

## Constitutional Law and Equality

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No two people (or things) are exactly alike. In that sense, none is equal to another. Yet all share points in common. At a minimum, all people are people (as, for that matter, all things are things). To that extent, at least, they are equal. Whatever the ways people might be equal or unequal, they can be *treated* equally or unequally in a wide variety of different ways. They might receive equal respect, or equal rights at law, or equal opportunities to distinguish themselves, or equal property and other resources, or equal welfare and happiness. Equality might be reckoned by individuals, or it might be by groups. There might be absolute equality: the same for everyone, regardless of what is thought to be deserved or otherwise proper. Or equality might be proportional: the same for everyone according to what is deserved or otherwise proper.

These different kinds of equality, it is fairly obvious, can often be mutually exclusive. Equal opportunity to distinguish oneself amounts to an equal opportunity to become unequal. Equal rights for people whose skills or whose luck is unequal may ensure unequal possession of property and other human resources. To ensure equality of possessions, conversely, may require unequal rights, by way of equalizing or “handicapping” people with unequal abilities. Equal possessions are apt to mean unequal welfare and happiness for people with different needs, tastes, and personality types; equal welfare may require unequal resources. Individual equality, at least of some kinds such as equality of opportunity, is apt to mean group inequality, since groups – almost however defined – will have differing distributions of skills, luck, and ambition. Absolute equality and proportional equality are sharply different: honors or possessions or prison sentences for all, say, as against honors or possessions or prison sentences according to a scale of who deserves them.

Equality, in truth, might mean almost anything. The crucial questions are, “Who is to be equal to whom? With respect to what?” Yet as an ideal, equality exerts great moral force, especially in modern places and times. What are the sources of equality’s power as an ideal? And toward what sorts of equality ought people and their laws to strive?

### The Enlightenment and Its Antecedents

Envy of those more fortunate than oneself is undoubtedly something as old as humanity, and surely it is one source of some people’s passion for equality. But envy as such

is generally considered a vice, not a moral imperative. Equality as an ideal might reach back to the Stoic idea that by sharing a common humanity all people are equal, alike the children of God. This was not an idea that found much echo in Aristotle or other classical writers. Aristotle (1941) was more concerned with proportional equality: treating likes alike, with emphasis on the many ways in which people are unlike.

At least two Aristotelian ideas resonate with modern egalitarianisms, however. The first was more prudential than moral: that whenever people for good reasons or bad come to expect equality – whether sameness of rights, or goods, or whatever – the conspicuous absence of that equality can make for dangerous social turbulence. The second was the suggestion that human friendship can hardly exist between people whose condition is greatly unequal, with the implication again that social solidarity might presuppose some degree of social equality.

The Jewish and Christian sides of the Western heritage are a complex tangle of egalitarian and inegalitarian tendencies. At least in some moods, Jews and Christians have perennially seen themselves as communities of believers equal before God. Hence the prophetic and New Testament denunciations of the rich, and the allusions in the New Testament to believers holding their goods in common. There is also an element of equal rights for all before the law: Leviticus commands “one manner of law, as well for the stranger, as for one of your own country.” Then again, there are important inegalitarian themes in Judaism and Christianity: distinctions between Jew and Gentile, saved and damned, priest and people, man and woman. At the beginnings of modernity, there was a leveling thrust to the Protestant Reformation, which abolished priesthood and hierarchy, and opened the Bible to all believers. And from some of the early Protestant sectaries, there was a whiff of more radical equality, social and economic as well as religious: “When Adam delved and Eve span/Who was then the gentleman?”

But the secular Enlightenment was the most important source for modern ideals of equality. For Hobbes, Locke, and Rousseau, men are equal in the state of nature. Hume – echoing Diderot and Adam Smith – wrote that all mankind are “much the same in all times and places.” The American Declaration of Independence, perhaps the greatest political document of the Enlightenment, proclaimed it a self-evident truth that all men are created equal. And the French Revolutionaries, calling for *égalité*, claimed the mantle of the Enlightenment, as did the nineteenth- and twentieth-century socialist movements.

If equality was a salient Enlightenment idea, what sort of equality, among the myriad conflicting possibilities, was meant? As an intellectual and social movement, the Enlightenment arose to repudiate what it saw as the backwardness, superstition, and intolerance of mediaeval Christianity, and the frozen, hierarchical society of mediaeval Christendom. The Enlightenment rejected the idea that a person’s worth, identity, and destiny should be overwhelmingly bound up in birth and kinship. In Sir Henry Maine’s later expression, the Enlightenment was a great step away from the “society of status.”

Instead, the Enlightenment thinkers put a high value on the individual, endowed as a person with natural rights. The supreme natural right is the right to pursue happiness, each person in his own way, according to his own faculties. Natural rights attach to every person, regardless of birth. As such, they are equal rights.

But for the Enlightenment, including the American founders, this meant equal rights before the law. It did not mean equal outcomes in life. On the contrary, life's happiest outcome is to achieve enlightened reason, and the Enlightenment accepted that people's capacities for this are unequal. Moreover, trying to ensure equal human happiness would mean that people could not pursue their own ideas of happiness: there would have to be a collectively imposed definition of happiness in order to administer an equal distribution of it.

