately developing any of these competing families of theories, one might note that a constitutional equal protection provision might be best construed along the lines of any of these theories. The Equal Protection Clause thus might genuinely aim at equality, as somehow further specified. Or it might aim merely at some minimal redistribution that may leave some persons avoidably short of sufficiency in some respect. Or it might aim at sufficiency for all, but not at equality. Or it might aim, with special emphasis, at assisting those deemed burdened or abject in some absolute, non-comparative sense, even if other approaches promise greater equality by, say, damaging the position of other groups. Or finally, as seems more plausible, the drafters, ratifiers, and current interpreters of the Equal Protection Clause may have largely failed to carefully consider most or all of the above alternatives,<sup>84</sup> despite the advantages (and disadvantages) of each.<sup>85</sup>

There are certainly cases in which one or more of these interpretive possibilities were clearly under consideration by the Court. In such cases, relatively stringent forms of egalitarianism have typically not fared well. Perhaps the best known and most important such case is that of *San Antonio Independent School District v. Rodriguez*.<sup>86</sup> The logic of *Rodriguez* does not fit precisely

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81. See HIROSE, *supra* note 77, at 87 ("[Prioritarianism] maintains that the amount of good certain benefits do for a person should be determined only by the absolute level of his or her own well-being, independently of the well-being of other people.").

82. See *infra* notes 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209 and accompanying text.

83. See *infra* notes 186, 187, 188, 189, 190, 191, 192, 193, 194, 195 and accompanying text.

84. It does not seem plausible that judges in equal protection cases have consistently and consciously chosen from among stringent egalitarian, minimalist, sufficientarian, and prioritarian interpretations, with or without using such terminology.

85. See *infra* Part V.

86. 411 U.S. 1 (1973).

with any of the broad theoretical approaches to equality.<sup>87</sup> But *Rodriguez* involves linkages, explicit and implicit, to more than one such approach.

*Rodriguez* famously applied minimum, rather than elevated, equal protection scrutiny to alleged discrimination along the lines of wealth and poverty,<sup>88</sup> and to allegedly unequal public school educational opportunities.<sup>89</sup> *Rodriguez* also declined to recognize access to a public school education as a constitutionally fundamental right at the federal level.<sup>90</sup> Driven at least in part by a sense of practicality, the Court crucially declared that “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”<sup>91</sup>

Let us set aside the literal language of “precisely equal advantages,”<sup>92</sup> since that formulation is simply odd. If everyone in a race has an equal head start or advantage in the race, then no one has a head start. The idea of an “advantage,” in its most familiar sense, is inherently relative or comparative. The distinction between an “absolute” status and a “relative” or “comparative” status is, however, certainly of broader importance.

We can understand why “absolute equality”<sup>93</sup> is not realistically attainable in areas such as educational opportunity. This is true even though “equal” is clearly not a synonym for “same,” or “identical,” or “uniform.”<sup>94</sup> School budgets, and even school enrollments, cannot be predicted beyond some level of precision, and it is often difficult to measure teacher effectiveness in a classroom, or to determine how physical facilities, curricula,

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87. See *infra* Part III.

88. See *Rodriguez*, 411 U.S. at 23–25.

89. *Id.*

90. *Id.* at 40.

91. *Id.* at 24.

92. *Id.*

93. *Id.*

94. Note that when we do basic math, we say that two plus three equals five more often than we say that they are identical, or the same thing. More practically, depending on value judgments or market prices, we may say that *A* and *B* have received equal gifts from *C* even if *A* has received a pendant and *B* a pin—not the same gift. For a contrary but implausible linkage of equality to similarity or sameness, see Isaiah Berlin, *Equality*, 56 PROC. ARISTOTELIAN SOC’Y 301, 312 (1956).

and extracurricular activities affect educational opportunities.<sup>95</sup> Can an advantage in one respect counterbalance a disadvantage in another?

These inevitable complications, however, do not justify the *Rodriguez* Court's repeated emphasis, under the Equal Protection Clause, that the plaintiffs were not absolutely or completely denied the opportunity to attend a public school.<sup>96</sup> Without a doubt, the plaintiffs were not denied any public school educational opportunity at all. How constitutionally significant this should be, however, is at best unclear.

Literally, the Court must apply not a "minimal protection clause," or a "some protection clause," or even an "adequate" or "sufficient protection clause," but instead it must apply an Equal Protection Clause, whether we take practical complications into account or not. Dividing a coveted pie equally between *A* and *B* may involve practices such as *A* doing the slicing and *B* choosing between the slices. No one expects precise equality beyond a certain degree, but the idea of equality clearly compares the two slices. *A*'s slice can be equal to *B*'s only via comparison.

Thus, equality in itself, and presumably as incorporated into the idea of equality of protection of the laws, is inescapably relative. We would not normally say that *A* has a slice equal to *B*'s merely because *A* has some minimal or even substantial amount of pie. Nor would we normally say that *A* has been accorded the equal protection of some law merely because *A* had received some minimal or even substantial degree of protection in the relevant respect. Nor, typically, would we say that *A* has a slice of pie equal to *B*'s slice merely because *A*'s slice is in itself adequate, or sufficient, for *A*'s purposes. We would not even say that because *A* is adequately protected by the laws, for *A*'s own independent purposes, *A* must therefore be enjoying a degree of legal protection equal to that of *B*.<sup>97</sup>

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95. See Alex J. Bowers & Angela Urick, *Does High School Facility Quality Affect Student Achievement? A Two-Level Hierarchical Linear Model*, 37 J. EDU. FIN. 72, 92 (2011) ("In conclusion, the implications of our findings for administrators, policymakers, and researchers is that while we were unable to find a direct effect of facility disrepair on student achievement, this does not necessarily mean that facilities and achievement are not related.").

96. See *Rodriguez*, 411 U.S. at 19–24.

97. Nor does affording person *A* some degree of protection imply that *A* is thereby receiving the proper degree of protection under a prioritarian theory of distribution.



The *Rodriguez* Court, however, opts for only limited equal protection scrutiny of the Texas school funding system because the plaintiffs were not absolutely denied all education. Whether the Court would apply analogous logic to equal protection cases involving, say, contestable vote dilution,<sup>98</sup> or a realistically affordable but somewhat burdensome poll tax,<sup>99</sup> is, however, unclear.

This is not to suggest that the Court in *Rodriguez* thought of genuine equality of educational opportunity and some merely minimal educational opportunity as themselves exhausting all of the ways in which the Equal Protection Clause might be interpreted in this kind of case.<sup>100</sup> In fact, the Court refers several times to the presumed Texas intent to provide, specifically, for an “adequate” education for all public school students.<sup>101</sup> If the Court’s decision in *Rodriguez* actually placed any weight on the asserted availability of universally adequate educational opportunities, that reliance on substantive adequacy would actually suggest a link to what are called “sufficientarian”<sup>102</sup> approaches to questions of inequality and distributive justice.

The important point for our purposes is that, whatever one thinks of the outcome in *Rodriguez*, the logic of *Rodriguez* does not seem to have been usefully guided, even indirectly, by any sort of then-available theory of equality. The problem is not that judges fail by declining to place themselves entirely in the hands of the philosophers of the day. Instead, the basic problem is that the judges seem not to have substantially benefitted from the work of those who have thought hardest about the idea of equality that is written into the Equal Protection Clause itself.<sup>103</sup>

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98. See generally *Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (“[T]he population deviations in the plan were not functionally equal as a matter of law, and . . . the plan was not a good-faith effort to achieve population equality using the best available census data.”); *Kirkpatrick v. Preisler*, 394 U.S. 526, 537 (1969) (“A State’s preference for pleasingly shaped districts can hardly justify population variances.”); *Reynold v. Sims*, 377 U.S. 533, 563 (1964) (deciding that legislative districts must contain roughly equal populations).

99. See generally *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (finding Virginia’s \$1.50 poll tax to violate the Equal Protection Clause).

100. *Rodriguez*, 411 U.S. at 19–24. Nor is this to claim that the Court must be consciously or even subconsciously applying some version of a broad theoretical approach to the idea of equality.

101. *Id.* at 24.

102. See *infra* Part V.

103. There is, of course, no explicit equal protection clause to bind the federal government, as opposed to the states. But federal equal protection jurisprudence ultimately relies on the idea of equality—presumably the same idea of equality as embodied in the Fourteenth Amendment binding the states. See *Adarand*

Of course, constitutional problems of basic equality are hardly confined to the contexts referred to above. There are commonalities as well as disparate themes among inequalities of basic legal personhood,<sup>104</sup> sex and gender,<sup>105</sup> sexual orientation,<sup>106</sup> and a range of disabilities,<sup>107</sup> among other categories. All such categories should have their place in an account of why courts addressing the most crucial equal protection cases have drawn so minimally on the best range of thinking about the underlying idea of equality itself. To begin such a task, we address the initial problem of the grounds, bases, or justifications often thought to underlie the idea of the equality of persons, and the fragmenting disarray into which discussion of such matters has fallen.

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Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (imposing essentially the same strict scrutiny equal protection test on all racial classifications at both federal and state governmental levels regardless of whether the classifications are purportedly benign and remedial); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (recruiting the ideas of due process, unfairness, and severity under the Fifth Amendment to perform equal-protection-like tasks).

104. See *Dred Scott v. Sandford*, 60 U.S. 393, 404–06 (1856) (“[T]hey were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”).

105. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (setting forth the basic mid-level scrutiny test for intentional or textual discrimination against men or women—presumably both); see also *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (seeking to legitimize a role for presumably inherent, constitutionally relevant differences where those policies are non-invidious or compensatory); *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973) (noting the existence of gross sexual stereotypes, as well as classifications that were intended to place women on a “pedestal,” but which resulted in confinement to a “cage”).

106. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013) (referring to an “evolving understanding of the meaning of equality” and emphasizing equal dignity, as distinct from indignity, humiliation, demeaning treatment, degrading treatment, disparaging treatment, and inequality of respect); *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O’Connor, J., concurring) (“Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”). This presumably does not suggest that all serious unconstitutional inequalities count as humiliating or demeaning. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.”).

107. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 528 (2004) (referring to “the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 444 (1985) (“The Education of the Handicapped Act . . . requires an ‘appropriate’ education, not one that is equal in all respects.”). Presumably, such cases could benefit from our best thinking on the role of what might be called “background luck” in endowments, the role of prioritarian and sufficientarian theories, and of utility maximization.

## II. Murky Justifications of the Equality of Persons

The question of why, ultimately, persons should be treated as equals is inescapable, even for a judge who is already committed to carrying out the Equal Protection Clause. The scope and depth of equal protection must ultimately reflect what courts assume to be the reasons why persons are to be treated equally and the limits of those reasons. As we shall shortly see,<sup>108</sup> there are various potentially conflicting ways in which people could be treated equally. Choosing what is to be equalized among persons will reflect what we believe to be the basic reasons for treating persons as equal in the first place.<sup>109</sup> Judges interpreting the Constitution thus cannot bypass such issues.

The problem for these judges, however, is that when the scholars do not bypass the question of what justifies equality, their answers are in disarray, thus discouraging any general judicial reliance. Professor Jeremy Waldron observes that “although there is plenty of work on equality, there is precious little in the modern literature on the background idea that we humans are, fundamentally, one another’s equals.”<sup>110</sup>

The theories we do have regarding the justification<sup>111</sup> of equality tend to inhibit judicial confidence in their broad use.<sup>112</sup> This is not at all a matter of any decisive refutation of such theories. In some ways, that would simplify matters for judges. Instead, many diverse attempts to justify equality remain on the table, with each such attempt continuing to bear its own limitations.

108. See *infra* Part III.

109. See Ian Carter, *Respect and the Basis of Equality*, 121 ETHICS 538, 543 (2011) (“[I]t is mistaken to answer the question ‘Equality of What?’ in isolation from the basis of equality.”). The idea of bases, justifications, or grounds of equality must be understood quite broadly; pragmatists and other sorts of anti-foundationalists and anti-metaphysicians are equally bound to offer some account of why equality is a good or pragmatic thing, and which forms of equality should take priority.

