JUSTICE FROM THE COURTS: A MORAL PHILOSOPHICAL APPROACH TO ENDING THE PARTISAN APPLICATION OF THE LAW IN THE UNITED STATES

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INTRODUCTION

Is the American legal system fair?

It depends what we mean by "fair." It also depends on the niche of the legal system we are talking about. Regarding the United States's criminal justice system, for example, a 2023 Gallup poll found that only forty-nine percent of Americans thought it was fair: That means a majority of Americans do not believe they would receive a just outcome if charged with a crime.[1]

That is just public *perception*, but perception is important. The system needs to be perceived as just if individuals are to abide by its rulings.

Many factors contribute to a perception of unfairness. These may include disagreement with the laws passed by the legislature, especially in the realm of criminal sentencing, and concerns with jury bias. Regarding court decisions on matters of broad public importance with the potential to alter national policy, public perception of judicial fairness and neutrality is particularly significant. For example, a 2024 Associated Press-NORC Center for Public Affairs Research survey found that seven in ten Americans believed U.S. Supreme Court decisions to be rooted more in the judges' personal ideologies than in an unbiased application of the law at issue.[2]

Public perception is hardly an infallible measure of reality. Yet, social science analyses looking at case outcomes support the perception that judges' decision-making is ideologically biased. One study, examining around 670,000 cases in the United States Circuit Courts of Appeals from 1985 to 2020, found that the political affiliation of the judge—measured by whether he or she was

1. *See* Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx [https://perma.cc/2G8S-U6VX]; *see also* Kenneth E. Fernandez & Jason E. Husser, *Public Attitudes Toward State Courts*, OR. STATE U., https://open.oregonstate.education/open-judicial-politics/chapter/public-attitudes-toward-state-courts [https://perma.cc/PX79-BYHM].

2. Thomas Beaumont & Linley Sanders, *7 in 10 Americans think Supreme Court justices put ideology over impartiality: AP-NORC poll*, ASSOCIATED PRESS (June 27, 2024), https://www.ap.org/news-highlights/spotlights/2024/7-in-10-americans-think-supreme-court-justices-put-ideology-over-impartiality-ap-norc-poll [https://perma.cc/54DQ-MCP6].

appointed by a Democratic or Republican president—was a predictive factor for the outcome of the case in six categories of cases where a judge could perceive one party as being in a position of weakness.[3] These six categories comprised a stunning ninety percent of the cases examined.[4] Another study examined 1,400 federal district court judges' criminal sentencing history and found that Democratic-president appointed judges sentenced black defendants on average to 4.7 fewer months in prison compared to Republican-appointed judges following the watershed *United States v. Booker*[5] case, a disparity that could not be accounted for by other factors.[6] A meta-analysis of several studies examining the potential connection between judges' party affiliation and their performance confirms that Democratic-appointed judges issue more "liberal" decisions and Republican-appointed judges more "conservative" ones.[7]

Pause and let this sink in. Compelling empirical evidence demonstrates that, regardless of what one may or may not have done, or what the text of the statute one is charged with violating may or may not say, the personal ideology of the judge one is lucky (or unlucky) enough to draw will influence, perhaps dispositively, whether he or she wins or loses and the severity of any punishment received. And even outside of the criminal context, cases can appear to be vehicles for policy reform or moral judgment, not providing the individuals what they are due under the law. No wonder the American public largely lacks confidence it will be treated fairly in court.

I witnessed the unmistakable impact of judicial ideological bias firsthand in my nearly ten years serving as a litigator in federal court for the United States Department of Justice. States and organizations bring cases to alter federal agencies' actions and policies, and carefully choose their forums to increase the chances of drawing judges politically or otherwise ideologically aligned with their causes. Challenges to major nationwide policies and programs are routinely filed in sleepy, out-of-the-way jurisdictions with no connection to the action simply because those courts are home to a single judge with well-known ideological leanings. In my experience, in these situations, the suing party is guaranteed a victory short of committing glaring malpractice. My most important day in court in these cases was not to argue a motion to dismiss, or litigate a trial, but to seek a transfer of venue to a court more closely connected to the controversy and convenient for the witnesses. When this early housekeeping motion was routinely denied—because what judge would want to pass on the opportunity for at least a few minutes in the national spotlight and

3. Amy Cohen, *The Pervasive Influence of Political Composition on Circuit Court Decisions*, 17 J. LEGAL ANALYSIS 14 (2023).

