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The Social Foundations of Law

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I. INTRODUCTION

The first few words of the Constitution of the United States capture the idea of the social contract—the legitimacy of government is based on the consent of the people.[1] The renewed interest in social contract theory since the 1970s[2] may have been generated by the public diversity of viewpoints and perspectives that began to emerge at the time and that challenged the very idea of "we the people."

In the sprawling, secular, contemporary American context, appeals to social cohesion based on religious principles or on shared geographic boundaries are of limited usefulness.[3] Voluntary participation in societal institutions may generate identification with a group, but this too is limited.[4] As I have noted earlier, "A national identity can be based on acceptance of a shared or common language, culture, or history, but in pluralistic and diverse societies citizens

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[*] Robert W. Woodruff Professor, Emory University School of Law. I would like to thank Cornell Law School student, Luke Fenchel, and the Program Associate for the Feminism and Legal Theory Project, Anthony Petro, for their assistance on this Article.

[1] *See* U.S. CONST., pmbl.

[2] THE SOCIAL CONTRACT THEORISTS: CRITICAL ESSAYS ON HOBBES, LOCKE AND ROUSSEAU ix (Christopher W. Morris ed., 1999); *see, e.g.*, ILYAS AHMAD, THE SOCIAL CONTRACT AND THE ISLAMIC STATE (1979); JAMES M. BUCHANAN, FREEDOM IN CONSTITUTIONAL CONTRACT: PERSPECTIVES OF A POLITICAL ECONOMIST (1977); RALF DAHRENDORF, CONFLICT AND CONTRACT: INDUSTRIAL RELATIONS AND THE POLITICAL COMMUNITY IN TIMES OF CRISIS (1975); EDGAR FAURE. L'AME DU COMBAT: POUR UN NOUVEAU CONTRACT SOCIAL (1973); IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980); CHARLES W. MILLS, THE RACIAL CONTRACT (1997); KAI NIELSEN & ROGER A. SHINER, NEW ESSAYS ON CONTRACT THEORY (1977); FRANCES FOX PIVEN & RICHARD A. CLOWARD, THE BREAKING OF THE AMERICAN SOCIAL COMPACT (1997); RON REPLOGLE, RECOVERING THE SOCIAL CONTRACT (1989); ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT (1995); BRIAN SKYRMS, EVOLUTION OF THE SOCIAL CONTRACT (1996); DEMOCRACY, CONSENSUS AND SOCIAL CONTRACT (Pierre Birnbaum et al. eds., 1978).

[3] Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1413 (2001). *See generally* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

[4] *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

often are fragmented along exactly these lines."[5] As a result, quite often a unifying myth is fostered and perpetuated as a way to build unity where division might otherwise prevail.

The idea that societies produce foundational myths as a way to instill national identity and loyalty provides a way to begin to understand how some lines of social cohesion are forged and transmitted over time.[6] One way to conceive of national community is through the establishment and transmission of myths or fundamental principles addressing the way society is ordered and the desirable traits of its citizens. Set out in mythic terms and reiterated through the generations, these can also be presented as coherent and binding principles—more than just aspirational, they can be asserted as symbolizing the existence of a social compact or contract embodying consensus and community among those who would otherwise remain strangers.

The social contract is a legal or theoretical fiction—a metaphoric or symbolic idea connoting a sense of connectedness and unity in purpose and belief among members of a society. Such members are envisioned as being united by agreement, in the same way that contracts between individuals reflect binding relationships around agreed upon conditions.[7] Contract is an appealing metaphor with which to consider social and political arrangements. It imagines autonomous adults—capable and equal individuals—engaged in a process employing wit, knowledge, and skill, rightly held to the terms they hash out in the process.

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[5] Fineman, *supra* note 3, at 1413.

[6] *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 10–17 (2004).

[7] A. John Simmons explains John Locke's definition of the social contract:

> A complete political society, Locke suggests, is created in two logically separable stages (which may or may not be separated by an interesting temporal gap). The society itself is created by a contract among all those who wish to be part of it. The society's government is formed by society's granting a separate trust, which conveys to government the political power which was previously invested in the society by its members. Political power is given first "into the hands of the society, and therein to the governors whom the society has set over itself, with this express or tacit trust: that it shall be employed for their good and the preservation of their property." While the creation of the "Legislative" (the "soul" of the commonwealth) is "the first and fundamental act of society," the body politic is created "by barely agreeing to unite into one political society." Consent to membership in the body politic must be unanimous ("by the consent of every individual"), for only a person's own consent can remove that individual from the state of nature. But this consent entails, Locke believes, consent to rule by the majority of the members in all subsequent matters (including, of course, the creation of government).

A. John Simmons, *Political Consent*, *in* THE SOCIAL CONTRACT THEORISTS, *supra* note 2, at 121, 127 (internal citations omitted).

In fact, in the modern context, the concept of contract is one of the primary devices for understanding individual and institutional relationships.[8] Contract is the term we apply to all sorts of relationships, be they implied or formally established. Contract is viewed as displacing older, less democratic ways of understanding relationships, such as status and hierarchy, which impose structured relationships that are usually beyond individual alteration.[9] The underlying and essential elements in a contractual relationship are (1) that two or more autonomous individuals with capacity (2) voluntarily agree (consent) to be bound by (3) some mutually bargained for benefit or trade (exchange).[10] This process of agreement and exchange provides the basis for establishing a contractual (reciprocal) legal relationship between individuals.[11]

The actual reduction of agreements and understandings to formal, written contracts is the way in which many private relationships are ordered in the realm of the market and related arenas.[12] Formal contracts in business and commercial transactions are typically the product of actual bargaining encounters that are reduced to writing and signed, often in the presence of witnesses. By contrast, average people in their roles as consumers or tenants routinely sign standard form contracts, which are sometimes referred to as "contracts of adhesion."[13] These contracts have terms that are set out by only one party and are imposed in a take-it-or-leave-it manner. These sorts of contracts may be regulated by the government or through legal doctrines that make certain terms unenforceable in an effort to protect the consumer from overreaching by others or gross unfairness.[14] These exceptions aside, even

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[8] In the late nineteenth century, Henry Sumner Maine wrote that legal development represented the motion "from status to contract." HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 165 (Henry Holt & Company 1906) (1864).

[9] Fineman, *supra* note 3, at 1405.

[10] *See, e.g.*, CLARENCE D. ASHLEY, THE LAW OF CONTRACTS § 3 (1911).

[11] I find in the course of my teaching that law students are very attached to the idea of contract. Many would use it to resolve all sorts of difficult social policy and economic resource issues. The idea of consent is particularly potent (she or he "asked for it"). *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 3 (1979) (contract, agreement, and bargain defined).

[12] Relationships within the family are considered beyond contract—their legality and consequences governed by status or policy principles—but, to a large degree, they are the product of state imposed obligations.

[13] *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530, 532 (1971).

[14] Karl N. Llewellyn, *O. Prausnitz, The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 702–03 (1939) (book review); *see also* Steiner v. Mobil Oil Corp., 569 P.2d 751, 758 (Cal. 1977) ("[A]dhesion contract analysis teaches us not to enforce contracts until we look behind the facade of the formalistic standardized agreement in order to determine whether any inequality of bargaining power between the parties renders contractual terms unconscionable . . . .").

with standard form contracts, the process is generally thought to be appropriately outside of government supervision and restriction. The ideas of individual autonomy and freedom to contract mandate that people be justly held to the bargains they have struck.[15]

The metaphor of contract in political theory operates on several levels. It may be used to talk about the imposition of coercive rules (law). In this regard, the social contract is articulated as a justification for considering individual citizens bound by established societal norms and conventions and for justifying state sanctioning of deviations.[16] Looking at lawmaking as an occasion when we articulate specific terms of the social contract should mean that this process places a heavy responsibility on the elected representatives of average citizens. They must ensure that their deliberations retain integrity with regard to the spirit of the overall social contract, as it is understood by those whom it binds.

As a rhetorical and ideological construct, the social contract functions like a foundational myth, except that its terms are explicitly directive, rather than merely inspirational. The idea that we, as individuals, are parties to the social contract carries with it the threat that our breach of its terms may result in the just application of sanctions. The social contract is the foundation for the application of law. As such, it is one of the ways in which we might make sense of the existing institutional arrangements in which rights and responsibilities are generated and imposed by our society. In this way, the idea of a social contract can be seen as an informal, intuitively understood ordering mechanism whereby our own actions, and the actions of others, may be judged. The perceived mandates of the social contract set up reciprocal and integrally related expectations and aspirations for individuals, institutions, and the state.

In utilizing the concept of contract as a tool to interrogate the justice of existing social arrangements, I hope to contest those principles that legal scholar James Boyle suggested several years ago as being the foundational myths of liberal state theory. Boyle stated that

> [m]any flavors of liberal state theory take as definitionally true that abuses of public power are more to be feared than abuses of private power, that rules constrain governments more than standards and—

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[15] *See, e.g.*, NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 281–91 (1972) (emphasizing the importance of freedom of contract in finding that it was improper to hold a successor employer to the substantive terms of a collective bargaining agreement that it had neither expressly nor implicitly assumed).

[16] Simmons, *supra* note 7, at 122.

