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On Equality: The Anti-Interference Principle

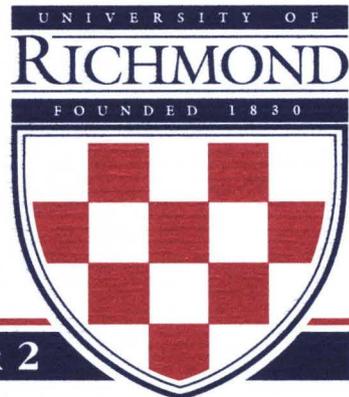
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ESSAY

ON EQUALITY: THE ANTI-INTERFERENCE PRINCIPLE

Donald J. Kochan *

*Quod ad jus naturale attinet, omnes homines aequales sunt.*¹

INTRODUCTION

Equality²—it is a concept that pervades political and social discourse throughout the country, and has done so for centuries.³ The Declaration of Independence provides, “WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness”⁴ Consider the inscription on the façade of the

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1. Translated as, “It holds good, according to natural law, that all men are equal.” BALLENTINE’S LAW DICTIONARY 1045 (3d ed. 1969).

2. Equality means “[t]he quality or state of being equal; esp., likeness in power or political status.” BLACK’S LAW DICTIONARY 616 (9th ed. 2009). Equality before the law means “[t]he status or condition of being treated fairly according to regularly established norms of justice; esp., in British constitutional law.” *Id.*; see also POLYVIOS G. POLYVIU, THE EQUAL PROTECTION OF THE LAWS 1–2 (1980) (providing various definitions of equality before the law).

3. See Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 245 (1983); see also ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 3 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1945) (1835).

4. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For additional information from the National Archives regarding the history of the Declaration of Independence, see <http://www.archives.gov/exhibits/charters/declaration.html> (last visited Dec. 3, 2010).

Supreme Court of the United States—“Equal Justice Under Law”—as an indelible monument to equality in the foundation of our legal system.⁵ As Karst describes in his influential article, “[t]he ideal of equality is one of the great themes in the culture of American public life. From the Declaration of Independence to the Pledge of Allegiance, the rhetoric of equality permeates our symbols of nationhood.”⁶ Karst may or may not concur with this essay’s ultimate conclusion, but his sentiment frames the debate—defining equality and defining its ideal in light of governing principles.⁷

This essay seeks to summarize the general equality concept and proposes that equality requires that the government engage in anti-interference with individual choices and activities, so long as these things create no negative externalities for others. If we are serious about respecting equality, such interference actions should be avoided. Adopting an “anti-interference principle” is a necessary foundation for achieving the goal of true equality.

The primary point is that equality matters.⁸ The purpose of this essay is not to survey the vast political, jurisprudential, and academic debate on equality,⁹ but instead, to take a broad look at the philosophical concept of equality itself. Part I discusses the general meaning of equality. Part II presents brief summaries of some selected recent developments regarding the concept of

5. For a description of the U.S. Supreme Court building and the inscription, see <http://www.supremecourt.gov/about/constitutional.aspx> (last visited Dec. 3, 2010).

6. Karst, *supra* note 3, at 245.

7. *See id.*

8. *Id.* at 273 (“Equality is a central theme in the native idiom of American culture.”). *But see* PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 165 (1970) (“[T]he rhetoric [of equality] is subject to use, if not capture, by anyone on any side of the question.”). Kurland’s point is instructive that equality *can* be just a rhetorical device, *but* the discussion of the concept still has utility; and precisely because the word is so often used, a discussion of appropriate uses is necessary.

9. For anthologies with many of the seminal works on equality, along with valuable bibliographies, see EQUALITY (David Johnston ed., 2000); EQUALITY: SELECTED READINGS (Louis P. Pojman & Robert Westmoreland eds., 1997). For other good samplings of the scholarship, see EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES (Stephen Darwall ed., 1995) (a collection of works on equality by leading theorists including G.A. Cohen, Ronald Dworkin, John Rawls, T.M. Scanlon, Amartya Sen, and Quentin Skinner, with an introductory synopsis by Stephen Darwall) and THE IDEAL OF EQUALITY (Matthew Clayton & Andrew Williams eds., 2002) (a collection of essays from leading theorists). For another excellent compilation, see NOMOS IX: EQUALITY (J. Roland Pennock & John W. Chapman eds., 1967) (from the Yearbook of the American Society for Political and Legal Philosophy).

equality, namely California's Proposition 8¹⁰ and the U.S. Supreme Court decision in *Ricci v. DeStefano*.¹¹ Part III introduces a useful term for the equality discussion—"anti-interference"—and argues that the best way to foster equality is to embrace freedom, choice, and liberty in the absence of a showing that different treatment is justified to avoid harm. Simply stated, equality is best served when the government refrains from interfering with individual choice and individual freedom.

I. THE DISCUSSION ON EQUALITY

The concept of equality has permeated debates on the struggle between the individual and the state throughout the history of the United States and other liberal systems of government. Our yearning for equality is instinctual.¹² On equality, Locke wrote that the state is bound by the principle that it must "govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court and the countryman at plough."¹³ Despite some historical failings, equality has always been a part of the American dream and the aspiration for freedom within the legal system.¹⁴ As such,

10. CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California.")

11. 567 U.S. ___, 129 S. Ct. 2658 (2009).

12. Karst, *supra* note 3, at 251 ("[T]he idea of equality seems to be a vital component of children's early understanding of justice. . . . By the time children are teen-agers, they understand that inequalities are often justified.")

13. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT ch. XI, § 142 (J.W. Gough ed., Basil Blackwell 1946) (1690).

14. See Karst, *supra* note 3, at 245. Alexis de Tocqueville recognized the legal importance of equality in the American system, and the "equality of condition" that was so prevalent in its society. DE TOCQUEVILLE, *supra* note 3, at 3; see also J. HECTOR ST. JOHN CREVECOER, LETTERS FROM AN AMERICAN FARMER 79 (Fox, Duffield & Co. 1904) (1782) (Immigrants in America can go "[f]rom nothing to start into being; from a servant to the rank of a master; from being the slave of some despotic prince, to become a free man, invested with lands . . . ! What a change indeed! It is in consequence of that change that he becomes an American."). The term "equality of opportunity" is itself susceptible to different meanings in the literature. Andrew Mason, *Equality of Opportunity, Old and New*, 111 ETHICS 760, 764, 780 (2001) (discussing equal opportunity theories based on responsibility-sensitive egalitarianism and meritocratic view of equality of opportunity and explaining how they can coexist, but also noting that their justifications do not rule out imposition of external controls). On the equal opportunity debate, see generally JOHN E. ROEMER, EQUALITY OF OPPORTUNITY (1998); Charles Frankel, *Equality of Opportunity*, 81 ETHICS 191 (1971); and John H. Schaar, *Equality of Opportunity, and Beyond*, in NOMOS IX: EQUALITY, *supra* note 9, at 228–49.

equality has long been embedded in our constitutional law and jurisprudence.¹⁵

In a recent article, Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York surveyed our nation's historic struggle with defining and mechanizing the protection of equality.¹⁶ Weinstein effectively describes the struggle as centered on the definitional issue:

If we are to understand the modern struggle with the concept of equality, we must consider a series of attempts at equalizations in such matters as politics, religion, socio-economics, education, and compensatory justice. As Aristotle recognized, we have to inquire: Equal in what respect? He would put it this way: No distinction ought to be made between people who are equal in all respects *relevant to the kind of treatment in question*, even though in other (irrelevant) respects they may be unequal. We must ask: Which respects should we now consider relevant in measuring equality in this country?¹⁷

Weinstein explained that “[e]quality has a chameleon-like quality,” and is envisioned in many forms.¹⁸

Equality is indeed a pervasive concept, and disagreements on its definition loom large.¹⁹ This essay must accept that reality and recognize that the equality literature is rich, diverse, and extensive.²⁰ Certain modern theorists and their works—particularly Cohen, Dworkin, Nozick, Rawls, and Sen—have a dominant presence in the discourse.²¹ These and many other notable theoretical

15. See Karst, *supra* note 3, at 278 (“Lawyers and judges who want to promote the values of equal citizenship cannot afford to abandon the constitutional rhetoric of equality.”).

