# ARTICLES

## BEYOND IDENTITIES: THE LIMITS OF AN ANTIDISCRIMINATION APPROACH TO EQUALITY

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### INTRODUCTION

Looking at the mounting statistics and reports on the growing inequality in the United States, one might wonder how a nation built on the ideal of equality could have strayed so far from that ideal in reality.[1] We seem to be proceeding

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[1] *See* CONG. BUDGET OFFICE, PUB. NO. 4031, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007, at 3 (2011), *available at* http://www.cbo.gov

under an impoverished sense of what it means to be a nation committed to equality. From a twenty-first century human-rights perspective, law and policy responses in a number of areas have fallen far short of mounting an adequate response to growing inequality.[2] These policy deficits will be hard to close because our Constitution, with its restrictive federal nature, limits the remedial ability of the federal government, and because current Supreme Court jurisprudence deems that equality requires only sameness of treatment[3] or nondiscrimination[4] rather than a more substantive vision of equality.[5]

/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf. This study found that between 1979 and 2007, the top 1% of households experienced an income growth of 275% while households in the highest income quintile experienced an income growth of 65%. *Id*. Middle-income households, however, experienced an income growth of 40% and households in the lowest income quintile experienced an income growth of only 18%. *Id.* Further, the study found that "the share of income accruing to higher-income households has increased, whereas the share accruing to other households has declined." *Id.* at 1. The practical effects of this trend stand in stark contrast to the notion of equality and the inalienable right to the pursuit of happiness praised in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[2] HUMAN RIGHTS WATCH, WORLD REPORT 2012, at 654-63 (2012) (providing an overview of observed inequalities and the United States' policy responses to these inequalities in areas such as labor rights, gender equity, disability rights, and criminal justice). The entrenchment of such inequalities can be seen in poverty rates and growing income disparities. CARMAN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, P60-239, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 1 (2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf ("Real median household income declined between 2009 and 2010. The poverty rate increased between 2009 and 2010. The number of people without health insurance increased between 2009 and 2010, while the 2010 uninsured rate was not statistically different from the 2009 uninsured rate."); *see also* CONG. BUDGET OFFICE, *supra* note 1, at 13-14.

[3] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, 228-29 (1995) (rejecting an argument that "'benign' racial classifications" – i.e., those intended to rectify past harm – should be subject to more deferential constitutional review than classifications with "invidious" intent and valuing instead a race-neutral approach to discrimination claims which treats all classifications the same, regardless of historical inequalities).

[4] I use the term "nondiscrimination" here rather than "antidiscrimination." The prefix "non" is used for negation of something (denial or disapproval), while "anti" means in opposition to something (taking an active stance against). *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 88, 1306 (Stuart Berg Flexner & Leonore Crary Hauck eds., 2d ed. 1987). Although typically labeled as "antidiscrimination," U.S. equality law is not opposed to all discrimination. Rather, U.S. law only actively opposes some forms of discrimination explicitly targeting discrete individuals or groups and therefore may be more appropriately described with passive nomenclature.

[5] Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence*, 34 GA. J. INT'L & COMP. L. 557, 559-60 (2006) (describing the Indian Constitution's embrace of the concept of "substantive equality" which "is less concerned with treating alikes the same and more concerned with

A distributional deficit is reflected in the existing and widening income gap between the 1% (or .01%) and the rest of America.[6] This disparity has occupied news recently, as has the tendency for billionaires to pay a lower income tax rate than do their employees earning much lower wages.[7] Also illustrating the unequal nature of the United States' economic distributional system is the fact that in the last half-century, although worker productivity has increased, average wage and compensation rates have remained nearly flat.[8] Workers are producing more, but their compensation remains the same.[9] Recent figures indicate that during the Great Recession following the 2008 global financial crisis, the typical middle class family's median net worth declined by 43.3%, while the wealthiest 10% of the population experienced only a 6.4% decrease in median net worth.[10]

recognizing differences . . . and ameliorating the unequal consequences of those differences").

[6] *See* CONG. BUDGET OFFICE, *supra* note 1, at 2.

[7] Warren Buffet, *Stop Coddling the Super-Rich*, N.Y. TIMES, Aug. 14, 2011, at A21 (explaining that Buffet's own income tax rate of 17.4% was lower than that of his twenty employees, each of whom generally paid out between 33% and 44% of their taxable income).

[8] LAWRENCE MISHEL, ECON. POLICY INST., ISSUE BRIEF NO. 330, THE WEDGES BETWEEN PRODUCTIVITY AND MEDIAN COMPENSATION GROWTH 2 fig.A (2012), *available at* http://www.epi.org/files/2012/ib330-productivity-vs-compensation.2012-04-26-16:45:37.pdf (showing a 254.3% increase in productivity between 1948 and 2011, while hourly compensation increased only 113.1% during the same period).

[9] *Id*. at 1-4. Commentators often attribute this gap between production and compensation (and others declines in worker welfare) to the decreasing influence of unions in the United States. Timothy Noah, for example, states: "Draw one line on a graph charting the decline in union membership, then superimpose a second line charting the decline in middle-class income share . . . and you will find that the two lines are nearly identical." TIMOTHY NOAH, THE GREAT DIVERGENCE 127-28 (2012). "Richard Freeman, a Harvard economist, has also estimated that the decline of unions explains about 20 percent of the income gap in the United States." Joe Nocera, *Turning Our Backs on Unions*, N.Y. TIMES (June 4, 2012), http://www.nytimes.com/2012/06/05/opinion/nocera-turning-our-backs-on-unions.html?_r=1&partner=rssnyt&emc=rss. Interestingly, some other countries recognize a right to collective bargaining. *See, e.g.*, Alan Bogg & Keith Ewing, *A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada*, 33 COMP. LAB. L. & POL'Y J. 379, 379 (2012). The International Labour Organisation also recognizes such a right. International Labour Organisation [ILO], Convention (No. 98) Concerning the Application of the Principles of the Right To Organise and To Bargain Collectively art. 4, July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951) [hereinafter ILO Convention]. Commentators have further explored how enforcement of the right to collective bargaining can drastically improve both social and economic conditions for workers. *See, e.g.*, Toby D. Merchant, *Recognizing ILO Rights to Organize and Bargain Collectively; Grease in China's Transition to a Socialist Market Economy*, 36 CASE W. RES. J. INT'L L. 223, 225 (2004).

[10] *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of*

The lack of social mobility in the United States today also indicates that there is a deficit in meaningful access to the opportunities provided by society and its institutions.[11] Significantly, recent studies have found that the United States is a far less mobile society than many European countries.[12] For most people, one of the best predictors of ultimate success and social standing is increasingly the economic position of their parents.[13] The hallowed American mantra of equality of opportunity and access is rendered hollow by such data.

An additional deficit, which both contributes to and is exacerbated by the inequalities resulting from the deficits previously discussed, exists within our democratic institutions. Disadvantaged circumstances lead to disengagement and alienation on an individual level.[14] Additionally, the United States as a

*Consumer Finances*, FED. RES. BULL. (Bd. of Governors of the Fed. Reserve System, Washington, D.C.), June 2012, at 1, 20, *available at* http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf (reporting a 43.3% loss of median net worth among the second quartile of American families, compared to a 6.4% decrease for the upper decile).

[11] ECON. MOBILITY PROJECT, RENEWING THE AMERICAN DREAM: A ROAD MAP TO ENHANCING ECONOMIC MOBILITY IN AMERICA 3-4 (2009), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/EMP_Road_Map.pdf; *see also* GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 8-9 (2005), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf (arguing that schools are increasingly segregated by race and poverty, leading to severe educational inequalities in the United States); Kevin Fiscella & David R. Williams, *Health Disparities Based on Socioeconomic Inequities: Implications for Urban Health Care*, 79 ACAD. MED. 1139, 1139-42 (2004).

[12] *See, e.g.*, Dan Froomkin, *Social Immobility: Climbing the Economic Ladder Is Harder in the U.S. Than in Most European Countries*, HUFFINGTON POST (Sept. 21, 2010, 8:30 AM), http://www.huffingtonpost.com/2010/03/17/social-immobility-climbin_n_501788.html (citing a 2010 Organization for Economic Co-Operation and Development (OECD) report which found that the United States is less socially mobile than Demark, Australia, Norway, Finland, Canada, Sweden, Germany, and Spain). The OECD reports significantly higher mobility among Nordic countries than the United States and some other OECD member states. ORG. FOR ECON. CO-OPERATION AND DEV., ECONOMIC POLICY REFORMS: GOING FOR GROWTH 2010, at 183-87 (2010); *see also* MILES CORAK ET AL., INST. FOR THE STUDY OF LABOR, IZA DP NO. 4814, ECONOMIC MOBILITY, FAMILY BACKGROUND, AND THE WELL-BEING OF CHILDREN IN THE UNITED STATES AND CANADA 4-9 (2010), *available at* http://ftp.iza.org/dp4814.pdf; ISABEL SAWHILL & JOHN E. MORTON, ECON. MOBILITY PROJECT, ECONOMIC MOBILITY: IS THE AMERICAN DREAM ALIVE AND WELL? 4-5 (2007), *available at* http://www.brookings.edu/~/media/research/files/papers/2007/5/useconomics%20morton/05useconomics_morton.pdf.

[13] *See, e.g.*, ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 12, at 184 (finding "intergenerational earnings elasticity" to be particularly low in the United States, the United Kingdom, Italy, and France); SAWHILL & MORTON, *supra* note 12, at 5 (providing statistics on the lack of significant intergenerational mobility among U.S. males).

[14] FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE 119

whole suffers from structural impediments to democracy as compared with our peer nations.[15] The length and manner in which our elections are run[16] and the role of private money in campaigns[17] create a chaotic and superficial political

(1988) ("[P]eople with lower levels of education vote less in the United States because the political system tends to isolate them, and not because less education is an inherent impediment to voting.").

[15] *See* ECON. INTELLIGENCE UNIT, DEMOCRACY INDEX 2011: DEMOCRACY UNDER STRESS 3-8 tbl.2 (2011), *available at* http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2011_Updated.pdf&mode=wp&campaignid=DemocracyIndex2011 (ranking the United States number nineteen on a list of most democratic countries based on criteria such as "[e]lectoral process and pluralism" and "[p]olitical participation"). A number of commentators have assessed the impact of these impediments on United States elections in depth. *See, e.g.*, Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 559-60 (2004) (arguing that there are four "structural democracy deficit[s]" in the United States: the electoral college; the disenfranchisement of Americans due to voting and registration difficulties, as well as voter suppression; the disenfranchisement of minority groups; and the difficulties faced by third party candidates); Timothy Vercellotti & David Anderson, Protecting the Franchise or Restricting It? The Effects of Voter Identification Requirements on Turnout 12-13 (Sept. 1, 2006) (unpublished manuscript) (manuscript available at http://www.brennancenter.org/page/-/d/download_file_50903.pdf) (analyzing how signature, non-photo-identification, and photo-identification requirements present procedural barriers to voting and lead to decreased voter turnout, especially among African Americans, Asian Americans, and Hispanics).

[16] *See, e.g.*, Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1285-86 (2005) (asserting that onerous ballot-access requirements for third-party candidates entrench the United States' two-party system); David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 602-10 (2009) (highlighting as a shortcoming of America's first-past-the-post, two-party electoral system its ability to foster "majoritarian domination," ultimately failing to adequately represent the views of political minorities); Raskin, *supra* note 15, at 563 (discussing how decentralized election administration, which leaves critical decisions in the hands of a multitude of state and municipal officials, has resulted in disenfranchisement through unduly burdensome registration requirements, confusing ballots, and faulty electoral technologies); Jamin B. Raskin, *What's Wrong with* Bush v. Gore *and Why We Need to Amend the Constitution to Ensure It Never Happens Again*, 61 MD. L. REV. 652, 697 (2002) (arguing against the Electoral College as an unnecessary impediment to direct democracy which depresses voter turnout).

[17] *See* Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS 59, 59-61 (2011) (discussing the recent increase in private, corporate funding in elections, warning that "[i]f the past is prologue, we should anticipate a marked increase in the use of non-profits to mask for-profit money in politics[,]" and urging consideration of more robust financial disclosure requirements); Mimi Marziani, *Money in Politics After* Citizens United*: Troubling Trends & Possible Solutions*, BRENNAN CENTER FOR JUST. (Apr. 18, 2012), http://www.brennancenter.org/content/resource/money_in_politics_after_citizens_united_troubling_trends_possible_solutions/.

discourse that avoids in-depth debates on shared factual foundations, favoring instead polarized sound bites, intentional misrepresentations and distortions, and partisan obstinacy.[18] Unsurprisingly, the Supreme Court's decision in *Citizens United v. FEC*[19] intensified these structural impediments, unleashing mountains of money through political action committees during the most recent election cycle.[20] The fundamental principle of equality guaranteed by "one person, one vote" is vanquished by the ability of corporations and billionaires to buy endless media advertisements, arguably often untrue or distorted, that favor or condemn candidates for office.[21]

This Article compares the legal culture of equality in the United States with the legal cultures of other constitutional democracies. It looks at two manifestations of equality: equality in its narrow sense – as a nondiscrimination mandate – and equality in its broader, substantive sense – as

[18] *See* Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After* Citizens United*?*, 61 CATH. U. L. REV. 97, 110-14 (2011) (exploring the potential long-term impacts of *Citizens United* in light of data from the 2010 electoral cycle showing increases in private donations, overall advertising expenditures, the number of involved "super PACs," and the use of negative campaigning); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 325-29 (2011) (finding that polarization leads to a lack of effective internal checks and balances during times of unified government and deadlock during times of divided government).

[19] 130 S. Ct. 876, 886 (2010) ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.")

[20] *See, e.g.*, Marziani, *supra* note 17. While overall spending on federal elections has increased, a study by the Center for Responsive Politics also found that "[t]he percentage of spending coming from groups that do not disclose their donors has risen from 1 percent to 47 percent since the 2006 midterm elections," "[t]he amount of independent expenditure and electioneering communication spending by outside groups has quadrupled since 2006," and "[s]eventy-two percent of political advertising spending by outside groups in 2010 came from sources that were prohibited from spending money in 2006." Spencer MacColl, Citizens United *Decision Profoundly Affects Political Landscape*, OPENSECRETS BLOG (May 5, 2011, 11:16 AM), http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

[21] In *Citizens United*, the Court rejected the notion that "the special, state-created attributes of corporations, particularly their capacity to aggregate wealth, give them power to distort the political process." Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979, 990 (2011). The Court ignored the concern raised by Justice Stevens in his dissent that "[p]oliticians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation" as a result of the majority's decision. *Citizens United*, 130 S. Ct. at 974 (Stevens, J., dissenting). As Robert Weissman notes, increased corporate and individual donations during the 2010 election "provided ample reason to suspect that these worst-case suspicions will be realized." Weissman, *supra*, at 991-94.

establishing a positive right to access the social goods or resources necessary to sustain equally valued individuals.[22] The Article ultimately argues that the foundational difference between the manner in which equality is understood in the United States and how it is understood in much of the rest of the world arises from the recognition and acceptance in other countries that human need and vulnerability are not only an individual responsibility but also a state responsibility.[23] The U.S. Constitution is ancient by international standards,[24] idealizes an antiquated political-legal subject, and embodies a restricted sense of state responsibility that is unrealistic for defining the appropriate legal relationships that exist between the modern state, the lives of individuals, and the operation of complex societal institutions.[25] Clinging to the idea of a "liberal" constitutional or political-legal subject that was prevalent when the U.S. Constitution was drafted[26] has impeded the evolution of a concept of equality that would complement our developing understanding of what is

[22] In discussing differing definitions of equality, Professor Matthew Craven states:

> [E]quality has been peculiarly resistant to definition and, over the centuries, has been given all forms of meanings and characteristics. . . . It is frequently asserted that equality demands that those who are equal be treated in an equal manner, and that those who are different should be treated differently. . . . The achievement of an equitable balance between identical and differential treatment, however, may be approached from either a positive or a negative vantage point. In positive terms, the principle would require that everyone be treated in the same manner unless some alternative justification is provided. In negative terms the principle might be restated to allow differences in treatment unless they are based upon a number of expressly prohibited grounds.

MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 154-55 (1995) (footnotes omitted).

[23] In discussing this conception of state responsibility and its impact on equality jurisprudence, I build on my previous work in the *Yale Journal of Law and Feminism* and the *Emory Law Journal*. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 10-22 (2008) [hereinafter Fineman, *Anchoring Equality*] (presenting the concepts of the "vulnerable subject" and the "responsive state" as important to America's approach to inequality); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 256 (2010) [hereinafter Fineman, *Responsive State*] (arguing for a "vulnerability approach" that requires the state to assume a positive obligation to effectuate equality among its citizens).

[24] Adam Liptak, *'We the People' Loses Followers*, N.Y. TIMES, Feb. 6, 2012, at A1.

[25] *See* Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 281 (2003) ("Originally made without the participation of women and itself thus in some tension with norms of democratic self-rule, the U.S. Constitution, like older constitutions more generally, may benefit from the insights of courts interpreting newer constitutions that have integrated commitments to gender equality at the same time as other rights." (footnote omitted)).