110. JEREMY WALDRON, GOD, LOCKE, AND EQUALITY 2 (2002); see also Carter, *supra* note 109, at 539 (“With a few notable exceptions, the task of identifying [the basis or bases of equality] has been strangely neglected by contemporary egalitarians.”). It would not be surprising if the rise of less metaphysically ambitious schools of thought corresponded with reduced interest in such questions. See JAMES GRIFFIN, ON HUMAN RIGHTS 2 (2008) (“When during the seventeenth and eighteenth centuries the theological content of the idea was abandoned, nothing was put in its place.”).

111. Any use of the singular is not intended to rule out multi-factor or multi-level pluralist justifications of equality.

112. See Kate Malleson, *Justifying Gender Equality on the Bench: Why Difference Won’t Do*, 11 FEMINIST LEGAL STUD. 1 (2003).

Thus, some attempts to justify equality emphasize empirical qualities of human persons.<sup>113</sup> An immediate, though hardly fatal, problem is that, for whatever reason, persons are obviously not more or less precisely equal in all arguably relevant empirical respects.<sup>114</sup> But if we avoid the problems associated with empirical grounds for equality by looking to non-empirical qualities,<sup>115</sup> we run straight into the problem of relying on dubious or obsolete metaphysical claims.<sup>116</sup>

There is thus an understandable tendency to try to work through the problems associated with empirically-oriented justifications of equality. One possibility is to deny that persons must in fact be equal in the empirical qualities, whatever those qualities may be, by virtue of which they should be treated equally.<sup>117</sup> Perhaps what should trigger treating *A* equally with *B* is not that *A* and *B* are more or less precisely equal in some relevant respect, but that *A* (along with *B*) has exceeded some relevant minimum threshold value with respect to the quality in question.<sup>118</sup>

Suppose, for example, that a court is to decide *A*'s voting rights claim under the Equal Protection Clause.<sup>119</sup> The idea of equality might suggest to some persons that *A*'s voting strength should be ninety percent of *B*'s if *A*'s relevant voting capabilities

113. See Carter, *supra* note 109, at 544 ("There is no empirically based reason to suppose that people are equally capable of setting ends rationally or are equally capable of acting for the sake of duty . . . or even that they are equally capable of trying to do so.").

114. See *id.* at 543–44. Even Thomas Hobbes argues only for a rough or pragmatic equality among adult persons. See THOMAS HOBBS, *LEVIATHAN* 86–87 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

115. See Carter, *supra* note 109, at 544 (referring to the Kantian non-empirical noumenal self).

116. See *id.*; see also JOHN RAWLS, *POLITICAL LIBERALISM* (2d ed. 2005) (arguing against basing legal policy on controversial metaphysical or religious assumptions).

117. See, e.g., Jeremy Waldron, *Basic Equality* 29 (N.Y.U. Pub. L. & Legal Theory Res. Paper Series, Working Paper 08-61, 2008), <http://ssrn.com/abstract=1311816> (arguing against the model that humans are characteristically similar to the exact equal degree).

118. See, e.g., Richard Arneson, *Egalitarianism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* 41 (rev. ed. 2013) [hereinafter Arneson, *Egalitarianism*], <http://plato.stanford.edu/entries/egalitarianism> ("The doctrine of sufficiency holds that it is morally valuable that as many as possible of all who shall ever live should enjoy conditions of life that place them above the threshold that marks the minimum required for a decent (good enough) quality of life."); see also GEORGE SHER, *EQUALITY FOR INEGALITARIANS* 79 (2014) [hereinafter SHER, *EQUALITY FOR INEGALITARIANS*] (presenting moral equality as based on our having a particular kind of conscious subjectivity).

119. U.S. CONST. amend. XIV, § 1.

are deemed to be ninety percent of  $B$ 's.<sup>120</sup> But equality in the voting-rights equal protection context might instead suggest the idea of a crucial threshold of whatever quality or qualities we think relevant. Perhaps persons should be granted voting rights—and specifically equal voting rights—once they have passed a threshold level of some relevant capability. The threshold in question might even incorporate a large element of administrative convenience, as in the case of minimum voting ages. Above that threshold level, any differences among persons in maturity, informedness, interest, experiences, integrity, and sagacity would be irrelevant.<sup>121</sup>

Paying exclusive attention to threshold levels of the supposedly relevant quality or qualities thus avoids some basic problems in justifying equal treatment. But a further crucial complication is that the courts would need to know why passing some threshold level should be decisive, rather than considering any of the remaining inequalities among persons.<sup>122</sup> And there must also be some justification for adopting one threshold level as decisive over another.<sup>123</sup>

There may well be possible solutions for these problems.<sup>124</sup> However, the various approaches seem to involve more controversy and mutual conflict than reassurance and mutual supportiveness.

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120. See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 52 (CreateSpace 2015) (1861).

121. See Arneson, *Egalitarianism*, *supra* note 118, at 41.

122. See Geoffrey Cupit, *The Basis of Equality*, 75 PHIL. 105, 110 (2000) (“Why should we suppose that our status is determined by our passing a particular threshold, whilst our possessing more than the minimum required to pass that threshold is entirely redundant?”).

123. See *id.* Before offering his own proposed alternative, Professor Cupit reflects that “it is not encouraging to note that even committed egalitarians admit to knowing of no satisfactory argument for our equality.” *Id.* at 116.

124. One possible approach would involve a non-metaphysical claim that, while we are not relevantly equal, we are all unique, or not replaceable. This approach thus focuses on our incommensurability or our mutual incomparability, not on our equality or inequality. See, e.g., JONATHAN GLOVER, CAUSING DEATH AND SAVINGS LIVES 228 (1977) (quoting the George Orwell dictum “one mind less, one world less”).

John Rawls's approach would hold that equal justice is owed to all moral persons. See RAWLS, A THEORY OF JUSTICE, *supra* note 66, at 505. In turn, moral persons are capable of having a rational plan of life and are capable of at least a minimally effective sense of justice. See *id.* Rawls himself recognizes the incompleteness of his argument in this respect. See *id.* at 509; see also JOHN RAWLS, JUSTICE AS FAIRNESS (1958), *reprinted in* JUSTICE AND EQUALITY 76 (Hugo A. Bedau ed., 1971) (discussing the concept of justice and how it interacts with morality). For a more elaborate, but correspondingly complex, approach to the grounds of equality, see Bernard Williams, *The Idea of Equality* (1962), *reprinted in* PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956–1972, at 230 (1973).

Here, as elsewhere, it is easy to understand why the courts would be reluctant to begin to try to work through the complications, and to place any consistent weight on their results.

But the conspicuously unresolved status of any underlying justification of treating persons as equals is merely the beginning of the accumulation of obstacles to meaningful judicial reliance on any theories of equality. At least equally daunting are the remarkably proliferating typologies of the forms and metrics of equality and inequality, as briefly introduced below.

### III. Equality of What? A Glance at a Few of the Proliferating Typologies

The idea of equality, including equality for constitutional equal protection purposes, can be interpreted in minimalist terms, or else in remarkably stringent terms, or with any degree of stringency between these extremes. In some views, by analogy, we treat runners equally when we give them all the same ribbons. In other views, we treat the runners equally in awarding the first place ribbon to the fastest runner who has complied with the rules.

Thus, while we may say that distribution in accordance with a person's different (genuine) needs is a rule of equality,<sup>125</sup> we might also claim to be respecting equality if we distribute a resource on the basis of agreements freely and genuinely entered into,<sup>126</sup> or in accordance with whatever we take to be a person's worth,<sup>127</sup> or a person's contribution or merit,<sup>128</sup> or a person's work or genuine effort.<sup>129</sup> These distributional principles could all be called egalitarian in at least some broad sense.<sup>130</sup> In general, the availability of a broad range of undemanding to exceptionally demanding forms of egalitarianism further complicates matters for judges seeking guidance.

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125. See Gregory Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE* 31, 35 (Richard B. Brandt ed., 1962).

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.*

130. One should also consider the difference in the egalitarian "strength" of these two related principles: (1) "Every man has a right to equal property," and (2) "Every man has an equal right to [some degree of] property." Richard Wollheim, *Equality*, 56 *PROC. ARISTOTELIAN SOC'Y* 281, 282 (1956). One should further consider principles of equal opportunity ranging from merely formalist or minimalist to those that would require the radical restructuring of the family. See T.M. Scanlon, *When Does Equality Matter?*, Presentation at John F. Kennedy School of Government (April 2004), [www.law.yale.edu/documents/pdf/intellectual\\_life](http://www.law.yale.edu/documents/pdf/intellectual_life) (discussing RAWLS, *A THEORY OF JUSTICE*, *supra* note 124).

More crucially, though, the theorists have not arrived at a consensus answer to the question: Equality of what? The various answers arrived at by theorists are at least as much mutually conflicting as they are mutually supporting. Nor does any consensual resolution seem to be on the horizon. The scholars have formulated the major “equality of what?” candidates in various ways. The Nobel Prize-winning economist Amartya Sen refers, open-endedly, to equality of “[l]iberties, rights, utilities, incomes, resources, primary goods, need-fulfillments, etc.”<sup>131</sup> In a different but equally open-ended theory,<sup>132</sup> the noted philosopher Harry Frankfurt refers to equality of “resources, welfare, opportunity, respect, rights, consideration, [and] concern . . .”<sup>133</sup> And the leading legal philosopher Joseph Raz, for his part, concludes: “Most of the popular egalitarian principles belong to one of four types: (a) All are entitled to equal respect: (b) All are entitled to equal opportunities: (c) All are entitled to equal welfare: (d) To each according to his needs.”<sup>134</sup>

Some of the above goods that could be stated in substantive terms—e.g., welfare, resources, income, and utility—could instead be discussed in terms of equal access to (or equal opportunity to obtain) those substantive goods.<sup>135</sup> Equal access, and equal opportunity, can clearly be thought of in more and in less stringent terms.<sup>136</sup>

Nor are the above criteria exhaustive. Equality of various forms of power, or of non-domination, could easily be added. It can be useful to extensively contrast, say, equality of welfare with equality of resources.<sup>137</sup> But even the broadest such contrasts may

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131. AMARTYA SEN, *INEQUALITY REEXAMINED* 25 (1992). Elsewhere Professor Sen singles out “utilitarian equality, total utility equality, and Rawlsian equality.” Amartya Sen, *Equality of What?* Lecture at Stanford University’s Tanner Lectures on Human Values 179 (May 22, 1979) [hereinafter Sen, *Equality of What?*].

132. See Harry Frankfurt, *Equality and Respect*, 64 SOC. RES. 3, 4 (1997).

133. *Id.* at 8.

134. Joseph Raz, *Principles of Equality*, 87 MIND 321, 340 (1978). Raz also distinguishes between “rhetorical and strict egalitarian theories.” *Id.* at 321.

135. See G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 907 (1989) [hereinafter Cohen, *Egalitarian Justice*] (discussing the differences between the views of John Rawls and Ronald Dworkin); see also G.A. Cohen, *Equality of What? Welfare, Goods and Capabilities*, in *THE QUALITY OF LIFE* 11 (Martha Nussbaum & Amartya Sen eds., 1993) [hereinafter Cohen, *Equality of What?*].

136. See Scanlon, *supra* note 130.

137. This is undertaken most famously by Ronald Dworkin. See Ronald Dworkin, *What Is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 191 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 290 (1981). These works were compiled in RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 11–119 (2000) [hereinafter DWORKIN, *SOVEREIGN VIRTUE*].

underemphasize the importance of equal capacities, or the equal “*capability* of people to do or be what they choose,”<sup>138</sup> which is a more functional or developmental approach.

It may be possible, to some degree, to combine two or more of the above criteria in some creative and sophisticated way. The philosopher G.A. Cohen, for example, held that in developing a metric for equality, “*both* welfare and *resources* should count.”<sup>139</sup> Of course, there will always be conflicts between, say, equality of income or wealth and equality of capability or of well-being, given differences of need among persons.<sup>140</sup> Equal income or wealth for those with and without expensive congenital disabilities is hardly the most meaningful sort of equality.<sup>141</sup>

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138. Norman Daniels, *Equality of What: Welfare, Resources, or Capabilities?*, 50 PHIL. & PHENOMENOLOGICAL RES. 273, 274 (1990). Dworkin addresses capability theories of equality in SOVEREIGN VIRTUE, *supra* note 137, at 285–303. For a discussion among the most prominent advocates of equality of (crucial) capabilities or functions, see Martha Nussbaum, *Women and Equality: The Capabilities Approach*, 138 INT’L LAB. REV. 227, 233 (1999) (emphasizing the importance of asking “not just about the resources that are present, but about how those do or do not go to work, enabling the woman to function”).

