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THE PROMISE OF EQUALITY: A COMPARATIVE ANALYSIS OF THE CONSTITUTIONAL GUARANTEES OF EQUALITY IN INDIA AND THE UNITED STATES

Nicole Lillibridge*

INTRODUCTION

All men are not created equal. This assertion seems wrong, even immoral, as modern liberal thought has established the inherent, equal worth of every person. But true equality among people cannot be achieved because there are natural inequalities among us. We recognize that one individual may have greater innate literary or athletic talent than another, or superior beauty or strength. These talents, in a just society, should be rewarded even though they have no moral significance. Therefore, some measure of discrimination among people is legitimate, and even mandated under a conception of a just society.¹ The difficulty in establishing and furthering such a meritocratic society, however, arises from the pernicious effects of longstanding illegitimate and immoral bases for discriminating among people, such as gender, race, and class. Over time, these differences compound, so that the child born into a relatively privileged family often gains certain advantages without any demonstration of superior talent, ability, or moral worthiness.²

This Article explores the differing conceptions of equality in the very different constitutional systems of India and the United States. The respective histories and predominant religions in each country have shaped divergent views concerning equality. India's long and complex history of entrenched social hierarchy has led its people to view the concept of equality as rather collective; in particular, the idea

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¹ JOHN RAWLS, *A THEORY OF JUSTICE* (1971), *reprinted in* GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 322 (2d ed. 1995) ("The natural distribution [of innate abilities and the chance of social circumstance] is neither just nor unjust; nor is it unjust that some men are born into society at some particular position. What is just and unjust is the way that institutions deal with these facts.")

² The morally arbitrary foundations of distinctions among such groups form one kind of argument against class inequalities. This could be considered a critique of class inequality at its foundations, as opposed to a present-time conception of the injustice of class inequality, which would focus on the disparity between a small class of extreme affluence and a large class of people with little to no wealth or resources.

of perfect equality, for many Indians, would chiefly include elimination of caste barriers and inferiority. In the United States, historical and religious influences resulted in, and perpetuate, a view focused on equality of individuals. This view has been described as “equality of opportunity,” or as embodying an “anti-discrimination principle.”³

Every aspect of national expression reflects the self-identification of the people in a nation as predominantly individualist or collectivist — whether in the areas of economic policy, foreign affairs, trade, or human rights. This Article primarily focuses on the issue of class equality, although that focus will hardly prove distinct. In India, an examination of class inequality must inevitably focus on caste inequality, yet elements of racial inequality and gender inequality will certainly intersect. Similarly, in the United States, while the concerns of the poor and of blacks are not fully aligned, black Americans are disproportionately poor. Moreover, the American paradigm of individual rights finds its strongest expression in the politics of economic disparity.

National identification with either of these paradigmatic worldviews — individualist or collective — and the resulting conception of equality as it existed at the time of constitution drafting, find embodiment in the documents themselves. In addition, I would argue that those constitutional imperatives subsequently mold and shape a national ideology of equality. In particular, India’s hierarchical social order and the historical degradation of certain groups led to compensatory discrimination programs in its constitution. Subsequently, the constitution shaped the view of social organization, with upper-caste groups now perceiving themselves as disadvantaged. Established after independence, the Constitution of India reflects the assumption that Indian society represents inequality, and the provisions regarding compensatory discrimination programs propose reforms toward that goal, with an ultimate aim of ameliorating unequal effects.

Americans’ belief that their nation is essentially classless has led to a Constitution uniquely focused on individual rights. An examination of the 14th Amendment as representative of a color-blind approach toward remedying inequalities reveals how the assumption that the United States is a nation of equals has been used to hamper reforms, in particular by disregarding the apparent effects of societal inequality and focusing instead on the implementation of a formalistic antidiscrimination principle. This view allows the effects of real inequality to be dismissed, at least in part, as representing the natural distribution of innate talents and abilities of each individual, rather than viewing existing equality as a product of unequal societal treatment over time.

³ See John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *FORDHAM L. REV.* 423, 429–41 (2002).

This Article first explores the consciousness of equality in India. Part I discusses the historical and religious roots of India and the influence of colonization. The Hindu caste system is addressed in Section A, while Section B details the role of colonialism in India's history. India's modern constitutional representations of equality are explored in Part II, including the Indian Supreme Court's role in furthering these constitutional aims. Part III of this Article focuses on the United States's individualistic approach to equality. Particular religious and philosophical influences on the framing of the Constitution are addressed in Section A. The conception of equality expressed in the Constitution itself, including subsequent amendments and U.S. Supreme Court jurisprudence, is the focus of Section B. A comparative analysis of these systems, provided in the Conclusion of this Article, demonstrates that a state's view toward equal rights impacts its ability to move toward greater economic and social equality and fulfill the mandates of its foundational documents. The Conclusion further discusses recommendations for greater progress in all systems striving for a better model of equality and, ultimately, more just societies.

I. INDIA'S HISTORICAL AND RELIGIOUS ROOTS

While the caste system and its origins in Hinduism provide the central focus of this examination of India's view of equality and social reform, it would be dismissive and oversimplified to treat the system itself as disconnected from a greater system of belief. Moreover, India's religious history and social history are closely related. As one of the world's oldest civilizations, the entire Indian subcontinent weathered many social changes and was exposed to the influences of several religions and cultures.⁴ For centuries, it has been a place of very diverse religious and ethnic groups, yet Hinduism has remained the dominant religion despite the encroachment by outside religions,⁵ such as by Christian missionaries, who have been active for many centuries.⁶ Internal religious movements, such as Buddhism, Jainism, and Sikhism emerged as strong religious influences but did not threaten the strength of Hindu belief to a serious degree.⁷

Hinduism has been described as an "experience" or an "attitude of mind," rather than a doctrinal code.⁸ Astounding varieties of spiritual belief are encompassed under the overarching label, including polytheism, pantheism, monotheism, as well

⁴ See A.L. Basham, *Introduction to A CULTURAL HISTORY OF INDIA* 1, 1-4 (A. L. Basham ed., 1975).

⁵ See A.L. Basham, *Conclusion to A CULTURAL HISTORY OF INDIA*, *supra* note 4, at 487, 494.

⁶ S. Radhakrishnan, *Hinduism, in A CULTURAL HISTORY OF INDIA*, *supra* note 4, at 60, 62.

⁷ *Id.*

⁸ *Id.* at 63.

as ancestor-worship or idolatry.⁹ Such diversity can be explained, in part, by the emphasis the Hindu tradition places on tolerance of other views¹⁰ and the encouragement of discussing reform.¹¹

A. *The Hindu Caste System*

Central to Hindu belief are the ideas of *samsara*, the nearly unending circle from death to rebirth, and *karma*, the law of moral cause and effect. As Radhakrishnan explains, "The Hindu social code does not ask us to impose an unnatural order on the world. We discover the intentions of nature in the constitution of men and women and it is our duty to act agreeably on them."¹² Radhakrishnan seems to refer to the system of the *varnas*, or the caste system, which has its roots in Hindu cosmology.

Dharma provides the central theme of the Hindu *sastras*, or ancient texts. While dharma can have various meanings, it basically refers to duties or codes of conduct mandated by the cosmic order. The moral prescription of dharma focuses on two aspects of human life: life stages¹³ and class.¹⁴ Dharma dictates varying duties for people depending on their position in society. According to the creation story of Hinduism, the primordial body of Brahma (or God or Vishnu, depending on the sect of Hinduism) created the world by dividing his body into four sections.¹⁵ Each section represented a *varna*, or caste, into which people would be divided. The priests (Brahmans) were at the top of the hierarchical order, followed by the warriors

⁹ *Id.* at 67.

¹⁰ *Id.* at 70. Radhakrishnan wrote:

A religion that is based on the central truth of a comprehensive universal spirit cannot support an inflexible dogmatism. It adopts an attitude of toleration not as a matter of policy or expediency but as a principle of spiritual life. Toleration is a duty, not a mere concession. In pursuance of this duty Hinduism has accepted within its fold almost all varieties of belief and doctrine and treated them as authentic expressions of the spiritual endeavor, however antithetic they may appear to be. Hinduism warns us that each of us should be modest enough to realize that we may perhaps be mistaken in our views and what others hold with equal sincerity is not a matter for ridicule.

Id.

¹¹ *Id.* at 71 ("Trying to impose one's opinions on others is neither so exciting nor so fruitful as joining hands in an endeavour to attain a result much larger than we know.").

¹² *Id.* at 75.

¹³ The obligations of a person depended on his life stages, which progressed from "active participation in the affairs of the world to a life of retirement and contemplation." STEPHEN A. TYLER, *INDIA: AN ANTHROPOLOGICAL PERSPECTIVE* 77 (1973).

¹⁴ *Id.*

¹⁵ NICHOLAS B. DIRKS, *CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA* 19 (2001).

(Ksatriyas), the merchants (Vaiśyas), and finally the laborers or servants (Sudras).¹⁶ Each of these groups held different societal obligations and each of these divisions came to be known by occupational functions,¹⁷ which also reflect the caste hierarchy's underlying obsession with purity. The preoccupation with the idea of purity is based on the central belief of maintaining order in carrying out the sacrificial ritual.¹⁸ Tyler describes the role of the ritual in Hindu society as integral.

Indian thought has allowed only two opposed possibilities: the correspondence between cosmic order and human experience is mediated through the social order, or it is expressed directly as a relation between the individual and the cosmos. This opposition has far-reaching consequences. *If the correspondence is mediated through the social order, then the individual is not a datum of society, but if the correspondence is between the individual and the cosmos, then society is not a datum of individual experience.* Indian thought thus establishes two mutual exclusive categories: the individual is either totally subject to society, or he is totally free of it. There is no middle way. . . .

. . . .

Axiomatic in Indian thought is the notion that ritual is the connection between the cosmos and the social order. To perform a rite correctly is to participate directly in the cosmic process.¹⁹

This explanation of the ritual process demonstrates another differentiation among the castes. The priests perform the rite, the warriors commission it, and the merchants provide the requisite goods and services to carry it out.²⁰ As the Shudras may

¹⁶ *Id.* Despite wide recognition of the Brahmins as the superior caste, there have been claims to this privilege by the Ksatriyas, which are supported by ambiguities in the creation accounts. TYLER, *supra* note 13, at 81. Moreover, the merchant class is perceived to be far below the Ksatriyas, although their historical success in business has led them to marked economic success in some instances despite their clearly inferior status in the social hierarchy. *Id.*

¹⁷ The occupational associations may have been imposed subsequent to the original creation myth by theologians (i.e., Brahmins). TYLER, *supra* note 13, at 23. The difficulties this uncertainty poses for historical study are addressed *infra* Part I.B.

¹⁸ DIRKS, *supra* note 15, at 57.

¹⁹ TYLER, *supra* note 13, at 24 (citation omitted).

²⁰ DIRKS, *supra* note 15, at 20–21.

not participate at all, their role in the order is to facilitate the ability of the other groups to continue the ritual, by acting as their servants.²¹

Tyler elaborates on the other category of Indian thought — individualism:

In contrast to this necessarily hierarchic structure of society is the maximal freedom and egalitarianism entailed by the view that the individual is the locus of the correspondence between macrocosm and microcosm. Just as the very notion of society implies hierarchy, the notion of free individual implies total egalitarianism. Where there are only free individuals there is no society. Consequently, the notion of freedom in India has always had an extra mundane reference and has always involved a denigration of ritual. . . . [This view no doubt] represents an archaic mythological opposition between man in society and man in a state of nature The origin of society entails the death of freedom and the subjugation of the individual.²²

The social hierarchy of the caste system can be envisioned, therefore, as inextricable from the essential practice of Hinduism itself.

Indian society cannot be cleanly divided into four castes, nor do these castes adequately categorize all of Hindu society. First, the creation legend does not account for the “outcastes” or “untouchables,” who identify themselves as the “Dalit” classes.²³ While the origin of these people in the creation story is disputed,

²¹ *Id.* at 21.

