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The Meaning and Good of Equality: Toward Enhanced Constitutional Principles

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*Symposium on Whether
Legalization of Same-Sex Marriage
Is Constitutionally Required—2012*

II.

EQUALITY MANDATES FOR
SAME-SEX MARRIAGE IN
THEORY AND PRINCIPLE

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The Meaning and Good of Equality: Toward Enhanced Constitutional Principles

Scott FitzGibbon *

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“[F]riendship is said to be equality.”

—Aristotle¹

“[L]et us discard all this quibbling about this man and the other man; this race and that race and the other race being inferior, and therefore they must be placed in an inferior position Let us discard all these things, and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal.”

—Abraham Lincoln²

I. INTRODUCTION

Equality is basic to our political discourse. It is a big idea; a constant touchstone; a noble aspiration. It is, however, supported by reference to shaky theoretical foundations. Many of the grounds given for pursuing it are instrumentalist, shallow, or “empty.” A few collide painfully with common sense.

This Article seeks to identify and describe a stronger foundation for equality: one which supports the *gravitas* which is assigned to it. It sketches a basic account of the nature and good of equality, which is rich and demanding (and comports with much common sense). This account, different from most, locates a central good of equality within affiliation, rather than making of it something that subsists importantly even between strangers.

It is here proposed that equality is relational. Equality comes into its own, so to speak, in a close association. Equality, at its best, is a dimension of friendship.

Having presented this thesis, this Article undertakes two further tasks. The first is to sketch an extended account of friendship. “Friendship,” as here understood, is a term which encompasses not only two-

1. ARISTOTLE, NICOMACHEAN ETHICS 125 (1157b 39) (Terence Irwin trans., 2d ed. 1999) [hereinafter *Nicomachean Ethics* (Irwin trans.)]. A more complete quotation of this passage is set forth at *infra* note 2121 and accompanying text.

Please note that where Aristotle is cited, Bekker numbers are included (for example “1157b 39” above). The Bekker number is a standard citation used when citing Aristotle since the Bekker number is the same in all translations, including published Greek versions.

2. Abraham Lincoln, *Speech of Hon. Abraham Lincoln in Reply to Senator Douglas: Delivered at Chicago, Saturday Evening, July 10, 1858 (Mr. Douglas Was Not Present)*, in POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS 44 (Burrows Bros. ed., 1897) [hereinafter POLITICAL DEBATES], available at <http://www.bartleby.com/251>.

person intimacies, but also associations such as clubs, parishes, extended families, and many other components of civil society. Indeed, extending yet further, friendship comprises, in a sense, civil society itself. The second task is to propose the above insights as a ground for constitutional adjudication. The law, it is here maintained, should promote equality by recognizing and promoting the associational components of civil society. The Article draws recurrently upon Aristotle, the philosopher upon whom Dante conferred the title “Master of those who know.”³

You are, let us suppose, the Chief Justice of the highest court of a young nation that has a written constitution. The constitution includes a provision that requires the court to “promote equality.”⁴ This clause has not as yet been the subject of decisive adjudication, so the slate is clean. Cases have come before you that invoke this clause and, that therefore, require an interpretation of the term “equality.”

Some of these cases touch, in one way or another, upon an unusual sociological condition in your country: namely that its households are structured in one or the other of two basic ways. One version—call them “Households Type A”—comprises unions, each of which is aspirationally permanent and based on an oath of loyalty between parties who undertake to live together, to honor and succor one another, to share the burdens of life, to welcome children, and to devote themselves to nurturing and rearing them. The second—call them “Households Type B”—comprises connections between two persons who come together on any other basis and for any purposes, often ones of emotion and appetite: persons who may or may not take any sort of oath or who do not undertake any commitment to the procreation and upbringing of children.

The statutes of one province in your country—Province Omega—treat the two types of households differently. They apply different nomenclature to Households Type A and accord them special treatment under various substantive doctrines. Legislative history and judicial opinions in Province Omega identify Households Type A as “components of society” and in various ways honor them more highly than Households Type B. Two other provinces follow divergent paths. One

3. “When I had lifted up my brows a little, The Master I beheld of those who know, Sit with his philosophic family.” DANTE ALIGHIERI, *INFERNO* 4:130–32 (Henry Longfellow trans., National Library Co. 1909) (1308–21), *available at* <http://www.divinecomedy.org>.

4. Unwisely perhaps: the phrase is very broad and probably ill-advised in implying that the matter is mainly for courts rather than for other branches or for private ordering.

of them—Province Sigma—inverts the policies of Omega and applies laws favoring Households Type B over Households Type A. Another province (Gamma) disfavors both, actively discouraging the formation and continuance of Households Type A and Households Type B so as to maximize the autonomy of the individual,

These elements of provincial laws and adjudication are challenged as violating the Equality Clause. You therefore seek to achieve a clear understanding of the meaning of equality.