> perhaps most significantly of all—that autonomy is more legitimately the concern of the state than equality.[17]

Such assumptions should be challenged.

II. CONTRACT AND EQUALITY: FORMAL, SOCIAL, SUBSTANTIVE

Just as reference to contract in the ostensibly private market context carries with it the understanding that the agreement it embodies is fair because it was bargained for and agreed to by the parties involved, a reference to the social contract is an implicit claim about the justice of the set of expectations, obligations, rights, and entitlements afforded an individual with regard to societal arrangements.[18] Of course, in considering the social contract, we encounter an arrangement that is not the product of individual bargaining or agreement. One is born into the social contract. Perhaps for this reason alone, some social contractarian scholars have argued that we must be more attentive to its fairness, with the state assuming a more active role in monitoring the terms of the imposed social contract, as compared to bargained for private contracts.[19]

As a rhetorical and ideological construct, the terms of the social contract are up for contestation and struggle. Appeals to the social contract can serve as a justification for society's current method of structuring, legitimating, and explaining existing relationships. In this way, the concept of a social contract can bolster the status quo. It may be a stabilizing device and can even be wielded to justify unequal financial and other forms of power distributions produced by market institutions. In fact, it is the idea of a social contract that makes intelligible (and defensible) for some the fact that a modern, egalitarian-oriented, democratic state can accept, or even condone, some degree and some forms of inequality.[20]

The social contract varies across nations—even in those with common legal heritages or similar cultural attributes. Roland Benabou, writing about unequal societies and the social contract, begins his article with the statement:

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[17] James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 394 (1993).

[18] *See* Simmons, *supra* note 7, at 131.

[19] *Id.* at 128–29.

[20] Fineman, *supra* note 3, at 1415.

> Some [countries] have low tax rates, others a steeply progressive fiscal system. Many countries have made the financing of education and health insurance the responsibility of the state. Some, notably the United States, have left it in large part to families, local communities, and employers. The extent of implicit redistribution through labor-market policies or the mix of public goods also shows persistent differences.[21]

In his article, Professor Benabou attempts to analyze the differences among countries with similar technologies and equally democratic political systems. Of particular interest to my objective of spreading responsibility for dependency to societal institutions other than the family are the differences between the United States and European countries. Benabou observes that European voters "choose to sacrifice more employment and growth to social insurance than their American counterparts, even though both populations have the same basic preferences."[22]

Europeans simply believe that the social welfare of individual citizens is a more public responsibility than do those in power in the United States.[23] We in the United States tend to turn to the private sector when seeking solutions to problems in society.[24] In fact, one of the primary ordering mechanisms of the American social contract is the creation of categories such as public and private, into which social institutions, people, and problems are distributed

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[21] Roland Benabou, *Unequal Societies: Income Distribution and the Social Contract*, 90 AM. ECON. REV. 96, 96 (2000).

[22] *Id.* at 97. He proposes a "simple theory of inequality and the social contract," which is based on two mechanisms: redistribution that would increase welfare receives "less political support in an unequal society than in a more homogenous one . . . [and a] lower rate of redistribution, in turn, increases inequality of future incomes due to wealth constraints on investment in human or physical capital." *Id.* at 119. He concludes that these mechanisms have produced "two stable steady-states, the archetypes for which could be the United States and Western Europe: one with high inequality yet low redistribution, the other with the reverse configuration." *Id.* He concludes his article with the statement, "[T]he original question of why the social contract differs across countries, and whether these choices are sustainable in the long run, remains an important topic for further research." *Id.* It seems that this issue is the one being played out in current European politics. *See, e.g.*, EUROPEAN UNIVERSITY INSTITUTE, ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES, RECASTING THE EUROPEAN WELFARE STATE: OPTIONS, CONSTRAINTS, ACTORS (1998–1999 European Forum), *at* http://www.iue.it/RSCAS/Research/EuropeanForum/EF_1998-1999.shtml (last visited Oct. 4, 2004); PETER FLORA, WELFARE STATE ANALYSIS (Research Programme 1996–1999), *at* http://www.mzes.uni-mannheim.de/res_prog_e/fb_ab106.html (last visited Oct. 4, 2004).

[23] *See infra* Part IV and accompanying notes; *see also*, James A Morone & Janice M. Goggin, *Health Policies in Europe: Welfare States in a Market Era*, 20 J. HEALTH POL. POL'Y & L. 557, 559 (1995) (describing "social welfare romantics," the authors write, "European welfare regimes have long served as an ideal, a promise that political reforms could yield social equity.").

[24] *See* Fineman, *supra* note 3, at 1416.

with significant policy implications. In particular, the categories of public and private structure the relationships between the state and the market on one hand (the public category) and the state and the family on the other (the private category).

This distribution is a political exercise. The family and the market are inherently neutral social institutions, which can be considered either private or public.[25] The designation as private carries with it a presumption that public supervision and control are inappropriate. Within the social contract, a private societal arrangement evidences a historically agreed upon restraint on governmental regulatory zeal.[26]

By contrast, substantial debate remains about the scope of the restraint on government implicated in the designation of an institution as public. This debate is also reflected in the rather chameleon-like nature of market institutions, which are characterized as public vis-à-vis the family but private, and, thus, beyond strict regulation, vis-à-vis the state.

One's position on the issue of governmental restraint in regard to public institutions can reflect an ideological predisposition on a number of important policy and legal debates. For example, economic libertarians and other "free market" proponents assert social contractarian terms that would leave most things, aside from military matters, to the "private sector"—to individuals acting in markets or within families or, if absolutely necessary, to small units of government. Individuals thus freed from governmental restraints can work out mutually beneficial, particularized agreements among themselves within social institutions considered private and, for that reason, distinguished and protected from the public sphere as exemplified by the state or government.

In contrast, the terms of the social contract advocated by those with a more social welfare-oriented perspective define a more active role for public supervision and regulation. Someone with a politically liberal perspective might suggest that families and markets can also fail individuals and that existing disparities in wealth and power may be unjust, warranting some corrective measures by the government. Some perceived injustices must be considered to be of a public nature, a concession that some situations are beyond individual power to alter. Gross inequality and inattention to the "victims" of free market are perceived to be public concerns, justifying

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[25] *See id.*
[26] *Id.*

governmental intervention and regulatory responses.[27] This position, while more progressive in nature, still concedes the fundamental distinction between public and private in regard to supervision.

III. THE SOCIAL FOUNDATIONS FOR A MORE EGALITARIAN SOCIETY

A. *American Concepts of Social Rights*

T.H. Marshall argued that there are three separate categories of citizenship rights—civil, political, and social—and that these rights develop in historically successive stages. According to Marshall, civil rights include "the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice."[28] Political rights include "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body."[29]

The term "social rights" refers to the guarantee of basic social goods that are economic or material in nature and include essentials such as housing, health care, and a minimum income guarantee. These and other necessities complement and facilitate the expression of an individual's civil and political rights in a democracy. This responsibility for some minimal form of substantive equality marks a right of humanity no less important and worthy of governmental protection than the already guaranteed formal civil and political rights and equalities. The initial governmental task, therefore, would be to ensure a more just allocation of the goods society and its institutions produce.

Social rights can range from the right to "a modicum of economic welfare and security" to the right to share fully in "the social heritage and to live the life of a civilized being according to the standards prevailing in the society."[30] Marshall coined the term "social citizenship" to describe the status conferred by such an approach to state responsibility.[31]

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[27] The economic redistribution in our welfare policy (however limited) and in the legal rules readjusting traditional patriarchal power within families were products of a liberal political view. For a brief discussion of the historical development of a lack of faith and distrust in the market and the rise of "new" liberalism, see *Liberalism as a Political Theory, Property and Market*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *at* http://plato.stanford.edu/entries/liberalism (last visited Feb. 11, 2005).

[28] T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 8 (1992).

[29] *Id.*

[30] *Id.*

[31] *Id.*

Marshall posited that there was a progression from one stage of rights implementation to another. Arguments for each successive right grew out of conflicts arising from attempts to realize an earlier set of guarantees. For example, civil rights could be compromised for a group if that group's political rights were not forthcoming. Marshall believed that all forms of citizenship rights, as well as the specific ways in which they would be manifested, would evolve and develop as new situations and circumstances presented themselves.

In the United States, we accept for the most part the universality of civil and political rights.[32] However, the concept of social rights is not found in the political vocabulary of most Americans.[33] Furthermore, our ideas about rights tend to be rather static—frozen in nineteenth century models and proceeding, if at all, in incremental measures typically at great cost to those who advocate for expansion.[34] Basically, our constitutional scheme defines citizenship rights in negative and individualistic terms.[35] Our legal system embodies a basically antidiscrimination model of justice that focuses on formal guarantees of equality of opportunity and access on the part of the government.[36]

At this very basic level, equality is the guarantee by the government that the rules applied to its citizens will be uninfluenced by their station or status in life.[37] Of course, historians might point out that, even under this limited concept, the equality-entitled citizen who populated the original American

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[32] The United States Senate ratified the International Covenant on Civil and Political Rights in June 1992. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. Ratified treaties have the same status of federal common law. Exceptions to the universality of political rights include voting rights for ex-felons—though this is now the object of civil rights reform movements. Civil rights have been denied to some persons as a result of status under the USA PATRIOT Act, Pub. L. No. 107-156, 115 Stat. 272 (2001).