[26] *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 10, 26 (discussing autonomy as a "core concept[] of American mythology" imbued in the founding documents of the United States).

necessary in terms of state responsibility to ensure that all people are treated as "created equal."[27] This Article concludes by offering the concept of the "vulnerable subject" as a more viable and appropriate figure around which to build contemporary policy and law and suggesting some measures legislatures and courts could take to build a more responsive and responsible state that would function to ensure meaningful equality of access and opportunity.[28]

## I. CONSTITUTING EQUALITY

In a February 2012 *New York Times* front-page story, Adam Liptak reported the results of a study undertaken by Professors David Law and Mila Versteeg that showed a "steep plunge" in the degree of similarity between the U.S. Constitution and constitutions of other democracies around the world.[29] Liptak noted that while a 1987 article in *TIME* estimated that almost all existing countries had "'written charters modeled directly or indirectly on the U.S.'" Constitution,[30] that trend was reversed in the 1980s and 1990s.[31] Among the potential reasons posited by Liptak for this declining influence was that that "[o]ur Constitution is terse and old, and it guarantees relatively few rights."[32] Liptak also mentioned increased recognition that there were "newer, sexier and more powerful operating systems in the constitutional marketplace."[33] Offering additional authority on this point, Liptak quoted Justice Ruth Bader Ginsburg: "'I would not look to the United States Constitution if I were drafting a constitution in the year 2012.'"[34] Justice Ginsburg indicated that she prefers instead the South African Constitution, the Canadian Charter of Rights and Freedoms, and the European Convention on Human Rights as potential

[27] DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* Fineman, *Responsive State*, *supra* note 23, at 258 n.26 (discussing how the Declaration of Independence itself illustrates the founders' valuation of autonomy).

[28] *See infra* Part IV.

[29] Liptak, *supra* note 24 ("'The turn of the twenty-first century, however, saw the beginning of a steep plunge . . . to the point that the constitutions of the world's democracies are, on average, less similar to the U.S. Constitution now than they were at the end of World War II.'" (quoting David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 801 (2012))).

[30] *Id.* (quoting John Greenwald, *A Gift to All Nations*, TIME, July 6, 1987, at 93, 93).

[31] *Id.* For a graphical representation of this decline, see Law & Versteeg, *supra* note 29, at 801 fig.13.

[32] Liptak, *supra* note 24. Law and Versteeg explored this theme further in their study, concluding that the U.S. Constitution is atypical among modern charters in the limited number of rights it protects. Law & Versteeg, *supra* note 29, at 804.

[33] Liptak, *supra* note 24 (surmising from a quip by Professor David S. Law that the U.S. Constitution is the constitutional equivalent of "'Windows 3.1'").

[34] *Id.* (quoting Interview by Al Hayat with Justice Ruth Bader Ginsburg, in Cairo, Egypt (Jan. 30, 2012) [hereinafter Al Hayat-Ginsburg Interview], *available at* http://www.memritv.org/clip/en/3295.htm).

models.[35] Highlighting the difficulty of the constitutional amendment process in the United States and contrasting it with the relative malleability and short lifespan of other countries' constitutions, Liptak concluded: "[T]he rights guaranteed by the American Constitution are parsimonious by international standards, and they are frozen in amber."[36]

Constitutions typically provide several different families of rights:

> [*S*]*ecurity rights* that protect people against crimes . . . ; *due process rights* that protect against abuses of the legal system . . . ; *liberty rights* that protect freedoms in areas such as belief, expression, [and] association . . . ; *political rights* that protect [political participation] . . . ; *equality rights* that guarantee . . . equality before the law[] and

[35] *Id.* (citing Al Hayat-Ginsburg Interview, *supra* note 34).

[36] *Id.* Liptak explained that other nations completely replace their constitutions "on average every 19 years," the same length of time that Thomas Jefferson, writing to James Madison in 1789, suggested a constitution "'naturally expires'" because "'the earth belongs always to the living generation.'" *Id.* (quoting Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, 392, 392-94 (Julian P. Boyd ed., 1958)). In contrast, the U.S. Constitution and its first ten amendments that make up the the Bill of Rights are well over 200 years old. Since then, there have been only seventeen amendments added to the Constitution. Liptak further reflected on the declining tendency of foreign judges to reference and cite decisions of the U.S. Supreme Court because of its "parochialism." *Liptak*, supra note 24. Aharon Barak, when he was president of the Supreme Court of Israel, wrote in the *Harvard Law Review* that the U.S. Supreme Court, at the beginning of the twenty-first century, was "'losing the central role it once had among courts in modern democracies'" and identified Canadian law as serving as a "'source of inspiration for many countries around the world.'" *Id.* (quoting Aharon Barak, *Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 27, 114 (2002)). Liptak also reported that Justice Michael Kirby of the High Court of Australia stated in a 2001 interview that "'America is in danger, I think, of becoming something of a legal backwater.'" *Id.* (quoting Michael Kirby, *Think Globally*, 4 GREEN BAG 2D 287, 291 (2001)). Providing a counterbalance to the idea that the U.S. Constitution no longer holds precedence as a protective charter of rights, however, Liptak went on to reference Justice Antonin Scalia's views on the comparative value of some other constitutions. *Id.* In testimony before the Senate Judiciary Committee in October 2011, Justice Scalia disparaged placing too much value in the textual commitments found in other nations' constitutions, absent an evaluation of their actual practice:

> Every banana republic has a bill of rights. . . . The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours. . . . We guarantee freedom of speech and of the press. Big deal. They guaranteed freedom of speech, of the press, of street demonstrations and protests, and anyone who is caught trying to suppress criticism of the government will be called to account. Whoa, that is wonderful stuff.
>
> Of course, they were just words on paper, what our Framers would have called "a parchment guarantee."

*Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 6-7 (2011) (statement of Hon. Antonin Scalia, J., Supreme Court of the United States).

> nondiscrimination; and *social (or "welfare") rights* that require . . . protections against severe deprivation.[37]

As for specific guarantees – those nearly ubiquitous to constitutions around the world – such as the rights of freedom of religion, expression, and private property, as well as equality guarantees, are considered "generic."[38] Other rights deemed commonplace include "the prohibition of arbitrary arrest and detention, the right[] to assembly . . . , and women's rights."[39]

In their study, Professors Law and Versteeg described the U.S. Constitution as "increasingly atypical" for three reasons.[40] First, "it offers relatively few enumerated rights" when compared to other constitutions.[41] Unlike the United States, which has not added rights for over a century, other countries have revised or expanded their constitutional protections over time.[42] Second, some of the comparatively few rights that the U.S. Constitution does enumerate are rarely provided at the international level.[43] For example, "only about one-third of the world's constitutions expressly provide for separation of church and state."[44] Additionally, the right to bear arms is found in less than a handful of constitutions worldwide.[45] Third, there is a significant divergence between the U.S. Constitution and roughly eighty percent of the rest of the world which has articulated the right to have basic physical needs met through the provision of

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[37] James Nickel, *Human Rights*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/archives/fall2010/entries/rights-human/ (last modified Aug. 24, 2010).

[38] Law & Versteeg, *supra* note 29, at 773 (stating that, as of 2006, the rights to freedom of religion and freedom of expression, the right to possess private property, and guarantees of equality were found in ninety-seven percent of global constitutions).

[39] *Id*. (explaining that freedom of association and assembly, freedom from arbitrary detention, the right to privacy, and women's rights are included in ninety percent of the world's constitutions). The U.S. Constitution, however, does not specifically provide for women's rights. *See* Judith A. Baer, *Women's Rights and the Constitution*, 44 SOC. SCI. J. 57, 58 (2007) ("[T]he Constitution presumes the existence of a person who is in fact an adult white male."). Further, in 1985 the Equal Rights Amendment to the Constitution failed to gain the required number of state ratifications, illustrating that the amendment process is difficult to maneuver successfully. *See* Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 426 (2008).

[40] Law & Versteeg, *supra* note 29, at 804-09.

[41] *Id*. at 804 ("[The U.S. Constitution] contains only twenty-one of the sixty provisions in [Law and Versteeg's] rights index, whereas the average constitution currently contains thirty-four.").

[42] *Id*.

[43] *Id*. at 805.

[44] *Id*.

[45] *Id*. (suggesting that the right to bear arms is "practically sui generis" as "the only other constitutions in the world today that still feature such a right are those of Guatemala and Mexico").

"second-generation [human] rights" such as state guarantees of medical care and food.[46]

The failure of the U.S. Constitution to provide for second-generation human rights has been attributed to its age.[47] Rights in the eighteenth and nineteenth centuries were understood largely in common law terms, with freedom of contract and private property considered paramount.[48] At the time of the Constitution's framing, there was also a different understanding of government, particularly the relationship between the state and its institutions.[49] The nature, structure, and magnitude of societal institutions that we encounter daily in the twenty-first century were unknown until relatively recently in our history.[50] Additionally, the very structure of our national government is an anomaly. Only twelve percent of the world's countries are currently governed under a federal system.[51]

[46] *Id*. at 806-07 (stating that "the U.S. Constitution omits a number of the generic building blocks of global rights constitutionalism," including women's rights and rights protecting physical needs); *Id.* at 838 (describing "second generation rights" as "positive rights that obligate the government to act affirmatively in certain ways").

[47] Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 8 (2005).

[48] *Id.* at 12. Sunstein suggests, however, that, although the U.S. Constitution in the eighteenth century did not expressly contain second generation rights, it is important to recognize that constitutional meaning changes over time through interpretation and amendments. *See id.* at 10-11.

[49] ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 24 (1996) (explaining that the American founders "enlisted the English liberal tradition, which put at the center of its political philosophy individuals free of government, enjoying property and thinking and praying as they wished").

[50] *See, e.g.*, Timothy Stoltzfus Jost, *Why Can't We Do What They Do? National Health Reform Abroad*, 32 J.L. MED. & ETHICS 433, 438 (2004) ("Throughout the nineteenth century and into the 1930s, it was generally believed in the United States that responsibility for social welfare resided in the states, and that the U.S. federal government lacked the constitutional authority to enact universal health insurance. . . . The Medicaid program was built on this model in the 1960s . . . ."); Patricia P. Martin & David A. Weaver, *Social Security: A Program and Policy History*, SOC. SECURITY BULL. (U.S. Soc. Sec. Admin., Office of Policy, Washington, D.C.), Sept. 2005, at 2, *available at* http://www.socialsecurity.gov/policy/docs/ssb/v66n1/v66n1p1.pdf (remarking that the idea of social insurance, first adopted in the United States as part of the Social Security Act of 1935, dates back to the 1880s, when "Germany . . . built a social insurance program (one requiring contributions from workers) that provided for sickness, maternity, and old-age benefits").

[51] Law & Versteeg, *supra* note 29, at 785-86 (finding that federalism was popular in the early nineteenth century, but its popularity has since declined significantly). In addition, the presidential system in the United States, as well as our particular form of judicial review, are structural features of constitutionalism that are significantly less popular today than in the past, and are now found in only a minority of nations. *Id*. at 791-96.

### A. *Constitutions and Comparisons*

Comparing the guarantees of the U.S. Constitution against the constitutions of other developed democracies reveals interesting variations and divergences in the way our constitution expresses both the ideal of equality and its vision of what characterizes the political-legal subject. Most significantly, differences emerge in consideration of how other countries: (1) view equality as expansive, protecting against more than just discrimination based on certain inherent individual characteristics, such race or sex; and (2) understand equality as constituting a universal right to access social and economic goods based on individual needs, aspirations, and achievement of personal security.[52] In the latter category, an individual's identity may be tied to his or her social

[52] Formal equality and social equality (or access to minimal social equality) are, of course, related. As T.H. Marshall pointed out long ago, it is necessary to have a certain amount of social goods before civil and political equality are meaningful. T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 35 (1950) ("[T]he right to freedom of speech has little real substance if, from lack of education, you have nothing to say that is worth saying, and no means of making yourself heard to say it. But these blatant inequalities are not due to defects in civil rights, but to lack of social rights . . . ."). Canada and many other countries have a more developed sense of substantive equality than that of the United States, based on the provision of socioeconomic rights to citizens. *See* Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WIS. L. REV. 597, 611 (describing Canada's more expansive conception of equal protection and recognizing that Canadian jurists view the United States as "the anti-model"); Sunstein, *supra* note 47, at 3-4 (describing the socioeconomic rights provided by the constitutions of Norway, Romania, Peru, Syria, Bulgaria, and Hungary). Those countries are also committed to international rights conferred in conventions that the United States has not ratified. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 538, 539 (1988) ("The United States therefore remains sadly isolated from the rapidly developing corpus of international human rights law."). For example, the American Convention on Human Rights was signed but never ratified by the United States. *See* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978). Additionally, the United Nations International Covenant on Civil and Political Rights was ratified by the United States but with five reservations, five understandings, and four declarations that rendered it largely meaningless in the United States, including reservation of the right to subject children to the death penalty. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; 138 CONG. REC. 8070-71 (1992) (stating for the record five reservations, understandings, and declarations attendant to the United States Senate's ratification). It was not until 2005 that the United States held capital punishment for minors unconstitutional under the Eighth and Fourteenth Amendments. Roper v. Simmons, 543 U.S. 551, 578 (2005). Finally, the United Nations International Covenant on Economic, Social, and Cultural Rights was signed but never ratified by the United States. *See* International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

position or status – as a worker or a family member, for example – but is not necessarily based on inherent personal characteristics.

B. *Equality As Nondiscrimination: The U.S. Constitution*

The equality right in the United States is typically expressed in nondiscrimination terms,[53] as a right to equal treatment and equal protection of law.[54] This equality guarantee, set out in the Fourteenth Amendment to the U.S. Constitution, which was ratified in 1868, does not identify specific groups or characteristics to be afforded equality.[55] On its face, Section 1 of the Fourteenth Amendment establishes what might be characterized as a universal legal or constitutional subject with regard to both due process[56] and equal protection of law:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[57]

The United States thus adopted a potentially radically broad equality right, which, on its face, provided that any citizen could challenge any state classification or distinction among citizens in federal courts.[58]

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[53] For the distinction between the passive "nondiscrimination" and more active "antidiscrimination" nomenclature, see *supra* note 4.

[54] David Lyons, *Constitutional Principles*, 92 B.U. L. REV. 1237, 1239-40 (2012) (discussing the view that the Fourteenth Amendment provides for both "equal enforcement of the law" and "equality before the law").

[55] *See* U.S. CONST. amend. XIV, § 1 (providing broadly that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States" and that the rights of citizens cannot be abridged). The Thirteenth, Fourteenth, and Fifteenth Amendments arose out of the Civil War, abolished slavery, expanded substantive due process and equal protection rights, and added black males to the category of persons entitled to vote. *Id.* amend. XIII (prohibiting slavery); *id.* amend. XIV; *id.* amend. XV (guaranteeing that the right to vote to freedmen).

[56] *Id.* amend. XIV, § 1. The Due Process Clause of Section 1 of the Fourteenth Amendment protects citizens' rights to procedural and substantive due process. 16C C.J.S. *Constitutional Law* § 1505 (2005) ("Substantive due process embraces the right of citizens to be free from arbitrary deprivations of life, liberty, and property, and protects individual liberty against certain government actions regardless of fairness of procedures used to implement them. Substantive due process forbids the government from infringing certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (footnotes omitted)).

[57] U.S. CONST. amend. XIV, § 1.

[58] The Supreme Court has interpreted the Fifth Amendment to extend the same equal protection principles to the federal government. Bolling v. Sharpe, 347 U.S. 497, 498-99

The potential avalanche of cases such an open-ended constitutional guarantee might have provoked was severely limited by Supreme Court precedents fragmenting the formally expressed universal subject along group identity lines and adopting different levels of judicial scrutiny for review of legislative classifications under American equal protection jurisprudence.[59] The Fourteenth Amendment's promulgation in the wake of the Civil War and the legacy of emancipation, along with the dismantling of Jim Crow laws in the mid-twentieth century, profoundly affected its interpretation, establishing race as the paradigmatic classification for scrutiny.[60] Anchored to that history, Supreme Court jurisprudence requires that in order to receive meaningful or heightened review an individual must demonstrate that they are a member of a "discrete and insular minority."[61] Consequently, minority status under the Constitution is determined by demonstrating historic discrimination, analogous to race discrimination, whereby an individual or group is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[62]

(1954).

[59] Erwin Chemerinsky, *The Supreme Court and The Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1144 (1992) ("The Equal Protection Clause was almost totally unused for the first four score of the amendment's history. Since then it has been terribly restricted by analysis based on rigid levels of scrutiny that provide no meaningful protection outside of discrimination based on a few suspect classifications.").

[60] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States."); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1073 (2011) (discussing how Congress intended to "promote some form of [racial] inclusion" with the Reconstruction Amendments and legislation of the time).

[61] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ."); Grace Jubinsky, *Selecting the Appropriate Standard of Review for Equal Protection Challenges to Legislation Concerning Subsistence Benefits*, 53 U. CIN. L. REV. 587, 589 (1984) ("The Supreme Court has applied strict scrutiny to protect 'discrete and insular minorities' because, by virtue of the condition of minority, effective participation in the political process is curtailed.").