4. *Id.*

5. 543 U.S. 220 (2005).

6. Alma Cohen & Crystal S. Yang, *Judicial Politics & Sentencing Decisions,* 11 AM. ECON J.160, 161–63 (2019).

7. Daniel R. Pinello, *Linking Party to Judicial Ideology in Federal Courts: A Meta-Analysis*, JUST. SYS. J. 219, 219–21 (1999); *see also* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. SOC. SCI. 203, 205–06 (2017).

the power to wholly shut down significant national initiatives (the filing party knew) the judge disagreed with—the case outcome was a *fait accompli*. Regardless of all the motions, evidence, and trial still to come in the lower court, my team and I would immediately start looking to the eventual appeal from our inevitable defeat at trial.

To be fair, the judiciary is a coequal branch of the United States federal government under the Constitution, and so will inevitably and appropriately participate in *governing*. However, as the United States Supreme Court has consistently recognized, its role in governing the country is not to create the law—that is the politically elected branches' job—but to say what the law those branches created *is*, and apply that law to determine individuals' rights and obligations in concrete controversies. And the purpose of this constitutional design, according to its own terms, is to "establish justice,"[8] among other goals. Is the judicial branch establishing justice if the exact same law passed by Congress means I win in one federal court, and I lose another; if I go to prison for six months in one court and a year in another, when my decisions and conduct are the same and the determinative variable is the ideological bent of the judge I draw?

I, and apparently a sizeable number of Americans, would say no. How did we get here from the Framers' goal of establishing justice?

Most people have encountered what I will call the "traditional view" of legal adjudication. Under this view, judges are and ought to be robe-wearing umpires calling the legal equivalent of balls and strikes. This view recognizes, but disapproves of, an exception: a minority of "activist" judges bringing uncertainty and slant into interpreting the otherwise clear-cut rules to accomplish some policy objective. This is a view one often will hear judicial nominees espouse in their U.S. Senate confirmation hearings in an effort to reassure their interlocutors that the law is straightforward and can be applied in an impartial and predictable way, without fear that the nominee will bring their individual views (which the senators may disagree with) to bear and warp it. This view is the conceptual grandchild of so-called "legal formalism," one of the oldest schools of thought when it comes to judging: The law consists of a body of principles based in reason that can be interpreted and applied in a neutral way based on the exercise of unbiased logic to arrive at principled and longitudinally consistent outcomes in the vast run of cases.

The view that arose in response, based on the arguable naïveté of legal formalism in the face of evidence such as that gathered above of disparity in judicial outcomes, is that there are no "neutral" judges. All judges are naturally making decisions based on their individual preferences. The law is no more a pure exercise of logic from a starting point of unbiased principles than any other decision about important things made by human beings—which is to say, none. There is no neutral way to interpret the law because human adjudicators are not dispassionate robots living in a sterile vacuum, but approach questions of right and wrong, fairness, logic, and consistency with constitutional principles, from

8. U.S. Const. pmbl.

the perspective of deeply-ingrained personal and cultural beliefs about and experiences of the world. So, the key to winning a case is drawing a judge whose views falls on your side of the spectrum or, at least, convincing her that they do.

The straightforwardly named "legal realism" school of thought espouses this perspective and emphasizes the significance of judicial psychology and ideology. It emerged in the early twentieth century based on the thoughts of famous jurists such as Supreme Court Justices Oliver Wendell Holmes Jr. and Benjamin Cardozo. This view comported with developments in human psychological understanding focusing on learning, linguistic development, and unconscious bias in decision-making, among other areas. As Cardozo explained:

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs . . . . In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[9]

It is hard not to concede the basic sense of this view. There is no way to interpret the meaning of even the most straightforward words in a statute in a strictly *neutral* way without bringing the interpreter's experience and beliefs to bear.