[33] Some have argued that activist movements leading up to the New Deal marked a period of time in which social rights were part of the public discourse. Perhaps it is time for a renewal of social rights discourse. Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 461 (Theda Skocpol & Morris Fiorina eds., 1999).

[34] *See generally* LISA DUGGAN, THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY (2004).

[35] As I wrote in *Contract and Care*, "[American capitalist democracy] is a system in which there are no citizenship 'rights' or claims to social goods that can be enforced against government." Fineman, *supra* note 3, at 1428.

[36] *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995). A good example of the antidiscrimination model is Title VII rights. For a comparison of Title VII rights with the "reasonable accommodation" model, see Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575 (2002).

[37] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). *Contra* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

constitutional story was white, male, and propertied. There was no initial universality of equality in regard to the exercise of political and civil rights under our Constitution.

To a large extent, the history of constitutional law has been in the incremental expansion of those entitled to equality as more and more people were assimilated to the original ideal since its early history.[38] The Civil War added the Thirteenth and Fourteenth Amendments, abolishing slavery and adding black males to those entitled to political equality. The Suffragette struggles led to the Nineteenth Amendment, adding women to the ranks of voters. Currently, gay men and lesbians seek protection within this antidiscrimination paradigm, arguing for access to institutions such as marriage and protection in employment and public accommodations.

However, even as the entitled groups have grown, the concept of equality has remained fairly stagnant. Political equality remains manifested in a very direct manner—access and equivalent treatment.[39] The idea was and continues to be "one person, one vote."[40] Our conceptualization of the ideal of equality also has been based on an equal treatment or antidiscrimination principles that reach beyond the political situation. This is certainly apparent in the juridical or civil sense of equality—equality before the law.[41] Different treatment is suspect, unless there is some legitimate basis for distinguishing among individuals or groups.[42] Affirmative action is suspect, as are rules tailored to be responsive to asserted differences among groups or individuals.

B. Equality Title

The American march toward greater and greater equality has resulted primarily in an increase in the number of persons considered to be entitled to equality in treatment or access to existing categories of social goods, not in an expansion of our understanding of the substantive nature of equality. We gain

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[38] *See* Carolene Prods. Co. v. United States, 304 U.S. 144 (1938).

[39] As Justice O'Connor commented in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 505 U.S. 833, 848 (1992) (internal citations omitted).

[40] Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

[41] *See* U.S. CONST. amend. XIV.

[42] *See* MARTHA ALBERTSON FINEMAN, ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 3–13 (1991).

the right to be treated the same as the historic figure of our foundational myths—the white, free, propertied, educated, heterosexual (at least married), and autonomous male.[43] We have not gained, however, the right to have some of his property and privilege redistributed so as to achieve more material and economic parity.[44]

In other words, we have not graduated from the struggle to achieve political and civil equality to a well-established sense of the need for realization of Marshall's sense of social rights—a more substantive approach to equality in order to meaningfully realize political and civil equality.[45] We have not altered our understanding of the concept of equality beyond mandating sameness of treatment—formal or procedural senses of equality offering access to opportunity on a par with the mythic male of liberal theory. We have merely expanded the group to whom this version of equality is to be applied.[46]

Of course, as Marshall recognized, political equality and the idea of equality under law are significant aspects of the protections and guarantees owed to the citizen by the state.[47] But it is important for us to ask whether these forms of equality—freedom from discrimination and a guarantee of sameness of treatment by the government—are sufficient to ensure an appropriate level of substantive equality in today's world. Retelling our foundational story for an audience confronting the problems and contexts of the twenty-first century might allow us to imagine a world in which we were promised more in terms of securing equality than just sameness of treatment in the political and juridical relationship between the government and the governed.

One could argue that concepts such as equality require constant mediation between articulated values and current realities.[48] In trying to understand the current contexts that shape our expectations for equality, we must be attentive to evolutions in our concepts and understandings of what we consider "just" and "fair." Our views on justice should be evolving as societal knowledge, realizations, aspirations, and circumstances change.[49]

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43 *See id.*

44 *See id.*

45 *See* FINEMAN, *supra* note 6, at 23–24.

46 *Id.*

47 *See id.* at 276–77.

48 *See, e.g.*, Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001).

49 FINEMAN, *supra* note 6, at 24.

In this regard, it is important to flesh out the realization that the term *equality* may be defined in several different ways.[50] Formal equality is the circumstance in which universal laws are applied equally to everyone. Formal equality does not, however, guarantee that everyone is treated equally. In fact, given existing inequalities, formal equality ensures that there will be unequal results or implications. It is procedural, not remedial, in nature.[51]

Of course, formal equality may prevent laws from drawing distinctions on the basis of personal characteristics, such as the United States Supreme Court's decision in *Brown v. Board of Education*, in which it ruled that segregated education was an equal protection violation.[52] Formal equality is a powerful tool in confronting discrimination and in protecting the civil and political rights to which we are entitled.

However, a formal equality approach actually defeats the quest for social citizenship rights—it ignores the fact that neutrality is seldom sufficient when there are gross underlying disparities in position. Nor does it address those many situations in which laws that are neutral on their face nonetheless result in an unequal impact. For instance, the prohibition against sleeping under bridges, while applicable to all, in reality only impacts the poor. It is those groups that have traditionally suffered deprivation and discrimination that are too often only further disadvantaged by the application of the rules of formal equality.[53]

There is a competing way of thinking about equality that does open the door to social citizenship claims.[54] The concept of "substantive equality" entails the "elimination of major disparities in people's material resources, well-being, opportunities, and political and social power. It also ideally seeks to minimize economic, social, and cultural oppression and exploitation."[55] In order to achieve the goals of substantive equality, it is necessary to address systemic inequality by assessing laws and regulations in the context of historical discrimination and by keeping in mind the goal of reducing oppression.[56]

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50 I expand upon this concept in FINEMAN, *supra* note 42, at 3–13.

51 This concept, too, is expanded upon in FINEMAN, *supra* note 6, at 273–77.

52 347 U.S. 483 (1954).

53 *See* FINEMAN, *supra* note 6, at 272–73.

54 *Id.* at 274–75.

55 *See, e.g.*, Kathleen E. Mahoney, *The Constitutional Law of Equality in Canada*, 44 ME. L. REV. 229, 230 (1992).

56 JOEL BAKAN, JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS 46 (1997).

Joel Bakan attempts to describe the conditions to which a more substantively equal society would aspire:

> [E]quality entails elimination of major disparities in people's material resources, well-being, opportunities, and political and social power, and an absence of economic, social, and cultural oppression and exploitation. Perfect social equality may be impossible, but the aspiration to rid society of oppressive and exploitative disparities, based on unequal social relations—such as those of class, gender, and race—is realistic and worth fighting for.[57]

Bakan may be correct that it is impossible to achieve a perfectly classless, genderless, and nonracist society—a true society of equals—and yet we will surely never even begin to significantly diminish the social constraints of inequality if we cannot envision such a society and move toward it.[58]

IV. THE LESSONS FROM INTERNATIONAL PRINCIPLES AND NORMS

The practices and aspirations of other societies might provide inspiration for the beleaguered American progressive seeking to establish a more substantive sense of equality.[59] The problems presented by dependency and poverty are not unique to American society. Other nations have gone through the process of allocating responsibility for dependency among their institutions and determining what role they will play in regard to supplying social goods and guaranteeing nonexploitative practices.

Outside of the United States, human rights paradigms now provide fertile ground for thinking about equality and economic and social rights. The incorporation of human rights concepts into areas of law affecting gender, sexuality, and family can transform our analysis—much in the same way as the incorporation of economics into law has successfully redirected policymaking in several areas.

New patterns of behavior, along with emerging articulations of entitlement and harm, are transforming notions of what constitutes human rights. The United Nations and other international institutions are no longer solely concerned with "first generation" human rights—the foundational rules

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57 *Id.* at 9–10.

58 *See, e.g.*, FINEMAN, *supra* note 6, at 275.

59 *Id.* at 280.

governing the relationship between the individual and the state—but are also focused on economic and social rights in "second generation" pursuits of broader and more comprehensive ideals of equality and human dignity.[60] Second generation principles, such as positive rights to food, housing, or health care, move human rights beyond traditional conceptions of the appropriate field of application for human rights to reflect a deeper understanding of the extent of governmental human rights obligations.

In recent decades, second generation international human rights discourse has begun to establish the principle that human rights are intimately connected by law and legal regulations to all aspects of family life and sexuality.[61] These issues are at the boundary of the developing human rights discourse and illustrate the ways in which human rights concepts can interact with relationships and institutions at the core of social arrangements. Additionally, this discourse has been the catalyst for lobbying and reform efforts with respect to issues such as sexual autonomy, sexual orientation, and reproductive health.