[62] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). In *Rodriguez*, the Court decided by a five-to-four majority that education was neither "explicitly nor implicitly" protected in the Constitution so as to require heightened scrutiny as a fundamental right. *Id.* at 35. The Court also found that Texas had not created a suspect class based on poverty. *Id.* at 28. In consideration of a wealth-based classification, the Court rejected the idea that the Equal Protection Clause required strict equality:

> Only appellees' first possible basis for describing the class disadvantaged by the

In spite of its initial radical potential, equality as a U.S. constitutional concept is actually understood narrowly as only the requirement of sameness of treatment between different social classifications.[63] But it really is not even that. Ironically, our formally open-ended equality provision is not applied equally in practice. Race or ethnicity classifications are subjected to strict scrutiny, while gender classifications receive intermediate review and most other classifications receive only cursory rational basis scrutiny.[64] This effectively leaves those outside of the narrow categories of race, ethnicity, and gender with no realistic way to challenge state treatment that minimally pulls itself over the arbitrary hurdle of rational basis review, no matter how detrimental or destructive.[65]

> Texas school-financing system – discrimination against a class of definably "poor" persons – might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the "poor," appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. . . .
>
> . . . .
>
> Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.

*Id.* at 22-24 (footnotes omitted).

[63] I have discussed the implications of this passive, narrow conception of equality previously. *See* FINEMAN, *supra* note 26, at 10 ("Equality is manifested in mere formal or legal guarantees of sameness of treatment for individuals. Inherent in sameness of treatment is the absence of affirmative governmental measures designed to raise the unequal to a more equal position.").

[64] There have been recent scholarly assessments that these categories are not as well defined and determinative of results as is traditionally taught in law schools. *See, e.g.*, Randall P. Ewing, Jr., *Same Sex-Marriage: A Threat to Tiered Equal Protection Doctrine?*, 82 ST. JOHN'S L. REV. 1409, 1413-16 (2008); Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2343-46 (2006).

[65] Our understanding of equality and equal protection has been profoundly shaped by these doctrines' nineteenth century roots, found in the Reconstruction Amendments and subsequently used as a tool to provide protection to freedmen and fight blatant forms of racial discrimination throughout the Civil Rights Era. *See* Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295,

In addition, the guarantee of equal protection of law is understood, even for the most protected individuals, as a prohibition against arbitrary discrimination and not as some broader inquiry into subordination or relative disadvantage.[66] This standard of equal protection, which is primarily focused on questioning unequal treatment, rather than on remedying unequal positioning or status within society, undermines the development of meaningful notions of equality of opportunity and access. Under such a standard, characteristics which are significant impediments to social and institutional inclusion for millions, such as disability and poverty (class), have not been afforded strict, or even intermediate, scrutiny.[67]

It is also worth noting that many state constitutions do not adhere to the federal Constitution's conception of equal protection. Some states enumerate protected categories mirroring other, more recently enacted constitutional systems.[68] In addition, although some states follow the Supreme Court's

299, 306 (2007) (discussing the distinctive nature of American antidiscrimination law, its historical focus on eradicating inequalities arising from race-based slavery, and its modern focus on "race-conscious affirmative action" over the past forty years). The history of applying varying equality standards to differently protected classifications, therefore, both defines legal identities for some and also organizes us into political interest groups based on race, ethnicity, gender, and other identity characteristics. *Id.* at 308 ("U.S. antidiscrimination law reaches only a few select protected categories like race, color, religion, national origin, sex, age, and disability.").

[66] Interestingly, in this catalogue, as well as in the law, class is absent as a suspect classification. *See Rodriguez*, 411 U.S. at 28, 40 (rejecting the application of strict scrutiny to an education policy allegedly discriminating against students on the basis of class and instead applying rational basis). Class bias would bring economic arrangements into question and, for that reason, would appear incompatible with a formal equality analysis that ignores disparities underlying circumstances of economic inequality.

[67] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 478 U.S. 432, 442 (1984); *Rodriguez*, 411 U.S. at 40.

[68] *See, e.g.*, Barbara Osborne, *"No Drinking, No Drugs, No Lesbians": Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 MARQ. SPORTS L. REV. 481, 489 (2007) ("Some state constitutions include sex as a protected category, but few of these state courts have interpreted 'sex' to include 'sexual orientation.'"); Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202 (2005) ("Today, twenty-two states have some form of explicit protection against sex discrimination in their state constitutions."). The California Constitution is illustrative of this more expansive notion of equal protection. CAL. CONST. art. 1, § 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."); *id.* § 31(a) ("The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."). The Connecticut Constitution also includes expansive antidiscrimination protections. Regarding the equality of rights, the Connecticut Constitution states: "All men when they form a social compact, are equal in rights; and no

precedent when interpreting their own equal protection clauses, that is not always the case.[69] State justices can and do view equal protection more broadly and inclusively. For example, the Supreme Court of Vermont, in *Baker v. State*, looked into the state's own early history and found a very expansive meaning for equal protection of law.[70] The court, recognizing ways in which state authority was implicated in the conferral of privilege and disadvantage, cited the common benefits clause of the Vermont Constitution: "[G]overnment 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."[71]

The Vermont Supreme Court distinguished federal jurisprudence from its interpretation of Vermont's common benefits clause, which it characterized as

man or set of men are entitled to exclusive public emoluments or privileges from the community." CONN. CONST. art. I, § 1. The state's constitution further provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." *Id.* § 20. Professor Jeffrey Shaman writes that the Connecticut Constitution may contain "the most comprehensive protection of equality" in the United States. Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1016 (2003).

[69] Shaman, *supra* note 68, at 1029 ("[S]ome state supreme courts have afforded their state equality guarantees a wider scope than the Federal Equal Protection Clause in order to protect rights beyond those recognized in the federal arena."); *see also* Christine M. Motta, *The Supreme Court of Alaska: Unique and Independent Like the People of the Last Frontier*, 60 ALB. L. REV. 1727, 1734 (1997) (explaining how the Alaska Supreme Court's interpretation of the Alaska Constitution's equal protection provision "differs from the U.S. Supreme Court's more inflexible approach to equal protection cases which first considers whether a fundamental right or suspect class is involved"); Wharton, *supra* note 68, at 1237 (discussing how "the values reflected in California's constitutional prohibition against sex discrimination in employment" led the California Supreme Court to sustain a claim for sexual harassment against a private employer despite an alleged defense that the claim was not actionable absent "state action").

[70] *Baker v. State*, 744 A.2d 864, 876 (Vt. 1999) ("The powerful movement for 'social equivalence' unleashed by the Revolution ultimately found its most complete expression in the first state constitutions adopted in the early years of the rebellion. In Pennsylvania . . . the result was a fundamental charter that has been described as 'the most radical constitution of the Revolution.' Yet the Pennsylvania Constitution's egalitarianism was arguably eclipsed the following year by the Vermont Constitution of 1777." (citations omitted) (quoting GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 75-82 (1969))). The court thereby concluded that Vermont's common benefits clause rightly extended state equal protection beyond that provided by the federal government. *Id.* at 870 (holding that although the federal Equal Protection Clause "may . . . supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters").

[71] *Id.* at 867 (quoting VT. CONST. ch. I, art. 7).

being concerned with ends rather than merely means. The court noted that federal jurisprudence has generally 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."[72] By contrast, underpinning the common benefits clause was the aspiration 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."[73] The court also emphasized that the common benefits clause granted affirmative protections, prohibiting "not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged."[74] Under this conception of the clause, the majority in *Baker* did not limit the potential set of classes whose interests may be protected under the Vermont Constitution to only those groups identified by the U.S. Supreme Court as deserving searching scrutiny.[75] As the Vermont Supreme Court noted, "the plaintiffs are afforded the common benefits and protections of article VII, not because they are part of a 'suspect class,' but because they are part of the Vermont community."[76] This fact alone compelled the court to "police a political process whose product frequently discriminates between citizens in respect to benefits and privileges."[77]

While it seems clear that an inclusive and rigorous approach to equality has strong roots in American history at the state level, it has been pruned back in Supreme Court jurisprudence. At the federal level, only discrimination explicitly directed against certain groups in society is deemed deserving of meaningful judicial scrutiny.

### C. *Equality As Antidiscrimination: Comparative Systems*

The discrimination and equality provisions in other constitutional and multilateral systems are more specifically structured than the open-ended

[72] *Id.* at 871.

[73] *Id.* at 876-77 (emphasis added).

[74] *Id.* at 874.

[75] *Id.* at 878. A handful of state constitutions contain provisions granting affirmative rights, distinctly departing from the traditional "negative liberties" model. *See* DeShaney v. Winnebago Cnty. Soc. Servs. Dep't, 489 U.S. 189, 195 (1989) ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."); *id.* at 204 (Brennan, J., dissenting) (using the term "negative liberties" to describe constitutional protections). For example, from as early as 1776 Pennsylvania recognized a "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 . . . ." PA. CONST. of 1776, pmbl.

[76] *Baker*, 744 A.2d at 878 n.10.

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

approach found in the Fourteenth Amendment.[78] Paradoxically, however, these other systems are much more comprehensive and inclusive in practice. In these systems, a general equality right is elaborated upon by listing explicit categories of persons who are to be included within the guarantee.[79] The potential to introduce new categories to these lists, through interpretation or amendment, reflects the ability of these more flexible systems to accommodate novel claims for equal protection by individuals and groups as they emerge on the political stage.[80] Extension of these lists over time indicates that claims for nondiscrimination based on individual characteristics or statuses are inherently the products of their time and place; they arise during certain periods of history and are shaped in distinct political, cultural, and social contexts.

For example, at its inception the European Union was a customs union, focused only on economic freedoms and leaving human rights and social protections wholly to the member states' national governments.[81] As such, the original Treaty Establishing the European Economic Community only referenced nondiscrimination on the basis of gender and nationality in the context of employment.[82] As the European Union has developed, however, cultural and social changes have led to an expansion of its competencies with regard to nondiscrimination, including the ability to combat inequality among a

[78] *See supra* note 55-58 and accompanying text.

[79] *See* Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity,"* 22 MICH. J. INT'L L. 283, 285 (2001) (recognizing that "a standard, contemporary statement of the non-discrimination norm" includes "an express enumeration of protected categories" and the potential to recognize new, unenumerated categories).

[80] *Id.* at 285-92 (discussing the growing international recognition of sexual orientation as an unenumerated category worthy of protection against discrimination).

[81] Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, 630 (2002) ("The negotiators of the original 1957 [Treaty Establishing the European Community] thought that the human rights guarantees in the national constitutions of EC member states and in the ECHR were sufficient for protecting human rights in the common market.").

[82] Treaty Establishing the European Economic Community arts. 7, 119, Mar. 25, 1957, 298 U.N.T.S. 11 (as in effect 1958) (now Consolidated Version of the Treaty on the Functioning of the European Union arts. 18, 157, Sep. 5, 2008, 2008 O.J. (C 115) 47); *see also* EU AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW 13-14 (2009), *available at* http://www.echr.coe.int/NR/rdonlyres/DACA17B3-921E-4C7C-A2EE-3CDB68B0133E/0/ENG_FRA_CASE_LAW_HANDBOOK_01.pdf ("The core purpose of the European Communities was the stimulation of economic development through the free movement of goods, capital, people and services. In order to allow for a level playing field between the Member States, the original Treaty Establishing the European Economic Community (1957) contained a provision prohibiting discrimination on the basis of sex in the context of employment.").

broader set of social classifications.[83] Since 2000, the European Union has expanded the protections afforded race- and gender-based categories[84] and has recognized a right to nondiscrimination in employment on the basis of disability, age, religion, sexual orientation, and belief.[85] In addition, the European Charter of Fundamental Rights includes the thoroughly modern and science-based protected category of "genetic features," along with fourteen more traditional grounds.[86] Over time, the European Court of Human Rights has also extended the scope of its equal protection jurisprudence.[87] This

[83] Petersmann, *supra* note 81, at 631 ("EU law has evolved into a comprehensive [] system for the protection of civil, political, economic and social rights of EU citizens across national frontiers.").

[84] Council Directive 2004/113, art. 1, 2004 O.J. (L 373) 37, 40 (EC) (extending protection on the grounds of gender to the provision of goods and services); Council Directive 2000/43, art. 1, 2000 O.J. (L 180) 22, 24 (EC) (creating a framework to combat discrimination and effect equal treatment in relation to racial or ethnic origin).

[85] Council Directive 2000/78, art. 1, 2000 O.J. (L 303) 13, 18 (EC) ("The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.").

[86] Charter of Fundamental Rights of the European Union art. 21, 2000 O.J. (C 364) 1. The preamble states that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity . . . . It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice." *Id.* pmbl. In adopting the Charter, the European Union recognized that "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible . . . ." *Id.* Further, Article 21 provides for non-discrimination protection:

> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

*Id.* art. 21.

[87] Developed in the post-World War II era, the European Charter of Human Rights prohibits discrimination of the enjoyment of any right provided for by the charter on the grounds of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). The last category, "other status," has allowed the European Court of Human Rights to extend the nondiscrimination protections to other grounds not specifically enumerated. *See* Rory O'Connell, *Cinderella Comes to the Ball: Art. 14 and the Right to Non-Discrimination in the ECHR*, 29 J. SOC'Y LEGAL SCHOLARS 211, 222 (2009).

extension of nondiscrimination protection in both the European Union and the Council of Europe, through the European Court, illustrates how other systems have adapted their conceptions of protected classes over time, in response to changing social understandings.

The South African Constitution enumerates seventeen protected categories, including the traditional grounds of race, ethnicity, religion, and sex, but also adding categories – e.g., pregnancy, marital status, social origin, sexual orientation, age, disability, and conscience – only addressed by legislation (if at all) in the United States.[88] The United Kingdom does not have a core constitutional document, but enumerates protected characteristics, including civil partnership and pregnancy and maternity in the Equality Act of 2010.[89]

These and other constitutional systems explicitly facilitate judicial expansion of protected categories. For example, the Canadian Charter of Rights and Freedoms sets forth enumerated grounds but also allows judicial expansion to additional grounds analogous to those listed.[90] Thus, while the

[88] S. AFR. CONST., 1996, § 9. The South African Constitution sets forth that:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

*Id.*

[89] Equality Act, 2010, c. 15, §§ 4-12 (U.K.). The government of the United Kingdom has indicated the Equality Act is intended to protect all people:

> The act covers nine protected characteristics, which cannot be used as a reason to treat people unfairly. Every person has one or more of the protected characteristics, so the act protects everyone against unfair treatment. The protected characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The Equality Act sets out the different ways in which it is unlawful to treat someone, such as direct and indirect discrimination, harassment, victimisation and failing to make a reasonable adjustment for a disabled person. The act prohibits unfair treatment in the workplace, when providing goods, facilities and services, when exercising public functions, in the disposal and management of premises, in education and by associations (such as private clubs).

*Equality Act 2010*, HOME OFFICE, http://www.homeoffice.gov.uk/equalities/equality-act/ (last visited Oct. 4, 2012).

[90] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 15 (U.K.).

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular,

approach to equality undertaken in countries such as South Africa and Canada – whose constitutions Justice Ginsburg specifically identified as more modern and appropriate models than the U.S. Constitution[91] – maintains a formal framework of nondiscrimination based on specific personal characteristics, their processes of constitutional evolution or amendment are flexible enough to expand, encompassing newly identified individuals and groups deemed worthy of equal protection. These constitutions are truly antidiscrimination focused. The United Kingdom even trumpets the fact that under its Equality Act of 2010 "[e]very person has one or more of the protected characteristics, so the act protects everyone against unfair treatment."[92]

### D. *Antidiscrimination As a Statutory Scheme*

In the United States, statutory equality reforms took place in the twentieth century and laws against discrimination now complement the Fourteenth

> without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

*Id.*

The grounds of protection enumerated in Section 15, however, are not exhaustive. The Canadian Supreme Court has recognized additional classifications where an individual or group is subject to unequal treatment on the basis of an identifiable "immutable" characteristic or a characteristic that could only be altered through extreme cost (i.e., "constructively immutable"). Corbiere v. Canada (Minister of Indian & N. Affairs), [1999] 2 S.C.R. 203, para. 13 (Can.). Several analogous grounds have been recognized by Canadian courts thus far, including sexual orientation. Egan v. Canada, [1995] 2 S.C.R. 513 (Can.) (prohibiting discrimination on the grounds of sexual orientation); *see also* Little Sisters Book & Art Emporium v. Canada (Minister of Justice), 2000 SCC 69, [2000] 2 S.C.R. 1120, para. 118 (Can.); M. v. H., [1999] 2 S.C.R. 3, para. 216 (Can.); Vriend v. Alberta [1998] 1 S.C.R. 493, para. 88 (Can.). After the Canadian Supreme Court declined to rule on the issue of same-sex marriage, Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 S.C.R. 698, paras. 3, 7 (Can.), lower courts began to interpret the Canadian Constitution to make laws against same-sex marriage illegal. *See* Halpern v. Canada (Att'y Gen.) (2003), 65 O.R. 3d 161, para. 108 (Can. Ont. C.A.) (using section 15 to legalize same-sex marriage in Ontario). Other analogous grounds recognized include marital status, tribal affiliation, and citizenship. *See* Lavoie v. Canada, 2002 SCC 23, [2002] 1 S.C.R. 769, para. 1 (Can.) (immigration status); Corbiere v. Canada (Minister of Indian & N. Affairs), [1999] 2 S.C.R. 203, para. 14 (Can.) (off-reserve aboriginal status); Miron v. Trudel, [1995] 2 S.C.R. 418, 481 (Can.) (marital status); *cf.* Nova Scotia (Att'y Gen.) v. Walsh, 2002 SCC 83, [2002] 4 S.C.R. 325, paras. 2, 32 (Can.) (agreeing that marital status is protected but concluding that the exclusion of unmarried cohabitants from the Matrimonial Property Act was not discriminatory).