16. See Jack B. Weinstein, *Changing Equalities*, 54 N.Y.L. SCH. L. REV. 421 (2010).

17. *Id.* at 423 (footnote omitted).

18. *Id.*

19. Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 607 (1983) (surveying literature on different meanings of equality but contending that “[t]he concept of equality is one and the same in all its usages”).

20. See *supra* notes 6–7 and accompanying text.

21. See, e.g., G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (2008); G.A. COHEN, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* (1995); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999); AMARTYA K. SEN, *INEQUALITY REEXAMINED* (1992). The work of these scholars is vast and the discussion of issues of equality can be found in most of their broader philosophical works, whether in book or article form. Some articles focused exclusively on the equality issue are particularly notable. See, e.g., Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283

leaders help shape the contemporary equality debate.²² The meaning of equality is a hotly contested issue within and between these works.

The debates within this body of literature certainly inform the conclusions reached in this essay, and those writings deserve further attention for anyone seeking to understand the competing theories on equality prevalent today. But this essay does not endeavor to place its analysis within this impressive and admittedly intimidating array of scholarship. Instead, it endeavors to supplement the existing discussion with a prism for analyzing equality that I call the “anti-interference principle.” The remaining portion of this Part will provide the initial premises supporting this essay’s ultimate embrace of that guiding principle of anti-interference as a tool for evaluation of legitimate governmental action.

From the Declaration of Independence to the Fourteenth Amendment of the U.S. Constitution, the fundamental principle of equality is embodied in our controlling laws.²³ The Fourteenth Amendment provides in part:

(1981); Amartya K. Sen, *From Income Inequality to Economic Inequality*, 64 S. ECON. J. 384 (1997); Amartya K. Sen, *On the Status of Equality*, 24 POL. THEORY 394 (1996). For certain comparisons among theorists, see, for example, EQUALITY AND LIBERTY: ANALYZING RAWLS AND NOZICK (J. Angelo Corlett ed., 1991); Stephen O’Hanlon, *Equality, Entitlement, and Efficiency: Dworkin, Nozick, Posner, and Implications for Legal Theory*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 31 (2009).

22. See, e.g., JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* (1999); SANFORD A. LAKOFF, *EQUALITY IN POLITICAL PHILOSOPHY* (1964); THOMAS NAGEL, *EQUALITY AND PARTIALITY* (1991); J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* (1978); LARRY S. TEMKIN, *INEQUALITY* (1993); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999); Hugo Adam Bedau, *Egalitarianism and the Idea of Equality*, in NOMOS IX: EQUALITY, *supra* note 9, at 3, 19; Isaiah Berlin, *Equality as an Ideal*, in JUSTICE AND SOCIAL POLICY 128, 130–31, 150 (F. Olafson ed., 1961); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); John E. Coons & Patrick M. Brennan, *Nature and Human Equality*, 40 AM. J. JURIS. 287 (1995); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007); Irving Kristol, *Equality as an Ideal*, in 5 INT’L ENCYC. SOC. SCI. 108, 110 (William A. Darity ed., 2d ed. 2008); John Plamenatz, *Diversity of Rights and Kinds of Equality*, in NOMOS IX: EQUALITY, *supra* note 9, at 79, 82; Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

23. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. XIV, § 1. See generally MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (1962); CHRISTOPHER JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

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.²⁴

Of the provisions in this amendment, the Equal Protection Clause usually receives the most attention.²⁵

Historically, the Privileges or Immunities Clause²⁶ has received less attention in contemporary debates on the principle of equality embedded in the constitutional structure; however, in recent years, there has been a fair amount of renewed interest.²⁷ Several competing theories of its meaning have been debated.²⁸ This essay does not intend to resolve that debate, except to agree with the position that at the very least, the Clause should be interpreted to mean that where one group or class is granted a privilege or

24. U.S. CONST. amend. XIV, § 1. For valuable discussions on the history of the Equal Protection Clause, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); RAOUL BERGER, *SELECTED WRITINGS ON THE CONSTITUTION* 165–69 (1987); EARL M. MALTZ, *THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION* (2003).

25. Many articles on the Fourteenth Amendment focus on larger theories of equality based on the Equal Protection Clause. See, e.g., Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); R.A. Lenhardt, *Understanding The Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

26. U.S. CONST. amend. XIV, § 1. On the history of the Privileges or Immunities Clause, see BERGER, *supra* note 24, at 169–72.

27. See, e.g., Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1244 (2010); Clark M. Neily III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate Over Privileges or Immunities*, 14 TEX. REV. L. & POL. 15, 18 (2009) (arguing for a liberty-enhancing and government-limiting interpretation of the Fourteenth Amendment, particularly based in protections against government intrusion under the Privileges or Immunities Clause).

28. See generally Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777 (2008). Claeys surveys the debates over the Privileges or Immunities Clause, discussing the interpretive views in the following works, among others: ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 239 n.12, 342–51 (1985); Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIBERTY 1096, 1098–99 (2005); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIBERTY 334, 340–51 (2005); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1410–33, 1451–56 (1992).

immunity, another group should not be denied the same.²⁹ The two clauses in the Fourteenth Amendment—privileges or immunities and equal protection—must be read together as supporting a general constitutional recognition of an equality concept.

Once a state begins to move beyond the basic privileges or immunities inherent in liberty and grant new privileges or immunities to only certain classes, equality blurs and society becomes mired in factional conflicts.³⁰ On several issues, we see that today. That is not to say that states should create privileges or immunities at all, but once they do—once they walk down that road—the government must open up the privileges or immunities to all persons or groups on a nondiscriminatory basis.³¹ The government has created far too many “privileges,” but once they are created, they should be available for all people. Equality demands it. Grant nothing beyond basic liberty if you will, but once we grant some privilege or immunity then it should be made equally available without special beneficiaries. Favoring some over others would violate the anti-interference principle. There must be an equal playing ground. Furthermore, if the principle applies, the government similarly cannot create an interference and then find “less-interfering” exemptions therefore justified. In fact, so long as the interference exists, even if unjustified, it should interfere with all equally (in other words, no exemptions from the interference).

Equality, in a legal sense, means that no person or class receives privileges or immunities, or punishments, in any discriminatory sense.³² The law cannot avoid the seduction of satisfying particular political interests, ultimately leading to unequal treatment. But the law should strive to avoid such seduction if the basic core of equality is to be preserved. That is a basic principle of democracy long-held where all are treated alike to the utmost.³³

29. See Harrison, *supra* note 28, at 1410–33, 1451–56.

30. See Karst, *supra* note 3, at 255–56 (“More generally, the American colonists resisted the idea of legal privileges attached to personal status.”).

31. Harrison, *supra* note 28, at 1412–13.

32. See generally BLACK’S LAW DICTIONARY, *supra* note 2, at 616.

33. ARISTOTLE, THE POLITICS bk. IV, § 1291b30, at 250 (T.A. Sinclair trans., Penguin ed. 1992) (“In such a democracy the law interprets equality as meaning that the poor shall not enjoy any more advantage than the rich, that neither shall be sovereign, but both shall be exactly similar. For if, as is held by some, freedom is especially to be found in democracy, and also equality, this condition is most fully realized when all alike share most fully

This essay dubs the guidance that can best serve the concept of equality as the “anti-interference principle”: The government should not target persons for negative treatment. Persons should not face interference with their equal opportunities in their pursuits; and no one should be entitled to equal outcomes or a redistributed share (meaning then that all entitlements that take from others to subsidize a special class—whether it be corporate or social—would be prohibited). Additionally, there is a right to the equality of condition under law—but condition unshackled and condition achieved, not condition given or condition in results. An individual’s condition needs to be of his own making, and the means for the making must be protected equally. The anti-interference principle is a matter of recognizing the sovereignty of the individual, and the limitation of governmental intrusion upon it so that individuals can reach equality. The condition of freedom requires the condition of equality, and vice versa.