Female genital mutilation, domestic violence, and rape within marriage have all come under human rights scrutiny with the application of first generation rights, resulting in governmental action and reform.[62] Meanwhile

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[60] The concept of dividing human rights into "generations" was initially proposed by Karel Vasak at the International Institute of Human Rights in Strasbourg. First-generation rights, or negative rights, protect the individual from the state. *See, e.g.*, The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at art. 3, 21, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, *supra* note 32. Second-generation rights, or positive rights, represent foundational provisions the State should foster in its citizenry. *See, e.g.*, G.A. Res. 217A, *supra*, at arts. 22–27; International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Dec. 16, 1966, art. 6, 993 U.N.T.S. 3. Vasak further proposed "third-generation" rights, which are broadly construed as group rights, or rights of collective determination. Burns H. Weston, Encyclopedia Britannica: Human Rights, *at* http://www.uiowa.edu/~uichr/resources/eb/index.shtml (last visited Feb. 11, 2005).

[61] *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), Dec. 18, 1979, 1249 U.N.T.S. 14 (1979).

[62] An example of how these practices, outlawed by CEDAW, come under the rubric of first-generation rights is illustrated in Amnesty International's fact sheet on sexual violence:

> Sexual violence against women is rooted in a global culture of discrimination, which denies women equal rights with men, and which legitimizes and sexualizes the violent appropriation of women's bodies for individual gratification or for political ends. Social and cultural norms that deny women equal rights with men render women more vulnerable to sexual abuse. In many cases, sexist policies and practices aggravate the violence women experience and increase women's vulnerability to further violence, as these policies often deny women effective recourse and force women to remain in violent situations. Sexual violence does not exist in isolation. Rather, it is compounded by discrimination on the basis of race, ethnicity, sexual identity, social status, religion, class, caste, and age, all of which may place women at an increased risk of

the widened application of second generation rights has led to scrutiny of the institutional structures which create those violations in the first place.[63] Initiatives for reform in areas as diverse as health care, schooling, and child care provision are debated in human rights terms in countries such as South Africa and Canada as well as in the nations of Europe.[64] This is a far cry from the traditional use of international human rights norms to monitor the relationship between the individual and the state, reaching into social relationships formerly deemed "private."[65]

In addition, international judicial tribunals have found various nations in violation of international law for failing to respect rights in relation to "nontraditional" categories such as gender and sexuality.[66] Nations have been required to provide remedies to victims and to change domestic laws that conflict with international legal standards.[67] The human rights paradigm can challenge even the most deeply held societal norms. For example, both Northern Ireland and the Republic of Ireland changed the law criminalizing homosexual acts after findings from the European Court of Human Rights declared that those laws violated the European Convention on Human Rights.[68]

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violence. Such discrimination involves the denial of basic social and economic rights and restricts women's access to justice.

AMNESTY INTERNATIONAL USA, WOMEN'S HUMAN RIGHTS, SEXUAL VIOLENCE: A FACT SHEET, *at* http://www.amnestyusa.org/women/violence/sexualviolence.html (last visited Feb. 11, 2005); *see also CEDAW General Recommendation No. 19*, Office of the High Commissioner for Human Rights, Violence Against Women, para. 1, U.N. Doc. A/47/38 (1992) ("Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.").

[63] *See, e.g.*, Gerhard Erasmus, *Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments*, 32 INT'L J. LEGAL INFO. 243 (2004).

[64] *See, e.g.*, FINEMAN, *supra* note 6, at 283–84. There, I write:

> The Constitution for the Republic of South Africa, for example, includes in its Bill of Rights the guarantee that "everyone has the right to have access to . . . social security, including, if they are unable to support themselves and their dependents, appropriate assistance." The same constitution mandates that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [the right to have access to adequate housing]."

Id. at 283 (internal citations omitted).

[65] *See* J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (1963). In 1982, Elliott Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs for President Ronald Reagan, denounced the ICESCR for blurring "public" with "private" rights. *Review of State Department Country Reports on Human Rights Practices for 1981, Hearing Before the House Subcomm. on Human Rights and International Organizations*, 97th Cong., 2d Sess. 13–17 (1982).

[66] *See, e.g.*, *In re* Fauziya Kasinga, Int. Dec. 3278 (BIA 1996), *available at* 1996 WL379826.

[67] *Id.*

[68] The European Human Rights Court ruled in 1988 in *Norris v. Ireland* that the country's sodomy law violates the European Convention on Human Rights and Fundamental Freedoms. 142 Eur. Ct. H.R. 22 (1988);

In Canada, the equality provisions of the charter are being used to challenge discrimination against same sex couples in family law.[69]

Such interventions represent an important change in the international legal order because the human rights mandates discussed above relate to areas that have historically been considered prima facie in the "private" domain.[70] In addition to governmental responses and specific reforms, breaching the walls created by notions of privacy surrounding family and intimacy by using human rights terms has resulted in altering societal attitudes, such as increasing the recognition of and intolerance towards domestic violence.

A. Human Rights and Social Goods

Norms have been developed in the international context that suggest a definition of the roles and responsibilities of the state with regard to its citizens that is far more expansive than the one ensconced in American constitutional principles of equality. For example, international human rights documents describe the obligations the state has to guarantee certain rights. They are far-reaching and diverse in subject matter and include, inter alia: the Universal Declaration of Human Rights (which was the first international statement to use the term "human rights");[71] the International Covenant on Economic, Social and Cultural Rights (which includes as basic rights such things as sufficient wages to support a minimum standard of living, equal pay for equal work, equal opportunity for advancement, and paid or otherwise compensated maternity leave);[72] the American Convention on Human Rights (which sets forth a commitment to adopt measures with a view to achieve economic, social, educational, scientific, and cultural standards);[73] the African Charter on Human and Peoples' Rights (which links civil and political rights to economic, social, and cultural rights);[74] and the European Convention for the Protection

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see also P.G. & J.H. v. United Kingdom, 9 Eur. Ct. H.R. 197, 217–19 (2001); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981).

[69] *See, e.g.*, M. v. H., [1999] 2 S.C.R. 3 (Can.) (setting aside the definition of "spouse" for support purposes under Ontario's Family Law Act).

[70] *See* BRIERLY, *supra* note 6 5at 85–110.

[71] G.A. Res. 217A, *supra* note 60, at art. 71.

[72] *Supra* note 6 0.

[73] American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123, OAS T.S. No. 36 (entered into force July 18, 1978).

[74] Banjul Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59.

of Human Rights and Fundamental Freedoms (which recognizes the obligation to respect human rights).[75]

While it is true that these documents have not been ratified by every country (most notably, in the context of this Article, the United States) and their principles are not uniformly followed in those states that have adopted them, they do set out aspirational terms. They stand witness to what are generally considered desirable, normative standards that have been widely accepted in many societies.

The United States has not even gone as far as to agree to the desirability of many of the provisions, and some of those documents that have been signed by the United States remain unratified (and unimplemented) by the Senate.[76] American reluctance to accept international norms is based partly on the fact that some of the documents embody an alternative to the formal vision of equal opportunity entrenched in the jurisprudence of the United States. For example, the International Covenant on Economic, Social and Cultural Rights recognizes "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts."[77] The Covenant goes on to instruct the government to ensure "fair wages and equal remuneration for work of equal value."[78] In doing so, it adds the principle of "comparable worth" to the formal equality notion of equal pay for equal work which is the lesser standard in U.S. law.[79] It also places on the

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[75] Nov. 4, 1950, 213 U.N.T.S. 221, *reprinted in* EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 3 (1987); *see also* International Covenant on Civil and Political Rights, *supra* note 32; American Declaration of the Rights and Duties of Man, May 2, 1948, *in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser.L.V/II/71, doc. 6 rev. 1, at 18 (1988) (which is unique among these documents for its overtly sexist language and lack of remedial provisions). Numerous optional protocols to the previously mentioned conventions provide more details as to the manner in which these rights will be guaranteed.

[76] Of course, even in countries where there is favorable reception for international human rights norms, the picture is not always a cheery one. Anne Bayefsky and Joan Fitzpatrick report that while the political branches of Canada and the United Kingdom indicate a greater acceptance of international human rights standards, this ratification "does not necessarily translate into greater and more principled acceptance of international human rights norms by domestic courts." Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 3 (1992). One could counter that at least these countries have gotten over the first hurdle: acceptance of universal and international opinion.

[77] *Supra* note 60, at art. 6, 993 U.N.T.S. at 6.

[78] *Id.*

[79] *Id.*

state an obligation to ensure for its citizens "a decent living for themselves and their families."[80]

Further, rather than confirming the role of the state as a supporter of the market and its institutions, these documents overwhelmingly suggest that governments are responsible for countering and correcting the natural imbalances and inequalities that result from the actions of market institutions.[81] They focus on rights that would further the development of progressive social equality and emphasize remedial actions for traditionally disadvantaged societal groups.[82]

While the documents all place a heavy emphasis on equality and the discouragement of discrimination, they generally promote a vision of equality that goes beyond formally treating every member of a society in the same way. They recognize that some members of society may justifiably need different treatment and different societal resources to gain an equal opportunity within society.

Many of these international documents include provisions specifying that members of traditionally disadvantaged groups—women, racial and ethnic minorities, people with disabilities, the elderly, and children of unmarried parents—should not suffer discrimination. This commitment to antidiscrimination measures is shared by the United States. However, other legal systems seem much more comfortable implementing affirmative action type programs as a necessary means to achieving such an inclusive vision.[83]

Going well beyond the United States' notion of affirmative action, international human rights documents also recognize the issue of dependency, with specific provisions for the needs of those who are elderly,[84] ill,[85] or

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[80] *Id.*

[81] *See, e.g.*, ICESCR, *supra* note 60, at art. 1, 993 U.N.T.S. at 5.