[91] *See* Al Hayat-Ginsburg Interview, *supra* note 34.

[92] *See Equality Act 2010*, *supra* note 89.

Amendment's guarantee of equal protection of law, even extending the nondiscrimination mandate to private actors in some contexts.[93] Congress has enacted statutory provisions applicable to the constitutionally protected categories of race, ethnicity, and gender.[94] Further, some categories receiving enumerated constitutional protection in other countries, such as age and disability, are instead protected by statute in the United States.[95] These statutes are often organized around individual characteristics or identity markers, including many of the same enumerated constitutional grounds found in the Canadian and European systems. Such statutes have not only served to mitigate the formal legal impediments applied to distinctions based on a wide variety of characteristics, but have also provided remedies for discrimination.[96] In addition, statutory bodies such as the Equal Employment Opportunity

[93] *See, e.g.*, Age Discrimination in Employment Act of 1967 § 3(a)(3), 29 U.S.C. § 622 (2006) (promoting "opportunities and potentials of older persons" through the "development of facilities of public and private agencies"); Title VII of the Civil Rights Act of 1964 § 705(g)(1), 42 U.S.C. §§ 2000e-2 to -17 (2006) (asserting that the Equal Employment Opportunity Commission's power extends over private agencies as well); Americans with Disabilities Act of 1990 § 304, 42 U.S.C. §§ 12101-12213 (2006) (extending the scope of protection to private entities providing specified public services).

[94] *See* Age Discrimination in Employment Act § 2(b) (promoting "employment of older persons based on their ability rather than age"); Civil Rights Act of 1991 § 3(1), 42 U.S.C. § 1981 (2006) ("provid[ing] appropriate remedies for intentional discrimination and unlawful harassment in the workplace"); Title VII of the Civil Rights Act § 703 (ensuring equal employment opportunity regardless of race, color, religion, sex, or national origin).

[95] *See* Lilly Ledbetter Fair Pay Act of 2009 § 2(2), 42 U.S.C. § 2000e-5 (2006) (responding to "[t]he limitation imposed by the Court on the filing of discriminatory compensation claims [which] ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended"); Americans with Disabilities Act § 2(a)-(b) (prohibiting discrimination against individuals with disabilities).

[96] *See, e.g.*, 3 HR SERIES: POLICIES AND PRACTICES § 246:7 (Jason Conklin et al. eds., 2009) ("The ADA incorporates remedies and procedures found in Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. . . . [These remedies include] injunctions, reinstatement, back pay, promotion, hiring, and reasonable attorney's fees. The compensatory and punitive damages . . . made available in Title VII cases . . . are also available in intentional discrimination . . . suits under the ADA."); 1 JOAN M. KRAUSKOPF ET AL., ELDERLAW: ADVOCACY FOR THE AGING § 3.66 (2d ed. 1993) ("The [Age Discrimination in Employment Act] allows for both equitable and monetary damages. Monetary damages include back pay, liquidated damages for willful violations, and other relief as may be appropriate to effectuate the act's purposes."); Karen L. Peck, *Union Liability Under the Age Discrimination in Employment Act*, 56 U. CHI. L. REV. 1087, 1110-11 (1989) ("Although Congress emphasized the desirability of conciliatory efforts by the Secretary of Labor to eliminate age discrimination, it also recognized the necessity of private enforcement and explicitly provided for it in the [Age Discrimination in Employment Act].").

Commission (EEOC) continue to play a positive role in ensuring the equal protection of law.[97]

These statutory developments are positive, but we must recognize their limits. First, while the antidiscrimination measures have been largely successful and have improved the circumstances and prospects of many legally disadvantaged persons, they do not reach everyone.[98] Second, it has become increasingly clear that a discrimination model built around personal characteristics or identities will not be sufficient to meaningfully ensure equality of access and opportunity unless accompanied by measures that take into account structural disadvantages associated with social roles, positioning, and functioning.[99]

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[97] *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/ (last visited Oct. 5, 2012) ("The [EEOC] is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information."); *see also* HR SERIES: POLICIES AND PRACTICES, *supra* note 96, § 246:7 ("The EEOC has the same powers under the ADA as it has under Title VII. These powers include the authority to receive and investigate charges of discrimination, as well as to bring civil actions in individual cases and against employers that engage in 'pattern and practice' discrimination.").

[98] *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 770-72 (2011) (commenting that reliance on comparisons of similarly situated individuals or groups to define discrimination results in excluding valid claims because a "comparator turns out to be unattainable for most individuals who claim discrimination"); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 338 (2001).

[99] *See, e.g.*, EDWARD ROYCE, POVERTY & POWER: THE PROBLEM OF STRUCTURAL INEQUALITY 17 (2009) (discussing how discrimination is largely a structural problem since "these obstacles . . . originate from the combined workings of the economic, political, cultural, and social systems"); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 136 (1989) ("[T]hose aspects of the workplace which cause work-family conflict are largely structural features that have resulted from the adoption of facially neutral policies . . . ."); Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1452 (1986) ("[T]he critical analytical problem of discrimination in the handicapped context now is less one of overcoming bigotry and invidious prejudice than one of redesigning social structures and institutions to make them more responsive to the needs of the disabled segment of the population."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) ("[M]anifestations of workplace bias are structural, relational, and situational. The underlying problems are exacerbated in workplaces with flexible, decentralized governance structures that require workers to participate more actively in decisionmaking . . . ."); Note, *"Trading Action for Access": The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156, 2167 (2008) ("Title VII has been rendered powerless to address structural discrimination and implicit bias.").

It is also important to note that there are both symbolic and expressive differences between statutory provisions and constitutional rights, as well as practical reasons why statutory provisions should not be considered a substitute for constitutional protection. The most significant practical difference is that constitutional recognition entrenches the protection of a right, while legislation is subject to a majoritarian process.[100] Protective legislation may not be forthcoming, or if it is, it can be inadequate or even detrimental to the individual or group claiming protection. Legislation also can be amended or repealed by a legislative majority for any reason, including short-term political gain.[101] Under applicable Supreme Court review, such legislative amendments may need only meet the weak rational basis standard to survive.[102]

Equality, thus reduced to a prohibition against certain targeted discrimination, has proven an inadequate tool to resist or upset persistent forms of subordination and domination, even in the case of individuals and groups deemed deserving of stricter constitutional scrutiny. In part, this inadequacy is the result of how the Supreme Court's assessment of discrimination focuses on the actions and motivations of individuals making decisions and determinations at specific and defined points in time.[103] This framework is designed to capture the victims and the perpetrators of discrimination.[104]

[100] *See* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 584 (1994) (describing the judiciary's role to check the majoritarian process in order to protect individual constitutional rights, while still having to give deference to legislators); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522-30 (1990) (discussing how the majoritarian process lacks the constitutional filters designed to protect individual rights).

[101] Commentators have discussed the concept of legislative due process as a potential solution to this problem. *See infra* Part IV.A.

[102] Chemerinsky, *supra* note 59, at 1154 ("Government may be arbitrary and discriminatory so long as it is not acting in the few areas that have received heightened scrutiny."). Of course, state constitutions may give greater freedom and protection than the U.S. Constitution provides with its attendant system for analyzing discrimination claims. The U.S. Constitution establishes the floor below which the state may not fall. *See* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 233-37 (2008). The relevant question I posit, therefore, is whether this floor should be built a bit higher and impose more positive duties on state and federal governments to ensure equality.

[103] This is the case with legislative classifications and private determinations, such as in the employment or public accommodation areas. *See, e.g.*, Sturm, *supra* note 99, at 486 ("The Supreme Court has recognized th[e] relationship between unstructured discretionary employment decisions and discrimination. . . . [The Court's application of disparate impact analysis to subjective employment practices acknowledges] that systemic factors, namely the structure (or lack thereof) of decisionmaking caused exclusion, as well as the expression of bias by individuals or groups operating within those structures.").

[104] *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. Rev. 91, 112-19 (2003)

Unless tied to individual actions, however, structural disadvantages and debilitating institutional and societal arrangements are left out of the picture.[105] In fact, current U.S. nondiscrimination jurisprudence largely leaves undisturbed – and may even serve to validate and facilitate – systemic inequalities that result in entrenching existing privilege and disadvantage in society.[106]

Also significant is the fact that, even in the context of well-established suspect categories, the antidiscrimination approach has not been successful in practice.[107] For example, in the wake of employment legislation such as the Americans with Disabilities Act of 1990[108] and the Civil Rights Act of 1991[109] there was an arroyo of discrimination cases: in 1991 federal courts heard roughly 8300 employment discrimination cases but by 2000 the number exceeded 22,000.[110] The long list of prohibited forms of discrimination represented in federal, state, and local laws, and the possibility of reverse discrimination actions, means that virtually everyone can fashion a discrimination claim.[111] But fashioning a claim is not the same as winning a lawsuit, and at later phases of the process the outlook is not good for plaintiffs. People who bring employment discrimination cases lose at trial at a greater rate than any other group of civil plaintiffs, and even when they win, their victory is more likely than most other awards to be overturned on appeal.[112] Some scholars have argued that judges are ideologically predisposed to be hostile to discrimination claims.[113]

("The conception of discrimination as deriving from a single decisionmaker at an identifiable, discrete point in time . . . leads to a narrow factual inquiry . . . [ignoring] that discriminatory bias operates at multiple stages of interaction and in the context of greater organizational structures of the workplace.").

[105] *See, e.g.*, Richard Thompson Ford, *Discounting Discrimination:* Dukes v. Wal-Mart *Proves That Yesterday's Civil Rights Laws Can't Keep Up with Today's Economy*, 5 HARV. L. & POL'Y REV. 69, 80-86 (2011).

[106] *Id.* at 75-86 (exploring how the current nondiscrimination model, developed in the 1960s, fails to adequately provide protection in a changing economic market and in fact incentivizes discriminatory hiring policies, given that there is "little risk of being sued for failure to hire" but much more risk of a "lawsuit for discriminatory termination").

[107] Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 449-52 (2004).

[108] American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

[109] Civil Rights Act of 1991, Pub. L. No. 120-166, 105 Stat. 1071.

[110] Clermont & Schwab, *supra* note 107, at 433.

[111] *Id.* (explaining how "new statutes created federal causes of action for new classes of plaintiffs"). As described above, however, the statutes upon which these claims rely are most often subject to political whims and deferential, rational basis review by courts. *See supra* notes 100-102 and accompanying text.

[112] *Id.* at 449-52 (highlighting that in employment discrimination cases "appellate courts reverse plaintiffs' wins below far more often than defendants' wins").

[113] Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*,

## II. POSITIVE DISCRIMINATION

Another significant distinction between the constitutional systems of many other countries and that of the United States is the treatment of affirmative action or other practices that allow the state to consider the relative positions of specific individuals or groups and attempt to remedy inequality. Several countries have moved to bolster the negative prohibitions against discrimination with positive provisions allowing governments to proactively and vigorously promote equality.[114] Paradoxically, such a duty may actually compel a government to discriminate; to draw distinctions in assessing who is deserving of special consideration or "affirmative action" in addition to formal equality. The antidiscrimination principle, however, is interpreted as allowing such differences in treatment when crafted as a means to eradicate the impact of past, systemic discrimination. This approach is based on the argument that, over the long term, such remedial measures will help ensure a more robust equality in practice.

### A. *Affirmative Action Abroad*

The Canadian Charter of Rights and Freedoms explicitly permits affirmative action, stating in Section 15(2) that the prohibition of discrimination in Section 15(1)[115] "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[116] South Africa's constitution also specifies that "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."[117]

94 CALIF. L. REV. 1, 22-26 (2006) ("[C]ourts appear to go out of their way to avoid entertaining disparate impact challenges to subjective employment practices."); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561-69 (2001).

[114] *See, e.g.*, Equality Act, 2010, c. 15, §§ 158-159 (U.K.). Countries party to certain international conventions also commit to ameliorate historical inequalities. *See, e.g.*, United Nations Convention on the Elimination of All Forms of Discrimination Against Women art. 4(1), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW] ("Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention . . . .").

[115] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 15(1) (U.K.) ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.")

[116] *Id.* § 15(2).

[117] S. AFR. CONST., 1996, § 9(2).

Other countries have adopted measures that fall short of explicit permission to engage in affirmative action, but nonetheless recognize that some form of positive action on the part of the government may be necessary. Such measures recognize that ensuring equality may require going beyond just responding to specific instances of discrimination established through individual lawsuits. These measures instead consider the potential consequences of nondiscriminatory actions for certain groups or individuals at a systematic level. The practice of "gender mainstreaming," for example, encourages governments to engage with non-governmental organizations, universities, and other groups to consider the impact of their decisions on gender equality.[118] This practice goes well beyond determining if there is, or was, intentional discrimination in a particular area.[119] It also reaches structural disadvantage and situations of disparate impact, as well as taking into account areas typically considered to be of particular relevance to women, such as the family. A report of the Council of Europe on gender mainstreaming indicates the broad intended scope of this practice:

> It might be useful to start with gender mainstreaming policy areas that are habitually labelled as gender-neutral. All policy areas which affect the daily life of citizens, such as transport policies, urban policies, [and] social policies are definitely important, although this is often not recognised. The same goes for research policies, because this is an important area to generate knowledge. Mainstreaming these policy areas might be very efficient, given the eye-opening effect it will produce. This effect will be very useful for convincing policy-makers and people of the need for gender mainstreaming, even when basic gender equality seems to be achieved.[120]

Significantly, a commitment to gender mainstreaming compels the development of a process for ensuring an independent and official assessment of the gendered implications and consequences of specific plans or proposals is brought within legislative deliberation.[121] This process also requires a

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[118] EQUAL. DIV., DIRECTORATE GEN. OF HUMAN RIGHTS, COUNCIL OF EUR., GENDER MAINSTREAMING: CONCEPTUAL FRAMEWORK, METHODOLOGY AND PRESENTATION OF GOOD PRACTICES 23 (2004), *available at* http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG_S_MS_98_2_rev_en.pdf (providing a comprehensive review of gender mainstreaming, including reports on various governments' processes).

[119] *Id.* at 12 (comparing the broad scope of gender mainstreaming to more narrow "'traditional' forms of equality policy").

[120] *Id.* at 19.

[121] OFFICE OF THE SPECIAL ADVISER ON GEND. ISSUES AND ADVANCEMENT OF WOMEN, U.N., GENDER MAINSTREAMING: AN OVERVIEW 13-14 (2002), *available at* http://www.un.org/womenwatch/osagi/pdf/e65237.pdf; *Gender Mainstreaming*, U.N. WOMEN, http://www.un.org/womenwatch/osagi/gendermainstreaming.htm (last visited Oct. 5, 2012) ("Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities – policy development, research,

forward-looking inquiry, undertaken to prevent *future* disadvantage for all members of the group. It is *not* a remedy for individual past harm.[122]

In the United Kingdom, children have been the beneficiaries of a similar approach through the appointment of a Children's Commissioner in each constituent country – England, Scotland, Northern Ireland, and Wales.[123] Among other tasks associated with ensuring and promoting children's rights and interests, these Commissioners have authority to assess the impact of proposed legislation and governmental activities on their designated constituency and to bring that assessment to the attention of legislators.[124] In making this assessment, the Commissioners use the resources of universities, non-governmental organizations, and experts in the areas at issue.[125] Significantly, this mandate also requires devising mechanisms for ensuring consideration of the opinions of impacted children and youth.[126] Both of these

advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.").

[122] EQUAL. DIV., *supra* note 118, at 12 (comparing the broad focus of gender mainstreaming against the traditional focus of equality legislation on a "specific problem" and suggesting gender mainstreaming as a means for "sustainable change" in gendered relationships).

[123] Children Act, 2004, c. 31, §§ 1-2 (U.K.). There are four Commissioners. *Id.* § 2 (England); *id.* § 5 (Wales); *id.* § 6 (Scotland); *id.* § 7 (Northern Ireland).

[124] *See id.* §§ 2-7. The Act defines the English Commissioner's functions as "promoting awareness of the views and interests of children in England," with particular regard for health, protection from neglect, education, ability to contribute to society, and socioeconomic security. *Id.* § 2(1), (3). The Children's Commissioner describes its mission as ensuring "that the views of children and young people are routinely asked for, listened to and that outcomes for children improve over time." *About Us*, CHILD. COMMISSIONER, http://www.childrenscommissioner.gov.uk/info/about_us (last visited Oct. 5, 2012). Analogous to the process of gender mainstreaming, the Commissioner seeks to achieve these ends "in partnership with others, by bringing children and young people into the heart of the decision-making process to increase understanding of their best interests." *Id.*

[125] *What We Do*, N. IR. COMMISSIONER FOR CHILD. & YOUNG PEOPLE, http://www.niccy.org/about/Whatwedo (last visited Oct. 5, 2012) (describing the Commissioner's engagement with universities and civil society organizations).