139. G.A. COHEN, IF YOU’RE AN EGALITARIAN, HOW COME YOU’RE SO RICH? 177 (2000).

140. See Sen, *Equality of What?*, *supra* note 131.

141. Classically, Henry Sidgwick focused on equality of happiness and recognized that equality of distributed resources would not account for substantial differences among persons in their basic needs. See HENRY SIDGWICK, THE METHODS OF ETHICS 284–85 n.2 (7th ed. 1962) (1907). But mental or psychological needs, artificially expensive tastes and contrived mental needs, and differences in how efficiently persons convert inputs into happiness lead to endless further complications. See *id.*; see also DWORKIN, SOVEREIGN VIRTUE, *supra* note 137, at 11–64; WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 72–73 (1990) (“Why treat people born with natural handicaps any differently? Why should they not also have a claim to compensation for their disadvantage . . . ?”).

For general background on the idea of desert as an approach to justice, see GEORGE SHER, DESERT (1987) (reviewing desert-claims arising in connection with wages, honors, rewards, and penalties, and elaborating on the justifications); WHAT DO WE DESERVE? A READER ON JUSTICE AND DESERT (Louis P. Pojman & Owen McLeod eds., 1999) (containing a collection of readings that contextualize the development of desert claims and analyzing divisions in contemporary perspectives on the issue); James P. Sterba, *Justice as Desert*, 3 SOC. THEORY & PRAC. 101 (1974) (focusing on the role of needs and deserts in conceptualizing social justice).

For further discussion of needs-based approaches to justice, see DAVID BRAYBROOKE, MEETING NEEDS (1987); Michael Ignatieff, *To Each According to His (Genuine?) Needs*, 11 POL. THEORY 419 (1983). For a critique of a needs-based approach to equality, see DOUGLAS RAE ET AL., EQUALITIES 99–100 (1981). Rae’s book also offers a forest of distinctions and complications relevant to the decisions of equal protection cases well beyond the few introduced in this Article. *Id.*



Further complications within the idea of equality could be offered, at any length.<sup>142</sup> One basic lesson, though, is that while courts might want to accommodate more than one reasonably complete theory of equality within, or underlying, their understanding of equal protection, and the greater the number and variety of such theories the courts attempt to assimilate in any fashion, the lower the chances that the courts will realistically be able to do so.<sup>143</sup>

At this point, it is not surprising that the courts, in general, have not made systematic use of theories of what should count as equality, or as the most important forms and measures of equality, for equal protection purposes. And we have not yet considered the basic further question of how stringent or demanding the most justifiable approach to equality should be.<sup>144</sup> Before briefly addressing this basic stringency question, though, we should pause to consider whether the judicial task could be simplified through the important idea known as luck egalitarianism.

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142. Consider some of the rather abstract, but clearly significant, distinctions drawn by Professor Larry Temkin. See LARRY S. TEMKIN, *INEQUALITY* 283 (1993) [hereinafter TEMKIN, *INEQUALITY*]. Comparisons among persons and among groups can take several potentially conflicting forms. *Id.* So, should we compare a particular person (or group) with the best-off person? The (tenth of) one-percenters? The average person? Or with all those who are deemed better off? And while we are engaged in such comparisons, should we (and the judges) focus on alleged inequalities as they are likely to play out over entire lifetimes? Should judges focus on the persons or groups as they are at the time of a given lawsuit? Or should judges instead focus on comparing persons or groups when they are both at the same life-stage, e.g., ready to retire, or at a particular age? Differences among these approaches could sensibly lead to very different equal protection outcomes and remedies. *Id.* at 285. And there is no reason to simply defer on these debatable matters of principle to the preferences and pleadings of plaintiffs and defendants in equal protection cases. Finally, note the distinction, drawn from the work of Derek Parfit, between instrumental and non-instrumental forms of egalitarianism. *Id.* For concise discussion, see Larry S. Temkin, *Egalitarianism Defended*, 113 *ETHICS* 764, 768 (2003) [hereinafter Temkin, *Egalitarianism Defended*] (explaining that, in instrumental egalitarianism, “the value of equality is wholly derived from the value of other ideals whose non-egalitarian goods it promotes,” whereas in non-instrumental egalitarianism, “equality, understood as comparative fairness, is intrinsically valuable, in the sense that it is sometimes valuable in itself, over and above the extent to which it promotes other ideals”).

143. Professor Sen, for example, argues that hybrid forms of utilitarian and Rawlsian approaches to equality cannot be successfully combined. See Sen, *Equality of What?*, *supra* note 131 (“[W]hile they fail in rather different and contrasting ways, an adequate theory cannot be constructed even on the [ir] combined grounds . . .”). At some point, additional judicial time and attention devoted to any such matters will be better allocated to other aspects of constitutional adjudication.

144. See *infra* Part V.

#### IV. A Failed Attempt to Limit the Complications: The Luck of Imposed Circumstances Versus the Luck of Free and Responsible Gambles

It may seem possible to slice through many of the complications of equality by thinking about different kinds of luck. Suppose someone is born with a serious disability that can be effectively treated, but only at a cost beyond that person's ability to pay. Should an egalitarian consider such a case to be merely a natural phenomenon, beyond any redress or compensation? Suppose also that another person has freely, knowledgeably, and responsibly wagered a large sum of money on the outcome of the Super Bowl and loses. Should an egalitarian treat that kind of luck in the same way as the genetic bad luck in the first case? These apparently easy cases underlie the appeal of what is called luck egalitarianism, famously developed,<sup>145</sup> but then partially disavowed,<sup>146</sup> by Ronald Dworkin.

To begin with, luck egalitarianism holds that "the idea of the moral equality of persons requires that each person take responsibility for [his or] her choices and assume the costs of these choices."<sup>147</sup> Alternatively, "luck egalitarianism claims that inequality is bad or unjust if it reflects differences in factors that are beyond the control or choice of the worse off."<sup>148</sup> The luck egalitarian thus looks not only at a person's assets or at their degree of happiness, but he or she also looks at the genuine opportunities that have been realistically available to the person.<sup>149</sup> For example, the basic assumption is that being born with an expensively treatable genetic disease is not chosen, consented to,

145. On the initial distinctions between "brute" and "option" luck and the normative role in egalitarianism of compensation based on purchases in hypothetical insurance markets, see DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 137, at 73–83.

146. See, e.g., Ronald Dworkin, *Equality, Luck and Hierarchy*, 31 PHIL. & PUB. AFF. 190, 190–91 (2003) (arguing that the central idea of equality of resources is not "that people be fully compensated for any bad luck after it has occurred, but rather that people be made equal . . . so . . . in their opportunity to insure or provide against bad luck before it has occurred, or, if that is not possible, that people be awarded the compensation it is likely they would have insured to have if they had had that opportunity"). For a key earlier source, see RAWLS, *A THEORY OF JUSTICE*, *supra* note 66, at 7, 9 (focusing on principles that regulate the basic social institutions that constitute "the basic structure of society").

147. Kok-Chor Tan, *A Defense of Luck Egalitarianism*, 105 J. PHIL. 665, 665 (2008).

148. HIROSE, *EGALITARIANISM*, *supra* note 77, at 41; see also Temkin, *Egalitarianism Defended*, *supra* note 142, at 767 ("Undeserved inequality is unfair, but deserved inequality is not.").

149. See, e.g., Cohen, *Equality of What?*, *supra* note 135, at 362 (distinguishing equality of genuine opportunities for welfare from equality of welfare itself).

or controlled by the person directly affected and is thus morally arbitrary,<sup>150</sup> amounting to an undeserved inequality. This opens the door to one form or another of subsidized cure, redress, or compensation in the name of egalitarianism.<sup>151</sup>

It is not our aim herein to critique luck egalitarianism,<sup>152</sup> or any other form of egalitarianism. The point, rather, is to suggest a few of its burgeoning complications, and, on that basis, its limited usefulness for courts deciding constitutional issues. Luck egalitarianism is ultimately no solution to the problem of the proliferating complications of equality theory, and, indeed, it further contributes to such complications.

To begin with, much of what constitutes persons' very identities lies partly or entirely beyond their voluntary choices. Unchosen natural and social circumstances include not only the economic class of one's parents,<sup>153</sup> but also what are sometimes considered to include "one's native abilities and intelligence,"<sup>154</sup> among other constituent traits. More broadly, one scholar has argued that even "[o]ur race, gender, and citizenship, how educated and wealthy we are, how gifted in math and how fluent

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150. See, e.g., PHILIPPE VAN PARIJS, WHAT'S WRONG WITH A FREE LUNCH? 25–26 (Joshua Cohen & Joel Rogers eds., 2001) ("Not even the most narcissistic self-made man could think that he fixed the parental dice in advance of entering this world. Such gifts of luck are unavoidable and, if they are fairly distributed, unobjectionable.").

151. *Id.* at 24–26.

152. One prominent form of "external" critique of luck egalitarianism comes from writers who are less interested in sorting through the various forms of luck, their boundaries, and their moral implications than in opposing what they take to be the various forms of social oppression, domination, and hierarchy. As one leading critic holds: "The proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others." Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 288–89 (1999); see also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY xii (1983) ("[Equality's] targets are always specific: aristocratic privilege, capitalist wealth, bureaucratic power, racial or sexual supremacy [or other forms of domination.]"); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990) (noting that a conception of justice should begin with the concepts of "domination and oppression," instead of focusing on distribution); Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003) [hereinafter Scheffler, *What Is Egalitarianism?*]. The extent to which some moderate forms of luck egalitarianism must differ with the anti-oppression critiques, beyond differences in emphasis, is unclear.

153. Here, we can assume some tenable distinction between "natural" and "social" circumstances, wherever we choose to draw that line. See Scheffler, *What Is Egalitarianism?*, *supra* note 152, at 5.

154. *Id.*

in English, how handsome and even how ambitious, are overwhelmingly a function of who our parents happened to be and of other equally arbitrary contingencies.”<sup>155</sup>

It is easy for most of us to see inheriting a particular genetic marker as morally arbitrary and undeserved. But it is also possible to see some environmental advantages afforded to a child, not as deserved by that child, but as conceivably deserved rewards conferred on ambitious, self-disciplined, self-sacrificing parents. This latter view may, however, just push the problem of arbitrariness back a generation. This is, again, not to pass judgment on any such views. While some theorists believe that one’s effort and ambition are the largely arbitrary reflection of, among other influences, our parents,<sup>156</sup> others, including leading philosopher Thomas Nagel, believe that “apart from pathological conditions, the level of someone’s effort is the result of free choice.”<sup>157</sup>

Unfortunately, fundamental political and metaphysical disputes over what counts as a free or responsible choice—and indeed, whether there are any sufficiently free and responsible choices—are at this point inescapable. As a culture, we do not know what to say about such matters. Perhaps we should try to set aside such issues, or somehow resolve them merely politically. Our “massive confusion about personal responsibility”<sup>158</sup> is evident. The question of “what really is beyond a person’s control is intensely controversial”<sup>159</sup> and certainly not susceptible to any resolution reflected in constitutional case law. Thus, it has been

155. VAN PARIJS, *supra* note 150, at 25.

156. *See id.* at 58; Nicholas Barry, *Reassessing Luck Egalitarianism*, 70 J. POL. 136, 140 (2008).

157. THOMAS NAGEL, *EQUALITY AND PARTIALITY* 118 (1991).

158. Nancy L. Rosenblum, *Civic Equality*, BOS. REV. (Apr./May 1995), <http://bostonreview.net/BR20.2/Rosenblum.html>.

159. Samuel Scheffler, *An Unfunded Mandate*, BOS. REV. (May/June 1995), <http://bostonreview.net/BR20.2/Scheffler.html>. For some jurisprudential implications in the criminal responsibility context, see Wright, *Criminal Law and Sentencing*, *supra* note 14. For a few of the most interesting current perspectives on free will and responsibility, see DANIEL DENNETT, *FREEDOM EVOLVES* (2004); DERK PEREBOOM, *FREE WILL, AGENCY, AND MEANING IN LIFE* (2014); DERK PEREBOOM, *LIVING WITHOUT FREE WILL* (2006); SAUL SMILANSKY, *FREE WILL AND ILLUSION* (2002); GALEN STRAWSON, *FREEDOM AND BELIEF* (rev. ed. 2010). Collectively, see *LIBERTARIAN FREE WILL: CONTEMPORARY DEBATES* (David Palmer ed., 2014).

recognized in particular that luck egalitarians—not exclusively, but most distinctively—are deeply enmeshed in what has been called the “free will problem.”<sup>160</sup>

Consider that, if we take one hard-nosed but popular approach in denying the reality of genuine freedom and choice,<sup>161</sup> at a minimum, some apparently different approaches to equality collapse into each another. Imagine thus a world of clockwork mechanisms, or of initial world conditions and inescapable physical laws, or of some form of programming, such that free and responsible choice, robustly understood, is impossible. Envisioning humans as complex, sentient, organic robots may help establish this problem.