[82] *See, e.g., id.* at art. 3, 993 U.N.T.S. at 5.

[83] *See, e.g.*, Lundy R. Langston, *Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?*, 13 AM. U. INT'L L. REV. 333 (1997); Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 BERKELEY J. INT'L L. 27 (2003).

[84] *See, e.g.*, Additional Protocol to the American Convention on Human Rights in the Area of Social and Cultural Rights: "Protocol of San Salvador," Nov. 17, 1988, art. 17, OAS T.S. No. 69, 28 I.L.M. 156 ("Everyone has the *right to special protection* in old age.") (emphasis added).

[85] *See, e.g.*, G.A. Res. 217A, *supra* note 60, at 76 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care and necessary social services, and the right to security in the event of . . . sickness [or] disability.").

handicapped[86]—members of "the highest risk groups . . . [or] those whose poverty makes them the most vulnerable."[87] In this context, some provisions acknowledge the special burdens that are placed on the family—the societal institution traditionally responsible for dependency—and specifically mandate that the state play an active role in supporting the family. The International Covenant on Economic, Social and Cultural Rights states, "[t]he widest possible protection and assistance should be accorded to the family . . . [particularly] while it is responsible for the care and education of dependent children."[88]

States use these norms in crafting their own laws. The Constitution for the Republic of South Africa, for example, includes in its Bill of Rights the guarantee that "[e]veryone has the right to have access to . . . social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."[89] The same constitution mandates that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [the right to have access to adequate housing]."[90] These types of affirmative guarantees form the substance of a growing consensus about governmental responsibility to citizens—a consensus that includes principles established in a discourse about equality that is shockingly muted in the United States.

It is true that these guarantees are more aspirational than operational in societies that lack sufficient resources to fully implement them, such as South Africa. But it would be cynical and unwarranted to dismiss their articulation as merely empty rhetoric. The struggle to articulate guarantees is part of the creation of an extra-national sense of what is "right" and "just." It is part of the process that constitutes a community of nations that band together over shared and evolving concepts and principles that they believe have universal applicability and inherent value.

In addition, these nations have processes that allow them to learn from one another—ways to move toward the "best practice" in regard to recognition of

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86 *See, e.g.*, Additional Protocol to the American Convention on Human Rights in the Area of Social and Cultural Rights: "Protocol of San Salvador," *supra* note 84, at art. 18 ("Everyone affected by a diminution of his physical or mental capacities is *entitled to receive special attention* designed to help him achieve the greatest possible development of his personality.") (emphasis added).

87 *See, e.g.*, *id.* at art. 10 (discussing the right to health).

88 ICESCR, *supra* note 60, at art. 10, 993 U.N.T.S. at 7.

89 S. AFR. CONST. ch. II, § 27.

90 *Id.* § 26.

rights and obligations. Courts all over the world are using the concepts and norms articulated in international human rights discourse and communicating with one another regarding those rights. Documents such as the Convention on the Rights of the Child[91] and the Covenant on Economic, Social and Cultural Rights provide the bases for discussion and demands—a debate that is greatly underrepresented in the United States.

Interestingly, as the international norms are filtered through local laws and made viable within jurisdictions, countries that adhere to international human rights standards increasingly rely on court cases from other nations.[92] This process of globalization of decisional standards, in which the experiences of one nation can inform and inspire another nation's policy on human rights, occurs frequently in countries such as Australia, Zimbabwe, and Canada.[93] It is not common, however, in the United States, where we remain isolationist in our jurisprudence.

Just a few years ago, and prior to *Lawrence v. Texas*,[94] Justice Ruth Bader Ginsburg noted the lack of integration of international norms in America, stating, "[t]he same readiness to look beyond one's own shores has not marked the decisions of the [United States Supreme Court]."[95] At that time Ginsburg found mention of the Universal Declaration of Human Rights in only five Supreme Court cases.[96] Further, of these few acknowledgements of our sister countries' courts, only two were found in the Court's majority opinions.[97] Ginsberg also called attention to the fact that the most recent of the citations appeared twenty-eight years earlier in a dissenting opinion written by Justice Thurgood Marshall.[98]

Matters have definitely improved since then. The Supreme Court has increasingly referred to foreign decisions. In 1998, Justice Breyer cited decisions from Jamaica, India, Zimbabwe, and the European Court of Human Rights in discussing how lengthy delay in administering the death penalty can

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91 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

92 *See* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH L. REV. 99, 99 (1994).

93 *See id.*

94 539 U.S. 558 (2003).

95 Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999).

96 *Id.*

97 *Id.*

98 *Id.*

render the punishment inhumane.[99] Similarly, in a 2002 case, Justice Stevens contended that the world community condemned the imposition of the death penalty for crimes committed by mentally retarded persons, citing for authority the brief from the European Union.[100]

In *Lawrence v. Texas*, the Court referenced the Wolfenden Report on Homosexual Offenses and Prostitution which led the British Parliament to repeal laws punishing homosexual conduct in 1967.[101] Further, the Court noted that five years before *Bowers v. Hardwick*,[102] in *Dudgeon v. United Kingdom*,[103] the European Court of Human Rights determined that laws proscribing homosexual conduct were invalid under the European Convention on Human Rights.[104] The Court went on to comment that this prohibition was at odds with the premise in *Bowers* that homosexual conduct was condemned in Western civilization.[105]

In a dissenting opinion, Justice Scalia ridiculed reference to international norms. He stated that the majority's discussion of "foreign views"[106] was "dangerous dicta,"[107] citing Justice Thomas's concurrence in the denial of certiorari in an Eighth Amendment case, *Foster v. Florida*[108]—which in turn relied on Justice Rehnquist's dissent in *Atkins v. Virginia*[109]—for the proposition that the Court "should not impose foreign moods, fads, or fashions on Americans."[110] At least for this three Justice minority, who also share a philosophy of original intent in constitutional decisionmaking, American jurisprudence is appropriately isolationist and insular.[111]

Recent and disturbing activities in the House of Representatives reflect the same isolationism. On March 11, 2004, MSNBC News reported that Republican House members, joined by more than fifty cosponsors, proposed a

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99 Elledge v. Florida, 525 U.S. 944, 944–45 (1998) (Breyer, J., dissenting from denial of certiorari).

100 Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002).

101 539 U.S. 558, 572–73 (2003).

102 478 U.S. 186 (1986).

103 45 Eur. Ct. H.R. 149 (1981).

104 *Lawrence*, 539 U.S. at 573.

105 *Id.*

106 *Id.* at 598 (Scalia, J., dissenting).

107 *Id.*

108 537 U.S. 990, 990 n.* (2002); *see Lawrence*, 539 U.S. at 573 (Scalia, J., dissenting).

109 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting); *see Lawrence*, 539 U.S. at 573 (Scalia, J., dissenting).

110 *Lawrence*, 539 U.S. at 573 (Scalia, J., dissenting).

111 A search of Humanrights.org reveals no international precedent for such comments.

resolution expressing the "sense of Congress" that judicial decisions should not be based on foreign laws or court decisions.[112] In an interview, Representative Tom Feeney of Florida stated that:

> [t]his resolution advises the courts that it is improper for them to substitute foreign law for American law or the American Constitution .... [T]to the extent they deliberately ignore Congress' admonition, they are no longer engaging in "good behavior" in the meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment.[113]

Notwithstanding such theatrics, many feel that the concepts underlying these universal documents—inherent human dignity, equality, freedom, and justice—are well worth exploring and advocating. They go beyond the purely economic justifications of the market that have been used to promote much of contemporary American social policy.

The international human rights debate and the debate over equality and its limits within the United States both address the same fundamental question: What is the responsibility of the state in regard to guaranteeing not only the civil and political liberty of its citizens but also the material conditions that make exercise of those liberties possible? At this moment in U.S. jurisprudence, however, the discourses proceed on parallel tracks, with little intersection or dialectic engagement.[114] The potential benefits for U.S. law are particularly compelling to those interested in seeing us develop a more substantive sense of equality.

V. EQUALITY IN THE SHADOW OF AUTONOMY

The isolationist tendencies expressed in the House resolution are reflected in and bolstered by other forces, which also help to explain our reluctance to expand social rights. In the United States, equality rests side by side with other foundational concepts that set out further expectations for the citizen in regard to the state.[115] These other concepts are viewed as establishing the structure for ordering the relationships among diverse societal institutions such as the

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[112] Tom Curry, *A Flap over Foreign Matter at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC, Mar. 11, 2004, *at* http://msnbc.msn.com/id/4506232.

[113] *Id.*

[114] I expand upon this theme in FINEMAN, *supra* note 6, at 263–92.

[115] *See id.* at 7–30.

family and the market.[116] In fact, these other foundational concepts have had a profound effect on the way in which equality has been understood historically, actually shaping the course and direction of its legal history and limiting the concept's potential scope.[117]

Paramount among these limiting values are contemporary ideas about individual freedom, which is reduced to the idea of autonomy, with its complementary components of individual independence and self-sufficiency.[118] If the state obligation in regard to equality is processed and shaped by an ideological system in which autonomy, understood as the right to be free from governmental intrusion and regulation, is primary, then it can mean little more than state neutrality.