[126] Children Act, 2004, c. 31, § 2(4) (U.K.) (requiring the Commissioners to involve children and take account of their views). The Northern Ireland Commissioner of Children and Young People describes one of its "key functions" as "promot[ing] the participation of children and young people by listening to them and working with them . . . . Increasingly acceptance of the principle of children and young people's involvement is being turned into practice through a variety of participation activities across a range of organizations." *Participation*, N. IR. COMMISSIONER FOR CHILD. & YOUNG PEOPLE, http://www.niccy.org/Participation (last visited Oct. 5, 2012). Pursuant to this charge, the Commissioner has adopted a children's-rights-based approach consistent with the Convention of the Rights of the Child, which states that children have the right to express their views on all matters affecting them. *See* Convention on the Rights of the Child art. 12, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

mainstreaming measures are related to and rooted in U.N. conventions that implementing countries have ratified but the United States has not: the Convention on the Elimination of All Forms Discrimination Against Women[127] and the Convention on the Rights of the Child.[128]

Also significant, and reflecting a broader concern than traditional nondiscrimination measures, are directives, such as those found in the Equality Act of 2010, that require governments to take "due regard" of certain statuses when making policy or taking action.[129] Of particular interest are the recent attempts to render socioeconomic status as worthy of such specific regard, which were part of the Act but unenforced by the current Conservative government.[130] Despite this retrenchment, however, such attempts expand consideration beyond discrimination to include an obligation to specifically consider the status of individuals. This development may reflect a growing international consensus on the need to take positive measures to eradicate a broader range of inequalities, including those that are economic and structural.

### B. *Affirmative Action at Home*

In the United States there were some initial concessions to the need for affirmative action in cases of proven discrimination on the basis of race in the 1970s and 1980s.[131] However, recent concerns regarding reverse

[127] CEDAW, *supra* note 114. While the United States has signed CEDAW, it has never ratified the treaty. *See* U.N. Treaty Collection, Status of Treaties: Convention on the Elimination of All Forms of Discrimination Against Women (Oct. 6, 2012), http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf.

[128] Convention on the Rights of the Child, *supra* note 126. The United States signed the Convention on the Rights of the Child in 1990 but has since failed to ratify it. *See* U.N. Treaty Collection, Status of Treaties: Convention on the Rights of the Child (Oct. 6, 2012), http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf.

[129] Equality Act, 2010, c. 15, § 149(1) (U.K.).

[130] *Id.* § 1(1) ("An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage."). Importantly, however, this provision requires only "due regard"; the Act's explanatory notes make clear that "[i]t is for public bodies subject to the duty to determine which socio-economic inequalities they are in a position to influence." GOV'T EQUAL. OFFICE, EQUALITY ACT 2010: EXPLANATORY NOTES 10 (2010), *available at* http://www.legislation.gov.uk/ukpga/2010/15/notes. Before these provisions entered into force, however, the U.K.'s Equality Minister dismissed the duty to consider socio-economic disadvantage as "ridiculous" and asserted that the government's approach to tackling inequality would focus on "equality of opportunity." *See* Amelia Gentleman, *Theresa May Scraps Legal Requirement to Reduce Inequality*, GUARDIAN, (Nov. 17, 2010, 9:47 AM), http://www.guardian.co.uk/society/2010/nov/17/theresa-may-scraps-legal-requirement-inequality.

[131] United States v. Paradise, 480 U.S. 149, 185 (1987) (upholding race-conscious promotions in the Alabama Department of Public Safety in response to proven past

discrimination and "innocent" third parties, as well as the controversy over the use of strict scrutiny in such cases, has raised doubts about the future of affirmative action in American jurisprudence.[132] A conscientious legislator or administrator might well be deterred by Chief Justice Roberts's statement in *Parents Involved* that "' [a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class,'"[133] as well as his concluding sentence that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[134]

In any case, even in the context of race and despite the legacies of slavery and Jim Crow laws that mandated racial segregation in public places and institutions, there is no requirement that the state or other entity in the United States undertake any positive, proactive measures to mitigate the discriminatory implications of ongoing governmental and private actions or inactions. There is no official, independent, funded body charged with making impact assessments on behalf of historically disadvantaged or particularly economically or socially sensitive individuals and groups.[135] The development of any protective scheme is left to the determinations of political actors and the default constitutional position in the United States is that the right to equality is only a right to formal equality, a limited guarantee of nondiscrimination or sameness of treatment.

discrimination); Fullilove v. Klutznick, 448 U.S. 448, 490 (1980) (holding that "Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives"); United Steelworkers v. Weber, 443 U.S. 193, 197 (1979) (affirming a race-conscious affirmative action plan under Title VII); Franks v. Bowman Trans. Co., 424 U.S. 747, 779 (1976) ("[C]lass-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate . . . .").

[132] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725, 736 (2007) (distinguishing between de jure and de facto segregation and calling into question the application of diversity as a rationale for affirmative action outside the context of higher education); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (requiring that the use of race be narrowly tailored to further a compelling interest for the purposes of diversity); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 508 (1989) (holding the use of race in a city's minority business plan unconstitutional because it was not narrowly tailored to a compelling government interest).

[133] *Parents Involved*, 551 U.S. at 730 (alteration in original) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

[134] *Id.* at 748. Recently, the Supreme Court heard arguments in a potentially consequential affirmative action case. *See* Transcript of Oral Argument, Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (Oct. 10, 2012) (No. 11-345).

[135] In contrast, the Environmental Protection Agency must assess the impact of actions on the environment. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006). The Congressional Budget Office must also provide cost estimates of all unfunded mandates on both state governments and private industries. 2 U.S.C. § 602(g) (2006).

### C. *Social or Socioeconomic Rights*

While flexibility and inclusiveness, as well as affirmative action, are important, perhaps there is an even more important characteristic that distinguishes other advanced constitutional systems from the United States: universal social or socioeconomic rights anchor and give substantive meaning to the equality as nondiscrimination guarantees.

#### 1. Substantive Equality

The European Union and countries such as South Africa and Canada operate within constitutions or conventions that embody economic, social, and cultural rights along with a right to equal protection of law. Similarly, at the international level several multilateral treaties commit ratifying parties to "take steps" to "progressively [ensure] the full realization of social, economic, and cultural rights "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[136] Further, countries ratifying these treaties, emblematic of which is the International Covenant on Economic, Social and Cultural Rights (ICESCR), express an understanding that social, cultural, and economic rights are interrelated with civil and political rights and inherently connected with citizens' practical opportunities to enjoy their right to self-determination.[137] In this light, these rights can be seen as necessary to give true effect to political and civil freedoms, which mean little without the resources, stability, and opportunity to engage in government and society as an active and able member of the community.

ICESCR recognizes a robust range of social, cultural, and economic rights related to each citizen's multiple roles as individual, family member, and worker. The enumerated rights to which ratifying countries commit themselves include: the right to work and to perform such work in safe and favorable conditions;[138] the right to engage in collective labor action, including through association with trade unions;[139] the right to benefit from a system of social insurance;[140] the right to free establishment of familial units, as well as protection of such units and their vulnerable members, including youth, children, and mothers;[141] the right to an adequate standard of living, necessitating adequate access to food, shelter, and stable living conditions;[142] the right to the "highest attainable standard" of health, both mental and

[136] *See e.g.*, ICESCR, *supra* note 52, art. 2

[137] *Id.* art. 1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

[138] *Id.* arts. 6-7.

[139] *Id.* art. 8.

[140] *Id.* art. 9.

[141] *Id.* art. 10.

[142] *Id.* art. 11.

physical;[143] the right to education, including compulsory primary education;[144] and the right to enjoy the benefits of culture, science, literature, and art.[145] Signed at the same time as the International Covenant on Civil and Political Rights (ICCPR), ICESCR forms one half of the International Bill of Rights' treaty obligations.[146] The International Bill of Rights generally separates social, cultural, and economic rights from their civil and political counterparts, guaranteed in the ICCPR. Nonetheless, the ICCPR's text illustrates the natural interdependency of these types of rights, offering independent protections for some fundamental social, economic, and cultural rights such as the right to join trade unions[147] and the right of ethnic, religious, and linguistic minorities to maintain their cultural heritage, religious freedom, and traditional languages.[148]

Regional treaty organizations such as the Organization of American States[149] and the African Union[150] have adopted similar protections among their member countries. Moreover, while these treaties guarantee universal rights, other international instruments focus specifically on answering and eradicating unequal protection of social, economic, and cultural rights among historically marginalized populations. Additional protection for rights of women, for example, can be found in the Convention on the Elimination of All Forms of Discrimination Against Women.[151] Similar protections focused on the unique needs of children are located in the Convention on the Rights of the Child.[152] Additionally, the Convention on the Elimination of All Forms of

[143] *Id.* art. 12.

[144] *Id.* art. 13.

[145] *Id.* art. 15.

[146] OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO. 2 (REV. 1), THE INTERNATIONAL BILL OF HUMAN RIGHTS 1 (1996), *available at* http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf. The International Bill of Human Rights also includes the Universal Declaration of Human Rights, which articulates many of these same social, economic, and cultural rights but is binding upon signatories only as an example of customary international law, not through a system of treaty ratification. John P. Humphrey, *The International Bill of Human Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529, 533-34 (1976).

[147] ICCPR, *supra* note 52, art. 22.

[148] *Id.* art. 27.

[149] *See, e.g.*, Organization of American States, American Convention on Human Rights art. 26, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

[150] *See, e.g.*, African Union, African Charter on Human and Peoples' Rights arts. 15-18, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986) (recognizing the rights to work under just conditions, education, physical and mental health, and association within a familial unit).

[151] *See* CEDAW, *supra* note 114, arts. 10-14 (guaranteeing to women the right to education, access to healthcare, and the ability to work, with a specific emphasis on ensuring marital autonomy and access to financial services and property).

[152] Convention on the Rights of the Child, *supra* note 126 (setting forth basic protections

Racial Discrimination[153] focuses, in part, on ensuring that no discrimination on the basis of ethnic or racial origin impedes the equal enjoyment of these rights. The Convention on the Rights of Persons with Disabilities also offers a guarantee that ratifying countries will undertake to ensure "full enjoyment by persons with disabilities of their human rights and fundamental freedoms," including economic, social, and cultural rights.[154] Intergovernmental organizations have also promulgated treaties which extend specific protection of such rights to groups identifiable by social or economic status rather than immutable characteristics such as gender or race. The International Labour Organisation, for example, has promulgated treaties focusing on the protection of social, economic, and cultural rights specifically for workers.[155]

2. The American Way: A Right to Choice, Consent, and Contract

In the United States, provisions providing rights to basic human needs paralleling those found in human rights conventions are few and far between. Compounding the problems produced by the narrow equality protections the United States offers is the fact that, unlike its peer nations, this country does not have a general, universalized social welfare system based on the concepts of rights and dignity.[156] Our social welfare policy begins with the ideologically based premise that individuals are responsible for their own welfare, and the policy imposes expectations of self-sufficiency and

for children regarding care, health, education, social development, cultural participation, and economic security).

[153] United Nations Convention on the Elimination of All Forms of Racial Discrimination art. 5, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Mar. 12, 1969) (requiring ratifying states "to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law," including in the enjoyment of "[e]conomic, social and cultural rights").

[154] United Nations Convention on the Rights of Persons with Disabilities art. 4, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S 3 (entered into force May 3, 2008) ("With regard to economic, social and cultural rights, each State Party undertakes to take measures . . . with a view to achieving progressively the full realization of these rights . . . ."). In December 2012 the United States Senate refused to ratify this convention. Michael Bowman, *US Fails To Ratify Convention on the Disabled*, VOICE AM. (Dec. 4, 2012), http://www.voanews.com/content/united-states-fails-to-ratify-convention-on-the-disabled/1558583.html.

[155] ILO Convention, *supra* note 9.

[156] Professor Hila Shamir explains this distinction:

> In political economy literature the United States is categorized as a liberal welfare state. Liberal welfare states are characterized as providing residual (rather than universal) welfare benefits, emphasizing individual responsibility (rather than social solidarity), and, most importantly in this context, relying mostly on the market (rather than the state) for provision of welfare services.

Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 BERKELEY J. EMP. & LAB. L. 404, 438 n.116 (2009).

independence on rich and poor, advantaged and disadvantaged alike.[157] There is no general guarantee of housing or food[158] and until recently no broad guarantee of access to health care.[159] There is no right to employment or to higher education.[160] As for the statutory welfare schemes, while old-age assistance is virtually universal under Social Security, eligibility is based on birth date, other social welfare programs tend to be targeted, such needs-based and means-tested programs.[161]

The lack of assurance with regard to social and socioeconomic stability reflects the extremely individualistic and privatized nature of our beliefs about state responsibility for ensuring even a modicum of social equality for individuals. The current balance between liberty and equality in the United States falls heavily in favor of liberty, with any potential social inequalities posited as presumably addressed through reliance on individual responsibility.[162] This balance effectively operates as a restraint on the state at the same time that it professes to confer "agency" by recognizing the autonomy of the individual.[163]

The paramount tenet of individual liberty is that the individual must have the autonomy to make choices independent of state interference.[164] This

[157] FINEMAN, *supra* note 26, at 31-54 (discussing the American ideal of independence and its effect on society's reaction to people in need).

[158] *Id.*

[159] Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156, 1157 (2005) ("The United States is also the only industrialized country in the world that does not . . . [have] some kind of legal recognition of a right to care."); *cf.* Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT'L L.J. 285, 305 app. 1 (2004) (charting the healthcare systems in every country of the world). The recent passage of the highly contentious Affordable Care Act finally establishes a system of near, but not completely, universal health coverage in the United States. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of 42 U.S.C.).

[160] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (holding that education is not a fundamental right); Bishop v. Wood, 426 U.S. 341, 350 (1976) ("The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.").

[161] *See* David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 646 (2004) ("The largest and more controversial means-tested programs – food stamps, Medicaid, Supplemental Security Income[], and the former [Aid to Families with Dependent Children (AFDC)] program – all include significant reciprocal obligations on claimants that go far beyond anything plausibly required to administer the programs.").

[162] Fineman, *Responsive State*, *supra* note 23, at 257 ("[T]he aspiration of equality for all has been balanced against the competing and often-conflicting ideal of individual autonomy or liberty.").

[163] *Id.* at 257-62.

[164] *See, e.g.*, Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 447 (1992)

principle informs our economic, legal, and political theories and is indispensable to the rhetoric of personal responsibility that pervades current discussions about entitlement reform. What Americans have instead of social and socioeconomic rights is liberty or autonomy – the right to make choices, the right to contract.[165] The ideal of an autonomous liberal subject has also profoundly shaped society's responses to revelations of dependency or need, which are mostly punitive and stigmatized (as in the responses to single mothers needing assistance) or paternalistic and stigmatized (as in the responses to the "deserving" poor, such as children, individuals with disabilities, and the elderly).[166] This stigmatization affects the perceptions of both those who are within and those who are without the stigmatized categories.[167]

Those who cannot effectively exercise their right to contract because they are not sufficiently capable, independent, and autonomous actors are herded together in designated "vulnerable populations," a designation that functionally operates as a proxy for need and dependency and renders those within it susceptible to monitoring and supervision.[168] This designation is used for individuals and groups in several categories; some are deemed incapable of making choices, others are grouped according to judgmental assumptions about the "choices" they have made in the past or are likely to make in the future.[169]

These mandates of self-sufficiency and independence do have limits; for example, our society is uncomfortable expecting such autonomy from the very young, very old, or profoundly ill or disabled.[170] Such groups are often seen as in need of protection, eliciting paternalistic responses from society and government.[171] These responses generally result in either a presumptive denial of agency, as in the case of children, or a revocation of agency based on assumptions regarding a declining ability to care for oneself, as in the case of

("When we speak of ordered liberty, we speak of the individual's liberty or freedom from invasion, intrusion, intermeddling, or over-regulation rather than the positive liberty or freedom to live a particular way, to attain one's full potential, actualize one's inner nature, or even govern oneself in a well-run democratic or majoritarian system.").

[165] Fineman, *Responsive State*, *supra* note 23, at 251-56 ("[T]he state is restrained from interference in the name of individual liberty, autonomy, and paramount principles such as freedom of contract.").

[166] FINEMAN, *supra* note 26, at 33-35.

[167] In considering these effects, I draw on and expand upon my work considering the perceptions of elder vulnerability in the *Elder Law Journal*. *See generally* Martha Albertson Fineman, *"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71 (2012).

[168] *See* Fineman, *Anchoring Equality*, *supra* note 23, at 8-10.

[169] FINEMAN, *supra* note 26, at 31-35.

[170] Fineman, *supra* note 167, at 85.

[171] *Id.*

some elderly persons.[172] However, when someone is seen as presumptively capable but a "societal failure," unable to maintain autonomy due to poor personal choices, society's response is strikingly different.[173] Impoverished single mothers and unemployed high school dropouts are classes often included in this category. Even those who are misled or manipulated into bad decisions can be condemned; the many individuals forced into mortgage default after having consented to coercive (although legal) contracts with aggressive financial institutions are a recent, poignant example.[174] The specter of moral hazard hovers over debates about possible state intervention to assist these persons, commonly resulting in policies which mandate that they suffer the consequences of their bad decisions.[175]

Another example of how a "vulnerable population" is constructed is found in the way that those persons who have engaged, or are viewed as likely to engage, in antisocial behavior, such as prisoners or at-risk youth, are deemed dangerous.[176] These groups, thought to be in need of significant intervention, are often sequestered in penal facilities away from society.[177] The distinction between this category and that of societal failure can blur in some cases where deviant but nonviolent behavior is nonetheless deemed dangerous to society. For example, over the past several decades single motherhood has been described as a significantly dangerous and destructive trend, and harsh proposals, effectively punishing children as well as their mothers, have often been justified by that characterization.[178]

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[172] *Id.*

[173] *Id.*

[174] *Id. See generally* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008) (arguing that the contract paradigm leads to credit products unsafe for consumers).