II. SOME WIDESPREAD ACCOUNTS OF EQUALITY

A. Descriptive Accounts of Equality⁵

You find in your research many descriptive accounts of equality. Descriptive accounts make equality a matter of fact. A simple version proposes that, comparing person by person—individual by individual—one can conclude that they are isometric. In other words, that in some important attribute or condition—other than the normative or prescriptive—they are, by some measure, the same.⁶

You, as Chief Justice, cannot be satisfied with any entirely descriptive account. For one reason, you should find it difficult to credit the proposition that all men *are* in fact equal in any important descriptive characteristic or that they achieve universal equality in any attribute or circumstance.⁷ The American Declaration of Independence may seem

5. I here endorse Professor Patrick Brennan's and John Coons's distinction between descriptive and prescriptive definitions of "equality." See JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* (1999); see also Felix Oppenheim, *Egalitarianism as a Descriptive Concept*, 7 AM. PHIL. Q. 143 (1970), reprinted in *EQUALITY: SELECTED READINGS* 55 (Louis P. Pojman & Robert Westmoreland eds., 1997).

6. A definition along approximately those lines is proposed in the "Equality" entry in the Stanford Encyclopedia of Philosophy: "Equality' (or 'equal') signifies correspondence between a group of different objects, persons, processes or circumstances that have the same qualities in at least one respect, but not all respects, i.e., regarding one specific feature, with differences in other features." Stefan Gosepath, *Equality*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2011), available at <http://plato.stanford.edu/entries/equality>.

7. Although I doff my hat to John Coons's and Patrick Brennan's strong defense of the thesis that people may be equal in respect to their moral capacity to apprehend the objective good and to choose it. See COONS & BRENNAN, *supra* note 5; see also Patrick McKinley Brennan, *Equality, Conscience, and the Liberty of the Church: Justifying the Controversiale Per Controversialius*, 54 VILL. L. REV. 625, 632–36 (2009).

It might (unpersuasively) be objected that all persons are equally mortal; or "equal in personhood" or—from a Christian or Jewish or Islamic point of view—"equal in having been created" ("equally created"?). Some traits and some conditions are not susceptible of quantification:

to assert the contrary when it states that “all men are created equal.” But Abraham Lincoln dispels this illusion:

[T]he authors of that notable instrument . . . did not mean to say all men were equal in color, size, intellect, moral development, or social capacity. They defined with tolerable distinctness in what they did consider all men equal—equal in certain inalienable rights They did not mean to assert the obvious untruth that all were then actually enjoying that equality.⁸

Furthermore, you must conclude that no purely descriptive theory can serve as a firm guide to any action, and certainly not to constitutional adjudication. Constitutional principles must be founded on normativity. Abraham Lincoln attributed a normative approach, rather than an entirely descriptive one, to the American founders. “They meant,” he said, “to set up a standard maxim for free society.”⁹

B. The Search for Normative Equality: Some Observations

The search proves difficult.¹⁰ The absence of equality entails no obvious privation. How is someone’s wellbeing implicated if someone else—perhaps a stranger of whose very existence he is unaware—comes to exceed him in any condition or attribute, or falls behind in some circumstance as to which they were formerly equal?

On the other hand, equality has been guaranteed in many national constitutions and international instruments. We appeal to it in our political debates and regard a failure to respect it as a fatal flaw in legisla-

you either have the trait or you do not; you are either in that condition or out of it. When it comes to something like that, the adverb “equally” carries no meaning.

8. Abraham Lincoln, *Last Joint Debate, at Alton: Mr. Lincoln’s Reply (October 15, 1858)*, in *POLITICAL DEBATES*, *supra* note 2, at 411, 415.

9. The sentence in full is as follows:

They meant to set up a standard maxim for free society which should be familiar to all,—constantly looked to, constantly labored for, and even, though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people, of all colors, everywhere.

Id. at 415.

10. For a discussion of the Christian tradition on this matter, with special attention to the writings of John Finnis, see Patrick McKinley Brennan, *Arguing for Human Equality*, 18 J.L. & RELIGION 99, 140 (2002).

tion and even in many matters of personal conduct and personal relations. These circumstances should encourage the search for a rigorous account of the goods of equality.

C. Instrumental Goods of Equality

One way in which equality is good might be called the “instrumental.” Aristotle proposes that there are some things that we undertake “for the sake of something else,” distinguishing them from things that we do for their own sakes.¹¹ Some actions are good only for what comes of them, and some things good only for what they can be used to produce. Other actions and things are good though they may lead to nothing else of importance or value.¹² The former sort of thing can be called “instrumentally” good only.

Equality can be instrumentally good. Equal oars and equal strokes keep rowboats moving straight. Equality in the possession of wealth may preclude resentment and so promote social stability. Equal time for all candidates makes an academic examination a more accurate measure of comparative achievement.

Can you be satisfied with the instrumental analysis of the good of equality? Things of only instrumental value should be altered as needs change and may be discarded when needs end. If the rowboat is assigned always to circumnavigate an island clockwise, the oars on the port side should be larger. Where equalities are only instrumentally good, they may cease to be good when circumstances change.

11. ARISTOTLE, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1729 (1094a 18–22) (Jonathan Barnes ed., W.D. Ross et al. trans., 1984) [hereinafter *Nicomachean Ethics* (Ross trans.)]. The passage more fully reads:

If, then, there is some end of the things we do, which we desire for its own sake (everything else being desired for the sake of this), and if we do not choose everything for the sake of something else (for at that rate the process would go on to infinity, so that our desire would be empty and vain), clearly this must be the good and the chief good.