²² TYLER, *supra* note 13, at 24–25 (citation omitted).

²³ There are various ways in which to refer to this group today, in large part due to greater caste consciousness arising from the reforms of the twentieth century. Briefly, the constitution outlawed untouchability as a practice in 1955, giving rise to the term “ex-Untouchable.” Eleanor Zelliot, *Introduction to VASANT MOON, GROWING UP UNTOUCHABLE IN INDIA: A DALIT AUTOBIOGRAPHY*, at xi (Gail Omredt trans., 2001). After the constitution instituted the practice of compensatory discrimination, discussed in detail *infra* notes 92–108 and accompanying text, the term “Scheduled Castes” came into common usage. *Id.* Beginning in the 1970s, the term “Dalit” arose to refer to the ex-Untouchables, a name meaning “downtrodden or broken down but used with pride as a self-chosen name that reflects no idea of pollution and can include all who identify themselves as oppressed by the caste system.” *Id.* Those identifying themselves in this manner use this label as a break from the hierarchical caste model’s focus on pollution, but also to break away “from the patronage of Gandhian ideology.” *Id.* Gandhi used the term “Harijan,” meaning “people of God” to refer to ex-Untouchables. *Id.* at x. The term was seen as patronizing by some, probably because of disagreement with his views on caste reform. *Id.* Further discussion of Gandhi’s view of the Dalit groups will be discussed *infra* notes 57–64 and accompanying text. For these reasons, where possible, the ex-Untouchables will be referred to as Dalits.

it appears that they were not part of the creator's body.²⁴ Ghurye noted that "the ideas of untouchability and unapproachability arose out of the ideas of ceremonial purity, first applied to the aboriginal Shudras in connection with the sacrificial ritual and expanded and extended to other groups because of the theoretical impurity of certain occupations."²⁵ The treatment of this group of people represents the ultimate in disparate treatment among the groups of Indian society.²⁶

Second, and perhaps more importantly, the four idealized Hindu castes do not reflect the true complexity of the Indian social hierarchy. Hierarchies exist in part because of the progressive duties arising out of life stages. Moreover, operating parallel to the four-fold caste system, regional and local differences greatly modified this basic model. The thousands of sub-castes within each larger caste group have been said to derive from hypogamous, or inter-caste, marriages.²⁷ For this reason, an understanding of the origins and role of the caste system generally does not provide a very accurate picture of the ways in which groups identified themselves and interacted in India either historically or today. However, the widely accepted (though doubtful) theory that hypogamous marriages resulted in the myriad social divisions "demonstrates the pervasiveness of an ideal order based on the assumption that the underlying relativity of human nature should be materially expressed in hierarchical social groups."²⁸

B. India's History and the Effects of Colonialism

The foregoing history of Indian religion and civilization presents only one possible understanding of the roots of Indian social stratification. Others argue that the effects of British colonizers forever altered the world's view of India, and India's view of itself.²⁹ Reasons for this shift are manifold, but one key reason is the source

²⁴ G.S. GHURYE, *CASTE AND RACE IN INDIA* 307 (5th ed. 1969); see also *supra* note 15 and accompanying text.

²⁵ GHURYE, *supra* note 24, at 180.

²⁶ The term "untouchable" accurately represents the wider societal perception of this large group of people. "Prabu mentions that untouchability refers to denying even human status to a group of human beings . . ." SUNEILA MALIK, *SOCIAL INTEGRATION OF SCHEDULED CASTES* 4 (1979) (citing P. N. Prabu, *Report of the Seminar on Casteism and Removal of Untouchability* 104, Indian Conference of Social Work (1955)). The untouchables often face treatment worse than animals. *Id.*

²⁷ TYLER, *supra* note 13, at 84.

²⁸ *Id.* Tyler notes that further evidence of this conceptualization of society is shown in the apparent inconsistency of these theories with the reality of the world. *Id.* When contradictory facts emerged to refute this theory, Hindu thinkers did not alter their model of the world; they altered the facts. *Id.* The multitude of groups continued to be "attributed to lapses in the observance of the rules of dharma." *Id.*

²⁹ For an extended and comprehensive discussion of these issues, which cannot be fully explicated here, see generally DIRKS, *supra* note 15.

of historical documentation of much of India's pre-colonial past. The view of India as adopted by Britain and the West draws from narrow sources — primarily the Hindu “law books,” which were the work of Brahman priests and early European explorers.³⁰ The early studies of Indian culture provided by the British reflect their own Western biases, but also the biases of the Brahmans, as most early British ethnographers only gathered information from this group and relied on their earlier interpretations of scripture.³¹ While this phenomenon provides a compelling inquiry into the effects of colonization on culture, the difficulty of fully understanding Indian culture became critical at the time of constitution drafting. As an independent India sought to define itself, the years of colonization ultimately helped further entrench Indians' essentially collectivist view of human society, and, of course, the role of equality in that society.

Flawed accounts of Indian history likely resulted from both innocent and nefarious reasons. Very early explorers to India did not mention caste, or did not do so in great detail.³² Louis Dumont in *Homo Hierarchicus* provided one of the first historical records of Indian history.³³ Dumont asserted that “a Western audience . . . will misunderstand caste and hierarchy, because of the modern denial of principles that seem opposed to individualism and equality.”³⁴ That the British seemed perplexed by Indian social structures is not entirely surprising, nor is it surprising that they were very concerned with understanding how class operated, considering the importance of class in nineteenth-century Britain. Prior to British rule, the caste system functioned as only one of several ways of expressing identity. On local levels, the influence of one group over another changed frequently. These groups included temple communities, territorial groups, and agricultural or trading collectives.³⁵ The power of these groups could rise or fall with their fortunes, or

³⁰ CYNTHIA TALBOT, PRECOLONIAL INDIA IN PRACTICE: SOCIETY, RELIGION, AND IDENTITY IN MEDIEVAL ANDHRA 48 (2001) (“Recent research on the early colonial period has, however, increasingly called into question the accuracy of images of ‘traditional’ South Asia derived from ethnographies and brahmanical literature.”). Talbot generally limits the scope of her book to the region of Andhra, one of the least-studied areas of India, but today it represents India's largest state. In fact, such recent scholarship represents a sharp change from early histories, which attempted to characterize the entire subcontinent as a single cultural and social entity, despite the incredible diversity of views and social arrangements.

³¹ See DIRKS, *supra* note 15, at 19–31 (discussing the flawed historical record due to Western and Brahmanical biases).

³² See *id.* at 20.

³³ See LOUIS DUMONT, HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS (Mark Sainsburg et al. trans., 1980). Dumont lived in India as a missionary, which presents difficulties apart from those of elite Brahman biases or colonial perspectives.

³⁴ DIRKS, *supra* note 15, at 4 (discussing Dumont's belief that the extreme individualism of the West is a roadblock to understanding caste).

³⁵ DIRKS, *supra* note 15, at 11–14.

even by royal decree.³⁶ Faced with such a complex society, it is no wonder that British leaders welcomed James Mill's account of Indian society.³⁷ Mill derived his view of caste from a British translation of *The Laws of Manu* (*Manu Dharma Sastras*), written by Brahman priests and scholars, which focused on the topics of varna — the social responsibilities of different castes.³⁸ The text's eventual position as a canonical explication of Indian society, of course, helped to solidify a Brahman-oriented worldview as emblematic of Indian society generally.³⁹

Revisionist examinations of Indian culture assert that "brahman dominance was greatly heightened by colonial practices of the nineteenth century."⁴⁰ Dirks argues that caste is not essential to Indian society, history, or tradition — contrary to popular belief and much scholarship. He argues that British rule "ma[de] caste the central symbol of Indian society."⁴¹ The colonizers did not create it, but under colonial influence, it became the main, if not the only, hierarchical social system of organization, superceding other, complex variations of traditional Indian social relationships of identity and community.⁴²

At the beginning of the twentieth century, the British preoccupation with caste spread to Indians in general, as they too began to view it as a primary institution of Indian social organization.⁴³ Caste became central to nearly every political or social-reform position. Part of this phenomenon was the legacy of intentional British influence on Indian doctrine. Biased presentations of India's pre-colonial past were not necessarily the unintentional misunderstandings of aliens to the social system. By making caste the core institution of Indian society, the colonizers strengthened and justified colonial rule.⁴⁴

During the last stages of colonization, caste was used to denounce Indian society, "particularly when it was seen as a force impeding social equality and the better treatment of women in Indian society."⁴⁵ Further, it was denigrated for its divisiveness and "portray[ed] . . . as a barrier to the gradual unification of the Indian

³⁶ *Id.* at 13.

³⁷ *Id.* at 31. After Mill, a British journalist, published his book, he was offered lifetime employment by the East India Company. His account refuted any suggestion that Indian society represented any meritorious values, despite never visiting the country or speaking any of its languages. *Id.* at 32.

³⁸ *Id.* at 34.

³⁹ *Id.* at 34.

⁴⁰ TALBOT, *supra* note 30, at 48.

⁴¹ DIRKS, *supra* note 15, at 5.

⁴² *Id.*

⁴³ *Id.* at 232.

⁴⁴ *Id.* at 14–15.

⁴⁵ *Id.* at 232. The role of women in Indian society poses interesting questions in terms of an Indian view of equality. Women did not have a prominent role in the traditional view of Indian society, and even if they held superior positions in terms of caste, they nonetheless were consistently inferior to men, at least men of their own caste. *Id.* at 72.

people under the essentially beneficent, modernizing rule of the British.”⁴⁶ As Sumit Surkar remarked, “the social injustice argument, while not absent, remained secondary.”⁴⁷

The ultimate result of these influences is that Indians have come to view their history as representing a hierarchical social order, in which Indians frequently identify themselves as members of a caste group rather than individuals.⁴⁸ Suneila Malik, in 1979, discussed a study aimed at improving social mobility among the Dalit castes through education.⁴⁹ The results indicated that many people identified themselves by caste, but that the less educated a member of a Scheduled Caste was, the more likely he was to identify himself as of a lower caste.⁵⁰ Malik also documented findings regarding the degree of respect afforded to certain Dalits. Studies found that while Chamar schoolteachers garner a higher degree of respect than their Dalit caste usually affords, these individuals still garner much less respect than teachers of higher castes.⁵¹ As indicated by B.S. Cohn in 1955, “Education is an individual achievement, but even educated *Chamars* cannot escape an awareness that mobility for them, too, must be a group phenomenon.”⁵² Although one might expect some improvement in the perception of Dalits since these studies were published, there is evidence that identification with one’s caste may have grown even greater.⁵³ Whether imposed by Brahman bias or colonial power, this self-identification had no greater impact than on the caste-reform movements of the twentieth century and the drafting of the Constitution of India.⁵⁴

II. INDIA’S MODERN CONSTITUTION AND CASTE-REFORM MOVEMENTS

As India gained its independence from colonial rule, re-establishing Indian society required a vision of the history of Indian society. The influences described in the previous section helped shape that national story, resulting in much conflict in determining how to address the inequalities of caste in the constitution. As Nehru

⁴⁶ *Id.* at 232.

⁴⁷ SUMIT SUKAR, *WRITING SOCIAL HISTORY* 365 (1997).

⁴⁸ Dirks argues that British influences made caste the essential symbol of Indian social organization, but he acknowledges that Indian history demonstrates that hierarchy and rankings of social groups have played a significant role. *See* DIRKS, *supra* note 15, at 14.

⁴⁹ MALIK, *supra* note 26, at 44–45.

⁵⁰ *Id.* at 45.

⁵¹ *Id.* at 52.

⁵² Bernard S. Cohn, *The Changing Status of a Depressed Caste*, in *VILLAGE INDIA* 53, 74 (McKim Marriot ed., 1955).