[175] Fineman, *supra* note 167, at 85 ("We are concerned with the 'moral hazard' implications should their bad choices be 'rewarded' with societal support."); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 833 (2003) ("[T]he liberal response to neoliberal welfare criticisms . . . must grapple with the problem that welfare threatens to harm both the public and, in the long run, its beneficiaries – the moral hazard problem."). "'Moral hazard' refers to situations in which economic actors, because they do not bear the full consequences of their actions, maximize their utility at the expense of others. A common example is an individual with theft insurance not protecting an easily-replaceable item." Kevin A. Kordana, *Tax Increases in Municipal Bankruptcies*, 83 VA. L. REV. 1035, 1068 n.161 (1997) (citing Y. Kotowitz, *Moral Hazard*, *in* 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 549 (John Eatwell et al. eds., 1987)).

[176] Fineman, *supra* note 167, at 85.

[177] *Id.*

[178] *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 609 (2006) (denying welfare benefits to children receiving adoption assistance or foster care payments); S.B. 507, § 1, 100th Leg., Reg. Sess. (Wis. 2012) (defining "nonmarital parenthood" as a contributing factor to child abuse). The impact of such

Certain characteristics or identity markers associated with historic disadvantage also sometimes qualify for inclusion within vulnerable population status. The elderly are often thought of as a vulnerable population, stereotypically assumed to be weak, poor, and in decline.[179] Ethnic and racial minorities are also characterized as generally vulnerable groups. This characterization is seen, for example, in the Urban Institute Health Policy Center's definition of vulnerability:

> Vulnerable populations are groups that are *not well integrated into the health care system because of ethnic, cultural, economic, geographic, or health characteristics*. . . . Commonly cited examples of vulnerable populations include racial and ethnic minorities, the rural and urban poor, undocumented immigrants, and people with disabilities or multiple chronic conditions.[180]

This targeted-group approach to vulnerability ignores its universality and inappropriately constructs relationships of difference and distance between individuals and groups within society.[181] Designating only certain individuals and groups as vulnerable transforms our shared vulnerability into a personal liability and renders the individuals so designated susceptible to alienation, stigma, or demonization.[182]

Clustering individuals according to one or two characteristics also masks significant differences among those individuals falling within the designated population and may obscure the actual nature and range of both advantages and disadvantages experienced by its members.[183] Characteristics have become proxies for social and economic problems that escape the lines drawn around discrete populations. This impedes understanding the extent and

legislation has been a further assignation of blame for poverty onto the impacted families themselves. *See* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 295 ("The socially and economically based deprivations that poor children and their mothers suffer are thereby transformed into deprivations attributable to and based upon their deviant family form."); Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287, 291 (1996) ("[P]owerful people employ stereotypes to demonize poor women to justify punishing them and their children for failing to succeed in a system that makes their success impossible."); Alexia Pappas, *Welfare Reform: Child Welfare or the Rhetoric of Responsibility?*, 45 DUKE L.J. 1301, 1314 (1996) ("Work requirements for AFDC parents, if imposed without the funds necessary to see them through, do little to promote the interest of children in AFDC . . . and frustrate the purposes of *both* policy promoting child welfare and policy aimed at behavior control.").

[179] *See* Fineman, *supra* note 167, at 119-30.

[180] *Vulnerable Populations*, URB. INST. HEALTH POL'Y CENTER, http://www.urban.org/health_policy/vulnerable_populations/index.cfm (last visited Oct. 7, 2012).

[181] Fineman, *Anchoring Equality*, *supra* note 23, at 3-5.

[182] *Id.* at 3.

[183] *Id.* at 3-5.

implications of those problems, as well as the development of effective measures to address them across categorical differences.

The most pernicious effect of the segmenting of a general population so that only some are designated as vulnerable, however, is that such segmentation suggests that the rest of us are not vulnerable. The very idea of vulnerable populations situates and validates an opposite and binary ideal – a population of autonomous, self-sufficient, and independent liberal subjects.[184] These liberal subjects are conceived of as invulnerable, or, at the very least, as expressing only a different, more acceptable vulnerability while still successfully achieving independence, self-sufficiency, and autonomy. They are the taxpayers, the job creators, the heads of households, and the pillars of the community.[185] Such characterizations obscure the magnitude of the many forms of benefits and social resources that are necessary to generate options and subsidize the exercise of autonomy for these liberal subjects. Consequently, the relationship between vulnerable populations and invulnerable autonomous subjects is cast as adversarial and abusive, with vulnerable populations maligned as freeloaders. This characterization, in turn, facilitates disunity among various separate vulnerable populations, such as the elderly and children, as vulnerable groups must compete for allocation of the scant resources set aside as welfare payments or for social security purposes. In contrast, the generous funds plowed into things termed investments, development initiatives, or stimulus programs tend to benefit the already successful members of society while seldom reaching those who are disadvantaged.[186]

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[184] Fineman, *supra* note 167, at 85-86.

[185] *Id.* at 86.

[186] One recent example is the Troubled Asset Relief Program (TARP), in which the government pledged to contribute between $75 and 100 billion to save banks' troubled assets. *See* DEP'T OF THE TREASURY, FACT SHEET: PUBLIC-PRIVATE INVESTMENT PROGRAM (2009), *available at* http://www.treasury.gov/press-center/press-releases/Documents/ppip_fact_sheet.pdf; Edmund L. Andrews & Eric Dash, *U.S. Expands Plan to Buy Banks' Troubled Assets*, N.Y. TIMES (Mar. 23, 2009), http://www.nytimes.com/2009/03/24/business/economy/24bailout.html?_r=1. These partnerships are often criticized as being "corporate welfare" programs. *See* Nick Beermann, Comment, *Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare?*, 23 SEATTLE U. L. REV. 175, 175, 177-79 (1999); Donald L. Barlett & James B. Steele, *Corporate Welfare*, TIME, Nov. 9, 1998, at 36, 40. The public-private partnership paradigm is common for governments contracting out schools, prisons, welfare agencies, and social programs. *See generally* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 500-01 (2005) (discussing the impact of privatization on the quality of inmate treatment and prison administration); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) (discussing government funding of religious institutions).

## III. BEYOND DISCRIMINATION, BEYOND IDENTITIES

The vulnerability and the human condition thesis presents a foundation for the argument that there is a state responsibility to monitor the promises of equality of access and opportunity that are fundamental to American society's construction of itself as the "land of opportunity." My argument is that to attain broad general opportunity and access in today's world, the state must be responsive to individual, social, and institutional circumstances so that equality is anchored in the realities of the human condition and not some abstract and unachievable "ideal."[187] In particular, it is surely true that the reality of our universal fragility plays some role in the construction of societal institutions. Just as surely, how those institutions respond to our collective and individual vulnerability should form part of the basis upon which they are judged by and incorporated into society. To see how these insights are relevant to political and ethical assessments of what constitutes a "just" state, I seek to reconsider the components of the basic social compact on three levels: Who is cast as the universal legal subject? How are the nature and function of societal institutions understood? What are ascribed to be the responsibilities of the state or collective to individuals and institutions?

If the primary objective is the eradication of inequality and discrimination, any measures designed to achieve this objective will be rendered less effective by the limited scope of our nondiscrimination inquiry. The state should have a rigorous duty to ensure for everyone both equal protection of the law and equal opportunity to enjoy the benefits of society. If monitoring is restricted to rooting out discrimination against or stereotyping of personal characteristics, however, the state will only ever be able to partially achieve that objective. To reflect a rigorous commitment to equality it will be necessary to move beyond identities and beyond our current understanding of discrimination to a more universal perspective.[188]

### A. *The Universal Legal Subject*

In recent work, I developed the concepts of "vulnerability" and "resilience" to challenge the one-dimensional definition of a liberal subject as it is used to render natural and inevitable relationships of dependency and need as pathological and deviant.[189] The idea of the "vulnerable subject"[190] as the appropriate legal and political subject arose from asking two fundamental questions: (1) What should be the political and legal implications of the fact that we are embodied beings, which means we are born, live, and die within a

[187] FINEMAN, *supra* note 26, at 18-20; Fineman, *Anchoring Equality*, *supra* note 23, at 10-11; Fineman, *Responsive State*, *supra* note 23, at 262-63.

[188] As described above, we may gain insight into more robust models of equality protection through consideration of other constitutional systems. *See supra* Part II.C.1.

[189] For a discussion of the misplaced reliance on the liberal subject, see FINEMAN, *supra* note 26, at 224-27.

[190] *See* Fineman, *Responsive State*, *supra* note 23, at 255-56.

fragile materiality that renders all of us constantly susceptible to both internal and external forces beyond our control? (2) What accounts for the lack of consideration given by our political, economic, and legal systems to the messy but inescapable dependency of human nature, marked as it is by "bodily needs, desires, and yearnings?"[191]

Unlike the liberal subject, the concept of the vulnerable subject is built around the idea of "life-course," reflecting a range of developmental and social stages through which individuals are likely to pass in the course of a normal lifespan.[192] The liberal subject at best captures only one stage – the stage least likely to reflect the vulnerability of the human condition.[193] By contrast, the vulnerable subject embodies the recognition that the individual will encounter a myriad of opportunities, frustrations, challenges, and experiences during his or her life, necessitating a wide range of expertise and capabilities.[194] We will be perceived by ourselves and others as weak and in need, as well as empowered and strong, at different developmental stages in our lives and as we pass through various experiences and environments. Reliance on individual agency in such encounters can only go so far and is not always available, adequate, or even desirable.

Throughout our lives we are subject to external and internal events over which we have little control.[195] These can be negative, such as disease pandemics, environmental catastrophes, terrorism, crime, crumbling infrastructure, failing institutions, recessions, corruption, and physical decline. They can also be positive, such as the feelings that seem to arise spontaneously in encounters with nature or art, or feelings of love, friendship, and compassion. We are situated beings who live with the ever-present possibility of changing circumstances beyond our control, which may alter our needs and desires both individually and in our collective lives. We are also accumulative

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[191] *See* Fineman, *Anchoring Equality*, *supra* note 23, at 12.

[192] Fineman, *supra* note 167, at 110 (rejecting a conception of old age as "a separate designation or category of human existence" rather than simply "one end of the continuum that represents the life-course of the vulnerable subject").

[193] *See* Fineman, *Anchoring Equality*, *supra* note 23, at 11-12 ("[T]he liberal subject . . . can only be presented as an adult. As such, the liberal subject stands not only outside of the passage of time . . . [but] captures only one possible developmental stage – the least vulnerable – from among the many possible stages an actual individual might pass through if s/he lives a 'normal' lifespan.").

[194] *Id.* at 12 ("The vulnerable subject approach does what the one-dimensional liberal subject approach cannot: it embodies the fact that human reality encompasses a wide range of differing and interdependent abilities over the span of a lifetime.").

[195] Fineman, *Responsive State*, *supra* note 23, at 267 ("The process of aging and death, for example, are clear, internal biological processes that show the limitations of human ability to avoid the ultimate consequences of our embodiment. There are also external threats to our bodily well-being that are difficult to eliminate or even substantially decrease. We may suffer or succumb to diseases that are random or the result of pandemics or other biologically based catastrophes.").

beings and inevitably individuals will possess different qualities and quantities of resources, both over the course of their lifetimes and as measured at the time of crisis or opportunity.[196] This difference in accumulation is important. It is often attributed solely to differences in individual efforts and talents in American political culture.[197] But differences must also be understood as structurally produced.

Considering the structural components of universal vulnerability raises a paradox: while human vulnerability is initially conceptualized as universal and constant, it also must be recognized that the experience of vulnerability is particular, varied, and unique on the individual level. This recognition of differences within an overarching construct of universal vulnerability also allows us to see two roles for law and policy.[198] Two forms of individual difference are relevant. First are physical, mental, intellectual, and other variations in human embodiment, and second are the differences in social location or positioning of individuals that occur as they move through life.

The variations in human embodiment are not socially neutral, and historically reactions to some of these variations have led to the creation of hierarchies, discrimination, and even violence.[199] Individuals who have certain characteristics have been subordinated and excluded from many of the benefits of society, often because their differences are thought to indicate that they are dangerous or are interpreted as inadequacy, inferiority, or weakness.[200] These differences or variations are also typically the basis for segregation of some individuals into a vulnerable *population* category. The appropriate legal response to this type of bias or exclusion is to improve and strengthen existing

[196] *See* Fineman, *supra* note 167, at 110. An appreciation of our universal and constant vulnerability is essential if we are to successfully challenge the misleading mantras of "personal responsibility," "self-sufficiency," and "autonomy" that so pervade political and policy discourse in the United States, preventing positive social welfare measures and curtailing state responsiveness to structural and embedded inequalities. *See* FINEMAN, *supra* note 26, at 31-54.

[197] Fineman, *Responsive State*, *supra* note 23, at 259 ("The rhetoric of autonomy mandates that the state stay out of the way. Its role is primarily that of facilitating private competitiveness in an asserted meritocracy that, it is promised, will duly reward individual initiative and talent if only left free to do so.").

[198] *See id.* at 268-69.

[199] *See* CHRIS SHILLING, THE BODY AND SOCIAL THEORY 55-59, 111-12 (1993).

[200] *See, e.g.*, *Integrating Gender into the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (South Africa, 31 August - 7 September 2001)*, 21 J. MUSLIM MINORITY AFF. 373, 377 (2001) ("[M]icroenterprise development must recognize the fact that race and gender discrimination may limit access to resources, such as credit, for women from disadvantaged racial, ethnic and immigrant communities."); Amy L. Knickmeier, *Blind Leading the "Colorblind:" The Evisceration of Affirmative Action and a Dream Still Deferred*, 17 N. ILL. U. L. REV. 305, 351 (1997) ("Societal racism against African Americans continues to present obstinate socio-economic and psychological barriers to achieving access to higher education.").

antidiscrimination measures, perhaps building complementary affirmative action and social welfare provisions to make up for past discrimination and reduce the probability of future disadvantage.

I would also argue, however, that our concept of discrimination should be modified to include many of the "new" categories now found in the constitutions of the world.[201] If our ultimate concern is unfairness, and if our objective is elimination of unwarranted discrimination that inhibits equality, why limit an equal protection inquiry only to personal characteristics such as race or gender? The affront to equality occurs not from the drawing of lines or distinctions in and of itself, but because of the resulting denial of access or opportunity or from exclusion, isolation, and the abuse or misuse of power. The national equality mandate should be rigorous and, like that of the Vermont Supreme Court and some other constitutional systems, should ensure for everyone both equal protection of law and equal opportunity to enjoy the benefits of society.[202]

A concern with equality of access and opportunity over the life course will mean that the second relevant difference – the variations in social location that are produced as the result of institutional practices and operations – becomes the most significant focus for a vulnerability analysis. We are all differently situated within webs of economic and institutional relationships that structure our options and create opportunities. This form of difference focuses us on institutional arrangements and makes it hard to ignore the realization that in order to have a more robust equality-based society it will be necessary to move beyond individual identities and discrimination as it is now understood and adopt a more structural and institutional perspective.[203] The institutional and structural aspect of the vulnerability approach will allow us to see the ways in which "private" institutions are (at least partially) publicly constituted.

### B. *The Nature of Societal Institutions*

A vulnerability approach imagines that it is an integrated vision of society, not one of separate spheres and competing autonomous individuals or groups, that should guide political and institutional ethics and practices.[204] Indeed, one way to think about the formation of society is to posit that it is human vulnerability that brings individuals into families, families into communities, and communities into societies, nation states, and international organizations. These entities are engaged with and emerge from interactions with each other, as well as with individuals. Further, these individuals are dependent not only on their relationships with each other, but also on the interactions they

[201] *See supra* Parts II.A, II.C.1.

[202] *See supra* notes 70-77, 88-92 and accompanying text.

[203] In other systems the harshness of this approach is softened because of the social welfare provisions, but the critique of thinking about equality in terms of comparisons and discrimination is still relevant.

[204] Fineman, *supra* note 167, at 110-11.

inevitably have with the institutions and political structures their society constructs.[205]

While it is the case that social location or positioning differences are manifested on the individual level, attention must also focus on the functions and roles of institutions. All individuals are dependent on society's institutions, be they deemed public or private and whether they are called family, market, or state entities, because it is through institutions that we gain access to resources with which to confront, ameliorate, satisfy, and compensate for our vulnerability. Resources can come in material forms, such as accumulated wealth. They also are present in social goods, such as relationships and ties within families or social networks, as well as in the "human capital" that comes from education or training.[206]

[205] This notion of formation of social foundations touches on John Locke's characterization of development of familial and social bonds. According to Locke, an urge towards self-preservation through association with others was born of "[n]ecessity, [c]onvenience, and [i]nclination" and vested in humankind by God, leading man to enter into a society. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 318-19 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). In this sense, "[t]he first [s]ociety was between Man and Wife," to which children were thereafter added. *Id.* at 319. The familial society mentioned by Locke first existed in a pre-political state of nature. Id. Thereafter, however, necessity springing from the "inconveniencies of [this state of nature], and the love and want of [s]ociety" led humankind to "unite[] and incorporate[]" into a government. *Id.* at 334.

[206] I have identified at least five different types of resources or assets that societal organizations and institutions can provide: physical, human, social, ecological or environmental, and existential. See Fineman, *Responsive State*, *supra* note 23, at 270.