Id.

12. Also, consider the following:

Literally, what is of intrinsic value is what is of value in itself, rather than of value instrumentally. If something is valued simply as a means to a further state of affairs beyond itself, it is being regarded as of instrumental value only. But not everything which is of value . . . can be so only instrumentally. Some things are of value in themselves and for no reason beyond themselves And whenever this is so the state of affairs in question will supply a reason for action which is independent of other desirable end-states or values, and which derives from nothing but itself.

ROBIN ATTFIELD, A THEORY OF VALUE AND OBLIGATIONS 25 (1987).

Perhaps when it comes to matters of law and government, instrumental defenses of equality are especially strong. Consider the military draft. It may be wise to conscript all people of certain ages, however weak or faint of heart. More complex criteria may be difficult to apply and more costly. They may be the more readily abused—the more susceptible of manipulation so as to favor the rich or well connected. Standards based on simple equalities are easily understood and applied, and in a social and political order which traditionally endorses them they command respect. Departures may seem, rightly or wrongly, to send an opprobrious message.¹³

For these reasons, as Chief Justice you may be attracted to instrumentalist explanations of the good of equality. Perhaps they will suffice. On the other hand, if equality were of only instrumental value, it might make little sense to identify it as a principle of constitutional dimensions. Instrumental goods, being dispensable, are often best left to statutes, regulations, or private ordering. If an equality requirement in a constitution is understood to support only instrumental goods, judicial deference to legislative determinations seems to be appropriate.

In the lawsuit concerning the disparate treatment of Households Type A and Households Type B, you might conclude that provincial legislatures were justified in quite a number of divergent legal approaches depending on the circumstances. Province Omega might give favored treatment to Households Type A because of the desire to promote stability by catering to popular opinion and because of a shortage of well-reared children. Province Sigma might cater to a populace with a destabilizing antipathy to stable households and combat overpopulation by giving favored treatment to Households Type B. Province Gamma might operate on a semi-Spartan theory of rugged individualism and disfavor households of both types. None of these policies is clearly anti-egalitarian under a purely instrumentalist understanding of the meaning and good of equality.

If equality has some meaning with greater *gravitas* and stability than this, it must lie in a non-instrumentalist direction. This Article now pursues that possibility.

13. Furthermore, in matters fundamental to political participation, departures from equality lead to other ills. Inequalities in voting rights, for example, leave the disadvantaged population in a weak position to defend itself from oppression.

D. Equality and the Good of Rationality

Those who consistently and comprehendingly pursue appropriate equalities may be commended as *reasonable*. A man who pulls the oars with the same steadiness and strength as the oarsman opposite not only promotes the boat's mission in staying on a straight line, but also confirms his reputation as a sensible fellow. A governor of a province who allocates wealth with a careful eye to need and merit can be commended as a man or woman of reason: someone who seeks the rule and measure at the heart of wise governance. Reason and its application are part of final good. Equality, in many instances, is based upon considerations which go beyond the instrumental and participate in the final good of reason. Here, indeed, may lie the most fundamental good involved in equality. A commitment to be and act with fairness—equality—leads on into a search for the rule, measure, and balance at the heart of any matter.

This line of thought has special traction when applied to judges and legislators, since the law is widely understood to be emblematic of reason. *Departures* from the course of reason—especially departures motivated by prejudice and other forms of bias¹⁴—are especially opprobrious when it is a government which swerves.

But it might be objected that, valid and fundamental though it may be, this account of the good of equality leaves it “empty”: devoid of substantive content. The rationalist approach might be understood to be in a sense purely “procedural.” It may lead to a demand that the

14. Bias lies behind many failures of equality. Inequalities on the part of judges and legislators are thus in many instances accurately attributed to an opprobrious or contemptuous disposition towards the disfavored group and to amount, therefore, not only to lack of clarity of thought but also to disrespect and insult.

Thus many inappropriate inequalities of action can be traced back to a fundamental inequality of attitude and will: the unjustified preference for the self. Thomas Nagel puts it this way:

Each of us begins with a set of concerns, desires, and interests of his own, and each of us can recognize that the same is true of others. We can then remove ourselves in thought from our particular position in the world and think simply of all those people, without singling out as I the one we happen to be By performing this deed of abstraction we occupy what I shall call the impersonal standpoint.

THOMAS NAGEL, *EQUALITY AND PARTIALITY* 10 (1991). Further along in this work, Nagel states that “pure impartiality is intrinsically egalitarian.” *Id.* at 68 (The sentence continues: “in the sense of favoring the worse off over the better off.”); *cf.* JOHN RAWLS, *A THEORY OF JUSTICE* 19 (1971) (“It seems reasonable to suppose that the parties in the original position are equal. That is, all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on.”).

decision maker, to be credibly reasonable and therefore just, seek—fair-mindedly and without prejudice—some appropriate rule and measure, without grounding any recommendation as to what that rule and measure ought to be. Perhaps for a legislator to be rational—and thus to be egalitarian—requires only that once he has established a goal—any goal, for any reason—he pursue it efficiently, having deliberated fair-mindedly about what adduces to an efficient outcome. Perhaps he need only have a “rational basis,” in a broad sense. Egalitarian rationalism does not present equality as a principal goal; it merely mandates evenhandedness in the pursuit of whatever goal has been selected. The Equality Clause need not demand that this rational basis itself be one related to the promotion of equality. Thus, substantively, the “Empty Idea of Equality.”¹⁵

E. Beyond Instrumental and Rationalist Accounts of Equality

Thus, egalitarian instrumentalism and rationalism amount to thin or inconstant accounts of equality. Instrumentalism and rationalism make equality in a sense secondary.¹⁶ The good of equality, as these accounts present it, derives from “outside”: from the end pursued and the reason endorsed. But surely there is something greater about equality: something ennobling; something—as Abraham Lincoln’s language suggests¹⁷—to which we can aspire as a guide to the national order.