As for any idea of equal wealth or resources, the American founders followed Locke in emphasizing the right to property as a fundamental human right, with the recognition that property rights inevitably mean differences in wealth. For these Enlightenment thinkers, property rights were important in at least two ways: first, they encourage industriousness and hence promote prosperity; and second, they afford each person a practical opportunity to pursue personal goals, a personal idea of happiness, independent of any collective orthodoxy about what constitutes a good life. (The paradigm orthodoxy, of course, was that of the Church, against which the Enlightenment defined itself in the first place.) The characteristic social ideal of the Enlightenment was the *carrière ouverte aux talents*: equal opportunity to pursue various (and hence unequal) careers, for unequal rewards, without legal disabilities founded on irrelevant accidents of birth.

### Equal Rights and American Constitutional Law

The Enlightenment idea of equality exerts great influence on American constitutional law, which tends to treat discrimination on the basis of hereditary status as the model of what equality forbids. Historically, this has evolved somewhat fitfully. There is no mention of equality as such in the original Constitution and Bill of Rights. Instead, the constitution prohibits titles of nobility, and the First Amendment guarantees government neutrality toward religion – religious discrimination having been a prime source of hereditary civil inequality in the seventeenth and eighteenth centuries. The US Constitution's only explicit provision for equality is the Fourteenth Amendment, adopted after the American Civil War. It prohibits the denial to any person of "the equal protection of the laws," and its point was to abolish government discrimination against blacks, who had been held in slavery on a hereditary, racial basis and flagrantly denied equal rights before the law.

From the time it was adopted until nearly the mid-twentieth century, however, the "equal protection" clause was virtually a dead letter in American constitutional jurisprudence. There were occasional honorable exceptions, but the courts upheld most kinds of racial discrimination, relying on the fiction of "separate but equal"; Oliver Wendell Holmes dismissed the equal protection clause as "the usual last resort of Constitutional arguments." This climate began to change only after the Second World War – a war that had been fought at least in part against Nazi racialism, after all – and in the 1950s the Supreme Court made equal protection the constitutional cornerstone for the civil rights revolution in the United States. The Justices did this by creating a kind of double standard: routine legal classifications or discriminations would continue to receive "minimal scrutiny" from the courts and would almost always be upheld, but

“suspect” classifications – racial discriminations above all – would now be “strictly scrutinized” under the equal protection clause, and nearly always struck down.

The Supreme Court’s school desegregation decisions were the prototype for “strict scrutiny.” Racially segregated schools, established by law in many parts of America, had meant drastically reduced opportunities in life for black pupils, based on hereditary status. Race ought to be irrelevant to one’s legal status, the Court now declared. School segregation was therefore condemned as a violation of equal protection. Within a few years after the famous decision in *Brown v. Board of Education*, the courts went on to condemn any law or government action – having to do with anything whatsoever, not just schooling – that treated people differently because of the color of their skin.

More recently, the courts adopted a kind of analogy between race and sex. Most sex discriminations nowadays receive something near “strict scrutiny,” and are disallowed as denials of equal opportunity. Yet the courts stop short of holding that sex (unlike race) can never be a relevant difference that might justify different legal rights and duties.

Even where race and sex are concerned, moreover, the courts interpret the constitution to bar the government only from “intentional” discrimination. This has a clear link to the idea that equality is a matter of individual rights, rather than of group outcomes, under the constitution. To condemn a law (or any government action) as violating equal protection, it is not enough to show that racial groups, or the sexes, fare unequally under the law. The court will only intervene if persuaded that the government’s *purpose* was to treat people differently on these bases. After all, the races and sexes fare unequally under many laws, perhaps under most of them. If blacks and whites have different average levels of education, for example, educational requirements for civil service jobs will affect the races differently. If they have different average incomes, fees and taxes will affect them differently. By scrutinizing intent, rather than effects, the courts turn the focus away from the group, and avoid trying to prescribe the massive social engineering that would be required to make every law and public policy affect every different group alike.

Court decisions in American civil rights cases routinely emphasize that equal protection means individual equality of opportunity, equal rights before the law, not equal outcomes or group rights. There are countertendencies, however, particularly in the “affirmative action” or “reverse discrimination” cases of recent decades. These reflect, quite obviously, the pressures created by the great racial disparities in America’s past, disparities that continue into the present.

“Affirmative action” means quotas and preferences for people because of their group membership. It has roots, paradoxically, in the Enlightenment idea of individual equality before the law. If all individuals have a right to be free of racial discrimination by the government, say, it seems a natural step to test whether such discrimination is actually occurring by looking at how many people of each race are hired into government offices, offered government contracts, or whatever. Yet this step puts the focus straightaway on numerical outcomes for the group, rather than on the question of individual discrimination. Furthermore, since there is no way of knowing how many people of each race there would be in the absence of discrimination, any benchmark figure is bound to be more or less arbitrary. The desire to compensate for past discrimination gives reason to set the benchmarks higher rather than lower. And there is a

strong incentive to meet any such benchmark, since doing so will tend to exonerate one from charges of discrimination. Hence, to achieve numerical outcomes, the society comes to apply different standards and qualifications to people depending on their group membership.