This suggests a second line of inquiry in which equality is placed in context with other societal aspirations and ideals. How do our contemporary aspirations for equality relate to our pursuit of other values, such as autonomy? How do our definitions of terms such as dependency and self-sufficiency shape our sense of what constitutes equality?

In undertaking such an inquiry it is important to examine how concepts like autonomy are used both rhetorically and ideologically. What does a resort to the rhetoric of autonomy mask? Whose interests are served when it is invoked? Indeed, what does it mean to those who invoke it as well as to those against whom it is invoked?[119]

In current U.S. free market ideology, absent discrimination or some other distortions of the market, any regulatory action by the state designed to confer more than neutral process in order to help some individuals or groups is susceptible to being interpreted as an intrusion on the autonomy of others. This interpretation results regardless of how desperate and (therefore) unequal the circumstances of those the state is seeking to assist or how privileged and (therefore) unequal the position of those who seek to shield themselves with autonomy's mantle. As part of this rubric of individual rights, our entrepreneurial spirit cannot and should not be contained or restrained—freedom for the individual requires freedom from governmental regulation and control. This belief creates a complicated set of hurdles for reformers to

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[116] *See* Fineman, *supra* note 3, at 1406.

[117] *See id.* at 1407.

[118] *See* Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 14 (2000).

[119] I explore the answer to these questions in FINEMAN, *supra* note 6, at 21–22.

overcome when they seek to argue that there is a need for governmental action to remedy inequity and to equalize existing unequal conditions.

The problem with substantive equality in this worldview is that it would require the provision of basic social goods through some system of affirmative action in order to ensure some base-line level of material well-being before any free market competition begins. In the United States, however, any type of state redistribution effort is deemed illegitimate by many as inconsistent with eighteenth century liberal theory—among the most revered foundational concepts of our society. In this country, we conceptualize the individual as a rights holder, separate from, but potentially in competition with, other rights holders within a neutral state. Rights holders are autonomous human beings, protected in their individuality from encroachment by others. Our particular constitutional ordering also implies that freedom from external rules and regulations generated by the government is inherent in individual autonomy. Autonomy is synonymous with a concept of self-governance and is characterized by self-sufficiency and independence—individual qualities that are seen as prerequisites for individual freedom of will and action.[120]

Notions of individual autonomy have been powerfully employed in shaping policy. In recent years, the myth of individual autonomy has been spun out in very individualistic terms by those invoking such terms as "independence" and "self-sufficiency" to describe the ideal citizen.[121] Independence and self-sufficiency are terms that refer to characteristics that are perceived as both attainable and complementary in our political and civic discourses.

In a very simplistic and severely limiting sense, individual autonomy in contemporary America is linked to economic measures. Independence and self-sufficiency are characteristics of an idealized economic status. Attainment of that economic status, in turn, is a necessary precondition for the conferral or recognition of any other type of independence or autonomy by the system. Only when we are economically self-reliant can we be considered independent. Because we are able to supply the economic resources necessary to meet our needs, we are self-sufficient. In this way, independence and self-sufficiency "buy" for us the right to self-governance and "control" over will and actions. They earn us our autonomy.

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120 *Id.* at 20.
121 *Id.* at 22.

VI. EQUALITY, AUTONOMY, AND MEANING

Foundational ideals such as equality and autonomy are in fact abstractions—terms with no independent meaning that can be understood in conflicting and incompatible ways. They can also be understood as symbiotically related, with one necessarily enhancing the attainment of the other. Partly, the scope and nature of these terms shape the task that the government has set itself in implementing them. For example, in setting out its notions of equality, South Africa had to address problems associated with its legacy of apartheid. Northern Ireland also has a history of occupation and exploitation with which to contend, although its national trauma was based on religion.

Autonomy assumes independence and the possibility of choice—that nondiscriminatory access to opportunities exists.[122] But it is not clear exactly what might be tolerated in the way of regulatory effort and action to make access to opportunity "real," to say nothing of making it "equal." For example, a desire to equalize opportunity can be used to justify the institutional creation of an affirmative action program to provide meaningful access for members of historically excluded groups.[123] At the same time, such programs serve as a rallying point for opponents of affirmative action who view them as giving some an unequal advantage.[124]

Supporters of affirmative action would argue for context—that individual autonomy is frustrated, and the whole ideal of equality twisted, if existing systems of privilege and power are such that some are disadvantaged and thus unable to compete on equal footing with those who have not been historically subjugated. In contrast, those resisting affirmative action would argue from a more formalistic position—that "special" treatment is not justified. For these individuals, governmental assistance or support compromises the autonomy and options of others and therefore is a perversion of the principles of equality and autonomy. Government intrusion also undermines the worthy goals of independence and self-sufficiency and signals the end of meritocracy.[125]

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122 *Id.* at 26.

123 *Id.*

124 *Id.*

125 *Id.* All of this, of course, roughly traces the recent debate over affirmative action at the university and law school levels. *Compare* Gratz v. Bollinger, 539 U.S. 244 (2003), *with* Grutter v. Bollinger, 539 U.S. 306 (2003).

Likewise, one may assert that a modern marriage is best understood as a partnership in which two autonomous individuals form a union.[126] It follows that in such an arrangement both parties (or partners) should be treated equally if the marriage should end in divorce. However, there are many different interpretations of equal treatment in such contexts as well as plausible, different understandings of autonomy. One could argue that equal treatment means the family assets should be divided in half, and that there should be no ongoing entitlement to the future wages of the primary wage earner[127]—this division would constitute a version of equal treatment at the moment of divorce. On the other hand, particularly if there are children, one could argue that the assets should be divided so that the party who is assuming caretaking responsibilities, usually the mother, is able to maintain a living standard nearly equal to that of the other spouse.[128] Under this theory, one could argue that periodic payments should continue for a substantial period of time to supplement the reduced amount the caretaker will be able to provide in working for pay.[129] It could be said that this would be the only way to treat the caretaker-child unit equally and to ensure their future autonomy.

Both approaches to this problem would be based on the principle of equality and a desire for autonomy; however, the focuses of the approaches are different. Husband and wife in this situation have conflicting and incompatible equality and autonomy interests. Achieving equality and the material conditions necessary for autonomy for caretaker and child comes at the expense of equal treatment of the noncaretaker and entails some compromise of his autonomous ability to decide the nature and extent of his obligations. Depending on which perspective is adopted, there would be very different divisions of marital assets and imposition of ongoing financial responsibility after divorce.[130]

A. Rethinking Autonomy

The very terms of autonomy, as exemplified by economic independence and a detached notion of self-sufficiency, might well be redefined or re-imagined in the public mind. Independence is not the same as being unattached. Independence from subsidy and support is not attainable, nor is it

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126 FINEMAN, *supra* note 6, at 26.
127 *Id.*
128 *Id.* at 26–27.
129 *Id.* at 27.
130 *Id.*

desirable; we want and need the webs of economic and social relationships that sustain us. Thus, a different understanding of autonomy and what it entails is needed. It is not beyond our current ability to imagine a new concept of autonomy, one that recognizes that the individual lives within a variety of contexts and is dependent upon them.

There are important debates that must occur in political and policy circles about the interrelationship between autonomy and equality. Specifically, we should not define our aspiration for equality in the shadow of autonomy. Rather, we must begin to think of autonomy as possible only in conjunction with the meaningful and widespread attainment of equality. For example, some degree of equalization of resources, so that there is a floor below which no citizen shall fall, would seem to be a prerequisite for the achievement of autonomy. Autonomy is only possible when one is in a position to be able to share in society's benefits and burdens. And sharing in benefits and burdens can only occur when individuals have the basic resources that enable them to act in ways that are consistent with the tasks and expectations imposed upon them by the society in which they live.

The expectation that one should achieve this form of autonomy—autonomy supported by a societal commitment to the provision of basic social needs—should be every citizen's birthright. Autonomy in this sense concedes that all individuals have an inherent dependence on society. While some, having benefited from history and circumstances, may have the current means and methods that make it fair to expect them to achieve autonomy, others have been disadvantaged and are thus deserving of some compensatory or supplementary societal support.

In addition, this form of autonomy concedes that the concept only has meaning in situations in which individual choices are not made impossible or constrained by inequalities, particularly those inequalities that arise from poverty. The goal of autonomy must be supported through an understanding of collective responsibility for basic needs.

In a paradigm that privileges an uncomplicated notion of autonomy, equality is inevitably also presented in a narrow and simplistic manner.[131] A simplistic autonomy discourse increasingly dominates American politics. Affirmative action attempts by the state to guarantee equality in more than a formal, procedural sense are considered suspect; some regard this as special

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[131] *Id.* at 273.

treatment, the very opposite of state neutrality that the autonomy-driven version of equality is deemed to demand. But the circumstances of privileged members of society are not deemed special in the same way. It is only explicit governmental attempts to assist those who are disadvantaged that are to be prohibited. The laws and structures that perpetuate wealth and privilege are not considered special treatment even though they benefit only those with special status and economic standing.