II. SELECTED RECENT DEVELOPMENTS ON EQUALITY IN THE POLITICAL AND JUDICIAL DEBATE

Certainly there is extensive discussion on equality in legal literature and case law. As stated at the outset, it is not a purpose of this essay to survey these materials—many qualified people have already accomplished that task. It is also not a purpose of this essay to explain or analyze the complex literature and case law specifically on the meaning and application of the Equal Protection Clause. That too is a wide, complex, and confusing scholarly and judicial debate.³⁴

Whatever the nature of the distinctions—race, ethnicity, gender, sexual orientation, income, or others—equality under the law should live up to its name. However, from Reconstruction³⁵ to the women’s suffrage movement,³⁶ to the civil rights movement,³⁷ to

in the constitution.”); THE REPUBLIC OF PLATO 236 (Allan Bloom trans., 2d ed. 1968) (describing how democracy, if ideally structured, would seem to be “a sweet regime . . . dispensing a certain equality to equals and unequals alike”).

34. See Nirej S. Sekhon, *Equality and Identity Hierarchy*, 3 N.Y.U. J. L. & LIBERTY 349, 350 (2008) (“There is little if any recent scholarship advancing a theory of equality that actually describes the Supreme Court’s equal protection jurisprudence.”).

35. See generally, e.g., THE FREEDMEN’S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS (Paul A. Cimbalá & Randall M. Miller eds., 1999); ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 (First Perennial Classics ed., 1989).

36. See generally, e.g., HISTORY OF WOMAN SUFFRAGE (Elizabeth Cady Stanton et al.

ongoing (and seemingly endless) debates over other issues such as same-sex marriage laws,³⁸ we have yet to fully define equality before the law. Nor is there likely to ever be a consensus on its best meaning or the appropriate role of the state in its achievement. From the dismantling of legal segregation leading to *Brown v. Board of Education*,³⁹ or interracial marriage issues in *Loving v. Virginia*,⁴⁰ some insight can be gleaned to help contextualize the current and continuing debate on how the law understands the concept of equality. Has the law fully reached a “post-discriminatory” ethic? Certainly not. It is definitely questionable whether American society is even achieving the “post-racial” promise some claimed would accompany the investiture of the Obama administration,⁴¹ let alone whether society or its laws can ever achieve a true and comprehensive nondiscriminatory foundation. Preferences and privileges abound, all subject to critique from equality theories including, as here, from the principle of anti-interference.

eds., 1969); COLLEEN ADAMS, *WOMEN’S SUFFRAGE: A PRIMARY SOURCE HISTORY OF THE WOMEN’S RIGHTS MOVEMENT IN AMERICA* (2003).

37. See generally, e.g., *TEACHING THE AMERICAN CIVIL RIGHTS MOVEMENT: FREEDOM’S BITTERSWEET SONG* (Julie Buckner Armstrong et al. eds., 2002); REGGIE FINLAYSON, *WE SHALL OVERCOME: THE HISTORY OF THE AMERICAN CIVIL RIGHTS MOVEMENT* (2003).

38. See *infra* notes 42, 44 and accompanying text.

39. 347 U.S. 483 (1954). For recent commentary on the importance of *Brown*, see Paul Finkelman, *The Centrality of Brown*, in *CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE* 224, 225–26 (Robert L. Hayman, Jr. & Leland Ware eds., 2009) (acknowledging *Brown*’s importance and influence but questioning its impact), and Karst, *supra* note 3, at 285 (discussing scholarship on *Brown*).

40. 388 U.S. 1 (1967).

41. Early in the 2008 presidential campaign, pundits began to tout an Obama presidency as shepherding in a post-racial era. See, e.g., Michael Crowley, *Post-Racial, Even White Supremacists Don’t Hate Obama*, *NEW REPUBLIC*, Mar. 12, 2008, at 7; Shelby Steele, *Obama’s Post-Racial Promise*, *L.A. TIMES*, Nov. 5, 2008, at A31. The characterization took hold in popular discourse. See Neubia Williams, Note, *A Post-Racial Era?: How the Election of President Obama and Recent Supreme Court Jurisprudence Illustrate That the United States Is Not Beyond the Centrality of Race*, 4 *S. REGIONAL BLACK L. STUDENTS ASS’N L.J.* 1, 1 (2010) (“In the wake of the election, the term ‘post-racial era’ has become more commonplace in the vocabulary of pundits and ordinary citizens alike.”); see also Sumi Cho, *Post-Racialism*, 94 *IOWA L. REV.* 1589, 1593 (2009) (discussing the emergence of advocacy for a “post-racial ideology,” although criticizing it as unwarranted and dangerous). Many claim, however, that the projected post-racial era has certainly not surfaced. See, e.g., Editorial, *Obama Team Pushes Quotas: The Justice Department Is Playing Diverse Racial Games*, *WASH. TIMES*, Jan. 22, 2010, at B2 (“Far from being a ‘post-racial’ presidency, the Obama administration continues to pick the scab of racial discord.”); Editorial, *No Getting Past Race in America*, *INV. BUS. DAILY*, Sept. 2, 2009, available at 2009 WLNR 17101293 (criticizing the Obama administration’s fixation on race and teasing, “[a]nd you thought you were getting a post-racial presidency”).

Several recent court cases have engaged the philosophical and legal debate on equality. Two notable examples are the cases examining Proposition 8 regarding same-sex marriage⁴² and the latest affirmative action decision from the U.S. Supreme Court in *Ricci v. DeStefano*.⁴³

Perhaps the most noticeable legal equality debate in the public eye in recent years centers around same-sex marriage and California's Proposition 8.⁴⁴ The same-sex marriage debate has a long history in California—including a veritable ping-pong match between initiative voters and the courts, starting before the year 2000 and continuing to present day.⁴⁵

Proposition 8, a voter-enacted amendment to the California Constitution, successfully passed in November 2008 in response to court decisions that invalidated, on state constitutional law

42. See, e.g., Courtney Megan Cahill, *(Still) Not Fit to be Named: Moving Beyond Race To Explain Why "Separate" Nomenclature for Gay and Straight Relationships Will Never Be "Equal"*, 97 GEO L.J. 1155, 1159–60 (2009) (discussing inequality nomenclature and analyzing the way courts and scholars treat substantive equality versus nominal equality). For commentary on the history and debate on Proposition 8, see generally M. Katherine Baird Darmer, "Activist" Courts, *Misleading Wedge Politics and the Tragedy of Proposition 8*, 14 NEXUS 69, 70 (2008); Jeffrey A. Redding, *Proposition 8 and the Future of American Same-Sex Marriage Activism*, 14 NEXUS 113 (2008); Ronald Steiner, *Understanding the Prop 8 Litigation: The Scope of Direct Democracy and Role of Judicial Scrutiny*, 14 NEXUS, 81, 81–82 (2008).

43. 567 U.S. ___, 129 S. Ct. 2658 (2009).

44. See Nicholas Goldberg, *Gay Marriage on Trial*, L.A. TIMES, Mar. 1, 2009 (describing the "twists and turns" from Proposition 22 to Proposition 8) ("The battle over same-sex marriage sometimes seems endless."); John Wildermuth, *Prop. 8 Among Costliest Measures in History*, S.F. CHRON., Feb. 3, 2009, at B1 (describing Proposition 8 campaign finances). Recently, in *Varnum v. Brien*, 763 N.W.2d 862, 904 (Iowa 2009), the Iowa Supreme Court also invalidated a gay marriage ban based on a violation of the Equal Protection Clause under an intermediate scrutiny analysis.