The decisions of the courts about all this, especially the Supreme Court, suggest that “affirmative action” is something of an exception that proves the rule about American constitutional doctrine. The judgments are often inconsistent, allowing and disallowing various affirmative action programs in situations that are essentially indistinguishable. The Court often decides these cases by patchwork plurality rather than by majority. Altogether, the decisions have an air of equivocation about them. Even when the Justices uphold or prescribe affirmative action, they tend to justify it in the language of equal opportunity and individual rights rather than group rights and equal outcomes.

Where racial (or sexual) discrimination is not at issue, the American courts do not read the equal protection clause to interfere with most of the ways government differentiates people. This too is linked to the idea of equal rights under law. Any constitutional principle of equality must grapple with the fact that in almost every law there is an element of equality, but also an element of inequality. The element of equality is that any general rule, by virtue of being a rule, applies equally in equal cases. Thus, insofar as a rule authorizes or forbids certain people to do certain things in certain situations, all persons within the stipulated category are equally within it. But there is an element of inequality as well, because most rules also “classify” or make distinctions among people. Criminal laws distinguish the culpable from the nonculpable; budgets spend money on some things (and people) but not on others; the laws of tort and contract create rights and liabilities for people in some situations but not in others, and so forth.

If it is in the nature of laws to “classify” or discriminate, equality before the law cannot mean equality without such discrimination. Ideally, it must therefore mean something like “treating likes alike.” One way that lawyers assess how well a rule treats likes alike is to consider how the classification corresponds to the legitimate purpose of the rule. To take an example that most Americans are now ashamed of: if the purpose of the internment of Japanese Americans during World War II was to round up disloyal people, the round-up was both “overinclusive,” since the overwhelming majority of Japanese Americans were loyal, and “underinclusive,” because members of the German American Bund, say, were not rounded up.

A drawback of this way of reasoning is that the statement of a rule’s purpose can often be manipulated to minimize over- or underinclusiveness. If the purpose of the Japanese American internment is said to be “to round up people with personal or family roots in any country that has actually attacked the territory of the United States,” for example, then the policy is not underinclusive in exempting the German American Bundists. Moreover, it is almost impossible for any law to achieve a perfect fit between its purpose and its scheme of classification. Any minimum age fixed by law for acquiring a driving license, for example, will be both over- and underinclusive: some underage people would undoubtedly be model drivers, whereas some people who meet the age requirement will be childish and irresponsible on the road.

“Equal protection” cannot mean that all legal classifications are improper, nor has it meant that the courts assume the power to decide which likes are alike or how much

over- or underinclusiveness is too much. According to the American Supreme Court, drawing distinctions by way of lawmaking is what democracy is all about. What civic equality forbids is discrimination on the basis of hereditary status, like race and sex; equality also forbids what the courts more recently have considered purely invidious or ill-willed discriminations based on sexuality. Other legal differentiations among people and their activities get “minimal scrutiny” under the equal protection clause and are routinely upheld.

As for the ways in which people differentiate themselves economically and in their ideas of a good life, the American courts have never adopted the equal protection clause as a charter for promoting equality of wealth or happiness. “Minimal scrutiny” extends to the laws of property, and to the legal framework for economic markets generally. This means that democratic institutions are free to decide from time to time how much economic freedom or regulation or redistribution is wanted. The idea that most such lawmaking should get minimal judicial scrutiny arose, in fact, in the New Deal years of the 1930s specifically to repudiate earlier conservative court decisions striking down social welfare legislation as unconstitutional. But by the same token, the Supreme Court disavows the idea that “equal protection” requires the state to provide even a minimum standard of welfare subsistence. There is nothing whatever in American constitutional history to suggest any requirement of actual equality of resources or of human happiness.

### Liberty and Equality under the Constitution

A great strength of the Enlightenment idea of civic equality, or equality before the law, is that it allows for a large measure of personal freedom under the Constitution. All freedoms, after all, entail the freedom to differentiate oneself from others. Political, artistic, or religious freedom, for example, is needed only by people who wish to differ politically, artistically, or religiously. It requires no exercise of freedom to conform to the prevailing orthodoxy. But to differentiate oneself is to make oneself unequal in one's condition, be it political, artistic, or religious. So likewise, economic freedom – economic activity being most people's daily endeavor – means the freedom to differentiate oneself economically: freedom to become economically unequal. Economic freedom is also related to other freedoms, as the Enlightenment thinkers recognized, since a degree of economic independence allows one to differ politically, artistically, or religiously in the face of pressures to conform. The ideal of equality before the law can coexist with the inequalities of condition that freedoms foment.

Hence the close link throughout American history, emphasized by Alexis de Tocqueville (1961), between this particular idea of equality and the idea of individual liberty embodied in the Bill of Rights. The Enlightenment thinkers' rationale for equal rights before the law is the supreme worth of the individual. Every individual, regardless of birth or ancestry, is a bearer of natural rights by virtue of being an individual. Respect for equal rights therefore entails respect for the unequal outcomes produced by the exercise of equal rights. Since every individual has unique abilities, luck, ambition, and so forth, the exercise of equal rights will mean different possessions and different levels of well-being for different individuals. (There will be different outcomes for groups as

well, since groups, almost however defined, are not identical in their distributions of abilities, luck, and so forth.) Only by curtailing or suppressing the exercise of equal rights could the state create and preserve equality of possessions or of welfare.