It seems we must look for some way in which people should be the same.

F. Individualist Accounts of Prescriptive Equality

Consider, therefore, theories which propose that, comparing people individual by individual, we can conclude that they *ought to be* the same in some respect.

Any theory along these lines collides with the observation that there is actually much to be said *in favor* of individual inequalities. It

15. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (explaining that the “idea” remains “empty” even when strict scrutiny is applied owing to indicia of bias).

16. But see NAGEL, *supra* note 14 (seeking to draw from the requirement of adopting the impersonal standpoint the substantive requirement of favoring those who have less).

17. See *supra* note 2 and accompanying text.

may be a good thing that some people are more intelligent than others, and desirable that talents are unevenly distributed. It is probably a good thing, even, that some people have more property than others and that the population does not experience, and never will experience, equality of opportunity. It is a good thing, though Ronald Dworkin denies it, that some people are more highly respected than others.¹⁸ Honoring excellent men and women is necessary if society is to avoid mediocrity or worse.

Differences—inequalities—between one individual and another make life interesting. What is more, they provide a rich set of occasions for benevolence—for the wise to enlighten the ignorant and the prosperous to assist the poor. Inequalities in skills and abilities fit for different functions and lead to different ways of life, enabling social flourishing rather in the way that different parts of the body are felicitously differentiated.

Inequalities enable the good of “complementarity.” This term might be defined as that condition where two or more things differ in such a way that their conjunction promotes the good in each. Men and women are complementary, both physically and in many traits of character. Crafts, and therefore craftsmen, are often complementary: the miller and the baker, for example. Perhaps all clear and well-functioning intellects are complementary: they foster knowledge in a special way, because each person sees and understands better when his field of vision is mirrored from different angles and through different sets of eyes. It would not be good for us all to be equal as to point of view.

This is not to maintain, of course, that stupidity, foolishness, or lack of talent is a good thing, nor to endorse paucity of opportunity or contemptuous disrespect. Were someone to dish out a great deal more

18. See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 330 (2011), *available at* <http://bit.ly/DworkinHedgehogs> (“A political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect . . .”). Everyone, except perhaps extremely evil persons, should be accorded *some* respect. This they deserve as a result simply of being human. Higher levels of respect may appropriately be accorded *ad libitum*, or they may be paid as mandatory tributes to merit. See STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 120–26 (2006) (proposing the categories “recognition respect” and “appraisal respect”). Recognition respect is to be awarded not because of special merit but as “the fitting response to dignity”—dignity being defined as the “authority of an equal: the standing to make claims and demands of one another as equal and free rational agents.” *Id.* at 120–21. It is “‘what we owe to each other’ as equal moral persons.” *Id.* at 122. Appraisal respect, on the other hand, “is esteem that is merited or earned by conduct or character.” *Id.* It is “moral esteem: approbation for her as a moral agent.” *Id.*

wisdom, intelligence, property, and talent, he could only be commended. You must, however, distinguish the thesis that a thing is good to bestow from the thesis that a thing is good to equalize. You should distinguish the insight that something is good to have from the proposition that it is good for everyone to have the same amount of it. As John Coons and Patrick Brennan observe: "People who are hungry do not need equality; they need bread" ¹⁹

Justice seems to call for some inequalities of condition. Nobel prizes and MacArthur Foundation "genius grants" are often awarded to people who have already acquired more than average amounts of respect and honor. Likewise, scholarships are often bestowed on students who have already learned more than most people. Such practices imply that the fostering of *inequality* can be a good thing. ²⁰

In matters of personal development, people are often best advised to "play to their strengths." The talented prose stylist may be encouraged to sharpen his skill and seek a career as a writer or journalist, or the promising mathematician to head toward computer science. If they accept such advice, they foster inequalities.

If individual circumstance or attribute equality is a good, destruction of excess holdings will often be commendable. If equality in happiness is a good, some people should be made less happy; if equality in virtue, some people should be made less virtuous. If equality in concern and respect were a good, as Professor Dworkin maintains, then there would be merit in according less respect to those who have a lot (Dworkin himself, for example).

19. COONS & BRENNAN, *supra* note 5, at 3.

20. Justice—that is, the justice of equality in transactions—often requires the conferral or promotion of inequalities. Consider the injustice involved when this inequality is ignored:

When my six-year-old son came home from first grade with a fancy winner's ribbon, I was filled with pride to discover that he had won a footrace. While I was heaping praise on him, he interrupted to correct me. "No, it wasn't just me," he explained. "We *all* won the race!" . . . Everyone who ran the race was told that they had *won*, and they were all given the same ribbon. "Well, you can't *all* win a race," I explained to him . . . He simply held up his purple ribbon and raised his eyebrows at me, as if to say, "You are thus refuted."