45. Several law review articles written in opposition to Proposition 8 provide good summaries of the issues involved and the history of the relevant case law. See, e.g., Erwin Chemerinsky, *Foreword: Judicial Opinions as Public Rhetoric*, 97 CAL. L. REV. 1763, 1763–64 (2009) (using the *In re Marriage Cases* opinion as a case study in whether "judicial opinions [should] seek to persuade the public"); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1696–98 (2010) (concerning the decision and justification for challenging Proposition 8 in federal court); M.K.B. Darmer & Tiffany Chang, *Moving Beyond the "Immutability Debate" in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1 (2009) (discussing the history of Proposition 8, the legal issues involved, and the treatment of LGBT rights in the courts); see also *supra* note 42 and accompanying text. Some articles, of course, explain that history as well but take the opposite view on whether equality demands recognition of same-sex marriage. See, e.g., Robert John Araujo, *Same-Sex Marriage from Privacy to Equality: The Failure of the "Equality" Justifications for Same-Sex Marriage*, in THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS 195 (2010).

grounds, California's legislative ban on same-sex marriage.⁴⁶ Proposition 8 essentially allowed the electorate to invalidate, in part, the California Supreme Court decision in *In re Marriage Cases*.⁴⁷ Proposition 8 amended the California Constitution to read: "Only marriage between a man and a woman is valid or recognized in California."⁴⁸ Once the amendment passed, some argued that the constitutional "ban" on same-sex marriage, or more precisely its limitation on recognition of any marriage other than between a man and a woman, by definition made the restriction constitutional, at least on state law grounds.⁴⁹

On May 26, 2009, the California Supreme Court upheld California's constitutional amendment banning gay marriage in *Strauss v. Horton*.⁵⁰ On May 22, 2009, a separate group of plaintiffs filed suit challenging the constitutionality of Proposition 8 while the state court challenge was still pending.⁵¹ In *Perry v. Schwarzenegger*, the U.S. District Court for the Northern District of California invalidated Proposition 8 as unconstitutional on August 4, 2010.⁵² Chief Judge Vaughn Walker's eighty-page opinion

46. Ben Ehrenreich, *Anatomy of a Failed Campaign*, ADVOCATE, Dec. 2008, at 34, available at http://www.advocate.com/Politics/Election/Anatomy_of_a_Failed_Campaign/ (discussing the events and spending during the Proposition 8 campaign, the postelection response, and that despite disparities, the "Yes side still won—52.3% to 47.7%"); Editorial, *State Should Stay Out of Marriage: Revoking Same-Sex Couples' Right to Marry Doesn't Belong in the State Constitution*, APPEAL-DEMOCRAT (Marysville, Cal.), Oct. 4, 2008, <http://www.appeal-democrat.com/articles/marriage-69456-california-state.html> (discussing "simple fairness" and Proposition 8).

47. Cal. Proposition 8 (2008) (superseding *In re Marriage Cases*, 183 P.3d 384, 426 (Cal. 2008)).

48. *Id.*; see CAL. CONST. art. I, § 7.5.

49. See generally Letter to the Editor, L.A. TIMES, Sept. 12, 2010, at 35.

50. 207 P.3d 48, 63–64 (Cal. 2009); see also *Strauss v. Horton: Proposition 8 Valid But Not Applicable Retroactively*, RECORDER, May 27, 2009, available at 2009 WLNR 21597292 ("The California Supreme Court . . . held that the recently enacted Proposition 8, which rendered unlawful the marriage of same-sex couples, constituted a permissible constitutional amendment and did not violate the separation of powers doctrine, but nonetheless did not apply retroactively and thus did not invalidate the marriages of same-sex couples performed prior to the effective date of Prop 8.").

51. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010); see also Chuleenan Svetvilas, *Challenging Prop. 8: The Hidden Story*, CAL. LAW., Jan. 2010, <http://www.callawyer.com/story.cfm?pubdt=NaN&eid=906575&evid=1>.

52. *Perry*, 704 F. Supp. 2d at 1003. For news discussions and summaries of the decision and the opinion in the case, see Maura Dolan & Carol J. Williams, *Ban on Gay Marriage Overturned; Appeal Promised After Federal Judge Finds State's Prop. 8 Unconstitutional*, L.A. TIMES, Aug. 5, 2010, at A1; Jesse McKinley & John Schwartz, *California Ban on Gay Marriage Is Struck Down*, N.Y. TIMES, Aug. 5, 2010, at A1; see also Maura Dolan & Carol J. Williams, *Facts Anchor Marriage Ruling*, L.A. TIMES, Aug. 6, 2010, at A1; Tim Rutten, *Marriage Reconsidered*, L.A. TIMES, Aug. 5, 2010, at A27.

found California's decision to privilege some over others without adequate basis in law or fact, concluding that:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.⁵³

Walker's ruling was based, in essence, on the finding that the state was unable to establish any state interest justifying the differential treatment and was unable to establish the existence of any harm as a result of issuing marriage licenses to same-sex couples.⁵⁴ No rational basis existed to legitimize the differential treatment of singling out only unions between a man and a woman for receiving recognition of a valid marriage and the exclusive imprimatur of the state.⁵⁵

After the ruling and legal wrangling over whether the decision would be stayed pending appeal, the U.S. Court of Appeals for the Ninth Circuit ultimately granted a stay before the district court decision became operable,⁵⁶ and the court of appeals will have the next opportunity to weigh in on this lingering controversy.⁵⁷ As of this writing, that appeal was still pending.⁵⁸

Several of the commentary headlines screamed that the court's decision in *Perry* was a major victory for equality.⁵⁹ It is indeed a

53. *Perry*, 704 F. Supp. 2d at 1003.

54. *Id.* at 998, 1003.

55. *Id.* at 997–98.

56. *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010).

57. *Id.* (“This appeal shall be calendared during the week of December 6, 2010 . . .”); see also Zusha Elinson, *After Marriage Ruling, Uncertainty Still Lingers*, N.Y. TIMES, Aug. 6, 2010, at A17; Jesse McKinley, *Green Light and Delay On Same-Sex Marriage*, N.Y. TIMES, Aug. 13, 2010, at A12. There remains some question whether Proposition 8 supporters have standing to bring the appeal, which is a separate note of interest for many independent of the substantive arguments on Proposition 8's constitutionality. See, e.g., Maura Dolan & Lee Romney, *Prop. 8 Hangs By a Legal Thread; Judge Will Lift Stay on Gay Marriages Next Week as Grounds for Appeal Narrow*, L.A. TIMES, Aug. 13, 2010, at A1; Editorial, *Prop. 8 on the Clock: The 9th Circuit Court of Appeals Has Shown a Proper Sense of Urgency in Ruling on the Case*, L.A. TIMES, Aug. 18, 2010, at A16.

58. See *supra* note 57 and accompanying text.

59. See, e.g., Bob Egelko, *Ruling Steeped in Principle of Equality*, S.F. CHRON., Aug. 5,

groundbreaking precedent,⁶⁰ and *The Los Angeles Times* proclaimed it a victory for the reason that it “changes the debate . . . forever.”⁶¹ Indeed the majority of opinion in the press viewed the decision favorably,⁶² although some found it wrongly decided or otherwise objectionable, and the opposition to same-sex marriage remains to fight on.⁶³

In light of this development, it might seem appropriate to focus on the same-sex marriage cases in any article about the law of equality as it should be examined today. However, this essay will not do so; it will not examine the reasoning in *Perry* except to acknowledge that the result can be justified with the application of the principle of anti-interference, especially because the *Perry* decision focused on the absence of harm as a determining factor in holding that the unequal treatment could not be justified.⁶⁴

Any further focus on such a highly contested issue would be diversionary from the central discussion of this essay; moreover, the already extensive literature will very quickly become saturated on that topic with a cornucopia of analysis and opinions.⁶⁵ It

2010, at A10; Scott Herhold, *A Victory for the Cause of Equality*, SAN JOSE MERCURY NEWS, Aug. 5, 2010, at 1A; Editorial, *Equal Protection Prevails in Court*, SACRAMENTO BEE, Aug. 5, 2010, at 12A; Editorial, *Equality Prevails*, S.F. CHRON., Aug. 5, 2010, at A15.

60. See Peter Schrag, *Viewpoints: Prop. 8 Decision One for the Law Books*, SACRAMENTO BEE, Aug. 6, 2010, at 11A.

61. Editorial, *Proposition 8 Ruling Changes the Debate Over Same-Sex Marriage Forever*, L.A. TIMES, Aug. 4, 2010, <http://www.latimes.com/news/opinion/editorials/la-ed-prop8-20100805,0,3655162.story>.