The Enlightenment idea of equality, which has been so decisive for American constitutional law, has surely held great attraction for many people over the generations and continues to do so, in America and elsewhere. But there has also been considerable dissatisfaction with it, a dissatisfaction that lies near the heart of much nineteenth- and twentieth-century radicalism, continuing into the twenty-first century. In fact, the Enlightenment idea of equality itself carries the seeds of many of the political and philosophical objections raised against it.

### The Radical Critique and the Radical Dilemma

There are at least two important objections. First, equality of rights does not prevent – to some extent it promotes – great inequality of condition. But the very success of the Enlightenment rejection of feudal inequality creates a moral sensitivity to inequalities of other kinds. Equality of rights implies equal dignity for every person, which inequality of condition seems to mock. If all people were not of equal dignity, after all, why should they have equal rights? Yet it seems a pious fraud to claim that there really is equal dignity for the rich and the poor, the happy and the miserable, those who enjoy the best of everything and those who scramble for castoffs. Modern life abounds in individual and group inequalities of resources, success, and happiness. Unease with these inequalities, a sense that they are wrong, is encouraged both by the wide popular acceptance of the Enlightenment proclamation of equality and by the ambiguity of what that proclamation might mean. Once it is accepted as a self-evident truth that all men are created equal, and without great pedantry about what is intended, there is a natural recoil from glaring human inequalities of any kind.

Second, there is a double edge to the association between equality of rights and the idea of freedom. As has been suggested, equality of rights respects the inequality of outcomes that liberty produces, whereas to keep people equal in their condition would require curtailing or suppressing the liberties that people would exercise to differentiate themselves if they were free to do so. The trouble is that equal rights cannot be exercised equally (sometimes they can scarcely be exercised at all) by people of greatly unequal condition. Just as it can be jeered that “the law in its majesty forbids rich and poor alike to sleep under bridges,” so freedom of speech, for example, is not the same for the rich, who can own a newspaper or a television network, and the poor who cannot. Likewise, the Enlightenment’s fundamental egalitarian idea of careers open to talent gives an obvious unequal advantage to those with greater talents.

The ideology that inspired much nineteenth- and twentieth-century radicalism was Marxism, and it might be expected that Marxist thought would offer a well-developed body of ideas about equality, by way of an alternative to the Enlightenment ideas that tolerate such inequality of condition. Equality was surely at the heart of Marxism, but Marx’s writings actually have little to say on the subject. This turns out to be consistent with the logic of Marx’s intellectual system. To be sure, equality – or rather, the principle “from each according to his ability, to each according to his needs” – is the goal

of history in the Marxist scheme. But there can be no equality so long as there are economic classes. And class conflict is the key characteristic of human life according to Marx, once people progress past “primitive communism” and until at the final synthesis they reach the Communist millennium. The definition of that millennium, however, is that when it is reached, problems of distribution will no longer exist. Once communism is achieved and the problem of distribution solved, the question of equality, therefore, becomes moot.

If Marxist “scientific socialism,” although inspired by the ideal of equality, had so little to say on the subject, the various strands of “utopian socialism” tended more toward yearning for equality, or struggling for it, than toward systematic philosophical speculation about it. The tension between liberty and equality of condition already dogged radical egalitarianism, however, as early as the Babeuf conspiracy during the French Revolution. The Babeuf manifestos proclaimed that all men by nature have the same right to earthly goods, that private property is the source of inequality and must therefore be done away with, that in order to ensure equality all men must be compelled to live in the same manner and to do manual work. “Let all the arts perish, if need be, so that we may have true equality.” It was clear to the Babouvists that “true” equality of condition would require a regime of compulsion, not of freedom.

Can there be equality of condition, in practice, without giving up constitutional freedoms? This is the crucial question for any radical theory of equality and of what “equal protection” ought to mean under the constitution.

History, as opposed to philosophy, does not give reason for great hope about this. Voluntary “utopian socialist” communities, it is true, appeared throughout the nineteenth and twentieth centuries in various places around the world, with equality of possessions and often with a sincere effort at free and equal participation in governance as well. But – with perhaps the single exception of the Israeli kibbutzim – all were short-lived: experiments began in hope that broke up quickly, usually in rancor.

Marxist “scientific socialism,” on the other hand, has enjoyed (if that is the right word) longer sway in various countries, and a greater opportunity to put an alternative vision of equality into actual practice. True equality of condition was never achieved for the peoples under Communist government, nor did the governments ever claim that it was: as a matter of theory, complete equality must always await the final synthesis, on a golden dawn yet to come. Still, in the most intense periods, in the USSR in the 1930s and in China during the Cultural Revolution, there was perhaps something close to equality of condition for all but the *vozhd*, Stalin himself, and for Mao, the Great Helmsman: an equality of terror, the haunting knowledge that no one, high or low, however conformist, was safe for even a moment from denunciation, arrest, and destruction. For the rest, the Communist regimes attained the sort of equality best expressed on George Orwell’s *Animal Farm*: “All animals are equal, but some animals are more equal than others.” The Communist ruling castes had their privileges, which were kept partly hidden; there was a shabby, often hungry, equality of possessions for everyone else; and there was rigid suppression of any “inequality” or distinction of political, artistic, or religious expression. It was all leavened with corruption, and bought at the price of tens of millions of dead and untold suffering.