Shortly after this comedy, he informed me of another curious school district policy—one that's been around the United States for a few decades. It's trivial perhaps, but telling. If my son wanted to bring some Valentine's Day cards for his classmates, we were told that he would have to bring one for *every* member of his class. No favoritism was to be tolerated. No one's fragile self-esteem would be put to that awful test. The school legislates that all valentine outcomes will be equal.

STEPHEN T. ASMA, *AGAINST FAIRNESS* 11 (2013).

Let us now move on to the project of identifying a firmer foundation for equality.

III. RELATIONALIST ACCOUNTS OF EQUALITY

A. Equality As a Social Good

Aristotle makes equality a component of the social virtues. Since social virtues by their very nature emphasize community, Aristotle thus invites us to look beyond any version of *individualistic* equality. We must move beyond the project of setting up mankind in a long row of monads and, wielding a measuring rod, walking the line attempting to record an equivalence or to enforce one.

The good of equality does not come into its own among solitaries. In an archipelago of hermits there would be no obvious point to equality. Nor should it trouble one hermit if he discovered that some other has a larger hermitage, or more knowledge, or even more faith than he himself possessed; nor should any be deflected from the pursuit of excellence by a concern about the inequality he would achieve if he surpassed the others. A similar point applies to self-isolating individuals who are not hermits. A continent populated only by persons who cared little for one another, and had only the chilliest of connections, would doubtfully be a region where equalities or inequalities possessed fundamental importance.

We must, rather, look for the major goods of equality in the context of relationships.

B. Equality in Transactions

One fundamental dimension of equality applies in transactions—for example in purchase and sales. To deal fairly is an egalitarian practice widely recognized in Western philosophy and legal thought. Fairness in this context requires giving a fair day's pay for a fair day's work, paying a fair price for what one purchases, and not cheating or stealing. These are the bases for classic principles of contract law. They are not proposed for their instrumental value only, nor are they "empty." They have a substantive and not just a procedural content.

In any narrow sense, however, principles of transactional equality do not do the job. Our national aspiration toward equality surely means something more than fairness in trade. Your concerns in adjudicating fairly between Households Type A and Households Type B go beyond any deals that may have been made between them.

Perhaps as Chief Justice you could extend principles of transactional equality so as to make them serve as the basis for constitutional adjudication. You could regard the state and the political community as nexi of contracts. You could characterize the relationships between your country's provinces and their households as agreements, and disputes about household-related laws as disputes about terms in those agreements. You could say that all of these disputes boil down to the question of whether each type of household gets what it bargained for.

This Article pursues another approach. It proposes that we need not locate a transaction or a bargain in order to find the good of equality.

C. Equality As a Component of Friendship

Equalities, mutualities, and reciprocal correspondences prove, upon examination, to be deeply woven into the fabric of friendship. The equalities and mutualities of friendship are central to its meaning and structure. Here is an enlightening passage from *Nicomachean Ethics*:

[I]n loving their friend they love what is good for themselves; for when a good person becomes a friend he becomes a good for his friend. Each of them loves what is good for himself, and repays in equal measure the wish and the pleasantness of his friend; for friendship is said to be equality.²¹

The equalities of friendship present themselves to common experience. Acting superior—holding oneself out as above the other and emphasizing one's higher accomplishments—is an affront, and were an associate to act in such a way it would signal an end to the friendship or perhaps reveal that none had ever taken root. True friends take the opposite course and avoid attending to any matter that might found a claim to superiority: they simply extrude such circumstances from the relationship.

Friends participate together in the projects of life. They do things together. They conduct themselves towards one another in ways that reflect and promote equality. They do not interrupt. They listen as well as speak, and listen carefully. They defer rather than presume. Throughout their activities they consider and seek one another's good.

21. *Nicomachean Ethics* (Irwin trans.), *supra* note 1, at 125 (1157b 34 to 1158a 1).

Their choices have a certain reciprocal character; so much so that something that is chosen by one has, in a sense, been chosen by the other.²² Their aims correspond: fulfillment of the wishes of one friend constitutes fulfillment of the wishes of the other, and outcomes pleasing to one are pleasing to the other. So thoroughly may their activities conjoin that the actions of one become, in a sense, the actions of the other.²³ In these ways, where friendship is at its fullest, inequalities are dissolved.

Friends achieve equalities out of what might be called “psychological procedure.” Friends pay attention to one another in equal measure. One friend reflects on the other’s views with care equal to the reflection that he lavishes on his own concerns. True friends construct, between themselves, a culture of equalities. They respect a commutativity of attention and commitment. “Friendship either finds or makes equals.”²⁴

True friends experience life together. One grieves when the other grieves and rejoices when he rejoices. Such equalities are not limited to matters of the heart. They go further, and comprise reciprocity as part of the fundamental elements of friendship. Above all, they comprise interchange and mutuality; indeed, a kind of mirroring in which the knowledge of one becomes the knowledge of the other. Friendship

22. See ARISTOTLE, *Eudemian Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1922, 1958 (1157b 34-49) (Jonathan Barnes ed., J. Solomon trans., 1984) [hereinafter *Eudemian Ethics*] (referring to a “mutual returning of choice”). Aristotle also states, “[I]f active loving is a mutual choice with pleasure in each other’s acquaintance, it is clear that in general the primary friendship is a reciprocal choice of the absolutely good and pleasant because it is good and pleasant.” *Id.* at 1960 (1237a 30-34).