Nevertheless, there are judges who conscientiously approach their work in line with the legal formalism mindset, and attempt to interpret the law in as neutral and unbiased a way *as possible*. Despite popular perception, in my experience, some of this type of judge do exist. They deserve our gratitude for this often thankless and Sisyphean endeavor. But, if they are being honest with themselves, they have to admit that the "as possible" modifier is inescapable in their unbiased approach as long as they remain finite human beings. As Cardozo explained, they do not operate in a vacuum, their understanding of the world, including the laws passed in it, generally came from somewhere, a particular place in time and history and culture and belief system, and that *somewhere* will not be exactly the same as all other people's *somewhere*. Try as powerfully as they might to uncover unconscious beliefs, check their assumptions, self-criticize and vet their conclusions through ruthless devil's advocacy, even these judges must admit that they are incapable of seeing and weighing *every* possible perspective equally and without the slightest influence from their personal worldview and biases.

The simplest way to say this is that all decisions about what something means must be made in a context, and, absent any superseding dictate, the

9. Benjamin Cardozo, *Lecture I. Introduction. The Method of Philosophy, in* THE NATURE OF THE JUDICIAL PROCESS (1921) (internal citations omitted).

context is necessarily going to be that of the decision-maker's own education, experience, and background beliefs about the world. Given this default interpretive setting, this means that the judge's personal political and ideological perspective will play a role, often a significant one, in his or her decision-making. Hence the seven of ten Americans believing that those judicial personal preferences, not an impartial reading of the law, determine the decision-making of the country's highest and most powerful court.

We need not continue to accept this status quo of judging based on personal ideology. We do not have to accept an unfair and undemocratic legal system where our fate, every time we show up in court, depends not on a law enacted through a democratic system, but the personal beliefs of the judge we happen to draw. That legal adjudication necessarily involves human judgments informed by beliefs about the world outside of the law at issue does not mean that these beliefs need be *personal* to the judge. There is a better, fairer way; one where the background views that judges bring to bear come not from their *personal* history and inclinations, but philosophical principles necessarily *shared* by *all* judges in their position and *all* individuals coming before them in court. Indeed, shared by all persons in the country, whether they are currently conscious of them or not, because, as this essay explains, these principles are not only consistent with but dictated by our status as human beings and the fundamental source of legal legitimacy underlying our democratic system in the United States.

In short, the "fairness" problem with legal adjudication arises not from the fact that judges are interpreting the meaning of laws in a value-laden context—that is unavoidable—but rather that the context is *personal* to the judge. If the background values comprising that context are shared, it is no longer "biased" or "unfair" for the judge to look to those common values when interpreting and the applying the law to the facts in that case.

As a practical matter, how could the judicial system possibly function if the courts had to ensure that judges shared the same values as all the parties in their cases before justice could be administered? The only practical way to ensure shared values is if those values are philosophically necessary—if the values are ones all judges and litigants *must* implicitly share as a matter of logic and universal principle, regardless of their individual choices and backgrounds.

In this essay, I argue at least one such philosophically necessary, universally shared value exists, and how we can build up from it to a "fairer" legal system in the United States.

I. First Principles

A. The American Founders and Self-Evidence

In April 1775, fighting between American colonials and British soldiers began in Massachusetts and quickly spread throughout many of the thirteen American colonies. By the end of August, King George III had declared the

American colonies "in a state of open and avowed rebellion."[10] In an attempt to create domestic coordination and leadership, the colonies elected and sent delegates to a Continental Congress in Philadelphia, Pennsylvania, the second of which convened on May 10, 1775. Originally, the aim of the delegates to the Second Continental Congress was to find a way to resolve the colonies' disputes with Great Britain and obtain reconciliation and an end to the hostilities. However, as both the war and deliberations dragged on, more delegates started to consider a permanent break from British rule. On June 7, 1776, a delegate from the Commonwealth of Virginia, Richard Henry Lee, introduced a resolution providing "that these united colonies are and of right ought to be free and independent states."[11] The Congress appointed a committee of five delegates, chaired by Thomas Jefferson (age thirty-three at the time), to draft a document explaining the colonies' reasons to assert independence. Three weeks later, the result was the Declaration of Independence, adopted by the Continental Congress on July 4, 1776.

The Declaration, drafted by Jefferson but subject to substantial revisions by the Congress, famously states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."[12] This statement is so ingrained in our common history and understanding of who we are as Americans that most of us accept it as true reflexively, without a second's hesitation. But let's step outside of the phrase's familiar embrace for a moment and examine it critically. Is it "self-evident," that is, clear to anyone and everyone as a matter of logical necessity—without need for empirical proof—that people are all "equal"?