> Physical resources are the physical goods or material things that determine our present quality of life, such as housing, food, entertainment, and means of transportation. Physical resources also can provide us with the means for accumulating additional resources when they take the form of savings and investments. . . .
>
> Human resources affect material well-being. They are those goods that contribute to the development of a human being, allowing participation in the market and making possible the accumulation of material resources that help bolster individuals' resilience in the face of vulnerability. These resources are often referred to in terms of "human capital," primarily developed through systems that provide education, training, knowledge, and experience. . . .
>
> Social assets or resources are provided by less tangible, not so easily quantifiable relationships. These include social networks from which we gain support and strength. The family is a major institution providing social resources . . . . [So too are] other associations, such as political parties or labor or trade unions . . . . In recent decades, a sense of community organized around identity characteristics, such as race, ethnicity, and gender, has constituted powerful networks of affiliation and belonging.
>
> Ecological resources can be conferred through our position in relation to the physical or natural environments in which we find ourselves. We live in an environment and are dependent on things like clean air and water. We experience the environment in immediate and cosmic senses. . . . A variety of external factors and physical actions can alter the environments in which we live and have profound influence over our needs and wellbeing.

These resources are accumulated and dissipated in the course of a lifetime in the process of making decisions, as well as in responding and reacting to life's circumstances. At times of crisis or opportunity our accumulated resources define what our realistic options are and consequently limit or enhance our "autonomy," defining the scope and nature of our ability to exercise agency.[207] These resources cannot eliminate our inherent vulnerability, but they can and do mediate, compensate, and lessen the experience of vulnerability. They provide us with "resilience," which is the true counterpoint to vulnerability, underscoring the inescapable reality that invulnerability is impossible to achieve.[208]

Our experiences with institutions are often concurrent and interactive, but also can be sequential. The relationship between the educational system and the employment and social security systems, for example, is sequential. Collectively these systems provide for the accumulation of resources, creating assets for use in the present and to preserve possibilities and opportunities for the future.[209] Significantly, however, the failure of one system in the sequence, such as a failure to receive an adequate education, affects future prospects and often cannot be fully compensated for, given that the systems further down the line are constructed in reliance on successfully maneuvering through this earlier system.[210] Someone who misses out on education typically will have fewer options and opportunities in the workplace, which will make for a more precarious retirement and fewer savings.[211]

Conversely, sometimes privileges conferred in one concurrent system can compensate for or even cancel out disadvantages encountered in others. For example, a good early introduction to education, such as that provided by Head

> Existential resources are provided by systems of belief or aesthetics, such as religion, culture, or art, and perhaps even politics. These systems can help us to understand our place within the world and allow us to see meaning and beauty in our existence.

*Id.* at 270-71 (footnotes omitted). These resources may help ensure individuals and communities, when faced with unexpected hardships, have the requisite resilience to survive and flourish. *See* PEADAR KIRBY, VULNERABILITY AND VIOLENCE 55 (2006).

[207] Fineman, *supra* note 167, at 99.

[208] The following analysis is based upon and further developed in Fineman, *Anchoring Equality*, *supra* note 23, at 5-7, and Fineman, *Responsive State*, *supra* note 23, at 266-73.

[209] Fineman, *Responsive State*, *supra* note 23, at 269-70 ("Societal institutions . . . collectively form systems that play an important role in lessening, ameliorating, and compensating for vulnerability. Together and independently they provide us with resources in the form of advantages or coping mechanisms that cushion us when we are facing misfortune, disaster, and violence.").

[210] *See id.* at 270 ("Initially, human abilities and experience are primarily developed through systems that provide education, training, knowledge, and experience. Accumulation of a degree of human capital is essential in gaining access to employment systems, which themselves can provide further resources.").

[211] *Id.*

Start, may trump poverty as a predictor of success later in school, particularly if coupled with the advantages a social or relational system can provide, such as a supportive family and progressive social network.[212] In other words, society's institutions interact in ways that actually produce (or fail to produce) social, political, and economic equality. They can confer privilege or disadvantage and an initial privilege or disadvantage may determine if an individual is able to fully benefit from other systems. Further, because this is true, the impact of privileges and disadvantages is cumulative and may have significant and more profound effects than the isolated gains or losses associated with any single indicator would suggest.

This focus on systems or institutions and the resources they can confer supplements attention to the individual subject, placing him or her in societal context and blurring the line between what is a public versus private or individual responsibility. This blurring allows us to re-conceptualize the nature of state responsibility by bringing into focus the social and economic role of institutions and using this to recalibrate our current overemphasis on individual responsibility.

It is also important to recognize that there are strong arguments for the imposition of some institutional social responsibility. The vast majority of institutions are heavily subsidized by society and benefit from the allocation of collective resources to them, whether that occurs in the form of tax policy or direct subsidy and investment. Because they are so important both to individuals and to society, the flaws, barriers, gaps, and potential pitfalls that such institutions contain must be monitored and adjusted when they are functioning in ways harmful to society. The values that should guide the judgment of when adjustment is necessary must be democratic and publicly oriented, reflecting norms of equality and open access and shared opportunity.[213]

### C. *The Responsive State*

Powerful, resource-giving institutions like the family, corporations, schools, and financial institutions are both constructs of the state – brought into existence and maintained under the legitimating authority of law and the regulatory machinery of the state – and also the way in which the state constitutes itself.[214] It is the legitimating authority of law and the regulatory

[212] Fineman, *Anchoring Equality*, *supra* note 23, at 15-16.

[213] These institutions may seek efficiency and profits and operate in a market system, but equality of access and opportunity and lack of undue privilege should provide the regulatory thresholds below which their functioning must not fall.

[214] *See* Fineman, *Anchoring Equality*, *supra* note 23, at 6 ("Through the exercise of legitimate force in bringing societal institutions into legal existence and subsequently regulating them under its mandate of its public authority, the state also constitutes itself."). This is true of family, corporate, religious, and educational institutions, as well as the other institutions in society that are given form and content in law.

machinery of the state that give content and consequences to these institutions and in doing so, illustrate the state's established monopoly over legitimate means of coercion.[215]

Any contemporary call for a more responsive state must begin with the observation that the choice is *not* one between an active state on one hand and an inactive state on the other. The state is always at least a residual actor.[216] The choice is one between the state exercising responsibility through the structuring and regulation of its various institutions or adopting of a policy of benign neglect and abandonment of responsibility in which its inattentiveness facilitates and enables patronage, spoilage, and corruption by powerful individuals and organizations. Insistence that the state be restrained and government be small, as is prominent in American politics today,[217] ignores the many ways in which the state, through law, shapes and governs institutions from their inception to their dissolution.

The state must also be understood as a political construct as well as a functioning entity, and as such it expresses certain preferences and values that should be explored for their accuracy and desirability. Our current conception of the state as being in need of restraint is built around the privileging of autonomy in which individuals, institutions, and the state itself are viewed as

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[215] These institutions, in combination with the legal and governmental structures that bring them into existence and monitor their activities, constitute the state as I conceive of it, manifested through complex institutional arrangements. The state exercises coercive but legitimate force in bringing these institutions into existence and regulating them through the mandate of its public authority. *See id.*

> The state [has] not wither[ed] away. Rather, it has withdrawn or been prevented by entrenched interests from fulfilling one of its traditional roles in the social compact: to act as the principal monitor or guarantor of an equal society. The fact that nonintervention has facilitated a skewed and unequal society with the distance between rich and poor growing in recent years, makes clear that some form of prevailing power is essential to counter unfettered self-interest. Understood historically as the manifestation of public authority and the ultimate legitimate repository of coercive power, the state is the only realistic contender in that regard. One pressing issue for those interested in furthering a new vision of equality must be how to modernize or refine this conception of the state and then explicitly define its appropriate relationship to institutions and individuals within contemporary society.

*Id*. (footnotes omitted). I picked up and continued this line of argument in *The Vulnerable Subject and the Responsive State*. *See* Fineman, *Responsive State*, *supra* note 23, at 269-75.

[216] Fineman, *Anchoring Equality*, *supra* note 23, at 7.

[217] *See, e.g.*, Teresa Wendt, *Has Your Party Changed? Check Out the GOP*, CONSERVATIVE DAILY NEWS (June 1, 2012), http://www.conservativedailynews.com/2012/06/has-your-party-changed-check-out-the-gop/ ("The Republican Party, like our nation's founders, believes that government must be limited so that it never becomes powerful enough to infringe on the rights of individuals."). However, "[d]espite the rhetoric of small governments and free markets, 'neoliberalism cannot function without a strong state and strong market and legal institutions.'" Paul O'Connell, *On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights*, 7 HUM. RTS. L. REV. 483, 500 (2007) (quoting DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 117 (2005)).

isolated entities, appropriately separated from one another. This perspective reifies all three, particularly the individual and the institutional, which are viewed as natural and ungovernable rather than socially constituted. The paramount value under this conception is liberty, whether it is expressed as mandating autonomy for the individual or a free market for the institutional, and the state is the enemy. In consequence, this perspective limits the development of understandings of the potential for the state to effectively regulate institutions, modifying or structuring them in more responsive ways. A restrained state is a state that can easily avoid assuming responsibility for inequalities and unwarranted privilege because its position as the ultimate societal authority, while recognized, is ideologically contained. It is important to concede both that the state can be and has been abusive, overreaching, and authoritative, and that avoiding this overreaching requires vigilance. Nonetheless, advocating vigilance is not the same thing as urging abandonment or retreat on the part of the state.

In contrast to the restrained state, the responsive state accepts responsibility for its operation and also that of the societal institutions which it has helped bring into existence. The responsive state views individuals and institutions as intertwined, symbiotic, and interdependent with each other and also with the state and its apparatus. Institutions are shaped through law and their operation profoundly affects individual options, opportunities, and well-being and the ability of the state to effectively govern. State responsiveness recognizes that the intertwining of the individual with the institutional can be either generative or destructive, warranting supervision and correction by the only entity capable of doing so: the modern state. This state, in turn, should be understood as a cluster of relationships, institutions, and agencies reflecting and shaping public norms and values through law and policy. Those relationships include the relationship between citizen and state, as well as between state and institutions. In a responsive state individuals realize that they too comprise the state and instead of standing outside of it they have a responsibility to see it is working effectively. Perhaps we could call this relationship "democracy."

The roadblocks to realizing a truly democratic and responsive state in the United States are many. Responsiveness is under suspicion, particularly if it costs money. Recently, the economic recession has served as an excuse and provided political cover for arguments to further dismantle what was an already weak commitment to social welfare programs.[218] However, the real hurdles to the realization of the idea of a responsive state are ideological, epitomized in the particularly distorted vision of what constitutes autonomy,

[218] *See, e.g.*, Peter Roff, Op-Ed, *The GOP Case for Spending Cuts to Boost the Economy*, U.S. NEWS & WORLD REP. (Mar. 25, 2011), http://www.usnews.com/opinion/blogs/peter-roff/2011/03/25/the-gop-case-for-spending-cuts-to-boost-the-economy; *see also* Fineman, *supra* note 167, at 80-81 (pointing out that the perceived debt crisis has been used to justify cutting existing old-age assistance programs).

independence, and individual responsibility that has overtaken political rhetoric and action in the United States.[219]

To overcome the obsession with autonomy and individualism that has impoverished American political discourse and resulted in the cynicism and disaffection of so many citizens, it will be important to emphasize that the basic foundational premise of the responsive state is inclusive, collective, and radically democratic and egalitarian. The state, in this view, is constituted for the "common benefit" and, thus, any privilege or favoritism resulting from state action or concession must be justified in those terms. The focus should be on the state's responsibility for and relationship to those who are privileged, as well as those who are disadvantaged. Structures that have served to unequally allocate society's resources to the benefit of the few must be monitored and reformed. [220] To do this, it will be necessary to ensure more transparency in law and policymaking and to provide far greater opportunities for public assessment of legislative and executive actions so that the idea of a democratic correction for political impropriety is more than just an empty promise in political science textbooks.

Initially, the common-benefit premise would have to be applied both as a basis against which to assess the appropriateness of existing privilege in society and as a means by which to analyze the generation of new forms of privilege. This Article began by documenting the vast and growing inequality in American society. The construction and valorization of the restrained state has helped to facilitate that inequality, and its resultant privileging should be assessed critically to determine whether policies that perpetuate the status quo are justified. Politicians will tell us that this is an impossible task when what they really mean is that it will place them in an uncomfortable position, particularly with those who are most privileged.[221] The answer to their

[219] Martha Albertson Fineman, *Women, Marriage and Motherhood in the United States*, 2011 SING. J. LEGAL STUD. 1, 10; *see also* FINEMAN, *supra* note 26, at 31-54; Fineman, *supra* note 167, at 116.

[220] A fundamental question to ask initially is why we organize work and wealth the way we do. The law itself recognizes an analytic division within the "market" and pits the various sectors against one another: the corporation versus the worker, the consumer, and the government regulator. Why not focus instead on regulating the maximum wage, achieved through norms governing appropriate ratio of executive to average worker compensation in other countries?

[221] For instance, the livestock lobby spent $2,945,609 on lobbying expenses in 2011 alone. Ctr. for Responsive Politics, *Lobbying Spending Database: Livestock, 2011*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/indusclient.php?id=a06&year=2011 (last visited Oct. 7, 2012). That same year, the agribusiness sector spent $125,255,173 on lobbying. Ctr. for Responsive Politics, *Lobbying Spending Database: Agribusiness, 2011*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/indus.php?id=A&year=2011 (last visited Oct. 7, 2012). On June 21, 2012, the Senate passed a bipartisan farm bill estimated to cost nearly $1 trillion over the next ten years. *See* Ron Nixon, *Senate Passes Farm Bill with Bipartisan Support*, N.Y. TIMES (June 21, 2012), http://www.nytimes.com/2012/06/22/

concerns is to reiterate that the responsive state begins and ends with the concept of *political* responsibility. This responsibility is placed on politicians and state functionaries to ensure access to and opportunities within the institutions that have been entrusted with generating and allocating wealth, power, and position in a market society. Political responsibility precedes and is an essential complement to the idea of *personal* responsibility, which focuses only on individual autonomy and free-market ideals.

In understanding how we might conceive of a responsive state, it is important to realize that just like the individual and the institutional, the state is vulnerable. This is true whether the state is perceived as restrained or as responsive. Powerful entrenched interests can hijack even the most egalitarian impulse for their own purposes. Governmental structures and practices can facilitate such distortions. As recent arguments in favor of corporate subsidies[222] and advantages for the wealthy[223] have illustrated, assertions that privileging is done for the common good are susceptible to manipulation. This is particularly true in a political system that is contentious, obfuscating, and renders legislators and executives ineffective by tolerating processes that are prone to manipulation and distortion of facts and arguments rather than conducive to problem solving and cooperative bipartisanship.[224] The challenge is how to structure state responsiveness in light of its vulnerabilities, namely the possibility of capture and corruption, and the current tendency of the

us/politics/senate-passes-farm-bill-but-tougher-road-seen-in-house.html?ref=politics. This example suggests that, when incentivized adequately, political leaders are likely to vote for big government spending regardless of political affiliation.

[222] Changes in the tax code are often supported as attempts to make the code simpler or more efficient and lowering corporate taxes is said to increase social productivity. *See, e.g.*, Len Burman, *Mitt Romney's Teachable Moment on Capital Gains*, FORBES (Jan. 18, 2012, 6:46 PM), http://forbes.com/sites/leonardburman/2012/01/18/mitt-romneys-teachable-moment-on-capital-gains/ (explaining the conservative belief that lowering taxes on money made through capital investments will incentivize economic growth).

[223] It is often proposed that raising taxes on the wealthiest echelons of the society hurts everyone because the wealthy are "job creators." *See, e.g.*, Peter Grier, *Is Obama's Tax Plan a 'Job-Killer'?*, CHRISTIAN SCI. MONITOR (July 10, 2012), http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2012/0710/Is-Obama-s-tax-plan-a-job-killer; David Jackson, *GOP Presses Obama on Bush Tax Cuts*, USA TODAY OVAL (Aug. 5, 2012, 12:34 PM), http://content.usatoday.com/communities/theoval/post/2012/08/obama-gop-duel-over-bush-tax-cut-extensions/1 (quoting Republican House Majority Leader Eric Cantor as stating that "Obama's proposal to end those tax cuts for people making more than $250,000 annually will hurt job creators"). This is a classic example of how the interests of one class are portrayed as the interests of society as a whole for public relations purposes.

[224] *See, e.g.*, Matthew Mitchell, *Obama and the GOP Both Hypocrites on Special Interests*, U.S. NEWS & WORLD REP. (Aug. 7, 2012), http://www.usnews.com/opinion/blogs/economic-intelligence/2012/08/07/down-with-special-interests-but-not-mine.

political system to actually provide incentives for overreaching, repressive tactics, and democracy-frustrating "hyper-partisanship."[225]

## IV. SOME NOTES ON IMPLEMENTATION

The constructs of a vulnerable subject and the responsive state as they are articulated in this Article set forth the guiding principles for what might be termed a political ethic or ideal. The vulnerability approach is offered as a framework or heuristic device through which to consider law and policy consistent with progressive notions of legitimization and democracy. As such, vulnerability analysis is less a blueprint for judicial review than it is a proactive model for inclusive legislative deliberation and policymaking in a pluralistic society.

### A. *From Political to Judicial: "Legislative Due Process"*

A vulnerability analysis attempts to replace current paradigms in political and policy rhetoric and is aimed at changing hearts and minds, a rather elusive objective. As such, the question of how it might operate on a practical level, beyond discourse and symbolism, is often raised. Surprisingly, there have been some very practical and concrete suggestions for legal reform that might be relevant in answering that question.