62. See, e.g., M. Katherine B. Darmer, *GOP Candidates and Prop 8*, ORANGE COUNTY REG., Aug. 9, 2010, <http://www.ocregister.com/opinion/walker-261308-couples-whitman.html>; Letter to the Editor, *A Legal Victory for Gay Marriage*, N.Y. TIMES, Aug. 6, 2010, at A22; Editorial, *A Victory for Gay Marriage: A Judge's Ruling Striking Down California's Proposition 8 Is Justified*, WASH. POST, Aug. 6, 2010, at A18; Editorial, *Equality for Gay Couples*, DENVER POST, Aug. 8, 2010, at D3; Editorial, *Gay Marriages Again, Soon*, L.A. TIMES, Aug. 13, 2010, at A20; Editorial, *In Defense of Marriage*, N.Y. TIMES, Aug. 14, 2010, at A18; Editorial, *Marriage Is a Constitutional Right*, N.Y. TIMES, Aug. 5, 2010, at A26; Editorial, *Marriage Not State's Business*, ORANGE COUNTY REG., Aug. 4, 2010, <http://www.ocregister.com/opinion/sex-260739-marriage-decision.html>.

63. See, e.g., Edwin Meese III, Editorial, *Same-Sex Marriage Decision: Federal Judge Went Too Far on California Ban*, OREGONIAN, Aug. 18, 2010, http://www.oregonlive.com/opinion/index.ssf/2010/08/same-sex_marriage_federal_judg.html; Kevin Tait, Editorial, *Judge's Decision on Prop. 8 Tears at Throat of Democracy*, BOS. GLOBE, Aug. 11, 2010, at 8; Tim Wildmon, *A Biased Ruling on Gay Marriage in California*, L.A. TIMES, Aug. 13, 2010, at A21; Editorial, *The Arrogance of Judicial Power: Homosexuals Hijack Political Process for Their Own Ends*, WASH. TIMES, Aug. 6, 2010, at B2; see also Mike Anton, *Prop. 8 Backers Angry at Reversal of Voter Mandate*, L.A. TIMES, Aug. 13, 2010, at A21.

64. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

65. See *supra* notes 59–63 and accompanying text.

is enough to recognize that the marriage debate demonstrates the continuing struggle over the meaning of equality today and the fact that equality will endlessly find new testing grounds even in our rather mature legal system.

Also enlightening to this essay's central theme is the June 2009 decision from the Supreme Court in *Ricci v. DeStefano*,⁶⁶ which further aptly represents the continued debate on equality under law.⁶⁷ Many consider *Ricci* a groundbreaking decision on equality.⁶⁸ Some have called it a milestone for cultural change,⁶⁹ others claim it is a decision that raises the bar on reverse discrimination,⁷⁰ and still others argue it signals that the courts are taking discrimination more seriously.⁷¹ Despite some limited commentary and analysis downplaying *Ricci* as a very narrow decision,⁷² it nonetheless has strong legs in the affirmative action, anti-discrimination, and equality debates.

In *Ricci*, interpreting Title VII of the Civil Rights Act of 1964,⁷³ the Court held that city officials were prohibited from denying promotions to white and hispanic firefighters simply because black firefighters did not perform as well on certain tests without

66. 557 U.S. ___, 129 S. Ct. 2658 (2009). For a recent note discussing the decision, see Kristina Campbell, Note, *Will "Equal" Again Mean Equal?: Understanding Ricci v. DeStefano*, 14 TEX. REV. L. & POL. 385, 387–88 (2010) (describing the *Ricci* decision and opining that it "will be remembered as the case with the greatest impact on race jurisprudence in recent history").

67. See, e.g., Laura Fitzpatrick, *A Brief History of: Affirmative Action*, TIME, July 13, 2009, at 20 (discussing *Ricci*) ("The court has long walked a fine line on the issue [of affirmative action] . . .").

68. See Joseph Williams, *Supreme Court Rules in Favor of Connecticut Firefighters: Group Accused City of Racial Discrimination*, BOS. GLOBE, June 30, 2009 at A10 ("[L]egal analysts said the court's decision dramatically shifts the affirmative action landscape.").

69. See, e.g., Ward Connerly, *Ricci and the Future of Race in America*, CHRISTIAN SCI. MONITOR, July 14, 2009, at 9 ("Clearly, the *Ricci* decision represents somewhat of a legal milestone" with "cultural significance.").

70. See, e.g., Charles Krauthammer, *The Meaning of Ricci*, CHI. TRIB., July 6, 2009, at C15 ("The import of *Ricci*, which raised the bar on reverse discrimination, is that it heads us once again toward that day—and back to true colorblindness that was the original vision, and everlasting glory, of the civil rights movement.").

71. See, e.g., Michael E. Rosman, *Make Race Irrelevant*, USA TODAY, June 30, 2009, at 8A ("[T]he Supreme Court in *Ricci* . . . shows that the nation's highest court is getting serious about ridding our society of race discrimination . . .").

72. See, e.g., David G. Savage, *Court Backs White Firefighters: Justices Decide City Erred in Tossing Test To Aid Minorities*, CHI. TRIB., June 30, 2009, at C12 ("[I]t does not appear to make a sweeping change in the law.").

73. 42 U.S.C. §§ 2000e–2000e-17 (2006). Notably the *Ricci* decision did not reach the question whether there was a constitutional violation under the Equal Protection Clause. 557 U.S. ___, ___, 129 S. Ct. 2859, 2664–65 (2009).

“a strong basis in evidence that, had [the city] not taken the action, it would have been liable under the disparate-impact statute.”⁷⁴

For purposes of this essay, the most interesting discussion in *Ricci* lies in Justice Scalia’s concurrence. Justice Scalia summarized the controlling principle against discrimination and favored seeing the concept of equality as one of neutrality.⁷⁵ He viewed the disadvantaging action against the white and hispanic firefighters as a discriminatory action that the government could not do itself nor compel an employer to take at the government’s direction.⁷⁶ Justice Scalia wrote: “[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race.”⁷⁷ In the end, the majority of the Court said that the civil rights laws cannot compel private individuals to create equal results or equal outcomes, especially if the decision discriminates against nonminorities without justification.⁷⁸

Often, merit matters, and it should as it is the best metric for judging the neutrality of rules and implementing anti-discrimination policies.⁷⁹ The *Ricci* decision supports the long-recognized focus on individualism and meritocracy⁸⁰ that under-

74. 557 U.S. at ___, 129 S. Ct. at 2664.

75. *Id.* at ___, 129 S. Ct. at 2682–83. (Scalia, J., concurring).

76. *Id.* at ___, 129 S. Ct. at 2682 (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)).

77. *Id.* (internal citation omitted); *see also id.* at ___, 129 S. Ct. at 2676 (discussing “a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent”).

78. *Id.* at ___, 129 S. Ct. at 2676, 2681. For media coverage on the *Ricci* case, *see*, for example, Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. TIMES, June 30, 2009, at A1 (describing the *Ricci* decision and quoting Professor Sheila Foster as saying “[t]his decision will change the landscape of civil rights law”); David G. Savage, *Diversity Decision May Alter Hiring*, L.A. TIMES, June 30, 2009, at A1 (explaining the *Ricci* decision); Abigail Thernstrom, *The Supreme Court Says No To Quotas*, WALL ST. J., July 1, 2009, at A13 (generally discussing the *Ricci* opinion); Editorial, *Firefighters and Race*, N.Y. TIMES, July 1, 2009, at A32 (strongly supporting the *Ricci* dissent).

79. *See* Rosman, *supra* note 71 (“The purpose of our anti-discrimination laws is to make race as irrelevant as possible. Their underlying assumption is that all races could succeed if decisions were made based on merit and not someone’s heritage.”).

80. *See, e.g.*, Karst, *supra* note 3, at 261 n.82 (“[L]est we wax too lyrical over the joys of equal opportunity, let us remember that the losers in a perfect meritocracy have the knowledge that they lost fairly—so that they have nothing to blame but their own failings.”).

scores the anti-interference principle described below as a prism for defining equality.