On such a basis, some have concluded that the distinction between the genuine (mere) opportunity to acquire some good and the straightforward (actual) acquiring of that good dissolves.<sup>162</sup> Equal opportunity in some respects, and equality of actual results in that respect, come invariably to the same thing.<sup>163</sup> If the results were not equal, it would follow, on the above assumption of a mechanistic clockwork universe, that the opportunity for equal results could not have been real. There is no room in such a picture for a chain of causation to be disrupted or rerouted by a genuinely free choice. One might as well say that a falling rock had a real opportunity to fall at a speed other than it did.

The real problem, however, is *not* that assuming a mechanistic universe or something like it alters the menu of egalitarian options. Such a universe more fundamentally undermines much of the motivational logic of consistent egalitarianism—at substantial net long-term personal cost—in the first place.<sup>164</sup>

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160. See Cohen, *Egalitarian Justice*, *supra* note 135, at 933–34; Scheffler, *What Is Egalitarianism?*, *supra* note 152, at 17–18; Temkin, *Egalitarianism Defended*, *supra* note 142, at 767.

161. See THE OXFORD HANDBOOK OF FREE WILL (Robert Kane ed., 2d ed. 2011) (representing the concept of free will broadly).

162. See, e.g., Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77, 86 (1989) (discussing the reality of decision-making opportunities).

163. See *id.*; Kasper Lippert-Rasmussen, *Egalitarianism, Option Luck, and Responsibility*, 111 ETHICS 548, 548 n.3 (2001); Saul Smilansky, *Choice-Egalitarianism and the Paradox of the Baseline: A Reply to Manor*, 65 ANALYSIS 333, 335 (2005).

164. For discussion, see Wright, *Criminal Law and Sentencing*, *supra* note 14. Interestingly, G.A. Cohen approvingly cites John Rawls as arguing that, without a strong form of free will, “many of our customary judgments of the moral worth of people would make no sense.” G.A. COHEN, RESCUING JUSTICE AND EQUALITY 14 (2008) [hereinafter COHEN, RESCUING JUSTICE].

Imagine a conversation between two humans, thought of as sentient, complex, organic, programmed robots of some sort. Human *A* says to human *B*: “You have \$100.00, and I have only \$50.00. You, as the only other relevant human for present purposes, ought to give me \$25.00, so that we both have \$75.00, in the name of equality.” *B* then asks, “Why should I?” *A* responds, “Because that is what you morally ought to do under the circumstances, given our various emotions and our natures as sentient, complex, organic, programmed robots.”

More broadly, why anyone should embrace substantial net long-term personal costs, including suffering, is unclear under these circumstances. Nor, importantly, does it make much of a difference if we add in the role of groups, or of separation in time and distance, or of entirely random departures from the otherwise determinative lines of causation. The reasonable motivation problem in persuading *B* is even more severe if *A* and *B* will not, or cannot, otherwise significantly affect one another, even indirectly, and if the transfers must be substantial or sustained over time. A principled egalitarianism is, in such a case, arbitrary, if not irrational.

So luck egalitarians in particular, if not egalitarians of every kind, will need some way to avoid going down this path. Fortunately—or unfortunately, in the case of generalist judges—there seems to be several possible responses. One is to declare that, regardless of what they believe about causation and randomness, humans, for the most part, simply cannot abandon familiar basic attitudes—“reactive attitudes”<sup>165</sup>—toward freedom, choice, and responsibility.<sup>166</sup> Another response is to endorse some otherwise reasonable view of choice and causation that solves or bypasses this problem.<sup>167</sup> A third response would be to declare that devising any necessary solutions to problems of causation, freedom, and choice should be left to academic specialists in such matters—individuals distinct from egalitarian theorists.<sup>168</sup> A

165. For the classic discussion on this topic, see P.F. Strawson, *Freedom and Resentment* (1962), reprinted in *PERSPECTIVES ON MORAL RESPONSIBILITY* 45 (John Martin Fischer & Mark Ravizza eds., 1994); see also Galen Strawson, *On “Freedom and Resentment”*, in *FREE WILL AND REACTIVE ATTITUDES: PERSPECTIVES ON P.F. STRAWSON’S “FREEDOM AND RESENTMENT”* 85 (Michael McKenna & Paul Russel eds., 2008) (presenting an interesting critique).

166. See Marc Fleurbaey, *Equality of Resources Revisited*, 113 *ETHICS* 82, 84 (2002); Carl Knight, *Luck Egalitarianism*, 8 *PHIL. COMPASS* 924, 926–27 (2013).

167. See DAVID HODGSON, *RATIONALITY + CONSCIOUSNESS = FREE WILL* (2012); RICHARD SWINBURNE, *MIND, BRAIN, AND FREE WILL* (2013); PETER VAN INWAGEN, *AN ESSAY ON FREE WILL* (1986); Fleurbaey, *supra* note 166, at 84.

168. See Richard J. Arneson, *Luck Egalitarianism*, 32 *PHIL. TOPICS* 1, 16 (2004).

fourth possible response would be to try to set aside problems of freedom, choice, and responsibility as problems of philosophy in general, or of metaphysics in particular, and to treat them instead as political problems to be resolved by some appropriate democratic process.<sup>169</sup>

Again, the point is not to endorse or reject any of these alternatives. Instead, the idea is that, at some early stage, any judge considering the possibility of generally drawing upon egalitarian theory to enhance equal protection jurisprudence should feel overwhelmed by the utterly unmanageable options.

Nor have we at this point encountered all of the most important unsolved problems and alternatives involving luck egalitarianism. Consider one such problem: Do egalitarians really wish to address all significant unchosen inequalities, while leaving unaddressed the personal adverse effects of all free and responsible, but disastrous, choices? Do egalitarians, including luck egalitarians, really wish to always unforgivingly leave freely and responsibly ruined lives to private charity?<sup>170</sup> Familiar legal

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Professor Arneson is the author of a very useful introduction to contemporary egalitarianism. Arneson, *Egalitarianism*, *supra* note 118.

169. See MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY 14 (1992) (describing the basis of work as “focusing on moral responsibility itself rather than on notions of free will” and as “view[ing] the modern concept of moral responsibility as part of social and political practice rather than an ideal that exists outside of and superior to our social and political concerns”); John E. Roemer, *Equality and Responsibility*, BOS. REV. (Apr./May 1995), <http://new.bostonreview.net/BR20.2/roemer.html>. For an earlier attempt to reduce the dependence of important issues on controversial philosophical assumptions, see John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 223 (1985).

170. See Nicholas Barry, *Defending Luck Egalitarianism*, 23 J. APPLIED PHIL. 89, 98 (2006) (“If all citizens have equal moral worth, then there is something troubling about allowing anybody to fall to an extreme level of material deprivation, when others have sufficient resources to prevent this, even if the inequality is largely a result of the victim’s deliberate gambles.”); Marc Fleurbaey, *Freedom with Forgiveness*, 4 POL., PHIL. & ECON. 29 (2005) (addressing problems of perverse incentives). See generally Peter Vallentyne, *Brute Luck, Option Luck, and Equality of Initial Opportunities*, 112 ETHICS 529, 544–45 (2002) (discussing the pros and cons of initial opportunity egalitarianism and “brute luck”).

practices allow various forms of voluntary and compulsory insurance,<sup>171</sup> bankruptcy options,<sup>172</sup> and even proximate cause limitations on liability<sup>173</sup> to avoid personally disastrous outcomes.

Given these sorts of problems, it is not surprising that luck egalitarianism comes in “weaker” and “stronger” versions,<sup>174</sup> and that the initially unitary, or at least manageable, idea of luck egalitarianism inevitably fragments into a family of multiple alternative options,<sup>175</sup> all technically available to an as-yet-unintimidated judge. The proliferation of arguably sensible but quite distinct basic forms of egalitarianism thus continues.

171. For a helpful discussion of some major forms of contemporary American social insurance programs, see THEODORE R. MARMOR, JERRY L. MASHAW & JOHN PAKUTKA, *SOCIAL INSURANCE: AMERICA'S NEGLECTED HERITAGE AND CONTESTED FUTURE* 1–68 (2014). For useful broad perspectives on insurance and the logic and rationales thereof, see Kenneth Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 657 (2013) (“[T]he *governance conception* views insurance as a surrogate for government in . . . protecting against misfortune . . .”). For a concise typology of governmental roles in insurance, see Richard Zeckhauser, *Insurance*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 281 (David Henderson ed., 2d ed. 2007), <http://www.econlib.org/library/Enc/Insurance.html>. For discussion of the relevance of attitudes toward risk, see Mark R. Greene, *Attitudes Toward Risk and a Theory of Insurance Consumption*, 30 J. INS. 165 (1963).

172. For discussions of the role of bankruptcy and official forgiveness of voluntarily incurred indebtedness, see Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) (discussing the legitimate role of some official accommodation of regretted “impulse” and other forms of flawed decision-making); Donald Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 451 (1993) (critiquing normative models of bankruptcy, including that set forth by Thomas Jackson); Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979 (2012) (discussing the consequences of unmanageable indebtedness); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) (“I see bankruptcy as an attempt to reckon with a debtor’s multiple defaults and to distribute the consequences among a number of different actors.”).

173. Among the classic tort discussions, see *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964); *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928); see also Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941 (2001); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David G. Owen ed., 1997); Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009).

174. See Richard Arneson, *Rethinking Luck Egalitarianism and Unacceptable Inequalities*, 40 PHIL. TOPICS 153, 154 (2012) (noting that, under strong luck egalitarian views, the unfairness is “expunged if those who are worse off than others are so through their own fault or choice,” whereas, under weak luck egalitarianism, “the injustice and unfairness of inequality are not entirely expunged, but lessened, the more it is the case that those who are worse off than others are so through their own fault or choice”).

175. See, e.g., Richard J. Arneson, *Luck Egalitarianism Interpreted and Defended*, 32 PHIL. TOPICS 1, 2 (2004) (“Luck egalitarianism as I conceive it is a broad family of views arranged in four main variants.”).



Luck egalitarianism, rather than slicing through some of the complications involved in thinking about equality, thus ends in perpetuating and exacerbating some of the most basic complications. In particular, luck egalitarianism does not dissolve the choices among relatively stringent egalitarianism,<sup>176</sup> prioritarianism,<sup>177</sup> and sufficientarianism.<sup>178</sup> Rather, luck egalitarianism winds up highlighting the need to choose among these fundamental alternatives,<sup>179</sup> as briefly depicted below.

## V. Prioritarianism and Sufficientarianism as Further Basic Alternatives to Stringent Egalitarianism

The final examples of the judicially unmanageable complications of equality in this Article are among the most direct. The basic idea is that we cannot reasonably say, without any further analysis, that only the most stringent forms of egalitarianism can count as forms of egalitarianism for constitutional equal protection purposes. Consider the following admittedly quite unrealistic hypothetical: Imagine that it is possible to adopt a policy that improves the circumstances of a small group of less well-off persons, perhaps temporarily and to only a minimal degree, at a quite substantial permanent cost to a much greater number of (relevantly innocent) persons at and just above the society's median. We can certainly choose to view such a policy as egalitarian—and as more egalitarian than not adopting the particular policy. But does this mean that adopting the policy is required by justice, fairness, or institutional morality? This hypothetical is in itself again extreme and unrealistic. But a number of related hypotheticals can be posed, the overall effect of which may leave a reasonable judge wondering about the moral and constitutional tradeoffs between a stringent egalitarianism, however that may be defined, and other important progressive values.

There is really no simple and attractive form of reasonably stringent egalitarianism. There is, to begin with, room for debate over which major theorists should count as stringent egalitarians.

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176. See *infra* Part V.