Speaking for myself, it is not self-evident, and indeed is demonstrably false, that I am or came into being the "equal"—that is, existing at a comparable level in any characteristic or capacity—to many individuals I am aware of. Under no sensible meaning of the term "equal" do I find myself the physical equal of Dwayne Johnson, the intellectual equal of Stephen Hawking, or the spiritual equal of Mother Theresa.

Some may place emphasis on the word "created" in the phrase, and contend that regardless of how we turn out, we are all born with equal capacities to succeed in all areas. However, genomics and socioeconomics undermine this argument. If one is not born with the genes to be six foot three, he will never be the height equal of someone who was. If one is born into abject poverty, to parents who abandon him at birth, he does not have an equal chance of attending an Ivy League college as someone born into a wealthy, two-parent family. Based on our experience of the world, *most people* are *not* equal in *most ways*. Taken merely at face value, this hallowed sentiment in the Declaration is wrong more often than it is right.

10. George III, *By the King, a Proclamation, For suppressing Rebellion and Sedition*, (Aug. 23, 1775).

11. Lee Resolution, 2d. Cont'l Cong. (1776).

12. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

When he was writing these words, Thomas Jefferson would have been no stranger to the inequities of persons—he arrived at the Second Continental Congress accompanied by three slaves as servants. How could he assert with a straight face, let alone have the remainder of the Congress take seriously and adopt, the proposition that "all men are created equal"?

The answer is this: Jefferson and the Founding Fathers were talking about a particular type of equality that is not based on empirical observation, but rather is based on a categorical understanding of the essence of what it means to *be human*. Our scientific species denomination, *homo sapiens*, is Latin for the "knowing," or more precisely, the "wise" person. The Oxford English Dictionary defines "wisdom" to mean "[c]apacity of *judging* rightly in matters relating to life and conduct; soundness of *judgement* in the choice of means and ends; sometimes, less strictly, sound sense, esp. in practical affairs: opposed to folly."[13] This is not to say that, as a matter of definitional logic, all humans are "wise" in the sense that they exhibit a capacity for sound judgment and make appropriate life and conduct choices. We sadly all know all too many who do not make productive use of that capacity. Rather, these terms and definitions merely help explain the insight that Jefferson—admittedly borrowing heavily from Enlightenment thinkers—had about a characteristic essential to being human: judgment.

To be human is to have the capacity to be conscious of the world and the existence of a self and others, to have a desire to take action to benefit that self or others, and to have the capacity to appreciate and decide whether to honor norms such as right versus wrong, safe versus dangerous, beneficial versus harmful, etc. All properly functioning human beings have these capacities because having these capacities is (at least in part) what defines them as human beings.

A few caveats and explanations are in order. First, this is not to say that all humans by their very nature (or by any other nature for that matter) exhibit accurate consciousness and make good moral and pragmatic decisions. This deductive argument merely claims that all humans qua human are directed towards having and using the capacity for consciousness and moral and pragmatic decision-making. And this is not merely a belief we have, or (even more speculatively) an aspirational hope. This, as the Declaration claims, is "self-evident" in our experience of the world and the other people beyond ourselves in it.

Of course, we can be skeptics and maintain that there is no way we can be certain that anyone beyond ourselves is conscious, has autonomy and decision-making capacity and is not a robot—or for that matter, a figment of our imagination. Empirical observation of human behavior shows how self-evident our understanding of others as reasoning and deciding beings truly is. The mere fact that we communicate with each other shows our presupposition that we and

13. *Wisdom*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/wisdom_n?tl=true [https://perma.cc/VM8H-CESU] (last visited Jan. 27, 2026) (emphasis added and omitted).

others have this consciousness and moral and pragmatic decision-making capacity.

First, we necessarily understand other humans to be conscious. This is reflected by our willingness to expend the time and energy to speak to them, anticipating their understanding of our words and responding accordingly. We may whimsically or in anger speak to inanimate objects (the plant we are watering, the table end we just jammed our foot against), but we do not expect them to understand and respond. That requires consciousness.