At the philosophical level, any theory of equality that offers itself as an alternative to the Enlightenment’s equality before the law – any theory that seeks to satisfy the

sense of injustice brought on by great inequalities of human condition – must presumably find ways of escaping the fragility of utopian socialism and the various drawbacks of “real, existing” Marxist socialism. At least, such a theory must do so if it is to hope for widespread acceptance and a chance to influence constitutional law.

John Rawls led the way among contemporary academic philosophers in trying to develop such a theory. Ronald Dworkin is also an influential philosophical advocate of the idea that justice requires equality of resources. Amartya Sen and Martha Nussbaum argue for an egalitarianism of capabilities, which implies state-enforced redistribution based on needs or human condition rather than equality of resources. Although they differ on various points, all these argue that economic egalitarianism is consistent with individual liberty, and perhaps essential to it. Michael Walzer is an example of a liberal writer with egalitarian sympathies who, nonetheless, accepts a range of inequalities in various spheres of life. Some academic feminists and like-minded “postmodern” radicals, on the other hand, more or less openly repudiate the liberal idea of individual freedom.

## Rawls

John Rawls’s book *A Theory of Justice* appeared in 1971, and reflected to some degree the resurgence of egalitarian radicalism that had rocked America and much of the Western world at the time. Philosophically sophisticated and complex, this book and Rawls’s subsequent writings have provoked enormous interest, by no means only among philosophers (Rawls, 1971, 1993). Rawls achieved at least three important things. First, he brought political philosophy back into the mainstream of academic philosophy at a time when analytic philosophy – prevalent in English-speaking countries – had appeared to turn away from social thought. Second, he insisted on the question of equality as a central issue for liberalism. And third, he succeeded in casting his argument (and much of the ensuing academic debate) in terms of the ways in which equality and liberty might reinforce each other, turning the spotlight away from the tensions between equality and freedom.

Rawls argues that justice requires two principles:

- 1 Every individual in a just society has an equal right to a fully adequate scheme of equal basic liberties consistent with a similar scheme for everyone.
- 2 Social and economic inequalities must satisfy two conditions. First, such inequalities must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.

The first principle is very close to the Enlightenment idea of natural rights and equality before the law. The second principle (known as the “difference principle”) adds a requirement that there should be considerable (but not necessarily total) equality of property and other resources for all individuals, presumably throughout their lives. Inequalities are justified only as incentives or rewards that promote such increases in the society’s wealth that actually make the poorest better off.

Rawls derives these principles from a hypothetical social contract. Suppose that a group of people meet to lay the framework for their society, and that they are behind a “veil of ignorance” as to what individual places they will have in that society. They do not know their race, sex, social class, talents, personal characteristics, or ideas of what makes for a good life. Rawls argues that they would adopt his principles in order to ensure that, when the “veil” is lifted, even the worst positions in society are as good as possible, and that all will be able to exercise their “moral powers” to pursue their ideas of a good life, whatever those ideas might turn out to be.

Much of the appeal of Rawls’s theory comes from the way it links equality to liberty. Rawls insists, in fact, on the “lexical priority” of liberty, by which he means that liberty must not be exchanged for other economic or social advantages, including greater equality. In Rawls’s social contract, equality is esteemed not for its own sake, but so that all persons will have the best practical opportunity to exercise their freedoms in pursuit of their individual ideas of the good life. Thus, Rawls’s equality principle avows its adherence to Enlightenment ideas about liberty, individual autonomy, and the supreme worth of the individual, while appealing to the egalitarian ethic, which the Enlightenment has fostered in modern men and women.

Actually, it is not clear how much equality of economic outcome is really required by Rawls’s “difference principle.” If inequality of resources could only be justified insofar as it improves the position of the single worst-off individual in society, then no inequality whatsoever could be justified, since the life of an utterly dysfunctional derelict, say, is probably not improved by any net improvement in the wealth of society. Rawls suggests that inequalities are justified if they improve the lot of a “representative member of the least advantaged class.” But then the size of that class is crucial. If by the “least advantaged class” one means the poorer 50 percent of society, say, then great inequalities might be justified: the poorer 50 percent of Americans are probably better off now on average than they would be in a society with significantly fewer incentives for the creation of national wealth. Yet Rawls surely implies that he intends something close to equality of property and other resources as his governing principle of distributive justice.

An objection frequently raised against Rawls’s scheme is that his parable of the social contract assumes great risk aversion on the part of those behind the “veil of ignorance.” He pictures them agreeing to forbid inequalities of economic outcome that do not benefit the least advantaged (or the least advantaged class), because any of them might turn out to be the least advantaged when the “veil” is lifted. But suppose in a society with more inequality, and more incentive to produce wealth, many people – perhaps most people – would be better off (although the worst off would be worse off) than they would be in a society where property is equal. Might people not wish to risk greater inequality – the possibility of being amongst the few who would be worse off than otherwise – in hopes of being amongst the many who would be better off?