⁵³ Even as Dalits gain greater levels of education and success, the rise of violence by upper-caste Indians suggests there may have been a rise in caste consciousness among the more privileged castes. *See infra* note 103 and accompanying text.

⁵⁴ *See* MALIK, *supra* note 26, at 6–7.

explained: "The conflict [of reform efforts] is between two approaches to the problem of social organisation, which are diametrically opposed to each other: the old Hindu conception of the group being the basic unit of organisation, and the excessive individualism of the west, emphasizing the individual above the group."⁵⁵ The debate over how to constitutionalize equality in a caste-based system can be broken into two camps, best represented by their leaders. These contrasting positions regarding caste and caste reform continue to define the debate to this day.⁵⁶

Mahatma Gandhi argued that the inequalities faced by Dalits would be best remedied by a "change of heart" among caste Hindus.⁵⁷ While early on he criticized the poor treatment of "Harijans" (as he called the group of ex-Untouchables), Gandhi hesitated to condemn the use of caste as a valid social hierarchy, instead looking for ways to improve upon the existing hierarchy.⁵⁸ He wanted to reinstate the "imagined pure state of Hindu society," composed of four distinct castes.⁵⁹ While this ambiguous position may have meant that he proposed a society based on current occupational talents, he likely envisioned a society based on birth. Gandhi "subscribed to the view 'once born a Brahmin always a Brahmin.'"⁶⁰ Dirks notes: "[Gandhi] felt that caste as a ranked structure of groups was bad but that the principles of varna and asrama (stage of life) on which caste was based, and of which caste could be seen as a degraded form, were noble and well worth reviving as ideals."⁶¹ His position on caste provided an interesting conception of the possibility of equality among unequals. Furthermore, Gandhi's view that caste was an integral part of Indian society and ultimately defensible, led him

⁵⁵ JAWAHARLAL NEHRU, *THE DISCOVERY OF INDIA* 245–46 (Oxford Univ. Press 1985) (1946).

⁵⁶ The debate between Gandhi and Ambedkar is more salient than ever. While Ambedkar was convinced that political identification with one's position would allow for social reform, ultimately requiring conversion from Hinduism, Gandhi was very concerned that such identification would lead to inter-caste conflict. DIRKS, *supra* note 15, at 277. Caste violence is as widespread today as it has ever been; in some regions, the violence has increased. *Id.* at 278.

⁵⁷ Zelliott, *supra* note 23, at x. As previously noted, many Dalits felt Gandhi's approach was patronizing.

⁵⁸ DIRKS, *supra* note 15, at 233.

⁵⁹ GHURYE, *supra* note 24, at 404–05. Ghurye argues that a return to the four-caste division would be unwise, unworkable, and pointless. He finds no modern justification for a reorganization in order to incorporate the Dalits or to streamline the castes back into four manageable groups, which was essentially Gandhi's position on caste. The rationale based on occupation appears useless, and the same problems with caste would recur if individuals' occupations were dictated by birth, especially in light of the problems arising from inter-caste marriages. *Id.* at 406.

⁶⁰ *Id.* at 405.

⁶¹ DIRKS, *supra* note 15, at 268.

to oppose further politicization of caste groups.⁶² As such, he strongly opposed the more radical and generally more popular views of Dr. B.R. (Babasaheb) Ambedkar,⁶³ which largely shaped the view of caste in India's modern constitution.⁶⁴

Ambedkar viewed caste as an "impediment to social justice, equality,"⁶⁵ and as a social construct developed by Brahmans to further their own interests. Later, according to his view, the legal text of *Manu* gave the caste system its religious justifications.⁶⁶ Ambedkar advocated for a separate electorate, in large part because of his distrust of majoritarian politics.⁶⁷ He did not believe that majorities could elect minority representatives who would truly further the interests of the Dalits. For Ambedkar, to accept minority political representation would itself be a concession to caste hierarchy.⁶⁸ The Communal Award of 1932 was passed in response to Ambedkar's movement toward a separate electorate for Dalits.⁶⁹ Yet, Gandhi's fierce opposition to such a separate electorate led him to announce a fast until death.⁷⁰ Political pressure arising from Gandhi's fast led to the compromise of the Poona Pact, which kept a communal electorate, but increased the number of seats for Dalit representatives.⁷¹

More than a debate over politics, the debate between Gandhi and Ambedkar can be seen as one attempting to define Indian society itself. As discussed earlier, the

⁶² MALIK, *supra* note 26, at 3. Gandhi opposed both parties based on caste and separate electorates focused on caste representation. *Id.*

⁶³ Ambedkar was at least more popular among the Dalits. The introduction to the autobiography of Vasant Moon — an example of a Dalit who rose to success and influence — characterizes Ambedkar as a "hero so important he is described as a 'wave,' and surely no despised group has ever had such a meaningful leader as [Ambedkar] was (and is) for awakened and ambitious Dalits." Zelliott, *supra* note 23, at ix. Moreover, as Dirks points out, "[d]espite continued resentment and debate on the part of some, there has been general unanimity about the importance of constitutional provisions and guidelines concerning reservations for scheduled castes and tribes." DIRKS, *supra* note 15, at 279. These reservations form the core of the constitution's compensatory discrimination program, which was proposed and included by Ambedkar. *Id.*

⁶⁴ Ambedkar is known as the "father" of the Constitution of India. *Id.* at 265.

⁶⁵ *Id.*

⁶⁶ *Id.* at 266–67.

⁶⁷ *Id.* at 270–71.

⁶⁸ *Id.* at 270.

⁶⁹ *Id.* at 269.

⁷⁰ *Id.*

⁷¹ *Id.* Also resulting from the Poona Pact negotiations was a resolution outlawing untouchability. This ended discrimination regarding Dalit use of public wells, schools, and roads, as well as the demanding of temple entry for Dalits. Gandhi supported the temple entry provision, but Ambedkar viewed this change in position as an attempt to include untouchables in a system that would continue to subvert their role in society despite their new entry into Hindu temples. At this point, Ambedkar began to grow more hostile toward Hinduism itself. *Id.*

role of Hinduism has played a very essential and influential role in Indian society. For Gandhi, “[c]aste [had] nothing to do with religion.”⁷² Late in life, Ambedkar came to believe that caste could only be eliminated by purging society of the Brahmans. This would require a revolution in the way the holy scriptures were read, and his argument questioned the moral basis of Hinduism itself. In fact, two months before he died, Ambedkar converted to Buddhism despite his longstanding secularism, and called on all Dalits to do the same. He realized that “as an untouchable, that he could neither undo nor escape the horrible embrace of Hinduism and caste society.”⁷³ The nuanced arguments of some, including Gandhi, that caste, Hinduism, and Indian society were all separable constructs rang hollow to Ambedkar, a Dalit himself.⁷⁴

As its primary drafter, Ambedkar’s greatest impact on the Constitution of India was the allowance for positive, or compensatory discrimination in favor of the Dalits.⁷⁵ In these provisions, he demonstrated his conviction that the Dalits “could only thrive through constitutional negotiation around their status as an oppressed and disenfranchised minority.”⁷⁶ Indians, in accepting his influence on the draft constitution, embraced this view.

A. India’s Modern Constitution

The debate between Gandhi and Ambedkar represents the clearest sides of the caste-reform movement. Prior to drafting the constitution, it was widely acknowledged that the caste system required change, if only as a reaction to the constant claim by the colonizers that Indian society was incompatible with modernity.⁷⁷ It should be noted that there are two kinds of possible change in the caste system. First, there is positional mobility, which focuses on the individual’s ability to transcend caste barriers.⁷⁸ A second kind of change — structural mobility — subverts the heredity-based hierarchy itself, and therefore leads to structural change.⁷⁹ Although it is widely accepted that social mobility in traditional Indian

⁷² DIRKS, *supra* note 15, at 267 (quoting Mahatma Gandhi, *A Vindication of Caste*, HARIJAN, July 18, 1936, reprinted in 1 DR. BABASAHEB AMBEDKAR, WRITINGS AND SPEECHES 83 (1979)).

⁷³ DIRKS, *supra* note 15, at 271.

⁷⁴ *Id.*

⁷⁵ *Id.* at 278.

⁷⁶ *Id.* at 265.

⁷⁷ *Id.* at 11. “Caste is a specter that continues to haunt the body politic of postcolonial India. Whether in constitutional claims about the abolition of caste discrimination or in political claims about the formation of the national community, it has become the subject of national shame.” *Id.* at 17.

⁷⁸ MALIK, *supra* note 26, at 2.

⁷⁹ *Id.*

society was very closed and caste-determined, this is belied by evidence of occasional movement of an individual to a higher (or lower) caste. However, such an individual success story would be a “positional and not structural change.”⁸⁰ After achieving their independence, Indians pushed for structural change.⁸¹

The Constitution of India clearly reflects a group-oriented approach to equality. The modern democratic constitution came into effect on January 26, 1950.⁸² Its preamble pledges to secure justice, liberty, and equality and to promote fraternity.⁸³ As one scholar has noted:

Justice is specifically described to be of three types, not only political but economic and social as well. Equality is of not only equal opportunity but also of status. Justice and Equality, as thus defined, between them, cut the very roots of caste. Citizens of India . . . avowed that the purpose of their political association is to guarantee to every citizen not only equality of opportunity, but absence of unequal treatment in social and economic matters.⁸⁴

Articles 14–18 of the Constitution of India address elements under the rubric “Fundamental Rights — Right to Equality.”⁸⁵ These protect individuals from discrimination on the basis of caste. Article 14 states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”⁸⁶ Article 15 prohibits discrimination in the access to public facilities, but reserves power for the government to make “any special provision for the advancement of any socially and educationally backward classes or citizens or for the Scheduled Castes and the Scheduled Tribes.”⁸⁷ The

⁸⁰ *Id.*

⁸¹ *See id.* at 6–7.

⁸² *See This Day in History: Republic of India Born: January 26, 1950*, <http://www.historychannel.com/tdih/tdih.jsp?month=10272953&day=10272991&cat=10272946> (last visited Feb. 22, 2005).

⁸³ INDIA CONST. pmbi.

⁸⁴ GHURYE, *supra* note 24, at 409.

⁸⁵ INDIA CONST. arts. 14–18.

⁸⁶ *Id.* at art. 14.

⁸⁷ *Id.* at art. 15, cl.4; *see also* GHURYE, *supra* note 24, at 410. While explicitly focused on the issue of caste in several places, the Constitution of India actually refers to class in several ways. First, at times reference is made to “backward classes,” which is defined as “socially and educationally backward,” and interpreted as referring to outcaste and low-caste citizens. *See id.* at 412. This label is also used in Article 340, which addresses provisions for educational positive discrimination. INDIA CONST. art. 340. A second manner in which lower castes are labeled is found in Article 46, which requires the state to protect “weaker sections of the people,” and when considering this provision’s context, seems to refer to the same

practice of untouchability is prohibited under Article 17, and Article 18 abolishes the use of titles.⁸⁸

In addition to these clear fundamental rights provisions, numerous other provisions complement the idea of equality in broad terms. Article 38 includes the following provision: “The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also *amongst groups of people* residing in different areas or engaged in different vocations.”⁸⁹ It should be noted, however, that Article 38 appears in Part IV, Directives of State Policy. The articles in this section are “not . . . enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”⁹⁰

Article 46 also falls under this rubric in demanding protection of the “weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”⁹¹ Although this appears as an unenforceable state directive, more clear provisions appear elsewhere which firmly entrench compensatory discrimination for the Scheduled Castes.⁹² Article 46 is furthered by Article 340, which provides for an appointment of a presidential commission to investigate the conditions of the backward classes in order to make policy recommendations.⁹³ Article 335 gives additional special consideration to Scheduled Castes by reserving to them a certain proportion of government posts — generally highly desirable, much sought-after

group as “backward classes” although there is some ambiguity. See GHURYE, *supra* note 24, at 413. Finally, and most important for constitutional purposes, the so-called “Scheduled Castes” are given special consideration in political representation and in hiring for government positions, among other things. This term, although undefined in the constitution, refers to Dalit groups and its scope is determined by the President, as provided in Article 341 of the constitution. See GHURYE, *supra* note 24, at 306.