177. See *infra* Part V.

178. See *infra* Part V.

179. See Knight, *supra* note 166, at 930 (presenting combinations of luck egalitarianism and prioritarianism or luck egalitarianism and sufficientarianism as viable options); Shlomi Segall, *What's So Egalitarian About Luck Egalitarianism?*, 28 *RATIO* 349, 351 (2015) (endorsing one version of luck egalitarianism over luck prioritarianism and luck sufficientarianism).

As possible candidates, consider the theorists G.A. Cohen<sup>180</sup> and, more controversially,<sup>181</sup> John Rawls.<sup>182</sup> And to assess the relative merits of the various arguably stringent egalitarian views, a judge would have to reach a conclusion, at least second hand, on remarkably complex, highly speculative, and empirical matters,<sup>183</sup> including the minimum level of financial or other incentives really required to motivate economic producers.<sup>184</sup>

Suppose, then, that a judge is unwilling to commit to a minimalist benefit to a deprived group at what seems a disproportionate moral cost to other groups.<sup>185</sup> What then? One broad family of alternatives has been given the title of “prioritarianism.” Prioritarianism actually does not give an utterly absolute priority to the interests of the less well off.<sup>186</sup> Rather, prioritarianism counts each person’s interests equally, but gives some greater degree of moral weight to the interests of persons who are desperate or ill-circumstanced, in some

180. See G.A. COHEN, *RESCUING JUSTICE*, *supra* note 164.

181. See, e.g., *id.* at 118 (focusing on Rawls’s attention to the “basic structure” of society as the crucial domain of equality); *id.* at 116–77 (arguing that Rawls’s “Difference Principle,” which maximizes the primary social goods available to the least well off representative groups, is insufficiently egalitarian, particularly from the standpoint of justice); R. George Wright, *The High Cost of Rawls’ Inegalitarianism*, 30 W. POL. Q. 73 (1977) [hereinafter Wright, *The High Cost of Rawls’ Inegalitarianism*]. For a critique of Cohen’s response to Rawls, see Richard J. Arneson, *Justice Is Not Equality*, in *JUSTICE, EQUALITY AND CONSTRUCTIVISM: ESSAYS ON G.A. COHEN’S RESCUING JUSTICE AND EQUALITY* 5 (Brian Feltham ed., 2009) [hereinafter Arneson, *Justice Is Not Equality*].

182. For a concise formulation nested within Rawlsian assumptions, see RAWLS, *A THEORY OF JUSTICE*, *supra* note 66, at 62 (“All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”). Whether Rawlsian principles are, in practice, more egalitarian than the resource-focused egalitarianism of Ronald Dworkin is said by Dworkin himself to depend in part on circumstances and empirical findings. See DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 137, at 115. For an exceptionally compressed account of some basic resource-egalitarian principles, see RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 356–63 (2011).

183. See COHEN, *RESCUING JUSTICE*, *supra* note 164; Arneson, *Justice Is Not Equality*, *supra* note 181; Wright, *The High Cost of Rawls’ Inegalitarianism*, *supra* note 181.

184. This is particularly true assuming a commitment to basic ideas of social justice. See COHEN, *RESCUING JUSTICE*, *supra* note 164, at 48, 68–69, 85, 119.

185. For a concise rejection of the Rawlsian response to this sort of problem, see NAGEL, *supra* note 157, at 73.

186. See Derek Parfit, *Equality and Priority*, 10 *RATIO* 202, 213 (1997) [hereinafter Parfit, *Equality and Priority*]; see also Derek Parfit, *Another Defense of the Priority View*, 24 *UTILITAS* 399, 401 (2012).

supposedly absolute, non-comparative, or non-relative sense.<sup>187</sup> Thus, for the prioritarian, ameliorating dreadful circumstances for some persons could take moral priority over obtaining a greater utility gain for a larger number of non-desperate persons.<sup>188</sup> Prioritarians do not always maximize utility.<sup>189</sup> However, for the prioritarian, it is also true that “benefits to the worse off could be morally outweighed by sufficiently great benefits to the better off,”<sup>190</sup> so prioritarians also reject a Rawlsian absolute priority for aiding the worst off.<sup>191</sup> Just how much of a priority should be accorded to the ill-circumstanced must somehow be worked out.<sup>192</sup>

It is again not this Article’s intention to critique the prioritarian approaches. The point is instead to note a few of the inescapable basic complications. Let us simply assume that a person’s relevant “absolute” circumstances can be fully disentangled from their “relative,” or their essentially relational, circumstances.<sup>193</sup> Could it not seem reasonable in, say, an educational equal protection case that the skill-set available to the plaintiff students, as well as the value of that skill-set of teachers relative to that of others in a competitive job marketplace, could

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187. See Parfit, *Equality and Priority*, *supra* note 186, at 214. Parfit emphasizes the supposedly absolute condition of the ill-circumstanced, rather than their comparative status relative to others, in order to distinguish prioritarianism from genuine (comparative) egalitarianism. On this point, see JOHN BROOME, *WEIGHING GOODS: EQUALITY, UNCERTAINTY AND TIME* 198–99 (1995); Richard Norman, *Equality, Priority and Social Justice*, 12 *RATIO* 178, 182–83 (1999); Michael Weber, *Prioritarianism*, 9 *PHIL. COMPASS* 756, 757 (2014). A judge might choose to care about both the absolute circumstances and the relative circumstances of the poor. This approach might well lead to a refinement of the educational equality case *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The logic of combining these prioritarian and more purely egalitarian considerations is briefly explored in SHELLY KAGAN, *NORMATIVE ETHICS* 54 (1998). However, a constitutional judge might instead conclude that the idea of a person’s absolute circumstances, apart from any comparative or inherently relational element, is to some degree misguided. See *infra* Part VI.

188. See Parfit, *Equality and Priority*, *supra* note 186, at 213.

189. See *id.*

190. *Id.*

191. See *id.*

192. For judges, the weight to be attached to being ill-circumstanced and to supposedly absolute circumstances, as well as to relative or relational circumstances, is likely to reflect inarticulate judicial intuitions. See R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 *HOUS. L. REV.* 1381, 1406–20 (2006).

193. But see *infra* Part VI (presenting reasons to doubt this possibility).

both be legally relevant?<sup>194</sup> If so, various judicial combinations of prioritarianism and purer egalitarianism are available,<sup>195</sup> by way of yet further complication.

One final broad family of basic approaches may sometimes have dramatically egalitarian consequences, but does not focus on equality as a matter of principle. These approaches are known by the usefully descriptive, if awkward, title of “sufficientarianism.” The most prominent forms of sufficientarianism, even more so than prioritarianism,<sup>196</sup> rely on the distinction between a person or group’s circumstances, absolutely understood, and their circumstances relative to some other person or group.<sup>197</sup> On that basis, the key intuition for sufficientarianism is that in many cases, someone’s “absolute” condition—e.g., starving, homeless, or neither—is of greater moral importance than how they are faring compared to some other person or group.<sup>198</sup>

More directly put, the basic sufficientarian position is that “[e]conomic equality is not, as such, of particular moral importance. With respect to the distribution of economic assets, what *is* important from the point of view of morality is not that everyone should have *the same* but that each should have *enough*.”<sup>199</sup> The sufficientarian emphasis is thus not on “the fact that some individuals . . . have *less* money than others but [on] the

194. In this context, consider the Supreme Court’s analysis in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 11–13 (1973) (comparing education resources across multiple school districts in Texas).

195. A judge could also add his or her particular views on luck, desert, choice, or responsibility to a combination of prioritarianism and purer egalitarianism—or else to a form of prioritarianism by itself. See Arneson, *Justice Is Not Equality*, *supra* note 181, at 11; Knight, *supra* note 166, at 930.

196. *Rodriguez*, 411 U.S. 1; BROOME, *supra* note 187; KAGAN, *supra* note 187; Norman, *supra* note 187; Parfit, *Equality and Priority*, *supra* note 186; Weber, *supra* note 187.

197. See, e.g., SHER, EQUALITY FOR INEGALITIARIANS, *supra* note 118, at vii (“[T]he non-comparative facts about a person’s life are morally more important than whether he fares better or worse than others.”); Harry Frankfurt, *The Moral Irrelevance of Equality*, 14 PUB. AFF. Q. 87, 91 (2000) (“What one person will require in order to serve his own most authentic interests effectively does not depend upon what another person has.”). For an expression of skepticism on this point, see Andrei Marmor, *The Intrinsic Value of Economic Equality* 1 (Jan. 31, 2000) (unpublished manuscript), <ftp://meria.idc.ac.il/Pub/courses/law/marmor/work/equality-htm> (“[C]an it be the case that people have enough of what they need if others have much more? . . . [N]eeds are also relative to the actual possessions of others in the same society [above bare subsistence].”).

198. This intuition does not work particularly well for high-end “positional goods,” including, say, houses with a breathtaking view of the Pacific and direct access thereto. See FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 28 (1977).

199. Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21, 21 (1987) [hereinafter Frankfurt, *Equality as a Moral Ideal*].

fact that those with less have *too little*.<sup>200</sup> Of course, it would seem a bit odd for a judge applying the Equal Protection Clause to look primarily to a theory that downplays the moral significance of equality, even if the theory may often lead to egalitarian effects. But one available option, however much it would further complicate matters for judges, is to somehow combine a form of sufficientarianism with some form of (more stringent) egalitarianism, to form a hybrid theory.<sup>201</sup>

In themselves, sufficientarian theories provide for ample basic and unavoidable complications for the conscientious judge deciding an issue of equal protection. Judges would have to address the possibility that, for example, a sufficientarian might unattractively recommend a policy by which a few persons are moved from barely below sufficiency to just at or just above sufficiency at a large cost to some unspecified number of persons who are at all times well below<sup>202</sup> the line of sufficiency.<sup>203</sup> This may seem regressive.

Even more basically, what counts as sufficiency in any given context is not self-defining, or otherwise uncontroversially discerned. In many cases, there will be a continuum from what might be considered insufficient, to barely sufficient, to beyond sufficient, with no distinctive markers along the way. In rare cases, sufficiency may be set at a level of bare subsistence,<sup>204</sup> or

200. *Id.* at 32; see HARRY G. FRANKFURT, ON EQUALITY (2015); see also Richard W. Miller, *Too Much Inequality*, in SHOULD DIFFERENCES IN INCOME AND WEALTH MATTER? 275, 280–81 (Ellen Frankel Paul et al. eds., 2002) (emphasizing burdens rather than inferiority).

201. For one step in such a direction, see the Compassion Principle articulated in Roger Crisp, *Equality, Priority, and Compassion*, 113 ETHICS 745, 758 (2003) (“*The Compassion Principle*: absolute priority is to be given to benefits to those below the threshold at which compassion enters. Below the threshold, benefiting people matters more the worse off those people are, the more of those people there are, and the greater the size of the benefit in question. Above the threshold, or in cases concerning only trivial benefits below the threshold, no priority is to be given.”).

202. Under a luck egalitarian analysis, this may not be their fault. This group could include people born with serious remediable or realistically irremediable disabilities. Again, this is not to suggest that unavoidable tradeoffs among the least well-off groups will be frequent or severe in practice; this hypothetical is intended to serve as a test of principle.

203. For discussion of related hypotheticals, see Paula Casal, *Why Sufficiency Is Not Enough*, 117 ETHICS 296, 298 (2007) (discussing Professor Frankfurt’s sufficientarianism); Liam Shields, *The Prospects of Sufficientarianism*, 24 UTILITAS 101, 101 (2012).

204. For context on a global minimum income, see VAN PARIJS, *supra* note 150, at 3 (“I submit for discussion a proposal for the improvement of the human condition: namely, that everyone should be paid a *universal basic income* (UBI), at a level *sufficient for subsistence*.”).

even below the level of fulfillment of basic needs.<sup>205</sup> Particularly in the most advanced economies, sufficiency may often seem more readily associated with the unavoidably vague notion of “decency.”<sup>206</sup> Thus, it has been argued that in such societies, justice does not require equality of resources,<sup>207</sup> or of subjective contentment,<sup>208</sup> but of “the resources required for a *decent level* of well-being.”<sup>209</sup>

It would hardly be unreasonable, though, for a judge to imagine that a state or federal constitutional right to education should be set not at the level of “decency,” let alone below decency, but at some more elevated level of adequacy or equality. Sufficiency offers to such a judge a number of basic options and complications. Collectively, though, the sufficientarian options in, say, public education, seem to merely reinscribe some, if not all, of the options available to the Court in *Rodriguez*.<sup>210</sup> Sufficiency may tend, overall, to further proliferate options, without itself providing much additional substantive guidance for choosing one more or less complete slate of standards over others.