This objection has implications that go beyond the niceties of social contract theory. The stated goal of Rawls’s theory of justice is that everyone should be enabled to pursue an individual idea of the good life. For many intellectuals, and perhaps for many religious people, that pursuit might be a matter of adhering to a particular theory, cause, or faith. But for many nonintellectuals, economic activity is the grist of daily life, and the idea of a good life is bound up with achieving economic distinction for oneself and

one's family. Yet economic distinction means economic inequality, and much of it might be forbidden by Rawls's theory of justice.

The question of risk aversion suggests that even behind the veil of ignorance, there might be no consensus for Rawls's principles. And once the veil is lifted, talented, lucky, or ambitious people might surely chafe. It is not clear how a notional agreement "behind the veil" would compel actual agreement in real life. In the absence of such agreement, a society intent upon Rawls's equality principle might have to use considerable compulsion in order to maintain it. Rawls insists that his theory gives "lexical priority" to liberty, even over equality. But a society really intent on equality – persuaded, perhaps, that if people stand out too much in their attitudes, outlook, or ideas, that they are apt to try to stand out economically as well – might relegate freedom to a priority that is "lexical" in the other sense: merely verbal or nominal, and only honored in the breach.

### Dworkin

Ronald Dworkin is a lawyer and philosopher, and probably the leading intellectual heir to Rawls. He derives his egalitarianism not from any parable of a social contract, but rather from an ethical theory that would judge people by how they meet the ethical challenges they set themselves in life. Since all are equal in having to face such challenges, justice requires that they should have equal resources with which to face them. Moreover, ethics are apt to be frustrated by unjust circumstances, so each person's ethical life is best led under conditions of justice, with equal resources for all. Freedom is essential for such equality, because to define equal resources in a complex world, and to allocate them fairly, there must be ongoing freedom of discussion; likewise, people must have liberty to develop their ideas of a good life in order for resources appropriate to those ideas to be distributed equally.

Equality of resources, for Dworkin, means that people's unequal talents and luck should not be permitted to produce inequalities of wealth. Dworkin is more radical than Rawls about this, inasmuch as he would not even tolerate inequalities that improve the condition of the worst off. On the other hand, Dworkin accepts that once everyone has received an equal initial bundle of resources, those people who choose to engage in valuable activities ought to be entitled to acquire and to keep what others are prepared to pay – so long as the ensuing inequality is the result of a person's choice of occupation and hard work, rather than a result of unequal talent or luck. And Dworkin (1987, 1988, 2000) calls for equality of resources, but not for a government effort to create equal welfare or happiness, because on his ethical model people ought to be responsible for pursuing their own, autonomous ideas of welfare.

Dworkin does not propose that people's talents and luck should actually be made identical – that those favored by birth should be forced to undergo physical or mental amputation of some kind. Instead, he envisions an insurance scheme, carried out in practice by redistributive taxation, which would compensate for inequalities of luck and ability. The goal would be to compensate for handicaps, but not for expensive tastes or other moral choices, whose consequences a person should rightly live with on Dworkin's "challenge model" of ethics.

One objection to this is that it is difficult to know where handicaps, talents, and luck might end and where matters of moral choice begin. If one is conditioned by one's upbringing to choose a valuable occupation and to work hard at it, is that one's luck or one's moral choice? And if handicaps are difficult to distinguish from expensive tastes and other personal choices, an egalitarian society might be driven towards a policy of compensating for expensive tastes as well as for handicaps, which tends to convert the principle of equality of resources into a policy of trying to ensure equal welfare or happiness for all.

A deeper objection is that equality of resources might not really promote Dworkin's goals of ethical autonomy and responsibility. Dworkin's argument is that equal resources give people the best chance to choose (and to try to meet) their own individual ethical challenges in life. But darker possibilities suggest themselves. Perhaps many people would not feel they can "afford" to be ethical individualists in conditions of general poverty: and in a society that enforces equality of resources there would be little incentive to create wealth and hence, it is fair to predict, little wealth. (There is evidence, surely, that ethical attention to human rights is greater in affluent countries than in poor ones.) Then again, there is the danger that when society enforces a sameness of resources or conditions, it may foster a human sameness as well – a climate of conformity and lack of imagination. People might be most apt to develop independent ethical ideals where there is wide human diversity, and there tends to be wider human diversity when human conditions differ, not when they are the same. Still another possibility is that, far from promoting ethical responsibility, a society that ensures equal resources might create a sense that no urgent ethical obligations remain, or that it no longer matters very much how any individual behaves.

Finally, it might be questioned how much liberty there could really be in a society committed to Dworkin's equality of resources. Unlike Rawls, who says that equality is necessary for autonomy and freedom, Dworkin suggests that freedom is valuable primarily because it is needed to achieve justice, by which he means a genuinely equal distribution of resources. If freedom is not valuable for its own sake, but only as a means towards equality, it is not clear why there should be freedom for people who do not believe that justice requires such equality, and who would use their freedom to speak and work against equality of resources.