⁸⁸ INDIA CONST. arts. 17, 18.

⁸⁹ *Id.* at art. 38, cl. 2 (emphasis added).

⁹⁰ *Id.* at art. 37.

⁹¹ *Id.* at art. 46.

⁹² Entitled, “Part XVI: Special Provisions Relating to Certain Classes,” Articles 330–42 carry out the aims of provisions related to equality. For example, the Scheduled Castes, as categorized by the President, are given proportional representation via reserved seats in both houses of the legislatures and in the state legislatures, but these reservations were scheduled to cease after 1960. India Cen. Acts No. 43 (1950), The Representation of the People Act, New Delhi, 12 May 1950. The descheduling effort has not begun. The sharp rise in violence against scheduled castes — including murder, rape, and arson — have eliminated the driving argument for the descheduling program — that untouchability no longer existed. INDIA CONST. arts. 330–42. See DIRKS, *supra* note 15, at 280.

⁹³ INDIA CONST. art. 340.

positions.⁹⁴ The system of reservations remains one of the most hotly debated aspects of the general compensatory discrimination program.

The caste-reform approach of the constitution has not been uneventful. In 1990, sixty-three students committed suicide by self-immolation and nearly 100 others made attempts.⁹⁵ Another 100 were killed in confrontations with police at protests.⁹⁶ The cause of these demonstrations was Prime Minister V. P. Singh's long-awaited implementation of the 1980 Mandal Commission recommendation in the early 1990s, which imposed quotas for the "backward classes" in government employment and the higher levels of education.⁹⁷ The Commission recommendation essentially criticized the approach of equality of opportunity, asserting that "the mere prohibition of discrimination . . . [was] insufficient to remedy the profound social effects of the caste system."⁹⁸ The Report claimed: "People who start their lives at a disadvantage rarely benefit from equality of opportunity . . . Equality of opportunity is also an asocial principle, because it ignores the many invisible and cumulative hindrances in the way of the disadvantaged."⁹⁹ Litigation challenging the report resulted in three months of oral argument before the Indian Supreme Court in 1992.¹⁰⁰ The court approved several basic principles regarding affirmative action implementation.¹⁰¹ Additionally, it held that the reservation programs should not be regarded as an exception to the constitutional protection of equality, but rather as a means of accomplishing true equality.¹⁰²

Part of the impetus for the continued opposition to reservation programs lies in the growing insecurity of upper-caste students regarding their future ability to succeed.¹⁰³ Many opponents of reservation policies also believe the policies are colonial in character. The first such policies were actually developed under colonial rule.¹⁰⁴ As noted by André Bétaille, an influential writer on caste inequality:

It is true that the British policy of pitting caste against caste, and community against community in the name of justice and fairplay, aroused widespread resentment and hostility, but it did not create the kind of response that has now come to the surface.

⁹⁴ *Id.* at art. 335.

⁹⁵ DIRKS, *supra* note 15, at 275–76.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Clark D. Cunningham, *Global Views: Affirmative Action: India's Example*, C.R.J. 22, 23 (Fall 1999).

⁹⁹ *Id.* (quoting the Mandal Commission Report) (alteration in original).

¹⁰⁰ See *Indra Sawhney v. Union of India*, 80 A.I.R. 1993 S.C. 477.

¹⁰¹ *Id.*

¹⁰² *Id.* at 477, 539.

¹⁰³ DIRKS, *supra* note 15, at 276.

¹⁰⁴ *Id.* at 289.

Perhaps Indians of an earlier generation could never feel towards their alien rulers the sense of outrage that their descendants now feel towards the leaders they have themselves freely chosen.¹⁰⁵

The persistent complexity of the caste system throughout India presents another problem arising from the system of compensatory discrimination. In attempting to separate out the classes that qualified as backward for ameliorative action by the state, India faced the same problems the British colonizers did in attempting to understand and classify the Indian castes comprehensively. The first commission charged with categorizing eligible groups for favorable treatment produced a list of 2,399 backward categories for advancement.¹⁰⁶ The problem, as for the British, was that categories and social and political power of certain castes varies from locality to locality, and region to region within the subcontinent. Concerted efforts by colonial ethnographers to fit Indian society into a uniform social order did not succeed, and these problems were compounded by great social and economic variations within each caste group.¹⁰⁷ Today, the government's attempt at positive discrimination makes this task of categorization one of far greater political consequence than the colonial attempt at a census.¹⁰⁸ While this focus on group categorization may be envisioned as one of logistics, it seems also to speak directly to the desire to organize society in collective, rather than individual, terms. The Indian government has been presented with no easy task, yet they have persisted in their attempts to achieve equality for the Scheduled Castes.

III. THE HISTORIC AND RELIGIOUS TRADITION OF AMERICA

The United States has followed an ideology of individualism beginning from the founding of the nation. The influence of this belief in the power and importance of the individual as the core political and social unit in this country has pervaded every issue of national interest.¹⁰⁹ The uniquely American conception of individualism

¹⁰⁵ André Bétaille, *Caste and Reservations: Lessons of the South Indian Experience*, HINDU, Oct. 20, 1990.

¹⁰⁶ DIRKS, *supra* note 15, at 283.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ A comprehensive treatment of this assertion would be much more extensive than that provided here. I intend to demonstrate this assertion by a few key examples, rather than an exhaustive history. Many factors contribute to the American focus on individualism that will not be explored here: the immigration experience, the rise of urban life and industry, the ideal of the family farmer, and the frontier experience, among others, have contributed to this national dogma, and each has been explored by others in some detail. See, e.g., MICHAEL J. PIORE, *BEYOND INDIVIDUALISM* 110 (1995) (describing the transformative importance of the frontier, due to its isolation from society, marked by a struggle of each man against the natural

provides the basis for our acceptance of capitalism, the extensive individual freedoms we enjoy,¹¹⁰ our emphasis on private property rights,¹¹¹ our religiousness as compared to other modern, liberal societies,¹¹² and our very democracy.¹¹³ In fact, the concept of the individual as the paramount social unit, and the belief in maximizing individual freedoms, in large part explain the division of the electorate into two separate parties to this day. The absolute belief in individualism emerges as a defining marker of the ways in which Americans perceive themselves as a nation.

At the same time, Americans also envision their nation as one embodying the ideal of equality, but in many instances, the concept of equality conflicts with the significance placed on the individual and his or her rights and freedoms. In contrast to the Indian view of society, which rests in large part on a sense of an individual's *duty* to others, the American view tends to speak in terms of *freedoms* or *rights*. Naturally, such a vision of society has resulted in a much different conception of equality in the United States — one focused on equal opportunity and increasingly

world as complementing an individualist, Lockean sense of the world). Moreover, the implications of this view are embodied in our culture. For example, the American excessive consumer culture can be viewed as emblematic of our views on individualism. *Id.* at 110.

¹¹⁰ See generally David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 LAW & SOC. INQUIRY 1 (1996). Abraham provides a compelling historical account that ties American ideals of liberty and individualism as together shaped by (and shaping) private-property ideology and jurisprudence.

America . . . is a society of abundant individual freedoms but with little collective organization, political purpose, or moral compass. America seems a world of sovereign individuals . . . in which any search for the common good of [its citizens] is undermined. This has much to do with America's diversity and with our negative, property-based conception of freedom — our Bill of Rights liberties — and our relative lack of positive, citizenship-based goals.

Id. at 2–3. Of course, most defenders of individualism would greatly oppose Abraham's assertion that this approach is either amoral or that this approach disadvantages the common good. See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1981).

¹¹¹ See, e.g., Abraham, *supra* note 110.

¹¹² PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 261 (2003) (citing TED G. JELEN, *TO SERVE GOD AND MAMMON: CHURCH-STATE RELATIONS IN AMERICAN POLITICS* 7, tbl. 1.1 (2000)).

¹¹³ The guiding standard of "one man, one vote," as elucidated in *Reynolds v. Sims*, 377 U.S. 533 (1964), demonstrates the connection between individualist orientation and democracy. For a discussion of the Voting Rights Act of 1964 and the implications of granting racial classifications paramount importance for these purposes in a color-blind society, see ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 210–24 (1992). See also Samuel Issacharoff, *The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 428 (2004) (discussing the ways in which the "one man, one vote" principle has been used, in practice, to dilute the votes of minority groups due to gerrymandering).

defined by the rhetoric of “personal responsibility.”¹¹⁴ Americans, by and large, perceive their society as classless and their law as “color-blind.”¹¹⁵ This idealistic view shapes the public discourse, but these assumptions are challenged in moments of stark public awareness of inequality. Such disjunction between the ideals that have become operating assumptions and the reality of great inequality molded the ways in which constitutional law approaches equality and the ways in which our society attempts to redress those inequalities.

In the following section, the sources and the implications of ideology and the resulting impact are explored. Section A investigates the role of prevailing religious and philosophical ideals at the founding of the nation, which provides much insight into the way our current Constitution views religion. In Section B, the historical ebb and flow of the views toward individualism and the impact on views toward equality are analyzed. Much of the constitutional doctrine of equality in the United States rests not on the text of the Constitution, but on subsequent interpretations of the document by the Supreme Court. Therefore, this Section focuses on three key periods in which a collective view of equality — sometimes referred to as an egalitarian view — has come to the fore, at least for a historical moment. These key periods occurred during the Civil War, during the Depression and New Deal era, and during the civil rights movement of the 1960s. This Section primarily addresses the aftermath of one of these moments — the civil rights movement — and how its legacy of affirmative action challenges American views toward individual opportunity.

A. The Religious Foundations of America

The original colonists, as every American schoolchild should know, came to this nation seeking greater freedom of religion. The Puritans exhibited “two of the most enduring views of colonial America: America as a haven of religious freedom, and America as a Christian Nation.”¹¹⁶ Yet, despite popular opinion, the religious beliefs

¹¹⁴ See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.); Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. (2003); Personal Responsibility, Work, and Family Promotion Act of 2002, H.R. 4737, 107th Cong. (2002); see also Pamela Yip, *Bush: Take Responsibility for Savings; But Many Consumers Won't Manage Their Money Well, Critics Say*, DALLAS MORNING NEWS, Jan. 26, 2004; *Presidential Biography: President George W. Bush, The White House*, at <http://www.whitehouse.gov/president/gwbbio.html> (last visited Jan. 27, 2005) (describing the President's reputation as a compassionate conservative shaping public policy “based on the principles of limited government, personal responsibility, strong families, and local control”).

¹¹⁵ See KULL, *supra* note 113, at 1.

¹¹⁶ FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 1 (2003) (providing a historical account of the complex ways in which religious beliefs and reforms have influenced our civil society).

of these settlers, at least the Puritan founders of New England, did not mirror those found in the Constitution drafted by a subsequent generation.

Although they arrived in order to establish a religious community, the colonists had no doubts that theirs was the one true religion, and hence they often squelched religious dissent by expulsion or violence against those who deviated from this view.¹¹⁷ The Puritans, or those Lambert terms the “Planting Fathers,” as distinguished from the Founding Fathers, drafted a Constitution in 1639 affirming their intent to form a Christian nation.¹¹⁸ The purpose of the government they established was “to mayntayne and presearve the liberty and purity of the gospell of our Lord Jesus which we now professe.”¹¹⁹ They adhered to a dogma in which “an individual could do nothing to effect his or her own salvation.”¹²⁰ God had chosen a group of them, “God’s Elect,” and unless admitted to join this group of people, a person had no hope of salvation.¹²¹ Moreover, the Puritans believed their organization in the New World was divinely ordained, and that their society must reflect God’s will. As such, they believed they were bound together in a “social covenant,” under the divine grace of God.¹²² They designed their towns as “‘Corporate’ communities,” in that they required some sacrifice of an individual’s freedom in the interest of community “holiness, peace, and order.”¹²³ In business, the priority of community over individual autonomy led them to value fairness of wages and prices over profits; violators of this principle were brought into court for violation of the social covenant.¹²⁴

The religious views of these early Americans would undergo radical changes before the founding of the republic, leading to a very different constitutional regime than one might expect given the Puritan origins of American society. These changes included two principal religious and philosophical transformations — the Great Awakening and the Enlightenment. Each of these changes transformed the Puritans’ community-oriented view of a just society into one focused on the individual, and these new ideas found their expression in our Constitution. The rise of the

¹¹⁷ SCHUCK, *supra* note 112, at 261 (citing DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION 36–40 (2001)). Eck is a leading scholar on the religious diversity of India, which rivals America in terms of such diversity. *Id.* at 417.