III. THE ANTI-INTERFERENCE PRINCIPLE: A NEW, YET OLD, PRISM FOR EVALUATING LEGAL PRINCIPLES ON EQUALITY

The “anti-interference principle” is a necessary foundation for achieving the goal of true equality. Equality requires that the government engage in anti-interference with individual choices and activities. Unequal treatment is justifiable only when grounded in avoidance of some harm that can be minimized only through differential treatment. Absent avoidance of harm, special designations, privileges, or classifications necessarily interfere with equality in ways that violate the anti-interference principle.

Equality talk is already flooded with nuances, phrases, and terms.⁸¹ Several main terms usually surface in the nomenclature when analyzing the legitimacy of legal rules, many with shared themes⁸² and some in direct thematic competition.⁸³ The primary terms used in scholarship and jurisprudence for the legal principles regarding equality include antidifferentiation,⁸⁴ anticlassifica-

81. *Id.* at 279 (“The importance of the rhetoric of equality in constitutional adjudication is hard to overstate.”).

82. Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371, 408 (2009) (“Two primary theoretical frameworks have emerged to explain the wrongfulness of the various forms of conduct which constitute illicit discrimination. Broadly speaking, they can be described as antidifferentiation (or anticlassification) theory and antistatization (or anticaste) theory. Interestingly, these two bodies have evolved over time in a manner which demonstrates a core, common concern.” (footnotes omitted)).

83. Reva B. Siegel, *Equality Talk: Antistatization and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1471–75 (2004). (“For many, the belief that anticlassification commitments are fundamental entails the view that our tradition embraces a particular conception of equality, one that is committed to individuals rather than to groups. On this account, the tradition’s embrace of the antistatization principle signifies its repudiation of an alternative conception of equal protection, the antistatization principle: the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups. . . . The understanding that anticlassification and antistatization are competing principles that vindicate different complexes of values and justify different doctrinal regimes is an outgrowth of decades of struggle over *Brown*, and is not itself a ground of the decision or of the earliest debates it prompted.” (footnotes omitted)).

84. See Marcus, *supra* note 82, at 409 (“Under antidifferentiation theory, wrongful discrimination consists of unequal treatment based on suspect characteristics, such as race, religion, or national origin. Discrimination so construed may be understood as a failure of impartiality. . . . This approach has increasingly been associated with conservative commentators in recent years and is apparent in recent Supreme Court decisions address-

tion,⁸⁵ antistigmatic,⁸⁷ equal citizenship,⁸⁸ and otherwise generally antipartiality or antidiscrimination.⁸⁹ Each has its own merits as well as its own shortfalls. Each term or characterization is sometimes politically or philosophically loaded in the jurisprudence and academic discourse. Though introduction of another term admittedly may be subject to a similar critique, the anti-interference principle best captures the concept of equality as it should relate to the government and its treatment of individuals. If nothing else, anti-interference is a missing term in the mix of the equality discussion.

ing affirmative action. . . . Arguably, it is now the ‘standard view’ that American antidiscrimination law is based upon antidifferentiation theory, although some commentators argue that this theory does not fully explain contemporary civil rights jurisprudence.” (footnotes omitted)).

85. See Siegel, *supra* note 83, at 1472–73.

86. See Marcus, *supra* note 82, at 411 (“Under antistigmatic theory, wrongful discrimination consists of ‘any conduct that has the effect of subordinating or continuing the subordination of a minority group’ or which demeans individuals by denying them the concern and respect which flows from their equal moral worth. In Owen Fiss’s influential formulation, ‘what is critical . . . is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group. . . . In recent years, antistigmatic theory has been more influential among academic commentators than among members of the Supreme Court, although its academic influence is formidable.” (footnotes omitted)).

87. *Id.* at 409–10 (“In recent years, the Court has offered two rationales for the antidifferentiation theory: individual stigma and social conflict. . . . The genesis of this notion is in the Court’s finding in *Brown v. Board of Education*” (footnotes omitted)); see also Karst, *supra* note 3, at 248–49 (“[I]t is precisely the denial of equal status, the treatment of someone as an inferior, that causes stigmatic harm. . . . When we are guarding against the stigma of inferiority, it makes excellent sense to regard equality as the constitutional rhetoric of choice.”).

88. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistigmatic?*, 58 U. MIAMI L. REV. 9, 9 (2003) (“Antistigmatic theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”); Karst, *supra* note 25, at 6 (“The [American] principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who ‘belongs.’ Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant.”); Karst, *supra* note 3, at 272–89 (discussing the equal citizenship principle); Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, 15 COLUM. J. EUR. L. 169, 173 (2009) (“The emphasis on equality is particularly important in the citizenship context. . . . By virtue of simply being a citizen, any individual can expect to be regarded as being as valuable a member of the community as any other individual possessing the same status.”).

89. See, e.g., Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 79 (2000).

Those in favor of advancing equality should wish to give it comprehensive breadth in the application of all laws and policies. The anti-interference principle is a concept of equality that extends beyond race, sexual orientation, gender, class, and other hot topics. It should extend to our treatment of the wealthy versus the poor, the healthy versus the diseased, the educated versus the uneducated, and the sophisticated versus the socially inept. No one's activities or pocketbooks should be unequally affected by governmental action if their activities do not cause harm to others. Equality requires the prevention of interference unless and until the action causes interference with others.⁹⁰

The anti-interference principle captures all forms of discrimination. There are two principal categories. First, governmental actions that specifically target some for disadvantage challenge equality. This is the area most often associated with what in common usage is considered "discrimination," even though that term should have a broader meaning. Second, governmental actions that privilege, prefer, or advantage some, while explicitly or implicitly excluding others from such beneficial treatment, status, or access, challenge equality. This is the area most often associated with the terms "reverse discrimination" or "redistribution," including social entitlements or corporate subsidies alike. In this second category a few suffer for the benefit of others (through taxes, lost opportunity, or access to limited or finite resources, etc.)—taking from one to give to another is itself favoritism and deprives one man of his freedom. It is a principle that prohibits regulating differently as much as it precludes subsidizing favorably. Under the anti-interference principle, neither form of unequal treatment is justifiable without proof of (1) *causation* of (2) real, legal *harm* that is (3) *traceable* to the action of the disadvantaged or excluded person or group. In other words, unequal interference with autonomy that is necessary to accomplish either form of differential treatment is not justifiable absent such findings.

Advantage and disadvantage alike should be earned, not dictated. When one *causes harm*, he deserves disadvantage—he has in a sense "earned" his discriminatory treatment and the avoid-

90. On the meaning of "interference," see BLACK'S LAW DICTIONARY 888 (9th ed. 2009), which defines "interference" as "[t]he act of meddling in another's affairs," or "[a]n obstruction or hindrance."

ance of harm justifies such treatment. For the same reasons, state-sanctioned preference should be prohibited. When one is *causing no harm*, he should not be required to face disadvantage to provide someone else advantage—to suffer in order to provide unearned advantages to another or in order to cure a condition that he has not caused. Those are the concepts inherent in an anti-interference principle. Those are the concepts that capture the meaning of the word equality.

Law and policy should protect the concept of equality to provide persons an equal chance—an equal opportunity⁹¹—to access privileges or immunities and to receive nondiscriminatory treatment. Furthermore, equality in law should not mean that everyone is entitled to an equal *outcome*.⁹² To conclude otherwise would be antithetical to the true nature of the concept.⁹³

What I am calling the anti-interference principle first mandates an appreciation for the individual and the protection of his liberty and choice in relation to the state. As Madison explained:

[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.⁹⁴

Several additional insights on the neutrality concept inherent in equality are also helpful. Hayek, for example, adopts and explains the Greek word “isonomia” as meaning “equality of laws to all manner of persons.”⁹⁵ Isonomia rejects special privileges and classifications based on rank in society.⁹⁶

91. See Karst, *supra* note 3, at 263 (“The ideal of equal opportunity is well established as part of the American tradition of constitutional equality.”).

92. A NEW DICTIONARY OF QUOTATIONS: ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 357 (H.L. Mencken ed., 1946) [hereinafter Mencken] (“Men are entitled to equal rights—but to equal rights to unequal things.” (quoting Charles James Fox (1749–1806))).