### Equality of Capabilities

Amartya Sen is an economist and philosopher; Martha Nussbaum is a classicist and philosopher; both have a strong liberal egalitarian bent. Sen (1992) and Nussbaum (2000) urge an egalitarianism of capabilities: that society should ensure that each person has the capability to exercise freedom effectively and to achieve the "functionings" or the goals that the person considers valuable. This approach is explicitly put forward as an alternative both to equality of welfare and equality of resources. A liberal society cannot and should not ensure equality of welfare, because to do so it would have to define what welfare is for everybody, preempting people from choosing for themselves among a variety of different and conflicting values and goals in life. But equality of resources would not have equal value for people who differ widely in their

natural and social situations: equal resources would not mean real equality, for example, for people who suffer physical, mental, or social handicaps.

Sen is somewhat abstract about what particular capabilities society should ensure to each person, although he alludes to Franklin Roosevelt's "four freedoms" – including freedom from want and freedom from fear – as being at least illustrative. Nussbaum lists ten central capabilities: life; bodily health; bodily integrity, including freedom from assault and sexual freedom; ability to exercise the senses, imagination, and thinking; emotional development; practical reason, including freedom of conscience; affiliation or relations with others; ability to live with concern for and in relation to animals, plants, and nature; ability to play; and control over one's political and material environment.

Both Sen and Nussbaum insist that people vary in their need for resources in order to develop their capabilities, and that society should provide more resources to those with physical, mental, or social handicaps. Social handicaps include obstacles created by traditional hierarchies and prejudice. Redistribution, therefore, should include preferential treatment on the basis of race, gender, and class.

Sen, however, concedes that extensive government redistribution may conflict with promoting economic efficiency and productivity. Sen suggests a need for compromise between market principles and redistribution, and criticizes the "extremism" of Rawls' principle that inequalities can only be justified if they improve the condition of the worst off. Sen even suggests that Rawls was driven by that principle to opt for mere equality of "primary goods" or resources rather than a more meaningful equality of capabilities, since the level of government intervention that would be required to ensure the latter would be prohibitive if no countervailing consideration of economic efficiency (beyond what would help the worst off) could be taken into account.

A theoretical criticism of capability egalitarianism is that it may tend to collapse either into equality of welfare or equality of resources rather than being truly a "third way." Sen and Nussbaum both emphasize that capabilities and effective free choice are good in themselves, not just as means to achieving other goods. But if capabilities are important goods – perhaps among the most important goods in life – then redistribution intended to equalize them is really an effort to equalize welfare. As for offering an alternative to Rawls' and Dworkin's equality of resources, Dworkin at least stipulates an insurance scheme to compensate for handicaps, so it is not clear that capability egalitarianism (intended to compensate for physical or social handicaps) is really any different in principle.

There are practical objections as well. Sen and Nussbaum insist that people with "natural and socially generated difficulties" need and should receive more resources than others in order to develop their capabilities. But no government could assess on an individual basis what each person needs along these lines. So capability grants would have to be on a group or category basis: a person would be eligible for preferential or affirmative action redistribution depending on whether the person belongs to an eligible group or category. The politics of victim group identity would appear to follow inevitably, with intense competition among racial, ethnic, religious, sexual, regional, class, and other groups, as well as groups based on physical and mental conditions of various kinds, for who is needier, who is more handicapped by "traditional hierarchy and prejudice," and who will receive bigger slices of the pie.

Moreover, government would have to grow considerably in size and power in order to direct society's economic resources towards promoting a complex list of human capabilities, while trying to accommodate, if not to suppress, controversy about the list. ("Concern for other species" does not appear to contemplate a high priority for hunting, to take one example of a capability that might be contested.) It is at least plausible that human capabilities flourish best, on average, in a more prosperous society. Prosperity surely tends to offer more choice, not only of commodities, but also of cultural and even spiritual resources. A significantly more politicized economy and a larger, more powerful, more intrusive state would not necessarily be conducive to prosperity.

Capability egalitarianism is perhaps most open to criticism for its want of what the poet Keats called "negative capability." Keats meant a kind of humility about the limits of reason and analysis in the face of beauty and the sublime. But in this context, what might be wanted is a degree of humility about the limits of government. Capability egalitarianism would mean extensive state intrusion in the economy, if not into the private life of each person whose capabilities are to be promoted. There is at least a question whether such state policy would in practice be benevolent, disinterested, or efficient.

### Equality Unmodified or Spheres of Justice

One possible reaction to the avowedly liberal egalitarianism of Rawls and Dworkin can be seen in the writing of some academic feminists, proponents of "critical race theory," and other "postmodern" radicals. These harken back to the eighteenth-century Babeuf manifestos and denounce liberalism in all its forms as inconsistent with true equality.

In the view of many of these writers, individual autonomy, legal rights, the artifacts of civilization, even rationality and language, are all means of acquiring unequal power, and hence sources of sexual, racial, or class oppression. Although equality is taken to be a transcendent virtue, the suggestion is that equality can scarcely even be defined within a society (and in a language) so corrupted by inequality of power.