¹¹⁸ LAMBERT, *supra* note 116, at 1 (quoting FUNDAMENTAL ORDERS OF CONNECTICUT (Jan. 14, 1639), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 23–24 (Henry S. Commager ed., 7th ed. 1963)).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 79.

¹²¹ *Id.* at 78.

¹²² *Id.* at 79.

¹²³ *Id.* at 80 (citing KENNETH LOCKRIDGE, A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS 16–17 (1970)).

¹²⁴ *Id.* at 80–81. The view that economic exchanges should be governed by moral law, rather than market forces, had widespread and significant support among Puritan believers. *Id.*

evangelical faith, known as the Great Awakening, demonstrated a shift toward individualism in the way Christians thought about their world and their society. Departing from the prior emphasis on Christian society and community, the evangelical preachers emphasized the primacy of an individual relationship with God.¹²⁵ The movement also challenged the established authority of existing parishes, introducing economic free-trade rationales into the religious sphere. In fact, Adam Smith's *Wealth of Nations* greatly influenced the role religion ultimately played in American society; he embraced a view of free trade in religion as fostering a stronger religious attitude and being less dangerous to democracy than an officially established religion.¹²⁶ The Great Awakening resulted in a competitive market for religious views and resulted in more emboldened parishioners all over the country.¹²⁷

The radical ideas of the Enlightenment provided another departure away from early American society and toward one centered on the individual, and like the new evangelical movement, adherents to this philosophy placed new reliance on the potential for the individual to find his own truth. One of the most prominent and influential thinkers of this era was John Locke. Locke's essentially objectivist positions about the individual's relationship with the external world formed the basis for the American tradition of liberalism.¹²⁸ He believed the world was viewed as evidencing uniform truths no matter the individual perspective.¹²⁹ Those who adopted these principles are often labeled Deists.¹³⁰ Adherents emphasized the principles of rationality, rather than divine "revelation," and the ideal of nature over biblical writings, as the lens through which to view God.¹³¹ Thomas Jefferson called

¹²⁵ LAMBERT, *supra* note 116, at 145. ("While Protestants had always preached salvation by faith alone and the priesthood of the believer, the revivals drew out the 'individualist logic of Protestantism . . . further than ever before.'") (quoting GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 145 (1991)) (alteration in original).

¹²⁶ *Id.* at 9 (citing ADAM SMITH, *2 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 797 (R. H. Campbell & A. S. Skinner eds., 1981)); *see infra* notes 134–38 and accompanying text (explaining how these ideas led to the adoption of the Establishment Clause).

¹²⁷ LAMBERT, *supra* note 116, at 128–29.

¹²⁸ *See generally* James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill*, 43 *CATH. LAW.* 367 (2004).

¹²⁹ PIORE, *supra* note 109, at 110. Piore describes the "national ethos" as paralleling this Lockean view of the world and the "strong sense of individuality that seems to accompany it." *Id.* Together with a relatively individualist strain of Protestant religions and "their emphasis on the direct and unmediated relationship between the individual and God," the combined impact of these ideas is expressed in the emphasis our nation places on the individual. *Id.* This is especially interesting in light of the Hindu-based view toward truth. *See supra* note 10 and accompanying text.

¹³⁰ *English Deism: John Locke*, Internet Encyclopedia of Philosophy, at <http://www.utm.edu/research/iep/d/deismeng.htm> (last visited Feb. 23, 2005).

¹³¹ LAMBERT, *supra* note 116, at 159. A Deist may prefer to refer to the ultimate goal as a search for truth, rather than a search for divine enlightenment.

himself a Christian, but his beliefs were akin to secular humanism.¹³² Today, this doctrine could be defined as elevating human reason over divine revelation, relying on humans to resolve mankind's problems, and presenting beliefs characterized as "ethical relativism."¹³³ Many other Founding Fathers — including Benjamin Franklin, Thomas Paine, John Adams, Alexander Hamilton, James Madison, and John Jay — adhered to the principles of the Enlightenment, promulgated by such thinkers as John Locke, Francis Bacon, and Isaac Newton.¹³⁴ These views, not those of Puritan society, were expressed in the American Constitution.¹³⁵

Although great tensions emerged between those subscribing to Enlightenment ideas and those involved with the evangelical Christian movement, the groups worked together to forever alter religion in this country by their combined effort to separate church and state.¹³⁶ Arising out of the belief of the individual — as either the focus for salvation or as the source of spiritual truth through independent rationality — the evangelicals¹³⁷ and those allied with secular humanist thought pushed forward the Establishment Clause.¹³⁸ Today, the United States has a more total separation of state and religion than other modern societies¹³⁹ and yet has a more active religiousness than those societies.¹⁴⁰ The great constitutional

¹³² See Paul Kurtz, *In Defense of Freedom of Conscience: A Cooperative Baptist/Secular Humanist Declaration*, Council for Secular Humanism, at http://www.secularhumanism.org/library/fi/kurtz_16_1.1.html (last visited Feb. 23, 2005).

¹³³ LAMBERT, *supra* note 116, at 279 (citing John Murrin, *Religion and Politics in America from the First Settlements to the Civil War*, in RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S, at 19–43 (Mark A. Noll, ed., 1990)).

¹³⁴ *Id.* at 161; see also *id.* at 175.

¹³⁵ *Id.* at 161 (“[T]he United States was conceived not in an Age of Faith such as that of the Puritan Fathers but in an Age of Reason,” a period which takes its very name from Paine’s criticism of Christianity.)

¹³⁶ *Id.* at 178–79.

¹³⁷ The evangelicals likely supported the non-intervention of the state in religious affairs for two reasons. First, as mentioned, their beliefs were in many ways against any religious establishment as they implored the public in sermons to question church authority and find their own relationship with God. Second, these teachings did not win the evangelicals any favor with the leaders of established churches, and many prominent religious figures called for government regulation of “Pedlars in Divinity.” *Id.* at 128 (quoting BOSTON WEEKLY NEWS-LETTER, Apr. 22, 1742).

¹³⁸ U.S. CONST. amend. I, cl. 1.

¹³⁹ SCHUCK, *supra* note 112, at 261 (citing Peter L. Berger, *Foreward* to CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES*, at xi (2000)). Of course, Adam Smith would argue that the Free Exercise Clause, coupled with the prohibition on government regulation, has fostered greater competition in the exchange of ideas to the benefit of both religion and of government. See *supra* note 126 and accompanying text.

¹⁴⁰ For more on the religious-marketplace-of-ideas theory and a discussion of how it has worked to foster a more religious society, see ROGER FINKE & RODNEY STARK, *THE*

implications of this ideological focus on the individual, so connected to these normative views, were not at all limited to the role of religion.

B. The Individualist Constitution

The U.S. Constitution grew out of both the belief in the individual as the basic unit of reason and the act of civic participation. The Bill of Rights focuses almost exclusively on individual freedoms and individual rights.¹⁴¹ The Constitution as a whole demonstrates a faith in individualism in its rigorous limitation of government. This distrust of a government may have grown out of early Americans' experiences with the English monarchy, but it also evidences a great respect for the individual, which is supported by their religious and historical moment in time.

While these principles need not be incompatible with the ideal of equality, the Framers rejected inclusion of the principle, both explicitly and implicitly. Jefferson was unable to include his "self-evident truth" of the inherent equality of all men. In fact, the Framers intentionally omitted this passage.¹⁴² Certain phrases in the Constitution's Preamble seem to invoke an ideal of equality. It speaks of "establish[ing] justice" and "promot[ing] the general Welfare."¹⁴³ It should be noted, too, that the emphasis on freedom and rights in the Constitution implicitly rejects the ideals of the individual's duty or responsibility, which would better align with a worldview based on collectivism, community, and true equality.

The ways in which individualism has been enshrined in Americans' views of themselves and the world, in our Constitution, and in the resulting legal regime, has

CHURCHING OF AMERICA, 1776–1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY (1992).

¹⁴¹ See U.S. CONST. amends. I–X.

¹⁴² Even if it had been included, the Framers' concept of the rational individual was likely limited to an image of a white, property-owning male. Not only was the institution of slavery conspicuously absent in this foundational document for modern, liberal democracies, but also serious discussion was given to granting the vote only to property-owning males. See generally Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989). It was thought among many of the Framers that those men without property did not have a sufficient stake in the operation of government to allow them a vote. *Id.*

¹⁴³ U.S. CONST. pmb. While an argument may be made that these do represent ideals of society, this does not seem to explain how Americans have come to view their society as one of equality. I would argue that Jefferson's inspirational words in the Declaration of Independence actually provided the basis for this principle. His assertion, "[T]hese truths [are] self-evident, that all men are created equal," offered at the defining American moment of revolution from tyranny, has proven too attractive to be diminished by its glaring absence from the Constitution. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). More importantly, as will be discussed *infra* Part III.B.1, the ideology of individualism puts forth an ideal of equality, even if it is not explicit.

had great implications for the movement toward greater equality since the Founding and it continues to shape national debate. Initially, the emphasis on individual freedom in our legal structure necessarily conflicts with the notion of social equality at some point. One's freedom, for example, to dispose of one's property as one would like contradicts the very idea of paying taxes to provide for the needs of the community. While many valid arguments have been made against the evils of strong government and its ability to levy taxes on its citizens, at some point the need to provide for the "general welfare" will require an infringement on individual liberty. For the most part, the perception of Americans that serving the individual provides the greatest good for society eliminates conflict with these values, at least in terms of the majority representation in government. However, at times of economic or other crises, the values of individualism and equality clash head on. As David Abraham points out: "The argument that liberty without equality is of minimal value and a great risk comes up during nearly every period of social upheaval."¹⁴⁴ In the following sections, this Article explores the ways in which the conflict between individualist and collectivist ideals in the interest of greater equality has impacted the American constitutional tradition over time. In particular, these sections focus on those times of social unrest which have led to widespread movements toward greater equality, demonstrating that the American concept of individualism is not static, nor immune from conflicting values simultaneously held in American self-perceptions.

1. The Civil War

Undoubtedly the greatest moment of social unrest in U.S. history was the Civil War. It can be viewed, as can be most social movements in our history, as a challenge to the ideal of individualism. Several factors relevant for the purposes of this Article led to the war itself. First, the abolitionist movement provides an example of a collective recognition of injustice, which worked to eliminate the ability to hold property in human beings. Throughout the Civil War, "[a] coalition of radical Republicans, abolitionists, and free soilers (alternatively, radical bourgeois, southern black workers, and elements of the northern working class)" organized to achieve a shift from an entirely negative view of liberty.¹⁴⁵ Second, the central competing values advanced by the Confederacy espoused the principles of individualism. Consistent with the Enlightenment ideals of the Founding Fathers, Southerners argued that their private property rights were an essential component

¹⁴⁴ Abraham, *supra* note 110, at 9 n. 24 (stating that the periods of the New Deal and the civil rights movement are examples of times when these values collided).