In summary: individually, collectively, or in any creative combination of these relatively pure forms of egalitarianism, the various forms of prioritarianism, and the less directly

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205. See *id.* at 6 (“A [universal basic income], as defined, can fall short of or exceed what is regarded as necessary to a decent existence.”). We set aside the complication of sufficiency in cases of exceptionally expensive tastes, whether those tastes are artificially cultivated or not.

206. See Stephen Nathanson, *Equality, Sufficiency, Decency: Three Criteria of Economic Justice*, 30 J. PHIL. RES. 367, 371 (2005).

207. See *id.*

208. See *id.* (“Even if most people find modest levels of resources sufficient for contentment, Frankfurt’s theory makes sufficiency entirely person-relative and thus totally dependent on the extent of someone’s desires.”).

209. *Id.*

210. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); see also *supra* Part I (discussing *Rodriguez*). For relevant state cases, see *Conn. Coal. for Justice v. Rell*, 990 A.2d 206 (Conn. 2010); *King v. State*, 818 N.W.2d 1, 33 (Iowa 2012); *Gannon v. State*, 319 P.3d 1196 (Kan. 2014).

egalitarian<sup>211</sup> family of sufficientarian views, tend more to overwhelm than to generally guide or enlighten the conscientious judge.

## VI. Equality and the Lost Potential of Community, Solidarity, and Fraternity

Let us briefly summarize more broadly: If a conscientious judge sought to draw generally upon egalitarian theory, or any of its major branches, in an attempt to inform and guide equal protection jurisprudence, the attempt would quickly collapse amidst basic, unavoidable, proliferating, unresolved complications. Looking to the role of various forms of luck<sup>212</sup> or to diluted and hybrid forms of egalitarianism<sup>213</sup> only adds further basic complications without providing further meaningful guidance.

This state of affairs seems regrettable, and, in a way, it is rather curious. Judges clearly need enough theory, of one sort or another, to understand the idea of being equal, insofar as “equal” bears upon “equal protection.” Even the original drafters and ratifiers of the Equal Protection Clause presumably did not dispense with their own dictionaries and thesauri.<sup>214</sup>

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211. It would be possible to treat the various forms of utilitarianism as approaches to a weak form of egalitarianism. Utilitarianism, in order to be meaningful, requires a remarkable degree of specification. See David Lyons, *The Moral Opacity of Utilitarianism* (Bos. Univ. Sch. of L. Working Paper Series, Paper No. 99-7, 1999), [http://papers.ssrn.com/paper.taf?abstract\\_id=212288](http://papers.ssrn.com/paper.taf?abstract_id=212288). Utilitarianism does classically treat each person as one, and no one as more than one. See, e.g., Berlin, *supra* note 94, at 301. But given utilitarianism’s typical indifference to the distribution of utility among persons, it seems sensible to set utilitarianism aside. See HIROSE, *supra* note 77, at 4 (“Classical utilitarianism endorses assigning equal weight to every person’s well-being . . . . However, it is not concerned with how people’s well-being is distributed.”). Note that any egalitarian effects of the diminishing marginal utility of income may be offset by phenomena such as loss aversion, endowment effects, and status quo biases. See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991). For a more critical stance, see David Gal, *A Psychological Law of Inertia and the Illusion of Loss Aversion*, 1 JUDGMENT & DECISION MAKING 23 (2006).

212. See *supra* Part IV.

213. See *supra* Part V.

214. The original version of the thesaurus compiled by Peter Mark Roget predates the Civil War. See WERNER HULLEN, A HISTORY OF ROGET’S THESAURUS: ORIGINS, DEVELOPMENT, AND DESIGN (2004), [www.oxfordscholarship.com/view/10.1093](http://www.oxfordscholarship.com/view/10.1093).

In the abstract, ideas such as community, solidarity, and (arguably) gender-neutral<sup>215</sup> fraternity<sup>216</sup> might provide guidance in addressing questions of equality and inequality. The key problem, however, is that the Constitution and its interpreters have never generally recognized community, solidarity, or fraternity as remotely analogous in their significance, weight, or stature to either liberty or to individual and group equality.<sup>217</sup>

One might also argue that ideas of community, solidarity, and fraternity are as fundamentally indeterminate and conflicting as that of equality. If so, such ideas would likely be unavailable or of only modest use in interpreting equal protection. This may well be. The point here, though, is that even if the ideas involved were nicely determinate, community and related ideas typically lack the constitutional stature to significantly refine our thinking about equal protection.

One problem in this respect is that community, solidarity, and fraternity have an essentially collective dimension that equality is sometimes claimed to lack. Equality is sometimes thought of in individualistic—as distinct from group-focused—terms.<sup>218</sup> Community, solidarity, and fraternity may require not only that the better-off sincerely cheer for the less well-off, but that the less well-off cheer for the better-off when they quite

215. See SIMONE DE BEAUVOIR, *THE SECOND SEX* 766 (Constance Borde & Sheila Malovany-Chevallier trans., Alfred A. Knopf 2011) (1949) (stating that, for the sake of a higher form of freedom, “men and women must . . . unequivocally affirm their brotherhood.”).

216. For background theory on the meanings of these and related concepts, see generally SEBASTIAN DE GRAZIA, *THE POLITICAL COMMUNITY* (3d ed. 1966) (urging for the revival of the political community and the study of anomie, which is the study of the ideological factors that negatively affect the allegiances of a political community); ROBERT A. NISBET, *THE QUEST FOR COMMUNITY* (reprt. 1969) (focusing on the political causes of the loss of community in the United States); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (reviewing trends in social capital and community and civic engagement in the United States). For a sense of the alternative French Revolutionary triad of liberty, equality, and fraternity, see, for example, MARQUIS DE CONDORCET, *THE SKETCH FOR A HISTORICAL PICTURE OF THE PROGRESS OF THE HUMAN MIND* (1795), reprinted in *POLITICAL WRITINGS* 1, 100 (Steven Lukes & Nadia Urbinati eds., 2012) (referring in particular to “the brotherhood of man”).

217. For a discussion in the specific context of homelessness policy, see Wright, *Homelessness*, *supra* note 24; see also Frankfurt, *Equality as a Moral Ideal*, *supra* note 199, at 24 n.6 (assuming that equality is largely a matter of comparing individuals and their circumstances and that fraternity is less salient than liberty or equality because of our basic commitment to individualism, onto which the non-individualist idea of fraternity maps poorly).

218. See, e.g., TEMKIN, *INEQUALITY*, *supra* note 142, at 285 (“[W]hat we have is a concern for the *individuals* who compose society and its groups. Equality, like many other ideals, should be understood individually, not holistically.”).



legitimately succeed.<sup>219</sup> Or equality may be thought of as merely a sort of thin, bloodless, remote, detached friendship.<sup>220</sup> Or, at the further extreme, one could actually more or less identify equality with fraternity itself.<sup>221</sup>

Many egalitarians, though, have raised the possibility that equality, even if it is valuable in itself, can also be pursued precisely for the sake of community, solidarity, or fraternity.<sup>222</sup> If equality is to be pursued in part for the sake of fraternity and related values, perhaps judicial interpretations of equal protection should to some degree be guided by visions of fraternity.

There is certainly some logic to interpreting equality and equal protection in light of the values of community, solidarity, and fraternity. The human need for meaningful belonging<sup>223</sup> typically requires some degree of equality, and of commonality of experience. Many people appreciate the opportunity to be a genuinely valued contributing member of a team.<sup>224</sup> And where

219. See Geoffrey Cupit, *Fraternity and Equality*, 88 PHIL. 299, 307 (2013).

220. See Andrea Teuber, *Simone Weil: Equality as Compassion*, 43 PHIL. & PHENOMENOLOGICAL RES. 221, 224 (1982) (reflecting on the thinking of Simone Weil).

221. See William Morris, *The Lesser Arts* (1877), reprinted in NEWS FROM NOWHERE AND OTHER WRITINGS 231, 253 (Clive Wilmer ed., 1993) (“EQUALITY, which, and which only, means FRATERNITY.”).

222. See, e.g., COHEN, RESCUING JUSTICE, *supra* note 164, at 32 n.9 (stating that community is now less compatible with inequalities than in premarket societies); JEAN HAMPTON, POLITICAL PHILOSOPHY 154 (1997) (discussing Aristotle’s view that equality of means produces the right kind of friendships or partnerships among the citizenry); DAVID HOLLENBACH, THE COMMON GOOD AND CHRISTIAN ETHICS 202 (2002) (“Poor people who are unemployed, inadequately housed, and undereducated in American inner cities are not part of a society that can be called a commonwealth.”); Anderson, *supra* note 152, at 288–89 (stating that the proper aim of egalitarianism “is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others.”); Frankfurt, *Equality as a Moral Ideal*, *supra* note 199, at 24 (“Sometimes it is urged that the prevalence of fraternal relationships among the members of a society is a desirable goal and that equality is indispensable to it.”); Thomas Nagel, *The Justification of Equality*, 10 CRÍTICA: REVISTA HISPANOAMERICANA DE FILOSOFÍA 3, 5 (1978) (stating that, from a non-individualist, communitarian view, “equality is good for a society taken as a whole”); Scanlon, *supra* note 130, at 19 (“The aim of avoiding stigmatizing differences in status appeals to an ideal of fraternity that is fundamentally egalitarian, and has been central to the egalitarian tradition.”).

223. See generally MICHAEL IGNATIEFF, THE NEEDS OF STRANGERS 13–14 (1985) (“It is because fraternity, love, belonging, dignity and respect cannot be specified as rights that we ought to specify them as needs and seek . . . to make their satisfaction a routine human practice.”).

224. See Lawrence Crocker, *Equality, Solidarity, and Rawls’ Maximin*, 6 PHIL. & PUB. AFF. 262, 263 (1977) (“People like the feeling of being part of a team where all members sink or rise together and equally.”).

there is genuine community, solidarity, and fraternity, the remaining non-exploitive inequalities among persons tend not to distract and destabilize the society.<sup>225</sup>

But, even so, given our historic constitutional emphasis on rights—and in particular on the rights of individuals and of discrete groups—the discourse of community, solidarity, and fraternity, however reasonably defined, cannot typically carry the authoritative weight necessary to generally guide and constrain the judicial interpretation of equal protection.

## Conclusion

The Supreme Court has thus not typically availed itself of the most conspicuous historical or contemporary theories of equality in interpreting and applying the Equal Protection Clause. This curious state of affairs is regrettable, regardless of one's general theory of constitutional interpretation. In large measure, this general disconnect is attributable to the endlessly proliferating and ultimately bewildering complications in even the most basic approaches to equality.

One might argue, perhaps, that this lack of useful general guidance from theories of equality is of less practical import than might be imagined. After all, the Court does not, on any occasion, adjudicate alleged denial of equality, or of equal protection, merely in general. Equal protection cases instead focus more contextually on economics and opportunity,<sup>226</sup> or on questions involving, as we

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225. See R.H. TAWNEY, *EQUALITY* 113 (Unwin Books 5th ed. 1964) (1931) (arguing that group exclusion, at the cost of human fellowship, is objectionable in ways not characteristic of mere “counting-house” inequalities among those who are in genuine community).

226. For a sampling of some popular, broadly economic policy-oriented references to problems of inequality, see, for example, ANTHONY B. ATKINSON, *INEQUALITY: WHAT CAN BE DONE?* 303 (2015) (recommending “guaranteed public employment at the minimum wage to those who seek it” and arguing that “there should be a statutory minimum wage set at a living wage, and . . . a capital endowment (minimum inheritance) paid to all at adulthood”); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 1–39 (Arthur Goldhammer trans., Harvard Univ. Press 2014) (2013) (arguing that a general inverse relationship exists between the rate of economic growth and the concentration of accumulated wealth); STIGLITZ, *THE GREAT DIVIDE*, *supra* note 38, at 141 (“[A] young person’s life prospects are in America more dependent on the income and education of his parents than in almost any other advanced country.”); Tammy Harel Ben-Shahar, *Equality in Education—Why We Must Go All the Way*, *ETHICAL THEORY & MORAL PRAC.* 1 (Apr. 12, 2015), <http://link.springer.com/article/10.1007/s10677-015-9587-3> (“[J]ustice in education requires nothing short of equal educational outcome between all individual students.”); Warren Buffett, Opinion, *Better Than Raising the Minimum Wage*, *WALL STREET J.* (May 21, 2015, 7:12 PM), <http://www.wsj.com/articles/better-than-raising-the-minimum-wage-1432249927> (arguing for a major expansion of the

have seen, matters of race and ethnicity, alienage, sex and sexual orientation, disability, and other statuses, along with their interactive effects.<sup>227</sup> Equal protection cases are thus focused on distinct categories, classifications, and contexts,<sup>228</sup> whatever their complications.