The situation in which the state ignores everyone's needs equally should no longer be tolerated. Some robust version of substantive equality is essential in a society that imposes on individuals an expectation that they can attain a degree of self-sufficiency as adults. In order to eventually develop competency to the fullest extent possible, an individual during her or his formative stages of life must have access to basic material and social resources. The assurance of some fundamental level of economic security guaranteed to all caretaking units in which such individuals are nurtured would be foundational in this regard. The state must subsidize caretaking just as it does other socially productive labor. It is the articulation of this aspiration for substantive equality that is the first step in building a politics to demand it.

B. Posing the Philosophy for an Active State

While it would seem obvious to most citizens of other Western countries that the state would be implicated in any discussion of possible solutions to the problem of inequality in society, many progressive Americans are almost as suspicious of governmental action as their conservative counterparts.[132] Perhaps this is why the political will to expand states' regulatory responsibilities has lagged over the past decades, even as recognition of persistent inequality has grown and notions about justice have evolved.[133]

The state is viewed with much more suspicion in the United States than it is in other Western democracies, and arguments about giving it a more active role are bound to be greeted with scrutiny and skepticism.[134] Contemporary legal and policy discussions, which are part of the process whereby the state is altered, are overwhelmingly concerned with limiting and restricting the state, particularly in regard to the economic areas of policymaking. Those who reject the idea that the government has a basic and explicit role in monitoring

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[132] *Id.* at 269.
[133] *Id.*
[134] *Id.*

and mediating change vigorously resist a more regulatory response to market developments.[135] In regard to the market, the state increasingly is either cast in the role of cheerleader or urged to facilitate—not regulate—economic arenas.[136]

In the United States, such arguments have culminated in a philosophy espoused widely from the center to the right of the political spectrum—by business leaders, politicians, and policymakers who urge an increase in the sphere of influence and power of the market and a weakening of the power of the federal government.[137] Their shared vision is of a minimalist national sphere, ideally accomplished through the privatization of functions previously performed by the government.[138] When government is necessary, the ideal route is through the devolution of responsibility to the smallest, most local units.[139]

This desired withdrawal of federal regulation and responsibility is urged even though the history of the United States shows that local rule on some issues cannot be effective and sometimes results in discrimination and concession to local passion and prejudice. Such withdrawal is urged even though it is clear that there has always been a struggle to get businesses to accept progressive labor practices. Deregulation is urged even though the market has shirked responsibility for the provision of social goods—such as health insurance, family and medical leave, daycare, or a minimum family wage—unless "encouraged" to do so by the state.[140]

To abandon progressive aspirations for the state, given this history of the market's failure to make progressive adjustments without coercion, is to abandon all hope for progressive change. The national government is the only organization with the potential to impose such measures. At a minimum, the state must strive to eliminate major disparities that result from unequal social relations and economic exploitation. A strong and vital state is necessary to even begin to undertake, let alone accomplish, that task.

Instead of fighting for the shrinking and weakening of the national government, progressives should be focusing on articulating appropriate

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135 *Id.* at 269–70.

136 *See generally* Homepage of the Libertarian Party, *at* http://www.lp.org (last visited Feb. 11, 2005).

137 FINEMAN, *supra* note 6, at 270.

138 *Id.*

139 *Id.*

140 *Id.*

objectives for the state to pursue. Defining the norms and aspirations that should supplement or, in some cases, replace the impoverished concepts provided by economic theory would be the place to start. There must be a change in the discourse of politics—one that will stimulate the creation of an alternative paradigm with which to compete for the prize of state policy. The new direction will displace the monopoly of free market imagery in which there is no collective responsibility, but only an exaggerated sense of individual autonomy.

C. Articulating the Connection Between Autonomy and Equality

The creation of an alternative paradigm of state regulation and responsibility is necessary to counter the nonregulatory philosophy of the current manifestation of American free market capitalism. A new paradigm would present an alternative to the forces currently driving our politics by explicitly building upon the premise that there is a fundamental connection between autonomy—an individual's ability to make choices in her or his life—and equality, which demands that the state exercise some responsibility to ensure that each individual has the necessary resources to allow choices to be made and to be meaningful. In this paradigm the state is not a default, and therefore stigmatized, port of last resort, but rather an active partner in helping the individual realize her or his capabilities to the fullest extent. In this vision, the equal opportunity guaranteed by the state would also be an individualized one—it would bear some relationship to a person's situation and reflect her or his circumstances.

D. Historical Roots for a More Substantive Equality

One task for scholars and others interested in resurrecting the foundation for a more equitable America is the excavation and dissemination of progressive history. This is necessary in order to counter the asserted inevitability of today's narrow and restricted political will.

Constructing such histories is beyond the scope of this Article, but a few examples are warranted. One rich source are the aspirations set forth in Franklin D. Roosevelt's Second Inaugural Address, delivered on January 20, 1937, which touch on the objectives of the New Deal.[141] Several excerpts

[141] Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937), *available at* http://www.yale.edu/lawweb/avalon/presiden/inaug/froos2.htm.

should resonate with those disturbed by the direction of today's political climate. For example, on economic forces Roosevelt stated,

> [W]e recognized a deeper need—the need to find through government the instrument of our united purpose to solve for the individual the ever-rising problems of a complex civilization . . . . To do this we knew we must find practical controls over blind economic forces and blindly selfish men.[142]

In a utopian vein, he continued,

> We have always known that heedless self-interest was bad morals; we know now that it is bad economics. Out of the collapse of prosperity whose builders boasted their practicality has come the conviction that in the long run economic morality pays. We are beginning to wipe out the line that divides the practical from the ideal; and in so doing we are fashioning an instrument of unimagined power for the establishment of a morally better world.[143]

Further, it was clear that the government had a vital role to play:

> I see a United States which can demonstrate that, under democratic methods of government, national wealth can be translated into a spreading volume of human comforts hitherto unknown, and the lowest standard of living can be raised far above the level of mere subsistence.[144]

The appropriate means to measure progress were also clear: "The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little."[145]

Progressive history is not only to be found in Democratic administrations, nor do we have to retreat to the 1930s to discover it. For example, the 1970s and 1980s marked an increase in workers' benefits. This increase was generated under the guidance of a Republican president. Professor Martha T. McCluskey describes the development of the Occupational Safety and Health Act of 1970, which highlighted "'serious questions about the fairness and adequacy of present workmen's compensation laws in light of economic,

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142 *Id.* at para. 2.
143 *Id.* at para. 11.
144 *Id.* at para. 22.
145 *Id.* at para. 29.

medical, and technological changes."[146] A bipartisan National Commission, appointed by President Nixon, was unanimous in finding that contemporary state protection was both "inadequate and inequitable."[147] According to McCluskey, as a result of this examination, over the next decade the majority of states enacted legislation that liberalized benefits for workers.[148]

Professor Sonya Michel traces the movement to bring social welfare benefits to poor families that began in the 1960s.[149] She notes that the discourse employed at that time "open[ed] the way for a major shift in public policy toward low-income women."[150] Over the course of the 1970s and 1980s, this conversation about society's responsibility to mothers entered the public policy debates regarding the progressive expansion of childcare benefits. Such a discussion is background for the arguments made in this Article, which also expands on T.H. Marshall's notion of citizenship by arguing that childcare allowances and other forms of compensation and accommodation are necessary social goods that must be provided to caretakers.[151]

E. State Constitutions—The Common Benefits Clause and Other Radical Egalitarian Ideas

In 1999, in *Baker v. State*, the Supreme Court of Vermont held that under the Common Benefits Clause of the Vermont Constitution, same-sex couples were entitled to receive the legal benefits and protections that were afforded to married couples of opposite sexes.[152] Its rationale derived not from arguments

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[146] Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 683 (1998) (quoting 29 U.S.C. §§ 651–78 (1994)).

[147] *Id.*

[148] McCluskey notes that "average state compliance increased from a level of 6.8 out of the nineteen 'essential recommendations' in 1972 to an average of 12.1 in 1982, when the national trend toward expansion appeared to level off substantially short of the recommended goals." *Id.* at 684. During this same period, writes McCluskey, "benefits and coverage in many states expanded as a result of changes in administrative and judicial interpretations of statutes." *Id.* The changes in aspirations for the state that occurred during the Reagan era meant that in the 1990s employers' cries that the expansion of benefits was a "crisis" fell on fertile ears. From 1989 to 1997, states heeded the demands of employers and insurers, rather than labor groups and other representatives of injured workers, and enacted legislation that substantially limited worker's compensation. *Id.* at 704–05. McCluskey describes the justification for this revamping as reducing costs for insurers. *See id.* at 700.

[149] Sonya Michel, *A Tale of Two States: Race, Gender, and Public/Private Welfare Provision in Postwar America*, 9 YALE J.L. & FEMINISM 123 (1997).

[150] *Id.* at 127.

[151] I put forth earlier versions of these arguments in FINEMAN, *supra* note 6, at 263–92.

[152] 744 A.2d 864, 867 (Vt. 1999).

of formal equality under the Equal Protection Clause of the United States Constitution but from a more expansive and earlier notion of equality derived from the experience of colonial America.