As an initial matter, it seems obvious that a vulnerability approach would not be focused on the judiciary as the primary branch for its implementation, nor would it necessarily support the judicial imposition of socioeconomic or other constitutional rights independent of legislative actions. The construct of the vulnerable subject and the plea for a more responsive state will have to be implemented in a political system in which the judiciary's role is limited[226] and legislative mistakes or misconduct are assumed to be subject to correction via the election cycles.[227] Recognizing the weakness of the assumption that our

[225] Recent accounts of partisanship in the United States suggest an unwavering commitment to party ideology at the expense of compromise and necessary reform. John Avlon, *Hyper-Partisanship Dragging Down Nation*, CNN (June 7, 2012, 2:56 PM), http://www.cnn.com/2012/06/07/opinion/avlon-partisan-pew/index.html; *see also* PEW RESEARCH CTR., TRENDS IN AMERICAN VALUES 1987-2012: POLITICAL POLARIZATION SURGES IN BUSH, OBAMA YEARS 1-4 (2012); Chris Cillizza, *Partisanship Doesn't Seem Worse. It Is Worse.*, WASH. POST (June 4, 2012, 3:33 PM), http://www.washingtonpost.com/blogs/the-fix/post/partisanship-doesnt-seem-worse-it-is-worse/2012/06/04/gJQAJIuzDV_blog.html. When taken to this extreme, partisanship may serve to frustrate rather than support representative governance.

[226] Although limited, judicial review of the legislative process should not be misconstrued as non-existent. For example, employing a common-benefits approach, the Vermont Supreme Court recognized a robust conception of equality by "polic[ing] a political process whose product frequently discriminates between citizens in respect to benefits and privileges." Friedman & Baron, *supra* note 77, at 152.

[227] *See, e.g.*, Jeffrey A. Jenkins & Michael C. Munger, *Investigating the Incidence of Killer Amendments in Congress*, 65 J. POL. 498, 501-02 (2003).

elected officials do good and careful work, Justice White wrote in his dissent in *INS v. Chadha*: "The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices."[228] Some commentators question the effectiveness of a political solution to legislative ineptness.[229] This is due both to the complexity of the legislative process and its lack of transparency, which affects both the electorate's ability to oversee the process and the functioning of the legislators. Aside from majoritarian bias, bills are often rushed to a vote before legislators have had an opportunity to review or consider them.[230] Legislators are more familiar with the legislative history (who supported what, who added amendments, etc.) than the outcomes on people.[231] Legislators generally treat constitutional issues as secondary to policy considerations, despite often using constitutional rhetoric to help prevail in policy disputes.[232] There also is some speculation that the majority of the public looks at congressional votes more for symbolic value than their actual policy outcomes.[233]

Given the significance of the issues addressed by legislation, such criticisms have led to suggestions that some form of judicial oversight of the process of legislative deliberation might be warranted. Without specifically endorsing any approach, it is instructive to see how these proposals are evolving. Former Justice John Paul Stevens explored the idea of legislative due process at length

[228] INS v. Chadha, 462 U.S. 919, 997 (1983) (White, J., dissenting).

[229] Professor Ittai Bar-Siman-Tov suggests that "the political safeguards that scholars and judges commonly rely upon to constrain legislative behavior actually have the opposite effect: these 'safeguards' in fact motivate lawmakers to be lawbreakers." Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 807 (2010).

[230] Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 139 (2011) ("Congress sometimes rush[es] big, important bills through the legislative process without providing an opportunity for all Members to properly review the bill and consider its effects and implications.").

[231] *Id.* at 151-52 ("In sum, [the legislator] has a deep understanding of the legislative history of the bill but not much familiarity with the text (or even none at all, if she is not on the committee that did the markup).").

[232] Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 34 (1999) ("Legislators are likely to treat constitutional issues as secondary to policy considerations and to view such constitutional considerations as useful primarily as tools to help the legislator prevail on a particular policy issue.").

[233] *See* Tim Groseclose & Jeffrey Milyo, *Sincere Versus Sophisticated Voting in Congress: Theory and Evidence*, 72 J. POL. 60, 60 (2010) (stating a commonly held belief that legislators often vote against their own policy preferences for purposes of political gain or other non-policy reasons); Nancy Marshall-Genzer, *What Is the Cost of a House Vote?*, MARKETPLACE (July 11, 2012), http://www.marketplace.org/topics/economy/health-care/what-cost-house-vote (exploring how the House of Representatives has voted thirty-three times to repeal the Affordable Care Act in the last eighteen months for symbolic reasons, despite knowing there are insufficient votes to pass the repeal in the Senate).

in his dissent in *Fullilove v. Klutznick*: "I see no reason why the character of [the legislature's] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law."[234] In fact, Justice Stevens found that procedural review would be *less* intrusive than substantive review.[235] In his dissent, Stevens relied on Terrance Sandalow's 1977 article, *Judicial Protection of Minorities*.[236] There, Sandalow built on Justice Stone's suggestion in *United States v. Carolene Products Co.* that the judiciary may have a heightened duty to protect discrete and insular minorities.[237] Generally, courts should defer to Congress to strike a balance between competing interests, but when a "'special condition'" exists that justifies distrust in the political process, courts should be able to engage in a more "'searching judicial inquiry'" for the deficiencies in the legislative process.[238]

In broad strokes, the argument for legislative due process review is that when it is apparent that special interests have Congress's ear and minorities do not, such an unequal influence should trigger judicial distrust. The solution on review should not be for unelected judges to make the ultimate determination whether the *law* is narrowly tailored, however. Rather, the courts should make a determination about the actual *processes* that Congress undertook.[239] This review of legislative history would go beyond a search for statements clarifying the meaning of ambiguous statutory language.[240] Under such a

[234] Fullilove v. Klutznick, 448 U.S. 448, 550 (1980) (Stevens, J., dissenting).

[235] *Id.* at 551 ("A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not 'narrowly tailored to the achievement of that goal.'").

[236] *See id.* at 551 n.27 (quoting Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977)).

[237] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[238] Sandalow, *supra* note 236, at 1173-74 ("[Justice] Stone believed that the task of striking a balance among competing interests is for legislatures and that courts ought to defer to their decisions. On occasion, however, a 'special condition' might exist justifying distrust of 'those political processes ordinarily to be relied upon . . . .' A 'searching judicial inquiry' might, in such situations, serve as a corrective for the deficiencies of the political process." (quoting *Carolene Prods.*, 304 U.S. at 153 n.4)).

[239] *Id.* at 1177 ("No one supposes, for example, that fairness requires courts to substitute their judgments for those of legislatures with respect to tax rates for the wealthy, the level of welfare payments for the poor, or the content of regulations imposed upon milk producers in the interest of consumers. Such issues, it is commonly understood, are to be resolved through the political process, and that is so even though there is a risk that the majority will not fully appreciate the costs that are imposed upon the minority.").

[240] Spain has "systematic judicial review of internal parliamentary procedures, including legislative processes." Suzie Navot, *Judicial Review of the Legislative Process*, 39 ISR. L. REV. 182, 188 (2006). Israel also appears to be inching toward review of process, as exemplified by Justice Matza's opinion in *Naot v. The Haifa Municipality*, in which he

system, "[j]udicial review is extended to an evaluation of the quality of the legislative or deliberative process."[241]

Professor Anita S. Krishnakumar has also proposed that Congress enact what she refers to as "a representation reinforcing framework" that would require all proposed legislation to be accompanied by an impact statement that outlines the legislation's expected effect on various interests.[242] This interest impact statement would set forth "who Congress intends to benefit, who it acknowledges will be harmed, who supported the bill, who opposed it and, if Congress wishes, broad instructions on which interests the statute should be construed to favor or disfavor."[243] Her proposal calls for having a "red flag list" of societal groups that are "diffuse, politically unorganized and whose interests traditionally have gone overlooked in the legislative process."[244] These groups would be identified by a non-partisan committee. If a bill includes these groups it must have an impact statement which would be sent to the Government Accountability Office or the Congressional Budget Office, which would be responsible for assessing the qualitative and, if possible, quantitative impact the legislation will have on these groups.[245] The impact statement would also assess whether and to what extent the legislation confers benefits on other groups, such as those traditionally able to "impose their will on the legislative process by controlling the flow of information to legislators."[246]

Building on the possibility of legislative due process review, Elizabeth Garrett and Adrian Vermeule advocate a path to help Congress meet the requirements it would entail: a two-step procedure for all bills.[247] The first step would require a committee to identify potential constitutional issues in a bill and the second step would require the committee to produce a

characterized a decision made by the city council without deliberation as an issue of voters' rights. *See* HCJ, 4733/94 Naot v. The Haifa Municipality PD 49 (5) 111, 125-26 [1996]. For a translation of the relevant portion of Justice Matza's opinion, see Navot, *supra*, at 242.

[241] Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1728 (2002).

[242] Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 3 (2009).

[243] *Id.*

[244] *Id.* at 28.

[245] *Id.* at 30 ("Once a committee has submitted a legislative proposal and 'interest impact' statement to CBO/GAO, that entity then should be required to prepare an impact report evaluating: (1) the impact in qualitative and, if possible, quantitative terms, that the bill is expected to have on List groups; and (2) the benefits the bill is expected to confer on other groups.").

[246] *Id.* (citing Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 254 (1986)).

[247] *See* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1310-11 (2001).

"constitutional impact statement" which would summarize the findings.[248] To ensure Congress is equipped to carry out this process, Garrett and Vermeule suggest adding additional resources through the creation of an "Office for Constitutional Issues."[249]

Judicial intervention might also help in cases in which strict application of the rules would fail to produce results that are compatible with the underlying purposes of legislative due process. As policymaking becomes more complex, more deliberation might be required to allow the legislature a full understanding of the issues at stake. In those cases, legislative due process rules might not provide an adequate floor for the amount of legislative deliberation required for informed and responsible decisionmaking. As such, the judiciary might be able to perform a supervisory (but not policymaking) role in a new framework of responsible legislative due process.

There are many criticisms of the legislative due process idea.[250] But criticism should not obscure the fact that many people are troubled by the current state of our democracy and the inability to move forward in solving critical problems.[251] Partisanship seems to be more important than the national good and the interests of the politically and economically disempowered are perceived as cast aside or manipulated for political advantage in a process in which money and access is increasingly unequal.[252] In some ways, the

[248] *Id.* at 1311.

[249] *Id.* at 1317.

[250] *See* Oliver A. Houck, *Things Fall Apart: A Constitutional Analysis of Legislative Exclusion*, 55 EMORY L.J. 1, 8 (2006) (discussing criticisms of legislative due process by the U.S. Supreme Court).

[251] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 7-8 (2006) (pointing to polling data which indicates widespread dissatisfaction with the performance of elected officials and federal policies as evidence of "a belief that our political institutions are *not* adequately responding to the issues at hand"); TASK FORCE ON INEQUALITY & AM. DEMOCRACY, AM. POLITICAL SCI. ASS'N, AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY 5 (2004) ("According to a host of opinion surveys and other indicators, Americans are increasingly worried about disparities of participation, voice, and government responsiveness. . . . Between the mid-1960s and the mid-1990s the proportion of Americans who felt that 'the government is run by a few big interests looking out only for themselves' more than doubled to reach 76 percent, while the number who believed that 'public officials don't care about what people think' grew from 36 percent to 66 percent." (quoting Gary Orren, *Fall from Grace: The Public's Loss of Faith in Government*, *in* WHY PEOPLE DON'T TRUST GOVERNMENT 77, 81 (Joseph S. Nye, Jr. et al. eds., 1997))).

[252] Paul Krugman, Op-Ed, *Plutocracy, Paralysis, Perplexity*, N.Y. TIMES (May 3, 2012), http://www.nytimes.com/2012/05/04/opinion/krugman-plutocracy-paralysis-perplexity.html?_r=0 ("For the past century, political polarization has closely tracked income inequality, and there's every reason to believe that the relationship is causal. Specifically, money buys power, and the increasing wealth of a tiny minority has effectively bought the allegiance of one of our two major political parties, in the process destroying any prospect for cooperation."); *see also* TASK FORCE ON INEQUALITY & AM. DEMOCRACY, *supra* note 251, at 7 ("As wealth and income have become more concentrated and the flow of money into elections has grown, campaign contributions give the affluent a means to express their voice

proposals for legislative due process are reminiscent of the gender mainstreaming and Commissioner on Children and Youth structures discussed above.[253] The intention is to provide some incentives so that the legislature will engage in a public and accessible harm-benefit analysis before enacting any legislation.[254] Perhaps such proposals are only a sign of increasing desperation, but it may be that such a structure would improve legislative transparency and allow the political process to work more effectively.

Recognizing that no system is without flaws or immune from criticism, those who propose some review of legislative deliberation seek to find a mechanism through which legislators would be confronted with information about potential inequalities and distortions arising from the underlying privileges and disadvantages created by their actions. The reformers' hope lies in the possibility that if such a mechanism were in place, interest groups could organize around the findings in the reports and investigations of proposed lawmaking prepared. This would assist such groups in advocating against legislation that risks unduly privileging or unreasonably disadvantaging certain people. Voters who do not like the results of specific legislative deliberations could actually try to "vote the bums out."

Perhaps the prospect of such public transparency would make legislators act in more responsible and responsive ways – their own electoral vulnerability making them more responsive to the vulnerabilities of *all* their constituents, not just those with deep pockets. The proposals for legislative due process do not diminish the legislature or its processes, nor do they seek to impose a system in which judges are making legislative decisions.[255] While not perfect, these proposals might offer a beginning for the construction of a system with

that is unavailable to most citizens. This undoubtedly aggravates inequalities of political voice.").

[253] See *supra* notes 118-126 and accompanying text.

[254] There are a number of statutory precedents that would guide such a bill. *See, e.g.*, Balanced Budget and Emergency Control Act of 1985 § 221(c), 2 U.S.C. § 602(g) (2006) (allowing for the conducting of studies estimating the financial impact of legislation which includes federal mandates on states and private industries); Defense Base Closure and Realignment Act of 1990 § 2903(d), 10 U.S.C. § 2687 (2006) (requiring a committee report and hearings on the impact of such closures and a non-partisan committee to make such decisions); National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006) (requiring environmental impact statements made after consultation with relevant agencies). Another example, although never enacted, is the Federalism Act of 1999 which would have required Congress to issue a report with every bill that (1) identified any section of a proposed bill that expressly preempted state or local government authority; (2) identified the constitutional basis for preemption; (3) set forth reasons for the preemption; and (4) included a federalism impact assessment performed by the Director of the Congressional Budget Office. Federalism Act of 1999, H.R. 2245, 106th Cong. § 8(a) (1999).

[255] *See* Houck, *supra* note 250, at 55 (asserting the legislative due process would be no more disruptive than past "finding the Congress, its rule powers notwithstanding, in violation of other constitutional norms").

more transparency in which the implications of human vulnerability and dependency are made visible and are understood to justify some realistic checks on the ineffectiveness, bias, and ineptitude in legislative deliberations.

### B. *Vulnerability As a Political Framework*

The first fundamental political question a vulnerability analysis seeks to answer is simply, "What does it mean to be human?" The answer this Article provides to that question is significantly different from the answers we see in current political and legal analyses. Centering the focus of analysis on dependency and vulnerability reformulates a second fundamental legal and political question: How should the United States, through law and regulation, define its responsibility and channel its authority and resources (including the production of law) in relation to both individual and institutional vulnerability?

The rhetoric of personal responsibility and self-sufficiency will hopefully fall flat politically once the role of the state and its institutions in the production of human resilience is clearly understood. Further, universal recognition that institutions of governance are themselves susceptible to capture, decay, corruption, and decline will elucidate how these institutions, when beholden to special interests, function to limit access and opportunity for far too many individuals. Revealing this normalization of disadvantage at the institutional level will make clear why more robust safeguards and monitors are necessary to ensure the state can be responsive to these institutional shortcomings.[256]

Ultimately, orienting law and politics around the "vulnerable subject" would emphasize a different set of values than those that have evolved around the image of a liberal subject and a restrained state. Those values would be more egalitarian and collective in nature, preferring connection and interdependence rather than autonomy and independence as the guiding visions in both the political and personal realms. In contemporary political discourse the image of the human being as both a legal reality and a political subject is reductive, diminished in both descriptive and aspirational terms. We are perversely individualized and isolated at the same time that we are cast as merely the subjects of balance sheets and statistical models, the asserted inevitability of our selfish nature captured in economic terms such as "moral hazard"[257] and the extent of our ambition confined by the glorification of "efficiency."[258]

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[256] This is particularly problematic for the legislative process. *See* Victor Goldfeld, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 369 (2004) (describing the political impact of partisanship and congressional gridlock).

[257] I have previously explored how blame for vulnerability is often assigned to individuals as a byproduct of their supposed "moral hazard." Fineman, *supra* note 167, at 85.

[258] Fineman, *Responsive State*, *supra* note 23, at 265 (discussing the glorification of "efficiency" in the modern state).

Further, the state is perceived as a threat to liberty and autonomy, not as one of the necessary providers or insurers of the resources whereby individual agency can be realized. These are the crabbed images that confine current political rhetoric and hobble the imagination of political and legal theorists. A vulnerability analysis asks us (and our politicians) to embrace a more complex and aspirational reality.