93. Kochenov, *supra* note 88, at 173 n.24 (“‘Equality’ here does not refer to equality in fact (as the Communist societies were trying to achieve) but the equality of opportunity.”).

94. James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983).

95. F. A. HAYEK, THE CONSTITUTION OF LIBERTY 164 (1960); see also Karst, *supra* note 3, at 261 (“Americans have always understood that in a fair competition there will be winners and losers.”).

96. Hayek continues that “it described a state which Solon had earlier established in Athens when he gave the people ‘equal laws for the noble and the base.’” HAYEK, *supra* note 95, at 164 (footnote omitted).

A related premise is that equality of opportunity need not mean equality of resulting condition.⁹⁷ As James Madison explained, inequality of outcomes is part of the natural condition in a free society:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.⁹⁸

It is social engineering to create labels and classes, with the imprimatur of law, to give privileges or immunities to some and deny them to others. As the U.S. Supreme Court stated in *Miller v. Johnson*, “[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”⁹⁹ Equality in law should mean the equality of chance and opportunity yet not guarantee equality in outcome.¹⁰⁰ We need not spread the wealth¹⁰¹ to achieve equality in our legal system, but we must spread the equality of treatment if equality is to mean anything at all. “Spreading the wealth” is the antithesis of equali-

97. JAMES FENIMORE COOPER, *THE AMERICAN DEMOCRAT* 104 (George Dekker & Larry Johnston eds., Penguin Books 1969) (1838) (“Equality, in a social sense, may be divided into that of condition, and that of rights. Equality of condition is incompatible with civilization, and is found only to exist in those communities that are but slightly removed from the savage state. In practice, it can only mean a common misery.”).

98. *THE FEDERALIST* NO. 10, at 73 (James Madison) (Clinton Rossiter ed., 2003); see also Karst, *supra* note 3, at 261 (“James Madison in *The Federalist* had recognized that equal opportunity meant unequal results.”).

99. 515 U.S. 900, 911 (1995) (quoting *Metro Broad., Inc. v. Fed. Commc’ns Comm’n*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting) (internal quotation marks omitted)).

100. Mencken, *supra* note 92, at 357 (“All men have an equal right to the free development of their faculties; they have an equal right to the impartial protection of the state; but it is not true, it is against all the laws of reason and equity, it is against the eternal nature of things, that the indolent man and the laborious man, the spendthrift and the economist, the imprudent and the wise, should obtain and enjoy an equal amount of goods.” (quoting Victor Cousin, *Justice et Charité*, 1848)).

101. This, of course, is a reference to the infamous Barack Obama response to “Joe the Plumber.” See Charles Hurt, *Obama Fires a Robin Hood Warning Shot*, N.Y. POST, Oct. 15, 2008, at 6 (“Barack Obama let slip his plans to become a modern-day Robin Hood in the White House, confiscating money from the rich to give to the poor. . . . Then, Obama explained his trickle-up theory of economics. . . . ‘I think when you spread the wealth around, it’s good for everybody.’”); see also Karst, *supra* note 3, at 263 (“From time to time, and particularly in recent years, egalitarian rhetoric has extended beyond equal opportunity to calls for a greater equality of outcomes.”).

ty as understood in a classical liberal theory of government.¹⁰² In fact, some have recognized that it is our ethic for equality within this country that has contributed to a tradition against “leveling.”¹⁰³

Moreover, there is a profound risk of interference when the government dictates or hinders individual decisionmaking. The intervention of legal conscriptions on individual choices means that we are not equal—someone else has paternalistically decided something for us rather than allow for independent choice. Individualism is always eroded if all individuals—equally—are incapable of designing their personal plan. We must be cognizant that every interference with personal choice is an interference with equality.

We turn now from the individual liberty component of the anti-interference principle to the harm component. The anti-interference principle finds its second major grounding in the harm principle championed by John Stuart Mill in *On Liberty*.¹⁰⁴ Mill “assert[s] one very simple principle” that:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.¹⁰⁵

102. “[A]bsolute equality and complete conformity of legislative classifications are not constitutionally required.” *Rossie v. State*, 395 N.W.2d 801, 807 (Wis. Ct. App. 1986).

103. Karst, *supra* note 3, at 261–63 (“What is remarkable is that this country has never been swept up by a political movement devoted to leveling. . . . Americans accept wide disparities in wealth and income, so long as the system remains open and people at the bottom of the economic scale are relieved from the kinds of deprivation that stigmatize or exclude them from participation in society.” (footnotes omitted)).

104. JOHN STUART MILL, *ON LIBERTY* 10–11 (David Spitz ed., W.W. Norton & Co., Inc. 1975) (1859).

105. *Id.* (footnotes omitted).

Under the harm principle, governmental power is highly limited to the prevention of harm to others only.¹⁰⁶

Mill's strategies for implementation of the harm principle are certainly open to criticism, which they have received from Epstein and others,¹⁰⁷ but his starting thesis is instructive here. No doubt devising strategies for the implementation of the anti-interference principle—a challenge not taken up in this essay—would garner much critique as well.

If we accept Mill's view, then an anti-interference principle, for equality purposes, captures both the interference of the government with the equal enjoyment of freedoms of the governed and the interference of one man against another. Upon acceptance of the harm principle, it must follow first that government cannot limit the freedom of *some* to do that thing others enjoy the freedom to do, unless allowing those *some* an equal freedom would cause harm to others. Second, it must also follow that the government cannot compel *some* to do for others things to "equalize" their condition if that *some* did not directly cause the *harm* that is asserted to exist in the unequal conditions. And, of course, simply exercising one's own concerns may have accidental or indirect and incidental effects on others (particularly when it comes to the acquisition of finite and competitive goods or in other zero-sum situations, for example), but this is only consequence, not harm.

As to the first point above, a principle of anti-interference means that the government cannot intervene in the equal exploitation of freedoms unless the discriminatory intervention is based on a justifiable belief that those adversely treated will otherwise cause harm. And as to the second point above, the principle means that an individual shall be under an anti-interference obligation of his own vis-à-vis others to not cause any harm that would prevent those others from equal access to such freedoms; and that individual is to otherwise be free from the type of interference from the state that creates redistributive obligations or unequal constraints designed to benefit some others at his expense unless it can be proven that others were directly harmed by his actions and he was somehow unjustly enriched by his imposi-

106. See Richard A. Epstein, *The Harm Principle—And How It Grew*, 45 U. TORONTO L.J. 369, 371 (1995); see also Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 215 (2006).

107. See Epstein, *supra* note 106, at 370; Ripstein, *supra* note 106, at 215.

tion of harms or externalization of the costs of his actions. And as each man stands in a reciprocal relationship with another, one man cannot ask that an innocent man be deprived of some liberty when he has done nothing to surrender his right to be left free of his neighbor's interference—i.e., where he has caused no harms that forfeit or relinquish his freedom from interference.

Simply put, government interference or intervention is justified only when a person's actions cause harm. Differential treatment is justified only when those persons subject to it receive such treatment because the character of the difference is the cause of the harm for which a remedy is sought by the government's intervention and achieved by the inequality in treatment.

The anti-interference bases for reaching these conclusions are not only grounded in the harm principle but also in the basic corollary understanding of externalities and the maxim of *sic utere tuo ut alienum non laedas*.¹⁰⁸ The U.S. Supreme Court has explained that “[t]he doctrine that each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property.”¹⁰⁹ Stated differently, one may act as he wishes so long as he internalizes the costs of his actions, thereby respecting others by not imposing negative externalities. Indeed, the Court has explained as “the very essence of government” the social compact’s authorization for “the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another,”¹¹⁰ as expressed in this *sic utere* maxim. Related adages include “[y]our right to swing your arms ends just where the other man’s nose begins,”¹¹¹ or alternatively, “[m]y property rights in my knife allow me to leave it where I will, but not in your chest.”¹¹²

108. Translated as “[s]o use your own property as not to injure that of another.” BALLENTINE’S LAW DICTIONARY 1178 (3d ed. 1969).

109. *Munn v. Illinois*, 94 U.S. 113, 145 (1876); see also Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967); Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Issues in Urban Runoff Regulation*, 9 CHAP. L. REV. 409, 419–21 (2006).