¹⁴⁵ *Id.* at 11. A positive view of rights would be more aligned with a collective view of social organization because such rights would diminish the role of the individual as the primary actor in and beneficiary of society.

of liberty.¹⁴⁶ The South also advanced the argument of “states rights,” which can be viewed as an outgrowth of a limited government ideal, premised on the primacy of the individual.¹⁴⁷ Third, the culmination of the War led to the 14th Amendment, finally establishing a place for the concept of equality in the Constitution, although this embodiment may have been less than wholehearted and still wedded to the ideal of individualism.¹⁴⁸ While the ideal of equality for mankind and the concept of the United States as a unified nation prevailed, it was short-lived.

Following the War, the country underwent a “counter-revolution of property”¹⁴⁹ that reinforced and strengthened the prior, prevailing view of a government based on negative rights and property rights. In interpreting the new 14th Amendment, the Supreme Court in the *Slaughter-House Cases* held that it maintained, rather than eroded, the autonomy of the States as actors, effectively rolling back any conception of a duty of the federal government to police the states.¹⁵⁰ Later, the Court nullified the portion of the Civil Rights Act of 1875 that required equality in public accommodations because it would impair the individual rights of private property owners.¹⁵¹

Although many Americans believe, and much scholarship suggests, that equality is a foundational principle of the United States, this idea is not found in the original Constitution. In fact, the Convention “neglected to reaffirm Jefferson’s paradoxical, self-evident truth.”¹⁵² The principal of equality was first constitutionalized with the Civil War Amendments. Most importantly, the 14th Amendment provided:

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

¹⁴⁶ See *id.* at 10–13.

¹⁴⁷ See *id.*

¹⁴⁸ See discussion *infra* notes 151–53 and accompanying text. Interestingly, this time period also produced the first provisions in the Constitution that undermined the autonomy of the States and, in contrast with the original document, extended federal power rather than limited it. See U.S. CONST. amends. XIII–XV.

¹⁴⁹ W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 580–636, 670–710 (S.A. Russell Co. 1956) (1935).

¹⁵⁰ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1873); Abraham, *supra* note 110, at 14–15.

¹⁵¹ *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

¹⁵² KULL, *supra* note 113, at 7.

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁵³

The promise of “equal protection of the laws” forms the core of the constitutional approach toward equality. This language provides the most individualist notion of equality possible — the law shall not treat each individual different from the next. Moreover, after the ratification of these amendments, the protections they ostensibly afforded to former slaves and other black Americans began to be limited by the Supreme Court.

Most notably, *Plessy v. Ferguson*¹⁵⁴ upheld that separate-but-equal standard legitimizing segregation.¹⁵⁵ Although historically repudiated, Justice Harlan’s dissent in *Plessy* continues to influence the discourse on equality. Harlan rejected the Court’s view that racial discrimination was a justifiable basis for classification of people and behaviors, unless that discrimination was unreasonable as determined by the Court.¹⁵⁶ Instead, Justice Harlan proposed a bright-line rule that all classifications based on race are unconstitutional.¹⁵⁷

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights

. . . .

. . . There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.¹⁵⁸

Justice Harlan’s opinion revived earlier arguments about the proper effect of the 14th Amendment.¹⁵⁹ While never explicitly adopted, Justice Harlan’s viewpoint

¹⁵³ U.S. CONST. amend. XIV, § 1.

¹⁵⁴ 163 U.S. 537 (1896).

¹⁵⁵ *Id.* at 543.

¹⁵⁶ *Id.* at 555 (Harlan, J., dissenting). As Kull writes, the “rule of constitutional law, and no other, will explain every Supreme Court decision in the area of racial discrimination from 1896 to the present.” KULL, *supra* note 113, at 118.

¹⁵⁷ *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

¹⁵⁸ *Id.* at 554, 559 (Harlan, J., dissenting).

¹⁵⁹ Wendell Phillips proposed, at the end of the Civil War, a nondiscrimination view of federal protection for black Americans. His proposal would have explicitly prevented the government from classifying people based on race, and although widely publicized, it was rejected. KULL, *supra* note 113, at 3–4. The proposal was rejected in part because Southern representatives felt more comfortable if the amendment only prevented unreasonable racial classifications. *See id.*

would reemerge late in the twentieth century when the Court faced the issue of affirmative action, or governmental recognition of race to benefit minorities.

The extension of greater protections to disadvantaged groups during times of crisis, only to abandon such efforts in less turbulent times, is a pattern that can be traced at least from the time of the Civil War. Abraham notes that in spite of these periods of minimization of individualism, negative rights, and property rights in favor of greater social goods, the United States has never moved in this direction for a significant period of time.¹⁶⁰ While the political discourse certainly focuses on this tension in values, this situation is reflected and furthered by the law.¹⁶¹ The reemergence of individualism, negative rights, and property rights continued for decades, finally reaching its zenith with *Lochner v. New York*.¹⁶² Here, the Court completely embraced the formalities of equality surrounding the freedom of contract, completely disregarding the real social contexts of the bargaining parties.¹⁶³ The worldview embraced by the Court in *Lochner*, adopted by the poor, immigrants, and elites alike, held that “the breadth of property holding made the United States a beacon.”¹⁶⁴

Indeed, this common individualist argument, often espoused today, advances the idea that grave economic injustices are beneficial to both society and individuals. In this way, distributive inequalities gain moral righteousness, which allows both the poor and the wealthy, the white and the black, to embrace an unequal system wholeheartedly. Of course, the argument wins such support because it embraces the very ideals on which the nation was founded. The Great Depression proved to be another time when the moral foundation of individualism began to rest on

¹⁶⁰ See Abraham, *supra* note 110, at 2.

¹⁶¹ See *id.* at 1 (arguing that the law, together with politics and history, has influenced our nation to the detriment of our “social state”).

¹⁶² 198 U.S. 45 (1905) (holding that the state could not impose a maximum work-week labor standard because it would intrude on the freedom of contract between employee and employer). At the time, the decision was consistent with other court decisions by the states. Abraham, *supra* note 110, at 18 n.59. As one scholar has stated, the Court aimed to “annex the principles of laissez-faire capitalism to the Constitution and put them beyond the reach of state legislative power.” *Id.* at 18 (quoting EDWARD CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 78 (1934)).

¹⁶³ Abraham, *supra* note 110, at 18. Indeed, a formalistic view of equality indicates the continued primacy of the value of freedom or individualism. As with the modern Court’s approach toward discrimination jurisprudence, discussed *infra* Part III.B.3.b, a focus on the freedom of each person to bargain independently for advantageous terms is analogous to addressing the presence or absence of intentional discrimination without addressing real and apparent discriminatory results. Both approaches begin with the assumption that each person holds an equal place in society, otherwise such apparent, unequal results would be morally unacceptable.

¹⁶⁴ Abraham, *supra* note 110, at 17. This defense of serious, apparent economic inequality has been made numerous times. See, e.g., POSNER, *supra* note 110, at 17.

shaky ground. To espouse the view that a just system should allow for greater equality among its citizens would undermine the sense of America as a meritocracy, where hard work is rewarded and anyone can achieve the highest levels of wealth and success.

2. The New Deal and the Rise of the Social State

The economic crisis of the Great Depression led to much social unrest. Unsurprisingly, it remains the greatest period of class-consciousness in the history of America, likely because the promises of individualism — opportunity and potential for great wealth gained through self-determination and hard work — had never rung so hollow to so many. The resulting reforms of Roosevelt’s New Deal, especially the social safety net of welfare, held the promise of being permanent changes in the best interest of society as a whole.¹⁶⁵

Of course, the concept of welfare directly contradicted the ideology of the individual. An individualist view, at least in its pure form, would argue that the concept of welfare would undermine the principles of a meritocracy. The idea that the state should provide for its indigent citizens directly conflicted with the moral ideology of individualism. Robert Reich provides the contrasting moral argument that emerged from the New Deal era (and the subsequent War on Poverty): “In America work is a citizen’s most fundamental economic responsibility. It is the essence of the Protestant ethic, the criterion for being considered a ‘deserving’ member of society. Once this responsibility is fulfilled, the burden shifts back to society.”¹⁶⁶ Reich calls a person’s willingness to work as implicating the “moral core [of] American capitalism.”¹⁶⁷ This view presents a collectivist-oriented position, but one that is especially palatable due to its appeal to the normative arguments underlying the belief in individualism. If an individual can work, this moral core responds that the individual should be able to get a job, that a full-time job should be enough to support a family, and that people should be able to advance

¹⁶⁵ The recognition of unions as powerful, useful players in the marketplace also provided workers greater equality at the bargaining table and protections from the political actors. The empowerment of labor was “quite a collectivist achievement, providing a countertendency for Americans who ‘grew up in a society which stressed the ideals of classlessness, individual initiative, and opportunity.’” Abraham, *supra* note 110, at 22 (quoting Derek Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394, 1402 (1971)). Moreover, union activity was not confined to the individualistic ideals of higher wages; in fact, unions “have historically been at least as concerned with justice and equity in the workplace as with the level of compensation as such.” PIORE, *supra* note 109, at 13.

¹⁶⁶ Robert B. Reich, *Introduction to MAKING WORK PAY: AMERICA AFTER WELFARE*, at vii (Robert Kuttner ed., 2002).

¹⁶⁷ *Id.*

further to the extent that they can by virtue of their own moral ability.¹⁶⁸ Reich's view represents the ways in which the New Deal altered the American view toward equality, and made the notion of equality of opportunity more realistic for many.

Although the social reforms of the era began to fade as President Roosevelt focused on winning World War II,¹⁶⁹ elements of the welfare state remain today, albeit radically diminished in recent years.¹⁷⁰ Under President Reagan, who saw the welfare system as stifling the poor's motivation to work and the wealthy's motivation to gain ever-greater levels of affluence, greater disparity in income was allowed and arguably promoted.¹⁷¹ Reagan's administration shifted the country's ideological focus, which had remained fairly collectivist since the New Deal and the subsequent civil rights movement, toward greater emphasis on individualist principles.¹⁷²

The appeal of these principles, emphasizing one's personal responsibility for overcoming economic hardships, demonstrates the persistence of these values in the minds of Americans. The identification with individualist principles, some claim, explains why mothers on welfare began to blame themselves for their own poverty and why union workers began to feel guilty when jobs were lost, in the face of evidence that the jobs would have been lost with or without union efforts.¹⁷³ Studies have demonstrated that America believes itself to be basically without class hierarchy and as a land of equal opportunity.¹⁷⁴ This is in spite of the fact that Americans enjoy "the most unfair distribution of wealth and income of any major nation. The richest 1% of the population now owns as much wealth as the bottom 95% of all Americans combined."¹⁷⁵ The apparent explanation of this disjunction is that, in viewing equality as synonymous with opportunity, and therefore concerning oneself with an evaluation of an individual's ability to succeed, Americans are willing to overlook demonstrated inequalities.

¹⁶⁸ *Id.* at ix.

¹⁶⁹ Abraham, *supra* note 110, at 22. See generally ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1995).

¹⁷⁰ *Id.*

¹⁷¹ PIORE, *supra* note 109, at 10.

¹⁷² See *id.* (describing the effects of Reagan's policies on the poor and their resulting social manifestations).

¹⁷³ *Id.* at 32.

¹⁷⁴ BELL HOOKS, *WHERE WE STAND: CLASS MATTERS*, at vii (2000) ("As a nation we are afraid to have a dialogue about class even though the ever-widening gap between the rich and the poor has already set the stage for ongoing and sustained class warfare."); SAMUEL LEITER & WILLIAM M. LEITER, *AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY: AN OVERVIEW AND SYNTHESIS* 235–36 (Robert J. Spitzer ed., 2002); see also discussion *infra* Part III.B.3 (discussing the pervasiveness and widespread acceptance of the rhetoric of individualism).

¹⁷⁵ LEITER & LEITER, *supra* note 174, at 235–36 (quoting Congressman Bernie Sanders, *Falling Behind the Boom Times*, BOSTON GLOBE, Feb. 12, 2000, at A15).