To love him *qua* chooser is to identify with his choices: consider the *Eudemian* concept of ‘reciprocal choice’ It is above all through his choices that I try to benefit him: in a life of co-operation he partly owes his choices to me, as partly both to the way of life within which they operate, and to the practical thinking out of which they issue. Consequently, his activity displays the character we share . . . it is partly in his activity that I find my own *eudaimoniā*.

A.W. PRICE, LOVE AND FRIENDSHIP IN PLATO AND ARISTOTLE 124 (1989), available at <http://bit.ly/14kKwKA>.

23. See *Nicomachean Ethics* (Ross trans.), *supra* note 11, at 1849 (1170a 2-4) (“[T]he blessed man will need [virtuous friends], since he chooses to contemplate worthy actions and actions that are his own, and the actions of a good man who is his friend have both these qualities.”).

24. PUBLIUS SYRUS, THE MORAL SAYINGS OF PUBLIUS SYRUS, A ROMAN SLAVE § 32, at 15 (D. Lyman Jr. trans., L.E. Barnard & Co. 1856), available at <http://bit.ly/168yCjt>.

involves a commonality of view and a concordance of thought and belief.²⁵

True friends, up to a point, seek to achieve a resemblance to one another in matters relevant to their friendship. They seek to “come together,” and to a substantial measure they succeed, correlating their opinions through discussion. A friend respects, often to the point of accepting, the beliefs of the other. Through commonality of life, friends may achieve similarity in tastes and habits of thought. They share.

Indeed, when very close, friendship seems to pass the bounds of mutualities and reciprocities—perhaps even beyond “equality” in the usual sense of the word—and reach a level at which a certain *identity* emerges, and the friends “become one.” “[T]o perceive a friend must be in a way to perceive one’s self, and to know a friend to know one’s self.”²⁶ A friend, Aristotle indicates, is “another self.”²⁷ Friends are “one soul in two bodies.”²⁸

Of course, it cannot literally ever come about that friends become the same person. If this were to occur there would no longer be a friendship at all, since only one person would remain after the merger (though perhaps he would be located in two places at the same time).²⁹

25. See *Nicomachean Ethics* (Ross trans.), *supra* note 11, at 1850 (1170b 10–13) (“He needs, therefore, to be conscious of the existence of his friend as well, and this will be realized in their living together and sharing in discussion and thought.”).

26. *Eudemian Ethics*, *supra* note 22, at 1974 (1245a 35–36). This passage is quoted more fully in the next footnote. For an interesting discussion of the “perceiving” dimension of friendship see PRICE, *supra* note 22, at 121–22.

27. *Id.*; *Nicomachean Ethics* (Ross trans.), *supra* note 11, at 1843 (1166a 31–32) (“[H]e is related to his friend as to himself (for his friend is another self)”. Compare *id.* at 1850 (1170b 5–7) (“[I]f as the virtuous man is to himself, he is to his friend also (for his friend is another self):—then as his own existence is desirable for each man, so, or almost so, is that of his friend.”), with *Eudemian Ethics* *supra* note 22, at 1974 (1245a 29–36) (“[A] friend wants to be, in the words of the proverb, . . . ‘a second self’; but he is severed from his friend, and it is hard to find in two people the characteristics of a single individual. But though a friend is by nature what is most akin to his friend, one man is like another in body, and another like him in soul, and one like him in one part of the body or soul, and another like him in another. But none the less does a friend wish to be as it were a separate self. Therefore to perceive a friend must be in a way to perceive oneself, and to know a friend to know one’s self.”).

28. AUGUSTINE, *CONFESSIONS* 58–59 (Henry Chadwick trans., 1991) (400) (“[My friend was] my ‘other self.’ Someone has well said of his friend, ‘He was half my soul.’ I had felt that his soul and my soul were ‘one soul in two bodies.’” (citation omitted) (quoting I DIOGENES LAËRTIUS, *LIVES OF THE EMINENT PHILOSOPHERS* (Loeb Classical Library vol. 184, Robert Drew Hicks trans., 1925))).

29. See ARISTOTLE, *Politics*, in 2 *THE COMPLETE WORKS OF ARISTOTLE* 1986, 2003 (1262b

Nevertheless, it would appear that in some truly close friendships, a high degree of interpenetration of thought, feeling, and belief arises, and a concordance of intention—and even, in a sense, a concordance of action—emerges. A man can understand, as Aristotle states, that a friend's actions are “his own.”³⁰ To the extent that this transpires—a condition one might call “moral vicariousness,” or a vicariousness of thought and action—inequalities melt away. If his condition is mine and mine his—his virtues and knowledge mine, and mine his—how could they be in any way unequal?