110. *Munn*, 94 U.S. at 124.

111. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

112. NOZICK, *supra* note 21, at 171 (internal quotation marks omitted).

Of course, the problem becomes how to define harm and what aggravating factors we might require even when a seemingly negative externality occurs so as to hold the perpetrator of the externality liable or responsible to the receptor. A problem arises in application of these maxims when we have too broad a definition of “harm” or “negative externalities.” The next steps of course are determining what harm means, who gets to decide, and whether there can be a means or defense for a limited definition. Undoubtedly, the meaning of “negative” and the meaning of “harm” create implementation problems, and as Harcourt and others suggest, these terms can and have been used as a justification for an increased scope of claimed “legitimate” intervention.¹¹³ The terms can be manipulated to become as mutable as the terms liberty, equality, public interest, or scores of other like terms. That is a legitimate critique of the anti-interference principle. The risk lies in people gathering “findings,” attempting to fit regulations into categories of causation or harm. These standards make implementation of an anti-interference principle difficult. The definitions of these limiting terms inevitably will be susceptible to competing factions as such things always are.

This essay does not endeavor to propose a complete solution to that problem or to outline an implementation plan, other than to suggest that our standards regarding causation and traceability can and should act as a check on broad justifications based on the “collective social harm” (by focusing on causation and traceability standards for particularized activities as a necessary predicate of proof of harm). Only an adherence to a strict definition of causation, harm, and traceability that would exclude avoidance of “collective impact” analysis or protection of “social fabric” type ends should be satisfactory.

Furthermore, only by distilling *unacceptable* negative externalities can we properly define legal rules. We must re-embrace the understanding that not just any injury or incidental negative effect constitutes a legal wrong that suffices to justify government intervention. Mill’s harm principle incorporates the negative externality concept, and also cautions that the scope of things constituting harms (or, “actionable” negative externalities) must be

113. See, e.g., Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

limited to interference with another individual's reciprocal rights to his own liberty:

The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection.¹¹⁴

Harm, in this sense, requires causation between the individual's action and a direct, traceable disruption to the reciprocal liberty of another to live his life with the same *sic utere*-based freedom. As Mill explained, dislike or even disgust of some, or conversely special like or reverence for others, are not justifiable reasons for the discriminatory interference with liberty and choice precisely because such discriminatory allocation of benefits or burdens is not based on the antecedent showing of actual, legal harm in its proper sense and meaning.

So, the most equalizing concept is non-interference—so long as one does not impose externalities on another he should not be constrained in his actions. And, it is this concept—combined with a reciprocal respect for it—that protects the true nature of equality. No one has more rights or privileges than another in the face of each other. And, no one has less either.

The anti-interference principle means let one live her life—so long as she harms no others—and do not otherwise place burdens on that life, living, profit, or pursuit of happiness. That is what we can learn from the *sic utere* maxim and the harm principle. Equality means making no distinctions, no differentiations—no interference unless the person is interfering with others and has “earned” the negative treatment. Unless one does harm, he is entitled to equal opportunity to the privileges and immunities of citizenship that all should share. And to the extent the government chooses to impose burdens, as it is want to do, the burdens should be equal.

114. MILL, *supra* note 104, at 87.

This brings us to an equalizing factor in the anti-interference principle. Along the way in this discussion, one may have questioned whether there is a distinction between equal economic treatment and equal “civil” treatment. There is not. The anti-interference principle can and should be applied neutrally and equally without regard to whether the issue is considered economic, social, or civil. Differential treatment through progressive taxation, for example, *is* differential treatment based not on harm but on mere differences in wealth. Differential treatment based on race or gender—in any direction (whether in directly excluding certain persons or directly preferring others)—*is* differential treatment based not on harm but on pigment or chromosomes. Differential treatment giving some welfare—in any direction (whether it be for the poor or involve corporate subsidies, bailouts, or the like)—*is* differential treatment based not on harm but on a mere social preference for one over another. Creating an institution like marriage yet excluding segments of the population from accessing the institution and all the benefits (and burdens) available in it *is* differential treatment not based on a preference to avoid harm, or precluding someone from a benefit because they have done something legally wrong, but instead based on some artificial classification based on a preference of giving more to some over others.

Obviously, the advocates in some of these philosophical camps—economic rights view versus social rights view—seldom mix. Yet, the anti-interference principle is a neutral doctrine that should align all of these normally divergent interests. A principled stance on equality requires a consistent approach. Equality is equality, regardless of the metric applied. The *fact of* one’s race, gender, sexuality, wealth, and like conditions is not a harm. And, if the *fact of* one’s condition is not a harm, that *fact* cannot be used as the basis for differential treatment—by impediment or propellant alike.

Only facts of traceable harm, with proof of causation, can overcome the presumption against interference with an individual’s liberty that should be applied to test the legitimacy of governmental action. Do not interfere with one’s life unless he is truly interfering with others. Do not constrain or handcuff one’s freedom unless it truly interferes with another’s life or freedom. In the end, principle should supersede special interests or societal commands, and the law should be crafted to protect a person’s

natural equality.¹¹⁵ There is no duty to rescue and no duty to others one does not negatively affect. Imposing affirmative obligations without proving negative externalities, and doing so selectively, is interference with individual freedoms, privileges, and immunities—just like telling the passing firefighters in *Ricci* that they would not be promoted simply because others failed. By passing the test, they did not *impose* negative externalities on others.

Although not posited as a rationale by either the court in *Perry* or the Court in *Ricci*, both results would have been justified in their result under an application of the principle of anti-interference. By advancing one's own interest in succeeding in a job competition or entering into a consensual two-party relationship, those persons are not harming another. Incidental effects not rising to the level of legal wrongs—defined as the infringement of the reciprocal liberty of others—cannot overcome the presumption against interference. With these examples in mind, I hope that ongoing debates on equality will also be informed by the premises that underlie the anti-interference principle. There at least should be a discussion on equality that includes not just race, sex, sexual orientation, or class, but also every form of differential law and policymaking, including things like income discrimination and resource redistribution. Even if not constitutionally mandated, the anti-interference principle is sound guidance for judging the appropriateness of governmental intervention and the inherent limits of state power in the larger context of the jurisprudential debate.¹¹⁶

The anti-interference principle could provide a unifying, consistent, and neutral approach. With its application, one would reach the same results achieved in *Brown*, *Loving*, *Perry*, *Ricci*, and other cases that have invalidated governmental action on equal protection grounds. I contend that anti-interference is really what is, or should be, at the heart of the review in these cases where the bases for state action in creating separate or discriminatory standards or engaging in discriminatory treatment are scruti-

115. See Mencken, *supra* note 92, at 357 (“So far as the natural law is concerned, all men are equal.” (quoting Domitius Ulpianus, *Liber singularis regularum*, c.220)); *id.* (“All men have equal rights to liberty, to their property and to the protection of the laws.” (quoting Voltaire, *Essai sur les mœurs*, 1754)).

116. Cf. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 213 (2004).

nized. Of course, because it has not been an adopted canon and equality jurisprudence lacks a cohesive and consistent doctrine, many other court decisions already exist that muddle our understanding of the proper and legitimate role of the state and the limits on governmental power from an equality constraint. Given political realities, it is unrealistic to predict widespread adherence to such a broad interpretation of the equality concept, but it is worthwhile to inject it into the ongoing equality discussion.

As Mill stated, “The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”¹¹⁷ Unless and until harm is proven, caused by and traced to an individual or group, the government must engage in a practice of non-interference with that realm of individual sovereignty. Equality demands that the government refrain from singling people out for differential treatment unless the stated, initial differential position is itself the thing that causes harm.

CONCLUSION

In the end, again, equality matters. The law will always struggle with its definition. It is not realistic to believe that classifications, preferences, progressive taxation, or other unequal laws will disappear. Yet, if we do not reflect on equality and its foundational elements, we risk getting lost and diverted from its most respectful meaning. The anti-interference principle provides a new prism for analysis of and point of departure for reaching some further substance and clarity in the equality discourse.

117. MILL, *supra* note 104, at 11.