Differences among the particular kinds of equal protection cases are no doubt apparent to all of us. The problem, though, is that no particular categorical or contextualized theory can point

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Earned Income Tax Credit); Tyler Cowen, *It's Not the Inequality; It's the Immobility*, N.Y. TIMES (Apr. 5, 2015), [www.nytimes.com/2015/04/05upshot/its-not-the-inequality-its-the-immobility.html](http://www.nytimes.com/2015/04/05upshot/its-not-the-inequality-its-the-immobility.html) ("Finding ways to increase economic mobility should be our greater concern."); Glenn Hubbard, Opinion, *Tax Reform Is the Best Way to Tackle Income Inequality*, WASH. POST (Jan. 10, 2014), [https://www.washingtonpost.com/opinions/tax-reform-is-the-best-way-to-tackle-income-inequality/2014/01/10/112710ea-68ca-11e3-a0b9-249bbb34602c\\_story.html](https://www.washingtonpost.com/opinions/tax-reform-is-the-best-way-to-tackle-income-inequality/2014/01/10/112710ea-68ca-11e3-a0b9-249bbb34602c_story.html) ("A policy shift in favor of mass prosperity—dynamism and inclusion—is best conducted via fundamental tax reform."); Neil Irwin, *Why Americans Don't Want to Soak the Rich*, N.Y. TIMES (Apr. 9, 2015), <http://www.nytimes.com/2015/04/19/upshot/why-americans-dont-want-to-soak-the-rich.html> (citing studies to demonstrate the complexity of Americans' attitudes about redistribution of wealth); Neil Irwin, *Why More Education Won't Fix Economic Inequality*, N.Y. TIMES (Mar. 31, 2015), <http://www.nytimes.com/2015/04/01/upshot/why-more-education-won-t-fix-economic-inequality.html>? (discussing a study that found that increased education improved economic potential, but it did not address the wealth gap); Steven Quartz & Anette Asp, Opinion, *Unequal, Yet Happy*, N.Y. TIMES (Apr. 11, 2015), <http://www.nytimes.com/2015/04/12/opinion/sunday/unequal-yet-happy.html> ("[O]ur current Gilded Age has been greeted with relative complacency."); *Greatest Dangers in the World*, PEW RESEARCH CTR. (Oct. 16, 2014), [www.pewglobal.org/2014/10/16/greatest-dangers-in-the-world/](http://www.pewglobal.org/2014/10/16/greatest-dangers-in-the-world/) (finding that "Europeans and Americans Focus on Inequality as Greatest Danger"); Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* (Nat'l Bureau of Econ. Research, Working Paper No. 19843, 2014), <http://www.nber.org/papers/w19843> (finding overall recent stability in U.S. economic mobility despite increased income inequality, but limited intergenerational mobility in parts of the Southeast and Rust Belt); Vladimir Gimpelson & Daniel Treisman, *Misperceiving Inequality* (Nat'l Bureau of Econ. Research, Working Paper No. 21174, 2015), <http://www.nber.org/papers/w21174> (finding perceived, but not actual, levels of inequality as correlated with the demand for redistribution); Robert J. Gordon, *Is U.S. Economic Growth Over? Faltering Innovation Confronts the Six Headwinds* (Nat'l Bureau of Econ. Research, Working Paper No. 18315, 2012), <http://www.nber.org/papers/w18315> (positing that the rapid economic progress of the United States is unique and will not continue indefinitely); Charles I. Jones, *The Facts of Economic Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 21142, 2015) (manuscript at 32–34), <http://www.nber.org/papers/w21142> (summarizing some recent international economic inequality data). For a general economic focus, but with explicit attention to several conspicuous social categories of domination and oppression, see the collection entitled *Equality and Public Policy*, in 31 SOC. PHIL. & POL'Y (2015).

227. See *supra* Part I.

228. See WALZER, *supra* note 152; YOUNG, *supra* note 152; Anderson, *supra* note 152; Scheffler, *supra* note 152; see also JOHN WILSON, EQUALITY 21 (1966) (emphasizing contextualized or particular categorically focused battles against inequality).

out just which cross-categorical differences are relevant, how they are relevant, how much they matter, and, in addition, how to accommodate interactive effects that may perhaps be reinforcing or synergistic.<sup>229</sup> In all such cases, the potential value of some legitimate broader theory of equality, adaptable for realistic use by judges, remains.

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229. For background discussion, see Larry S. Temkin, *Inequality: A Complex, Individualistic, and Comparative Notion*, 11 PHIL. ISSUES 327, 337 (2011).

### Appendix: Some Historical Illustrations

What follows is a highly selective chronological listing of works that positively address the grounds, nature, or measure of some form of equality relevant to the arguments above. On this understanding, see:

MOZI, BASIC WRITINGS 43 (Burton Watson trans., Columbia Univ. Press 2003) (c. 400 B.C.E.) (endorsing the universality, rather than the partiality, of one's benevolence).

PLATO, THE REPUBLIC 227 (Francis M. Cornford trans., Oxford Univ. Press 1951) (c. 360 B.C.E.) ("[T]he soul of every man does possess the power of learning the truth and the organ to see it with.").

ARISTOTLE, THE POLITICS OF ARISTOTLE 130 (Ernest Barker trans., Oxford Univ. Press 1962) (c. 330 B.C.E.) ("[A] man who is superior to others in flute-playing, but far inferior in birth and beauty . . . ought to get the better supply of flutes.").

MENCIUS, MENCIUS 247 (D.C. Lau trans., Chinese Univ. Press 2003) (c. 310 B.C.E.) ("As far as what is genuinely in him is concerned, a man is capable of becoming good . . .").

THE BHAGAVAD GITA 43 (W.J. Johnson trans., Oxford Univ. Press 1994) (c. 300 B.C.E.) ("I am the same with regard to all creatures; I feel neither aversion nor affection. But whoever shares in me with devotion, may be thought of as good, for he has fixed on what is right.").

EPICTETUS, THE DISCOURSES 24–25 (Christopher Gill ed., Robin Hard rev. trans., Everyman 1995) (c. 140) (discussing the question "what should we conclude from the doctrine of our kinship to God?").

JOHN CHRYSOSTOM, ON WEALTH AND POVERTY 55 (Catherine P. Roth trans., St. Vladimir Seminary Press 1981) (c. 390) ("[N]ot to share our own wealth with the poor is theft from the poor . . .").

PETER ABELARD, ETHICS, *reprinted in* ETHICAL WRITINGS 1, 21 (Paul Vincent Spade trans., 1995) (c. 1140) ("If . . . the possession of things cannot bring about a better soul, surely it cannot make it dearer to God . . .").

MOSES MAIMONIDES, *Guide of the Perplexed*, *reprinted in* ETHICAL WRITINGS OF MAIMONIDES 129, 131 (Raymond L. Weiss & Charles Butterworth trans., 1975) (c. 1190) (discussing the divine image in persons, who are little lower than the angels).

BONAVENTURE, THE LIFE OF ST. FRANCIS, *reprinted in* BONAVENTURE 179, 254 (Ewert Cousins trans., 1978) (c. 1260) ("Francis said: 'I believe that the great Almsgiver will charge me

with theft if I do not give what I have to one who needs it more.”).

ST. THOMAS AQUINAS, *THE SUMMA OF THEOLOGY*, reprinted in *ST. THOMAS AQUINAS ON POLITICS AND ETHICS* 30, 72 (Paul Sigmund ed. & trans., 1988) (c. 1270) (“[T]he things that anyone has in superabundance ought [not just morally, but legally] to be used to support the poor.”).

MEISTER ECKHART, *No Respector of Persons (Sermon 17)*, in *MEISTER ECKHART: A MODERN TRANSLATION* 174, 177 (Raymond Bernard Blakney trans., 1941) (c. 1320) (“[H]umanity is just as perfect in the poorest, most despised person as it is in the Pope or the emperor.”).

BIRGITTA OF SWEDEN, *THE FIFTH BOOK OF REVELATIONS*, reprinted in *BIRGITTA OF SWEDEN: LIFE AND SELECTED REVELATIONS* 101, 111 (Marguerite Tjader Harris ed., Albert Ryle Kezel trans., 1990) (c. 1350) (“[A]ll temporal goods ought to be common and, out of charity, equal for those in need.”).

GIOVANNI PICO DELLA MIRANDOLA, *On the Dignity of Man*, in *ON THE DIGNITY OF MAN* 1, 5 (Charles Glenn Wallis trans., Hackett Publ’g Co., reprinted 1998) (1486) (“Thou . . . mayest sculpt thyself into whatever shape thou dost prefer.”).

THOMAS MORE, *UTOPIA* 84 (Robert M. Adams ed. & trans., W.W. Norton & Co. 2d ed. 1992) (1516) (“My chief objection was to the basis of their whole system, that is, their communal living and their moneyless economy.”).

ST. TERESA OF ÁVILA, *THE LIFE OF TERESA OF JESUS* 201 (E. Allison Peers trans., Image Books 1960) (1565) (“How friendly we should all be with one another if nobody were interested in money and honour!”).

WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* 97–99 (Barbara A. Mowat & Paul Werstine eds., Simon & Schuster Paperbacks 2010) (c. 1600) (“Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die?”).

TOMMASO CAMPANELLA, *THE CITY OF THE SUN: A POETICAL DIALOGUE* 39 (Daniel J. Donno trans., Univ. of Cal. Press 1981) (1602), (“[T]hey cannot give gifts to one another because all is

held in common and because the officials are careful to see that no one has more than he deserves, while everyone has all that he needs.”).

WILLIAM SHAKESPEARE, *KING LEAR* 162 (J.S. Bratton ed., Bristol Classical Press 1987) (c. 1606) (“So distribution should undo excess, And each man have enough.”).

THE ENGLISH LEVELLERS (Andrew Sharp ed., Cambridge Univ. Press 1998) (c. 1648).

THOMAS HOBBS, *LEVIATHAN* 87 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) (“[T]he difference between man, and man, is not so considerable, as that one man can thereupon claim to himself[] any benefit, to which another may not pretend, as well as he.”).

BENEDICT DE SPINOZA, *THEOLOGICAL-POLITICAL TREATISE* 195 (Jonathan Israel ed., Michael Silverthorne & Jonathan Israel trans., Cambridge Univ. Press 2007) (1670) (“[E]ach individual thing has the sovereign right to do everything that it can do . . .”).

RICHARD CUMBERLAND, *A Philosophical Inquiry into the Laws of Nature*, in *A TREATISE OF THE LAWS OF NATURE* 237, 371 (Jon Parkin ed., John Maxwell trans., Liberty Fund, Inc. 2005) (1672) (“[The human mind has a] *spiritual, incorporeal, and God-like Nature*, which is capable of a better Employment than that of the Soul of a Swine, instead of Salt, to preserve a Carcass from Rottenness . . .”).

SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 61 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673) (“[E]ach man [should] value and treat the other as naturally his equal, or as equally a man.”).

JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 285, 289 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (stating that humans are equal because they are “all the Workmanship of one Omnipotent and infinitely wise Maker; All the Servants of one Sovereign Master, . . . [and] his Property . . .”); BLAISE PASCAL, *Pensée* 200, in *PENSÉES* 66, 66 (A.J. Krailsheimer trans., Penguin Books rev. ed. 1995) (1670) (“[E]ven if the universe were to crush him, man would still be nobler than his slayer, because he knows that he is dying . . .”).

MONTESQUIEU, *Letter 109*, in *PERSIAN LETTERS* 150, 150–51 (Margaret Mauldon trans., Oxford World Classics 2008) (1721)

(naming equality as the source of the collective wealth of the citizenry).