Friendship is a fundamental element in human flourishing. True, its value is in part instrumental, since friends are, as Aristotle observes, our refuge in adversity and our security in prosperity.³¹ But friendship is of far more than instrumental value. Who would dispense with it? “For without friends,” as Aristotle states, “no one would choose to live, though he had all other goods.”³² It is an exalted condition. With a friend, as Aristotle says, we are able to do more and even to think and know more.³³

Equality, as a constituent of friendship, comes into its own as a final, non-instrumental good. The mutualities and reciprocities of friendship; the melting away of inequalities; the interpenetration of thought, feeling, and belief; perhaps even the moral vicariousness, which are friendship's special gifts, are things we would not choose to sacrifice though we had all the other goods.

12–14) (Jonathan Barnes ed., B. Jowett trans., 1984) [hereinafter ARISTOTLE, *Politics*] (noting that lovers who “desire to grow together in the excess of their affection, and from being two to become one” that “one or both would certainly perish” if their desire was fulfilled).

30. *Nicomachean Ethics* (Ross trans.), *supra* note 11, at 1849 (1170a 1–3) (“[T]he blessed man . . . chooses to contemplate worthy actions and actions that are his own, and the actions of a good man who is his friend have both these qualities.”). Some of the reasons for Aristotle's surprising conclusion are offered by Richard Kraut:

[I]f I ask a friend to do something for me, then in a way his action is done by me, since I initiated it. As [Aristotle] says[,] . . . in such cases ‘the starting point is in us.’ Now, a friend is someone whose character I have helped shape, over the course of our long association. For this reason, there is a sense in which ‘the starting point’ of whatever he does, when he expresses his character, is in me. What he does is in a way my doing as well, because his actions flow from the character that I influenced.

RICHARD KRAUT, ARISTOTLE ON THE HUMAN GOOD 143 (1989), *available at* <http://bit.ly/14kK0fR>.

31. See *Nicomachean Ethics* (Ross trans.), *supra* note 11, at 1825 (1155a 9–11) (“[H]ow can prosperity be guarded and preserved without friends? . . . And in poverty and other misfortunes men think friends are the only refuge.”).

32. *Id.* (5–6).

33. *Id.* (15–16) (“[W]ith friends men are more able both to think and to act”).

IV. FRIENDSHIP, AND EQUALITY WITHIN FRIENDSHIP, AS COMPONENTS OF SOCIETY

This leads to the next major thesis of this Article, which is that friendship is not limited to couples; it is, rather, an association that can be found throughout the fabric of society and within many of the components of a civic order.

A full culture of friendship sustains and promotes many things: first, the deep procreative connections between man and woman characteristic of marital excellence; second, the more casual, but nevertheless pleasant and enriching, connections of camaraderie that make life enjoyable and give it much of its zest; and finally, those brotherhoods—for example, of the workplace and professional associations—which lend a quality of human decency to what might otherwise be a destructive or soulless economic environment.

Affiliations of these sorts can be, and often are, friendships in a broad sense of the word. As this implies, such affiliations can be, and frequently are, *fora* for equality. They work best, and are most fulfilling for the people who belong to them, when the dimensions of mutuality, reciprocity, interaction, and give and take are present—when they operate through a kind of balance.

A well-functioning and flourishing society is planted thick with such associations and organizations: marriages and extended families; social clubs and affinity groups (e.g., the Knights of Columbus and the Elks); service organizations, such as the PTA, the Welcome Wagon, and the St. Vincent de Paul Society; business partnerships; corporations; unions; and the Rotary Club (connections, in other words, related to commerce). All of these groups recognize and promote a sort of equality and reciprocity among their members, nurturing within themselves the mutualities and correspondences in which equality fundamentally consists.

A *society of friendship*—that is, a society of equality within friendship—“knows” friendships and affiliations of these various sorts. It recognizes and defines them accurately. A strong culture of friendship honors and applauds them, making much of people who are loyal to their friends, as Scripture honors Jonathan and David, and as the Romans did Damon and Pythias, and as the Germans, in the nineteenth century, did Goethe and Schiller.

A society that strongly promotes the various associations and affiliations that make up its character honors and respects such associations—“understands” them, so to speak—and communicates truthfully

about them, rather than in some way presenting an unflattering and distorted picture. A society that is truly egalitarian—in the sense of equality that is presented in this paper—discerns the equality-promoting affiliational forms that constitute its fabric.

A society that effectively promotes equality-instantiating affiliations sustains civic virtue. It promotes the constancy, the self-knowledge, and the capacity for self-restraint and self-sacrifice without which no one can sustain a true friendship. It promotes that trait which Aristotle refers to as “read[iness] to follow rational principle.”³⁴ A promiscuous horde could not sustain a culture of friendship.

Even within a well-ordered society, not all conglomerations of persons instantiate equality or constitute friendships in any important way. Equality, like most other important goods, can be consistently pursued and reliably achieved only within associations where its members possess the good sense, discipline, understanding, knowledge, and benevolence upon which such a project can be founded. A society of friendship will distinguish associations that promote equality from those that are casual, ill-conceived, or meretricious.