3. Affirmative Action, the Push Toward Equal Results, and Individualist Backlash

The formalistic conception of equality as an individual right has been used to help remedy overt discrimination against certain groups. Yet, this approach toward equality has actually frustrated the achievement of greater substantive equality. The debate surrounding affirmative action provides the greatest example of this phenomenon. The affirmative action programs of the mid- to late-twentieth century demonstrated a shift from the original goal of civil rights reformers to remedy intentional discrimination. Affirmative action, instead, focuses on effects of discrimination on particular groups, and, as critics contend, has resulted in an approach that is “antimeritocratic.”¹⁷⁶ Despite the elimination of segregation during the civil rights era, great disparities between white and black Americans persisted and the promise of equality seemed increasingly hollow. The next logical step for achieving greater equality was to look toward remedying those disparate effects. This section addresses the ways in which this project failed, largely due to the American belief in equal opportunity for the individual regardless of race. While a national ideology stressing individual merit and opportunity is quite laudable, this system of beliefs has worked to prevent a move toward greater substantive equality.

a. The emergence of the principal of substantive equality

By the mid-1960s, civil rights activists began not to attack formal inequality under the law, as represented by Jim Crow laws, but instead real inequalities facing black Americans. As Bayard Rustin wrote in 1965, there were more blacks facing unemployment and attending segregated schools in 1964 than when *Brown v. Board of Education* was decided a decade earlier.¹⁷⁷ Also in 1965, an extensive study at the Labor Department revealed startling findings on the American progression toward greater equality. A young Assistant Secretary at the Labor Department, Daniel Patrick Moynihan, directly addressed the need to work toward equality of

¹⁷⁶ See *id.* at 2.

¹⁷⁷ Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, 39 COMMENTARY 25, 25–27 (Feb. 1965). Rustin directed attention to the resentment within the black community, and noted that the struggle “after all, is not *civil rights*, strictly speaking, but social and economic conditions.” Moreover, he advocated a shift in focus toward “not merely . . . removing the barriers to full *opportunity* but . . . achieving the fact of *equality*.” *Id.* at 26–27.

results rather than equality of opportunity.¹⁷⁸ The Moynihan Report marked a sharp shift from the discourse of the civil rights era struggle for equality.

The ideal of equality does not ordain that all persons end up, as well as start out equal. . . . But the evolution of American politics, with the distinct persistence of ethnic and religious groups, has added a profoundly significant new dimension to that egalitarian ideal. It is increasingly demanded that the distribution of success and failure within one group be roughly comparable to that within other groups. It is not enough that all individuals start out on even terms, if the members of one group almost invariably end up well to the fore, and those of another far to the rear.¹⁷⁹

The Moynihan Report provided the foundation for affirmative action programs, although the Report's author would likely not have foreseen the effect of his findings. Moynihan advocated a comprehensive program, aimed at full employment, eradication of ghetto conditions, and structural reform of public education. As Rustin noted, this would require a "multi-billion dollar federal public works program."¹⁸⁰ In essence, the Report recommended attacking the roots of pervasive inequality since the formal legal barriers to full opportunity had been largely eliminated. While the goals were presented as racially neutral, the focus of remedies was on the problems of the black urban poor.¹⁸¹ Perhaps most remarkable is the reception the Report received in the political community. While often condemned,¹⁸² the Report led to President Johnson's famous commencement speech at Howard University in June 1965. Johnson said: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."¹⁸³ Johnson's statement remains

¹⁷⁸ KULL, *supra* note 113, at 184 (citing OFFICE OF POL'Y PLAN. & RES., U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) [hereinafter MOYNIHAN REPORT]). For more on the creation of this Report and the public and scholarly reaction, see LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (1967).

¹⁷⁹ MOYNIHAN REPORT, *supra* note 178, reprinted in RAINWATER & YANCEY, *supra* note 178, at 3.

¹⁸⁰ Rustin, *supra* note 177, at 28.

¹⁸¹ See KULL, *supra* note 113, at 181. Even if the Report was directed at ameliorating the root causes of poverty itself, it would have been a great departure from traditional American views toward class and equality.

¹⁸² *Id.* at 188.

¹⁸³ *Id.* at 186-87.

remarkably accurate in its characterization of the effects of an individualist-oriented view of equal opportunity, especially where substantive equality of opportunity continues to be outside the limits of mainstream debate. Johnson's attempt to reshape the aims of equality beyond mere formalism created the basis of modern affirmative action programs.¹⁸⁴

After President Johnson's speech and its signal that greater social programs furthering equality might be forthcoming, the Watts riots and the escalation of the Vietnam conflict quickly consigned the Report recommendations to practical irrelevance.¹⁸⁵ The Report's author had assumed vast amounts of money and time to address the causes of inequality. Now, it seemed a quick fix was needed, with little money and time to address the complex issues raised by its findings.¹⁸⁶ The aftermath of this culmination of events began in 1968.¹⁸⁷ Without a political mandate, the difficulties of addressing inequalities in results were left to courts and administrators, as they were less politically accountable, and had some options available to them without collecting actual funds.¹⁸⁸ Where massive job creation had been one of the main recommendations of the Moynihan Report, the constraints on judges and civil rights agencies led to the only available option: they broadly interpreted the laws against discrimination and began using racial preferences in allocating jobs already in existence.¹⁸⁹ The remaining affirmative action programs currently in place are remnants of this project.

b. Affirmative action attacked

The laudable goals of substantive equality have been nearly eliminated by the Supreme Court as well. As noted earlier, the civil rights reforms of the 1960s presented one of the highlights in American history where the paradigmatic goal of individualism gave way, to some extent, to the ideals of greater collective equality. The Court's subsequent retreat from the principles of racial equality represented in *Brown* finds clearest expression in its decisions addressing affirmative action, as well as those cases arguing that the clear effects of discrimination — not only discriminatory intent — should be addressed under the constitutional guarantee of equality.

In several cases, the Court has been presented with overwhelming evidence of unequal results among races and has denied that the situation rises to the level of an infringement of constitutional rights.¹⁹⁰ Perhaps most notably, the Court addressed

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 188.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 188–89.

¹⁸⁹ *Id.* at 189.

¹⁹⁰ For example, the Court has struggled with the constitutionality of affirmative action in government-funded schools. *See infra* notes 194–203 and surrounding text.

the use of preferences in granting city contracts to minority-owned businesses.¹⁹¹ In Richmond, Virginia, the former capital of the Confederate South, a city with a fifty percent black population, less than one percent of city contracts had been granted to minority-owned businesses.¹⁹² As a result, the city created a set-aside program reserving thirty percent of contracts for minority-owned businesses to ameliorate this disparity. The record was replete with evidence of the city's long-standing history of racism and oppression toward blacks. The Court did not hold that thirty percent was too great a set-aside, but that there was no evidence that white firms would not hire minority subcontractors and therefore there was "*no proof of discrimination.*"¹⁹³ As shown in this example, the formalistic use of the 14th Amendment's protections of equality has been used by the Court to undermine the very project of equality.

If affirmative action — or a judicial recognition of unequal results — could be justified in any situation, it would appear to be in the case of education. After all, the promise of equality of opportunity seems especially false as very poor (and often minority) children attend miserably failing schools, while students in the next, more economically prosperous district are provided every educational advantage. However, the Court has not been more likely to pursue greater substantive equality in education than in other areas, despite the precedent established in *Brown* recognizing that the formality of separate but equal masked true inequality.¹⁹⁴ In particular, in *San Antonio Independent School District v. Rodriguez*,¹⁹⁵ the Court addressed the great disparity in schools, largely resulting from the district's use of property taxes as a revenue base.¹⁹⁶ The Court denied that a fundamental right was implicated, as there is no fundamental right to publicly funded education.¹⁹⁷ The Court also declined to recognize the poor as a suspect class under the 14th Amendment.¹⁹⁸ Furthermore, as Justice Powell noted, it was unclear any harm was suffered, for there was no proof that less funding would result in a lower-quality school or education.¹⁹⁹ The recent decision in *Grutter v. Bollinger*²⁰⁰ reluctantly authorized some continued use of affirmative action in admissions for higher

¹⁹¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹⁹² *Id.*

¹⁹³ Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equality*, 87 MICH. L. REV. 2128, 2130 (1989). Williams's article provides a compelling criticism of the rhetorical devices the Court uses in *Croson*, 488 U.S. 469, to minimize the experience of discrimination victims.

¹⁹⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁹⁵ 411 U.S. 1 (1973).

¹⁹⁶ *Id.* at 8.

¹⁹⁷ *Id.* at 37.

¹⁹⁸ *Id.* at 28.

¹⁹⁹ *Id.* at 42–43.

²⁰⁰ 539 U.S. 306 (2003).

education.²⁰¹ Interestingly, the decision was not based on the grounds of achieving greater equality, but largely because of the university's goal of diversity.²⁰² That is, the affirmative action program furthered the goals of all students to have a better educational environment; the benefits to black and other minority students were almost beside the point.²⁰³

The Court's approach to these issues has largely tracked public opinion. Increasingly, the political will for programs to help black Americans, like programs to help the poor, has evaporated. Moreover, no matter how sympathetic one's view toward affirmative action, the program has largely failed.²⁰⁴ The ultimate attempts by courts and administrators to achieve greater substantive equality have only achieved benefits for the most qualified individuals among those in the chronically disadvantaged group. Proponents have lost the "unifying power and the moral claim associated" with the antidiscrimination principal; the nation has "lost sight of the crisis it originally set out to confront."²⁰⁵ As implemented, these programs have only exacerbated the problems of poor urban blacks; not only do they have fewer opportunities to succeed, many Americans now view them as failing *despite* all of the perceived benefits they receive from affirmative action. These reasons, among others, demonstrate the difficulty defenders of substantive equality have had in resisting compelling ideological claims, largely from conservatives, that affirmative

²⁰¹ *Id.* at 343.

²⁰² *Id.*

²⁰³ *See, e.g.,* Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1453–54 (2004); *see also* Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Bell, a leading critical-race theorist, explains the *Brown* decision as largely conservative and motivated by desires to gain greater credibility in the ideological struggle of the Cold War, to give black Americans hope that the ideals of freedom trumpeted during World War II might eventually include them, and to push the South toward greater economic success, which had been hampered by segregationist policies. *Id.* at 524–25. He also argues that gains in greater equality for blacks have only been achieved when such reforms are in the interest of the white majority. *Id.* at 524. He calls this "interest-convergence theory" and has elaborated on this theory in many publications. *See, e.g.,* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 102–22 (1987); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 47–64 (1992).

²⁰⁴ For a discussion of the problems affirmative action programs face, *see generally* DARIEN A. MCWHIRTER, *THE END OF AFFIRMATIVE ACTION* (1996).

²⁰⁵ KULL, *supra* note 113, at 190; *see also* STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991). Carter notes that the results of affirmative action programs have meant middle-class blacks are better off, but lower-class blacks are actually worse off. *Id.* at 71. While this may not be the cause of the growing income gap within the black community, it certainly will not solve it. *Id.* at 71–72. Carter's book also provides an insightful and personal discussion of the difficulties of identifying oneself as black and also supporting affirmative action programs, despite strong feelings of individualism and the desire to claim ownership for one's individual accomplishments. *Id.* at 71–123.

action is contrary to America's central focus on the individual, either in economic terms, or in terms of equal opportunity among job applicants. Indeed, perhaps the greatest detriment of affirmative action programs lies in the expenditure of "limited political capital available for 'programs to help blacks' on measures that do little or nothing to improve the condition of those black Americans."²⁰⁶

The current public and legal debate over the value, and even the legitimacy, of affirmative action highlights the sensitivity and ambivalence Americans feel toward any program that undermines the ideals of this nation, including equality among individuals, merit, and nondiscrimination. As Peter Schuck writes, the unpopularity of affirmative action today lies in its "reinforcement of the pernicious and increasingly meaningless use of race as a central principle of distributive justice rather than other distributive principles, particularly merit, with which most Americans, whites and minorities alike, strongly identify."²⁰⁷ Affirmative action programs provoke such resentment precisely because they are only justifiable if one recognizes that inequality exists, which most Americans are reluctant to acknowledge.²⁰⁸ At the least, one must maintain that poverty can be overcome if one merits better social and economic standing. Second, these policies were implemented in a half-hearted manner. Even the reforms proposed by the Moynihan Report would have been widely opposed because they would have resulted in higher taxes, which many view as an infringement of individual property rights and an unjust redistribution to those who have proven incapable of improving their own conditions. However, the failure to implement the Report's changes has resulted in even greater opposition precisely because they favor minority groups in a zero-sum allocation of jobs and resources.