ALEXANDER POPE, AN ESSAY ON MAN (1733–1734), *reprinted in* THE RAPE OF THE LOCK AND OTHER POEMS 85, 115 (Martin Price ed., 2003) (“Thus God and Nature linked the general frame, And bade Self-love and Social be the same.”).

JEAN-JACQUES ROUSSEAU, A DISCOURSE ON INEQUALITY 137 (Maurice Cranston trans., Penguin Books 1984) (1755) (“[I]t is manifestly contrary to the law of nature . . . that a handful of people should gorge themselves with superfluities while the hungry multitude goes in want of necessities.”).

ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 345 (Prometheus Books 2000) (1759) (“The meanest as well as the greatest, are under the immediate care and protection of that great, benevolent, and all-wise Being . . .”).

JEAN-JACQUES ROUSSEAU, *The Social Contract*, in THE SOCIAL CONTRACT AND DISCOURSES 1, 50 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762) (“[N]o citizen shall ever be wealthy enough to buy another, and none poor enough to be forced to sell himself . . .”).

VOLTAIRE, *Égalité (Equality)*, in PHILOSOPHICAL DICTIONARY 245, 245 (Peter Gay trans., Basic Books, Inc. 1962) (1764) (“[A]ll men would necessarily be equal, if they were without needs. . . . [I]t is not inequality which is the real evil, it is dependence.”).

DENIS DIDEROT, *Supplément au Voyage de Bougainville* (1772), *reprinted in* POLITICAL WRITINGS 35, 42 (John Hope Mason & Robert Wokler eds. & trans., 1992) (“This inhabitant of Tahiti, whom you wish to ensnare like an animal, is your brother. You are both children of Nature. What right do you have over him that he does not have over you?”).

JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 44–45 (Prometheus Books 1988) (1781) (noting how persons might react differently to similar pain and pleasure stimuli).

MARQUIS DE CONDORCET, ON THE INFLUENCE OF THE AMERICAN REVOLUTION IN EUROPE (1786), *reprinted in* CONDORCET: SELECTED WRITINGS 71, 73 (Keith M. Baker ed., 1976) (referring to “the natural and primitive equality of man”).

THOMAS PAINE, RIGHTS OF MAN 38 (Heritage Press 1961) (1791) (“The illuminating and divine principle of the equal rights of man (for it has its origin from the Maker of man) relates, not only to the living individuals, but to generations of men succeeding each other.”).



- MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* (Candace Ward ed., Dover Publ'ns, Inc. 1996) (1792) (arguing that deficiencies in education, rather than innate intellectual differences, account for the inequality between men and women).
- FRIEDRICH SCHILLER, *Twenty-Seventh Letter*, in *ON THE AESTHETIC EDUCATION OF MAN* 131, 140 (Reginald Snell trans., Dover Publ'ns, Inc. 2012) (1795) (referring to a preparatory phase where, "in the realm of aesthetic appearance, is fulfilled the ideal of equality which the visionary would fain see realized in actuality also . . .").
- IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 30 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) ("*Innate equality* [is] independence from being bound by others to more than one can in turn bind them . . .").
- WILLIAM GODWIN, *Principles of Society*, in *ENQUIRY CONCERNING POLITICAL JUSTICE* 67, 78 (K. Codell Carter ed., Oxford Univ. Press 1971) (1798) ("[W]e may deduce the moral equality of mankind. We are partakers of a common nature, and the same causes that contribute to the benefit of one, will contribute to the benefit of another.").
- ROBERT OWEN, *THE MANIFESTO OF ROBERT OWEN* (1840), *reprinted in A NEW VIEW OF SOCIETY AND OTHER WRITINGS* 360, 360–63 (Gregory Claeys ed., 1991) (claiming that private property creates "inequality of condition").
- PIERRE-JOSEPH PROUDHON, *WHAT IS PROPERTY?* 168 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840) ("Property is impossible because it is the negation of equality.").
- SØREN KIERKEGAARD, *WORKS OF LOVE: SOME CHRISTIAN REFLECTIONS IN THE FORM OF DISCOURSES* 70, 72 (Howard Hong & Edna Hong trans., Harper & Bros. 1962) (1847) ("One's neighbour is one's equal.").
- ARTHUR SCHOPENHAUER, *ON LAW AND POLITICS*, *reprinted in ESSAYS AND APHORISMS* 148, 148 (R.J. Hollingdale trans., 1970) (1851) ("[I]n each man the same will to live appears at the same stage of its objectivization.").
- HERMAN MELVILLE, *MOBY DICK* 126 (Penguin Books 1992) (1851) ("[T]hat democratic dignity which, on all hands, radiates without end from God; Himself!").
- CHARLES DICKENS, *A TALE OF TWO CITIES* 122 (Signet Classics 2007) (1859) ("So many die of want; so many more will die of want.").

- WALT WHITMAN, *Thoughts*, in LEAVES OF GRASS 408, 410 (Jason Stacy ed., Univ. of Iowa Press 2009) (1860) ("Of Equality—As if it harmed me, giving others the same chances and rights as myself . . .").
- VICTOR HUGO, LES MISÉRABLES 575 (Lee Fahnestock & Norman MacAfee trans., Signet Classics 1987) (1862) (describing the Paris street urchin).
- JOHN STUART MILL, UTILITARIANISM (1863), *reprinted in* ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS 115, 145 (Mark Philp & Frederick Rosen eds., 2015) ("Society between equals can only exist on the understanding that the interests of all are to be regarded equally").
- MATTHEW ARNOLD, CULTURE AND ANARCHY 70 (J. Dover Wilson ed., Cambridge Univ. Press 1960) (1869) ("[Culture] seeks to do away with classes . . .").
- FRIEDRICH NIETZSCHE, *Schopenhauer as Educator*, in UNTIMELY MEDITATIONS 127, 127 (Daniel Breazeale ed., R.J. Hollingdale trans., Cambridge Univ. Press 1997) (1874) ("[E]very man knows . . . he will be in the world only once and that no imaginable chance will for a second time gather together into a unity so strangely variegated an assortment as he is . . .").
- WILLIAM MORRIS, *The Lesser Arts* (1877), *reprinted in* NEWS FROM NOWHERE AND OTHER WRITINGS 231, 253 (Clive Wilmer ed., 1993) ("[W]e shall one day achieve equality, which, and which only, means fraternity, and so have leisure from poverty and all its griping, sordid cares.").
- EDWARD BELLAMY, LOOKING BACKWARD 87 (Cecilia Tichi ed., Penguin Classics 1986) (1888) ("The basis of his claim [to an equal economic share] is that he is a man!").
- KARL MARX, *Critique of the Gotha Program* (1891), *reprinted in* THE MARX-ENGELS READER 525, 531 (Robert C. Tucker ed., 2d ed. 1978) ("In a higher phase of communist society . . . can the narrow horizon of bourgeois right be crossed . . . and society inscribe on its banners: From each according to his ability, to each according to his needs!").
- Frederick Douglass, Self-Made Men (Apr. 6, 1894), in GREAT SPEECHES BY FREDERICK DOUGLASS 125, 148 (James Daley ed., 2013) ("[O]ur national genius welcomes humanity from every quarter and grants to all an equal chance in the race of life.").
- LEO TOLSTOY, THE KINGDOM OF GOD IS WITHIN YOU 373 (Leo Wiener trans., Noonday Press 1961) (1894) ("[O]nly with the recognition of the equality of all men, with their mutual service,

is possible the realization of the greatest good which is accessible to men . . .”).

THOMAS HARDY, *JUDE THE OBSCURE* 73 (Wordsworth Editions Ltd. 1993) (1895) (discussing the closed cultural circumstances of the young and educationally aspiring stone mason Jude Fawley).

William Dean Howells, *Equality as the Basis of Good Society*, 51 *CENTURY MAG.* 63, 63 (1895) (“The ideal of society is equality, because . . . to all in their more enlightened moments, inequality is irksome and offensive.”).

WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 355 (Modern Library 1994) (1902) (“[T]he mystery of democracy, or sentiment of the equality before God of all his creatures . . . tends to nullify man’s usual acquisitiveness.”).

W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (Dover Publ’ns., Inc. 1994) (1903) (addressing the continuing oppression of Black Americans).

JOHN DEWEY, *DEMOCRACY AND EDUCATION* 117–18 (Free Press reprint ed. 1997) (1916) (discussing the origin of the “following nature” education doctrine).

George Bernard Shaw, *Socialism: Principles and Outlook*, in 3 *THE ENCYCLOPEDIA BRITANNICA* 572, 572 (J.L. Garvin ed., 13th ed. 1926) (“Socialism, reduced to its simplest legal and practical expression, means the complete discarding of the institution of private property by transforming it into public property, and the division of the resultant public income equally and indiscriminately among the entire population.”).

R.H. TAWNEY, *EQUALITY* (Unwin Books 5th ed. 1964) (1931) (arguing for a more equal English society).

SIMONE WEIL, *THE NEED FOR ROOTS: PRELUDE TO A DECLARATION OF DUTIES TOWARDS MANKIND* 15 (Arthur Wills trans., Routledge 2002) (1949) (“Equality is a vital need of the human soul. . . . [T]he same amount of respect and consideration is due to every human being because this respect is due to the human being as such and is not a matter of degree.”).

SIMONE DE BEAUVOIR, *THE SECOND SEX* (Constance Borde & Sheila Malovany-Chevallier trans., Alfred A. Knopf 2011) (1949) (examining the history of women’s oppression).

MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY* (Transaction Publishers 1994) (1958) (presenting a satire of the United Kingdom’s education system).

ARNOLD BRECHT, *POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY POLITICAL THOUGHT* 311 (1959) (“One significant feature in which all human beings are alike may be

their ability to choose to be good or evil in any moment of their lives.”).

MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 69 (Fortress Press 2010) (1963) (“All men are caught in an inescapable network of mutuality, tied in a single garment of destiny. . . . I can never be what I ought to be until you are what you ought to be, and you can never be what you ought to be until I am what I ought to be.”).

MARTIN LUTHER KING, JR., *Negroes Are Not Moving Too Fast* (1964), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 176, 176 (James Melvin Washington ed., 1986) (referencing the Anatole France dictum that “[t]he law, in its majestic equality, forbids all men to sleep under bridges—the rich as well as the poor”).

JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 115 (1990) (arguing that genuine consent requires that it be “possible for the most deprived members of society to speak without fear and with adequate information”).

IRIS MURDOCH, *METAPHYSICS AS A GUIDE TO MORALS* 365 (1992) (“Human beings are valuable, not because they are created by God or because they are rational beings or good citizens, but because they are human beings.”).

JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 166–67 (William Rehg trans., 1996) (1992) (“[N]on-neutralizable bargaining power should at least be disciplined by its equal distribution among the parties. More specifically, the negotiation of compromises should follow procedures . . . [such] that all the affected interests . . . have equal chances of prevailing. To the extent that these conditions are met, there are grounds for presuming that negotiated agreements are fair.”).

JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* 148–63 (1999) (discussing equality in Christian philosophy).

JÜRGEN HABERMAS, *THE FUTURE OF HUMAN NATURE* 56 (Hella Beister, Max Pensky & William Rehg trans., 2003) (2001) (“On the one hand, there is the nature of the person ‘being an end in itself’ who as an inexchangeable individual is supposed to be capable of leading a life of his own; on the other hand, there is the equal respect which every person in his quality as a person is entitled to.”).

- NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 360 (2008) (“[I]f God loves, in the mode of attachment, each and every human being equally and permanently, then natural human rights inhere in the worth bestowed on human beings by that love.”).
- GILBERT MEILAENDER, NEITHER BEAST NOR GOD: THE DIGNITY OF THE HUMAN PERSON 87–104 (2009) (discussing the idea of equal dignity of all persons).
- JEAN PORTER, MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY 337 (2010) (“[W]ith respect to the fundamental needs and capabilities proper to us as organisms of a certain kind, we are all equal . . .”).
- GEORGE KATEB, HUMAN DIGNITY 17 (2011) (“Only the human species is, in the most important existential respects, a break with nature and significantly not natural. . . . Of course, if the species breaks with nature, so must every individual member of it.”).
- RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 2 (2011) (“[Any legitimate government] must show equal concern for the fate of every person over whom it claims dominion [and] must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life.”).