This suggests the corollary insight that when a political society moves in the direction of minimizing the bonds between man and man—reducing the concern of each for the other, paring away at their commitments to one another, and limiting those commitment to matters of safety and property—it diminishes equality. A further corollary is that a political society misunderstands equality and may actually thwart it when that society encourages or even demands inappropriate equalities between strangers.

A further implication is that a political society that segregates infringes equality. A social order that cuts off one race, ethnic group, or religion from communication and affiliation with the main society—even in the improbable instance in which the segregated class is equally well-supplied with goods and opportunities—really is “inherently unequal,” as the United States Supreme Court indicated in *Brown v. Board of Education*.³⁵

For you as Chief Justice of the Supreme Court of your young nation, the above comments identify the foundation upon which you may build the main principles of its equality jurisprudence.

34. ARISTOTLE, *Politics*, *supra* note 29, at 2056 (1295b 6).

35. 347 U.S. 483, 495 (1954).

Let us therefore proceed to the fourth section of this paper, passing over the dreadful apparition—happily unfamiliar to a harmonious and socially wholesome age such as our own—of a sort of “*anti-society*,” a sort of “society of dissolution” that places a meretricious, casual, and exploitative affiliation on an equal footing with a mutual and reciprocating one. A pseudo-society, as Plato indicates in *The Republic*, makes pleasures its aim, establishing an “equality of pleasures” (“all [pleasures] are alike and must be honored on an equal basis”) and making them its guide, respecting an affiliation only insofar as its parties derive pleasure from it.³⁶ In such a society, “[F]or the sake of a newly-found lady friend and unnecessary concubine . . . a man will strike his old friend and necessary mother . . . [and] for the sake of a newly-found and unnecessary boyfriend, in the bloom of youth, he will strike his elderly and necessary father.”³⁷

In such a society, leading institutions go so far as to encourage the dissolution of the bonds of even the closest affiliations, and instead celebrate their destruction. Such societies discredit the likelihood that affiliations foster equality, concluding instead, like Michel Foucault, that basic associational forms are nothing better than zones of exploitation and conflict.³⁸

36. THE REPUBLIC OF PLATO 239 (561b–c) (Alan Bloom trans., Basic Books, 1991), *available at* <http://bit.ly/YELevp>. Plato attributes this statement to Socrates.

37. *Id.* at 255 (574 c–d). This assertion is actually posed as a question by Socrates: “Is it your opinion that . . . ?” But it is clear in context that Socrates expects to receive an affirmative answer and that he approves of it once he receives it.

38. See JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 290 (1992) (attributing to Foucault the view that “modern civil society is composed only of individualized strategists engaged in a struggle of each against all, pervaded by power and politics understood as war carried on by other means.”). See also MICHEL FOUCAULT, *The Confession of the Flesh*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977*, at 194, 208 (Colin Gordon ed., Colin Gordon et al. trans., 1980) (proposing “just a hypothesis” that “[w]e all fight each other”). According to Foucault:

The State is superstructural in relation to a whole series of power networks that invest the body, sexuality, the family, kinship, knowledge, technology and so forth. True, these networks stand in a conditioning-conditioned relationship to a kind of “meta-power” which is structured essentially round a certain number of great prohibition functions; but this meta-power with its prohibitions can only take hold and secure its footing where it is rooted in a whole series of multiple and indefinite power relations that supply the necessary basis for the great negative forms of power.

Id. at 122.

V. TOWARD CONSTITUTIONAL PRINCIPLES

Return, then, to you as the Justice privileged to develop the principles of your country's constitution. What does the discussion above suggest about the Equality Clause?

The analysis takes you, I submit, beyond any individualist account of equality—beyond the limited scope afforded to egalitarianism by the instrumentalist, rationalist, and transactional accounts. The thesis instead identifies a wider and firmer basis for egalitarian jurisprudence: one that accepts, as a central project in the promotion of equality, the recognition and promotion of certain institutions and affiliations of civil society. It suggests that a people will develop and sustain equality to the extent that it supports many such institutions, well-developed and well-understood. It commends the development by your new Supreme Court of equality principles that promote the self-discipline, self-control, and practices of discernment that form the foundations for friendship. It supports the development of legal doctrines that give definitional confirmation to firmly-based affiliational forms that truly promote equality. It recommends that the law identify, favor, and strengthen associations which possess characteristics suitable to the promotion of the mutualities and reciprocities of friendship: associations, for example, that involve declarations of loyalty, and that engage all the parties in significant projects of benefit to each.

The analysis suggested in this Article invites you, as Chief Justice, to commend and uphold laws that give special support and sustenance to Households Type A. The laws of Province Omega that favor them and that disfavor Households Type B should withstand scrutiny under the Equality Clause for this reason. They should be upheld, whether or not they can be defended on some other ground such as their “rationality,” or serving a purpose in the instrumentalist sense. The lawyers for Province Omega do not have to establish that Households Type A serve a policy goal such as growing the population. They need only adduce the circumstance that those who created Province Omega law reasonably concluded that Households Type A instantiate affiliational equalities, and that households Type B are too casual, emotionally labile, and transient to sustain them.

The attorneys for Provinces Sigma and Gamma will find it more difficult to sustain their jurisdictions' laws. A jurisdiction that disfavors and undermines the most fundamental affiliational units of civil society vitiates equality.