Few minorities have directly benefitted from these policies, and the comparatively greater opportunity afforded to white Americans and wealthy individuals has remained unchanged, but the very existence of such programs has led to hostility by those who feel they have been harmed by "reverse racism."²⁰⁹

²⁰⁶ KULL, *supra* note 113, at 221.

²⁰⁷ SCHUCK, *supra* note 112, at 135.

²⁰⁸ Many have argued that whites dislike affirmative action policies because they put white people on the defensive. Furthermore, many have argued that the dislike also stems from the policies' ability to undermine the ideals of individualism and meritocracy that, if questioned, could pose many more difficulties in Americans' self-perception. As one author noted, because affirmative action policies require one to quantify the numbers of each racial group to have achieved certain successes, "affirmative action programs strip legitimacy from the assumption that the current distribution of access, wealth, and work is a natural phenomenon. The predominance of white people in a medical school class, secretarial pool, lunchroom, or office party loses that natural status which required no justification." Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Class*, 76 S. CAL. L. REV. 799, 811 (2003) (citations omitted).

²⁰⁹ As one politician explained: "I don't think there are 500 people in Louisiana that have either been adversely affected or benefited from affirmative action. But everyone who

c. The lost goal of substantive equality and its effect on lived reality

In discussing the formation of radical American individualism, this Article has made some generalizations about the pervasiveness of this principle in the hearts and minds of Americans. While the rhetoric often presents broad principles of policy when invoked by politicians, the effect of these principles is personally felt. In fact, the strength of the ideology of individualism has become clearer in the past two decades, as the reforms that aimed at collective equality have been increasingly limited. For example, the views of black children in an inner-city school demonstrate the pervasiveness of these ideals. Social scientists investigating the future of civic participation among certain groups visited Baltimore public schools and met with many students on several occasions.²¹⁰ The children generally attended segregated schools and lived in racially homogenous communities.²¹¹ Most tellingly, the students were “amazed” to see white people (the researchers) because they seldom saw white people other than police officers. Indeed, many students assumed the researchers were basketball recruiters.²¹²

Despite these experiences, the black students expressed the view that racism and discrimination occurred “a very long time ago.”²¹³ Each of them could recount horrific stories about murders and police brutality, without any broader comprehension of the possible forces at work in their community — chronic poverty, crime, discrimination, and drugs. As the researchers noted, “we found little confidence among the black adolescents in our study that collective action was at all relevant to their efforts to get ahead. Many African Americans coming of age in the new century view the civil rights movement as ancient history.”²¹⁴ Indeed, the students did not direct anger about their social situation at discrimination but rather toward each other. A discussion about the merits of welfare at Dunbar High School in Baltimore’s inner city led a female student to argue that the government should not be focusing on getting women to work, but that welfare reform should begin with getting the men to work.²¹⁵ A male student responded, “Just close your legs, that

doesn’t have a job or whose son cannot get into law school believes it’s because of affirmative action.” Edwin Edwards, Remarks During His Gubernatorial Campaign Against Former Ku Klux Klan Leader David Duke (1991), *quoted in* MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND MAINSPRINGS OF AMERICAN POLITICS* 7 (1997).

²¹⁰ JAMES G. GIMPEL ET. AL., *CULTIVATING DEMOCRACY: CIVIC ENVIRONMENTS AND POLITICAL ASSOCIATION IN AMERICA* (2003). In studies within diverse public schools, the authors document the ways in which one’s social and economic status, culture, and environment impact one’s political efficacy. *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 70.

²¹⁴ *Id.* at 69.

²¹⁵ *Id.* at 70.

would solve the problem.”²¹⁶ Equal opportunity and self-reliance, as seen in this example, often result in blaming the victim. The researchers noted further: “Again and again we found that these kids had come to believe in the American individualist creed, that success is really up to them, and that poverty and other social problems stem from a lack of motivation rather than structural inequalities or discrimination.”²¹⁷

CONCLUSION

India and the United States share many similarities, suggesting that their systems are actually not so different, although their ideological views toward individual rights and substantive equality have resulted in very different constitutional regimes. “India has developed a legal system that is probably more similar to that of the United States than any other country, particularly in the field of constitutional law.”²¹⁸ Both constitutions guarantee similar individual rights, both boast of constitutional courts with great powers of judicial review, including the ability to strike down legislation, and both share the common tradition of the British common law.²¹⁹ However, the Indian approach toward affirmative action, as an example of a project to further equality, focuses on eliminating the continued effects of social hierarchy that have perpetuated the inferior socioeconomic status of certain groups.²²⁰ The difference between these views toward equality can be explained by the focus either on the individual or on groups and the benefits individuals receive based on their position in society’s hierarchy. President Johnson’s recognition of the actual conditions of inequality²²¹ — both the lived realities of individuals and the persistence of inequality among societal groups — would have presented a paradigm shift in the American civic religion. In contrast, such recognition of collective disadvantage guides India’s approach to achieving greater equality. The comparison of these two approaches toward equality provides some interesting lessons.

First, the absolute furtherance of either of these approaches to equality would not be advisable. A purely collectivist, results-oriented push for substantive equality finds its clearest expression in the rhetoric of Marxism, which, in practice, denies the inherently unequal qualities of individuals, undermines individual liberty, and even proves ineffective at eliminating true inequalities. India’s system recognizes the value of achieving substantive equality while also protecting individual freedoms and rights. An entirely individualist approach toward equality of opportunity

²¹⁶ *Id.*

²¹⁷ *Id.* at 69.

²¹⁸ Cunningham, *supra* note 98, at 22.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *supra* note 183 and accompanying text.

can be found in early America and, to some extent, this formalistic approach persists to this day. It denies that there are very different opportunities available to those born within an existing social hierarchy, and justifies existing inequalities by referencing the formal equality of every individual under the law.

Second, each of these approaches result in very different legal principles, which can be summarized as an effects-based inquiry into achieving equality on one hand or a formalistic goal of ensuring antidiscrimination on the other. Each of these standards has its own drawbacks. Primarily concerned with the effects of past discrimination and continuing socioeconomic stratification of castes, the Indian approach, at least in theory, focuses on achieving the ideal of a society free of undeserved inequality. However, the resentment that such programs of the Indian approach have generated reflects the shared principles of individual rights and merit that have prevented adoption of such programs in the United States. The protests of the upper classes in India reflect the despair among their young people that they are themselves disadvantaged, with some feeling a distinct lack of opportunity. Whether their perceptions reflect an accurate view is debatable, but the conflicting ideals nevertheless present Indian leaders and voters with a difficult balancing of interests.

Moreover, the argument that antidiscrimination alone will eliminate continued caste discrimination has not evaporated. Ghandi's concern that an attempt to give secured political rights to the lower castes would result in greater entrenchment of the caste system may prove true. The more practical approach of Dr. Ambedkar — to grant the lower castes and outcastes political power regardless of continued discrimination by upper-caste Hindus — does have the advantage of at least achieving practical results. The Indian approach lacks the idealistic moral authority of achieving a unified society where caste, class, and race are no longer contemplated; however, concrete steps to elevate groups' societal standings provide an ability to measure and achieve some progress, rather than waiting for elimination of racism or for each individual of a maligned group to pull him- or herself out of poverty by sheer fortitude and determination. A further problem encountered with an effects-based inquiry arises in the context of defining disadvantaged groups and weighing their relative barriers to full equality. In India, caste has become the dominant concern for social reform, but women and certain races face very different obstacles, and they too have similar histories of social and economic discrimination. The U.S. Supreme Court has expressed alarm over this precise problem as a means of justifying their refusal to look at unequal effects.²²²

²²² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Supreme Court held: To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race

An approach concerned solely, or even primarily, with preventing overt, invidious discrimination does not achieve equality of results, as can be seen from the American experiment in achieving racial equality since World War II. In fact, once the U.S. Supreme Court began to give the 14th Amendment's guarantee of equality under the law some teeth, perhaps beginning with *Brown*, the principle quickly began to operate to *prevent* the achievement of greater equality, as seen in the history of affirmative action programs. The same pattern can be seen with the legislative reforms toward equality of the New Deal era, such as welfare programs and labor laws; these have largely been eroded by arguments that they impair individual liberty and responsibility.

A legal approach focused on eliminating unequal effects among society's groups ensures, to a much greater extent, the ability of individuals to achieve equal success. After all, it is unlikely that wealthy white individuals control nearly all of the nation's capital due to their inherent, superior talents. That these groups have not suffered from centuries of discrimination and other hardship provides a much more likely explanation for this class stratification. Their control over the social capital in society provides another explanation (i.e., those whose forbears amassed fortunes in a time of explicit exploitation of others remain much more likely today to retain those advantages and continue to accumulate them). Essentially, to protect the rights of the individual to such a great extent merely entrenches those already among the elite. Collectivist programs aimed at alleviating inequality also proceed from the assumption that the law provides a tool for achieving social change, whereas formalist equality-of-opportunity approaches proceed from the assumption that the legal system is limited in its ability to influence social structures.

Third, each of these legal approaches has political ramifications. India's society, shaped by the values of social responsibility, together with the values of liberalism and individual rights, demonstrates an acknowledgement of existing injustices and has coupled this awareness with concrete steps to ameliorate them. In contrast, the United States has already achieved equality of opportunity under the law, at least in terms of formal equality. As such, the push toward ever-greater equality, envisioned during the civil rights era, has largely stalled. Disenchanted with social programs that seem to have failed, mainstream America has largely given up on the project, content to explain the continued gulf between the rich and the poor, whites and blacks, as a natural consequence that cannot be affected by government intervention. More accurately, most likely feel that these disparities can only be prevented through programs that undermine the ideological rhetoric of

is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently immeasurable claims of past wrongs.

Id. at 505–06 (1989). *But see* Williams, *supra* note 193, at 2128–29 (criticizing the Court's argument in *Croson* as disingenuous and unfounded).

untempered individualism, private property, and capitalism that has been ingrained in the national psyche since before the drafting of the Constitution. Subsequently, the entrenchment of these ideals in our constitutional system has strengthened them to the extent that most Americans view them as part of the national order, having achieved the status of moral imperatives. Thus, as India continues to attempt greater equality, even though it will very likely never result in an absolute equality based on merit, the United States retreats to its default position of radical individualism and utilizes less overtly racist and elitist rhetoric to justify the country's conditions.

This Article analyses the more collectivist principles of true equality and the more individualist principles of liberty as if they are diametrically opposed. To some extent, they must conflict. The incompatibility of these principles is demonstrated in the discussion of the opposition of Enlightenment ideals to concepts like welfare reform and affirmative action. This conflict is also evidenced in the traditional Hindu view of the individual as opposed to the benefit of society. Yet, the principles of individualism need only conflict with the ideal of equality when one embraces an absolutist or radical view of either of these ideals. In fact, the radical view of egalitarianism as expressed in Marxist thought is justified, in part, on the idea that man cannot be free as long as he is bound to an unequal society and unable to exploit fully his own natural talents without regard for the need to compete against others. Although liberty and equality can be opposed to each other, a balanced view of either ideal and furtherance of both laudable goals requires some elements of each.