The only way to try to achieve equality, on this view – or even to find out what equality might mean – is through a radical new form of democracy that gives "voice" and "power" to the disadvantaged. In particular, the best that the law can do is to "listen empathically to the powerless," to abandon "false neutrality," and to "empower the oppressed."

One thing that these feminist and other writers surely illustrate is how readily various ideas of equality can be at war with one another. Equality in the sense of generality is probably basic to most ideas of law: law, that is, means creating general rules to be applied "without regard to persons," and specifically without regard to any person's wealth or status. By contrast, the strong implication in much of the more radical legal writing over the past generation is that legal rules (and judges) should above all "take account of persons" and favor those deemed to be oppressed: in the name of equality, of course, and hence in the name of constitutional equal protection.

Michael Walzer represents a very different reaction to Rawls and Dworkin. Walzer is a democratic socialist. Nonetheless, his book, *Spheres of Justice* (Walzer, 1983), begins with the recognition that it is the human way for people to differentiate themselves

from one another, unless prevented by overwhelming force from doing so. Walzer accordingly rejects any principle of equality of resources or equality of condition that would try to prevent people from differentiating themselves economically.

Rather, Walzer suggests that the nub of equality, the basic thing that egalitarians want, is that life should not be a matter of domination by some people and subordination for others. The best way to have less dominance is to recognize that there are many different spheres of life, and to ensure that there are opportunities for dignity and success in each. Walzer's goal is what he calls "complex equality," whereby people are able to face each other as equals, not because all are required to be the same in any particular respect, but because all have a real chance to achieve dignity in one or other sphere of life.

Thus, for Walzer, the market is one legitimate sphere, but politics is another, kinship is another, the sphere of basic human needs is yet another. In some of these spheres there will inevitably, and rightly, be a hierarchy of achievement and success. Economic activity is a sphere in which some people will be more successful than others. But success in one sphere ought not, in justice, to spill over into another. For example, there are many things that money cannot buy, and in Walzer's view there are many more – including political power – that it should not be able to buy. Provision for basic human needs, according to Walzer, should itself be considered a sphere separate from the market. So, like political power, a basic level of welfare should not be a matter of what money can buy, although money inequality need not otherwise offend "complex equality."

As a socialist, Walzer might favor "blocking" a variety of money exchanges that most people in market economies might not find objectionable. But "complex equality," as a general idea of justice, has strong affinities to the Enlightenment idea of equality before the law. Unlike Rawls and Dworkin, Walzer does not see human dignity as requiring equality of economic outcome. Rather, like the Enlightenment thinkers, Walzer intends his spheres of justice as a way for people to differ from each other – with as much equal status as possible, but short of creating pressures for human sameness that are apt to overwhelm all freedom to be different.

### Is Equality a Value?

Equality is shorthand for many values, some of which conflict with one another, and some of which conflict with other values such as freedom. Two ideas of equality, however, probably command broad support in most developed countries today. The first is that, whatever inequalities of condition there might be, these inequalities should not be permanent and hereditary, and that social policy ought to do what it can to promote opportunities for "mobility" and success. This is essentially the Enlightenment idea: that the law should not treat people differently on the basis of accidents of birth, and more generally, that race or caste or status should not overwhelmingly govern a person's destiny.

The second idea is that, in relatively wealthy societies, "no one ought to starve": that there ought to be some minimum of social insurance and alleviation of need. Strictly speaking, this is not an idea of equality at all. It stipulates a minimum, and in no way

forbids inequalities of condition above the minimum. Still, what underlies it is an idea of equality, not equality of condition but equality of respect: that to be respected as a person, and to have any real opportunity to take advantage of equal rights, one must be above a certain threshold of want. Whether alleviating want is best done by government or by civil society and private philanthropy, or in what combination, is of course controversial.

These two ideas do not fully answer the radical egalitarian objections, namely that great inequalities of condition ought always to be a source of moral unease, and that equal rights cannot really be exercised equally by unequal people. Yet there is a paradoxical, perhaps even self-defeating, aspect to radical egalitarianism. The source of almost every kind of egalitarianism, after all, is something like the liberal idea of the supreme worth of the individual. Were it not for that idea, why would it matter that all should be equal and that no individual should be slighted? Yet the tendency of radical egalitarianism – of trying to achieve anything like equality of condition – is to efface the differences that distinguish one person from another, that make each person individual.

An important reason that the Enlightenment idea of equal rights is widely accepted is that it coexists fairly well with other widely held values, including the idea of individual freedom. More radical ideas of equality, it is true, are deeply held by some people, and have an influence in the popular culture and sometimes in electoral politics. But these ideas are far from displacing the Enlightenment idea of equal rights. Outside the academic world, for example, there is little public resonance even to Rawls's and Dworkin's avowedly liberal egalitarianism. The same is surely true of radical feminism and other "postmodern" radical theory. Equality as a matter of constitutional law continues to mean equal rights, not equal resources or equal capabilities or a requirement that the government should try to ensure an equally happy life for everyone. This is perhaps unlikely to change very much under liberal constitutions, at least until equality of human condition can be persuasively reconciled with human freedom to distinguish oneself and to be different.

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MAIMON SCHWARZSCHILD

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