The Vermont Constitutional Clause predated the Fourteenth Amendment and is not based on a concept of discrimination. Nor is it focused on protection for a specific category of persons. The Common Benefits Clause states, in part, "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . ."[153]

The court distinguished federal jurisprudence from its interpretation of Vermont's Common Benefits Clause as a matter of ends from means. It noted that federal courts had been "broadly deferential to the legislative prerogative to define and advance governmental *ends*, while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective."[154] On the other hand, the court suggested that underpinning the Common Benefits Clause was the notion that "the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege."[155]

Consistent with the approach of the Vermont Supreme Court is a small but growing body of state constitutional jurisprudence that approaches equality using state provisions like the Common Benefits Clause, opening up the promise of a more radical and substantive notion of equality than seems possible under the United States Constitution. This jurisprudence is in line with what some legal scholars call the "new judicial federalism,"[156] and it seems to mark a path in which substantive equality norms—or more radical

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153 VT. CONST. ch. I, art 7.

154 *Baker*, 744 A.2d at 871. The majority continued, noting that the Clause prohibits "not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged." *Id.* at 874. Further, in the majority's view, the Common Benefits Clause, "at its core . . . expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage." *Id.* at 875.

155 *Id.* at 876–77.

156 For a background on new judicial federalism, see Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996). *See also* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).

egalitarian ideas of equality—may emerge in the upcoming years.[157] I am interested less in "new judicial federalism" as a movement than as an overall mechanism for delivering more substantive forms of equality.

New judicial federalism may be defined as "the renewed reliance by state courts on state constitutions as independent sources of constitutional rights, often with the aim of extending greater protection to individual liberties than is available under current interpretations of the federal constitution."[158] A quarter century ago, Justice William J. Brennan, Jr., called new judicial federalism "an important and highly significant development for our constitutional jurisprudence."[159] Cases like *Baker* mark the actualization of this theoretical movement.[160] Many state constitutional scholars have found an expansion of rights in states that contain provisions analogous to Vermont's Common Benefits Clause.

A handful of states contain provisions granting affirmative rights, distinctly departing from the U.S. Constitution's "negative" rights model. For instance, the preamble to Pennsylvania's Constitution states: "it is our . . . duty to establish such original principles of government as will best promote the general happiness of the people of this State . . . and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever . . . ."[161]

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[157] Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675, 696–97 (1992) ("The federal Equal Protection Clause has been applied almost exclusively as a 'negative' right, and has not been extended to include positive 'distributional implications.' Many of the pressing issues that will be brought to state courts in the future . . . will involve asserted positive rights.") (internal citations omitted).

[158] Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143, 143 (1984) (internal citations omitted).

[159] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

[160] G. Alan Tarr suggests, "Paradoxically . . . the activism of the Warren Court, which has often been portrayed as detrimental to federalism, was a necessary condition for the emergence of vigorous state involvement in protecting civil liberties." Tarr, *supra* note 156, at 1111.

[161] PA. CONST. pmbl. (1776), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 278 (William F. Swindler ed., 1st ed. 1973–1979) [hereinafter SOURCES AND DOCUMENTS]; *see also* CAL. CONST. art. I, § 11 (1849), *reprinted in* 1 SOURCES AND DOCUMENTS, *supra*, at 448 ("All laws of a general nature shall have a uniform operation."); IOWA CONST. art. I, § 6 (1846), *reprinted in* 3 SOURCES AND DOCUMENTS, *supra*, at 435 ("All laws of a general nature shall have a uniform operation . . . ."); MASSACHUSETTS BODY OF LIBERTIES art. 2 (Mass. 1641), *reprinted in* 5 SOURCES AND DOCUMENTS, *supra*, at 47 ("Every person within this jurisdiction, whether inhabitant or foreigner, shall enjoy the same justice and law, that is general for the Plantation, which we constitute and execute one towards another, without partiality or delay."); N.H. CONST. pt. I, art. XXXV (1784), *reprinted in* 6 SOURCES AND DOCUMENTS, *supra*, at 347 ("It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that

The majority in *Baker* seems to expand the potential numbers of persons whose interests may be protected under the Common Benefits Clause beyond those identified with groups protected in the jurisprudence of the U.S. Supreme Court. As the Vermont court noted, "the plaintiffs are afforded the common benefits and protections of Article 7, not because they are part of a 'suspect class,' but because they are part of the Vermont community."[162] This approach led the court to "police a political process whose product frequently discriminates between citizens in respect to benefits and privileges."[163] This application of equality moves us in the direction of examining outcomes, not just treatment.

Some scholars see this rubric, which is akin to a more radical egalitarian perspective, as appropriate only for state high courts. Robert F. Williams comments:

> Obviously, the Common Benefits Clause of the Vermont state constitution reads very differently from the federal Equal Protection Clause and has very different origins. This should not be surprising because the state and federal governments constitute very different polities with very different governmental functions. The federal government exercises limited, delegated powers in contrast to the states' plenary, residual authority. No one would have expected the federal Constitution to provide any sort of guarantee about the "benefit, protection, and security of the people." Historically, that was a function of state government.[164]

Yet, as the reference to the development in the states in *Lawrence v. Texas* has shown, state conceptions and understandings may pull federal decisionmaking forward. Therefore, I find it promising that we have recently seen state courts developing a more robust conception of equality in some cases.

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there be an impartial interpretation of the laws, and administration of justice."); OHIO CONST. art. VIII, § 14 (1802), *reprinted in* 7 SOURCES AND DOCUMENTS, *supra*, at 554 ("All penalties shall be proportioned to the nature of the offence."); OR. CONST. art. I, § 33 (1857), *reprinted in* 8 SOURCES AND DOCUMENTS, *supra*, at 206 ("[A]ll taxation shall be equal and uniform."); TENN. CONST. art. I, § 2 (1834), *reprinted in* 9 SOURCES AND DOCUMENTS, *supra*, at 152 ("[G]overnment [is] instituted for the common benefit . . . ."). Some of these quotes have been adapted from old English. This research is quoted from John Marquez Lundin, *The Law of Equality Before Equality Was Law*, 49 SYRACUSE L. REV. 1137, 1157 n.77.

[162] Baker v. State, 744 A.2d 864, 878 n.10 (Vt. 1999).

[163] Lawrence Friedman & Charles H. Baron, Baker v. State *and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 152 (2001).

[164] Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 87 (2001) (internal citations omitted).

Of course, when one examines some issues through the lenses of the fifty states, it may sometimes seem that they collectively take one step backward for every two forward. In the 2004 election, for example, eleven states voted to amend their constitutions to define marriage as between members of opposite sexes.[165] On the other hand, several states seem poised to expand the rights and benefits given to such couples. There are both minority protection and majoritarian components to state constitutional equality doctrines on both state and federal levels. Much work in excavating equality principles from their more radical colonial past needs to be done, but it is clear that substantive equality is not only a "foreign" concept. It is home-grown and as American as our War for Independence. Its history contains the possibility for a more expansive contemporary understanding of equality that can reverberate throughout the United States as a whole.

CONCLUSION: THE POLITICS OF SUBSTANTIVE EQUALITY

There are several important questions to ask both our politicians and ourselves as we seek to refine and further define an otherwise abstract commitment to substantive equality with which to replace our current formal version. As with many concepts of historic magnitude, some of the most significant questions to pose about equality have to do with how we should respond to evolutions in understanding and changes in aspiration for the term: Is a mere commitment to formal equality sufficient for a humane and modern state? How should the state respond to the fact that our society is increasingly one in which a privileged few command more resources than the struggling many, and individuals are born into and continue to experience disparities in well being that are built upon existing inequitable distributions of society's resources?

In the United States today, some live in real poverty and deprivation, while a few have more wealth than they could spend in ten lifetimes. Of course, there is also the vast majority, who view themselves as "middle class." These Americans have homes, automobiles, and even small stock portfolios. Most of them, nonetheless, live in a state of insecurity. Given the way things are organized in our system of privatized and individualized responsibility, they

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[165] Those states included Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. *See* Elizabeth Mehren, *Election 2004: The Nation; Gay Unions; 11 States Back Bans on Gay Unions; Georgia, Ohio Bar Partner Benefits*, L.A. TIMES, Nov 3, 2004, at A21. All approved anti-same-sex marriage amendments by double-digit margins. *Id.*

are only a few paychecks, a catastrophic illness, or a divorce away from economic disintegration and despair.

The insecurity and unfairness generated in the current political and economic organization of this society suggest that we should fashion a sense of equality that is more concerned with ultimate outcomes. In such a society, a more substantive notion of equality would warrant that the rewards that it and its resources produce are more equitably distributed among its members. This would be a society with some basic guarantees of social goods—a society that would not tolerate any person left behind—left without adequate resources to allow them and their children to succeed to the fullest extent possible.

Marshall's vision can form the foundation for an argument that the state must provide the "rights of autonomous citizenship" in order for Americans actually to effectively exercise their civil and political rights. Without the autonomy provided by basic social goods, the rights of citizenship are merely formal, not substantive.

While it is possible to appreciate Marshall's notions of citizenship, the current politics in the United States are such that substantive equality arguments are likely to be banished to the realm of utopian visions. Absent some vigorous democratic movement for change based on outrage stemming from the badly skewed and unequal distribution of material, political, and social goods, those who control the American state are not likely to do more than continue in their current role as reactive facilitator of the market and its institutions.