Second, we necessarily understand other humans to have a degree of autonomy, the ability to engage in rational choice and conform one's behavior to that choice. As with other people's consciousness, our willingness and desire to communicate with other people presupposes they have this autonomy. For instance, all business and economic communication assumes that the object of that communication, the consumer, can understand the offer, consider it, and make and execute a decision to purchase that good or service. The salesman necessarily understands that the consumer can choose between different options (buying the car versus not buying the car) and conform his behavior to the consumer's choice (if her choice is to buy, the consumer will offer some method of attempting to pay for and take possession of the car). This does not apply solely to economic communication. All communication that is not purely descriptive—such as teaching, advising, questioning, friendly requests and offers, disciplining children, etc.—assumes the recipient of the communication has the *capacity* to consider and act in accordance with that teaching, advice, request, offer, or discipline, whether or not he or she chooses to do so.

That is, our communication often seeks to *convince*. I suggest to you that you *should* take this action, as opposed to another, or adopt this attitude, as opposed to another. And the reasons I hold out one option as more worthy of your conduct than another generally fall into two camps: (1) it is in your interest (self-, family-, team-, or company-interest); or (2) it is "the right thing to do," i.e., it is required by morality, law, or another normative code of conduct. And this is how we get to the second "self-evident" piece of being human: pragmatic and moral decision-making. We implicitly understand others to be able to perceive information in the world (including our communication to them), consider it, and reach and execute decisions based on judgments informed by reasoning. And this implicit understanding remains, regardless of whether we convince someone in any particular case. It is an invincible belief.

To say that something is a "self-evident" characteristic of human being, that all persons necessarily share in simply by virtue of being born a human being, does not require proving that every human being who ever lived had consciousness and moral and pragmatic decision-making capacity. It is rather an understanding of the essence, or definition if you will, of human being. Of course, we all know of people, either directly or by report, who, due either to a birth condition or subsequent unfortunate event in life, lack consciousness and/or rational decision-making capacity. But these sympathetic examples do not mean that consciousness and rational decision-making capacity are not essential to human nature. Rather, the lack of this capacity due to damage or disease underscores all the more our understanding of how intrinsic this capacity is to human being, as we do not view such conditions as being simply a different variation of full human experience, but a loss of some part of human experience.

Another way of looking at it is that these capacities are part of the telos of human being. Telos, as employed by the philosopher Aristotle, is the final of four causes of an entity's existence and denotes the purpose or function of a thing, the ultimate end for which it exists.[14] An object's telos is categorical to the type of thing it is and unaffected by the contingencies of its current material state. Humanity's telos includes its capacity to engage in rational decision-making regardless of whether any particular human has that capacity on any given day.

If a particular human loses (or is born) without one or both of those capacities, does this undermine our empirical understanding of the essential capacities of human beings? No. We recognize that the individual *has the potential* for those characteristics, but sadly lacks or has lost them. These deviations only serve to reinforce our understanding of the norm. That such exceptions do not prevent us from recognizing the universality of the *potential for* consciousness and rational decision-making in all creatures of the species human being means that the capacity for these attributes is at the definitional or essential level. We are able to say that, generally speaking, humans necessarily have consciousness and rational decision-making capacity by virtue of being human, full stop.

The skeptical reader may think: If the only way all persons are equal is that they are all humans in essence, this is a very narrow and academic view of equality without much potential to move the ball in terms of real-world legal justice. To see why this is not true, and appreciate the profound implications of this view of equality, we must stretch our view wider than Jefferson's one-sentence assertion of self-evident equality in the Declaration. Jefferson and other Framers were heavily influenced by the contemporaneous works of Enlightenment thinkers, such as John Locke, Frances Hutchison and Jean-Jacques Rousseau.[15]

B. A German Influence?

Recent scholarship has also cited the eighteenth-century German philosopher Immanuel Kant as influencing the views of the Framers.[16] Kant rigorously and systematically navigated the moral implications of human nature and reasoning capacity. Examining his moral philosophy is critical for

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14. *Aristotle on Causality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 7. 2023), https://plato.stanford.edu/entries/aristotle-causality/ [https://perma.cc/9ECC-XGJV].

15. *See, e.g.*, Robert Curry, *Getting to 1776*, CLAREMONT REV. BOOKS (Apr. 10, 2017), https://claremontreviewofbooks.com/digital/getting-to-1776 [https://perma.cc/95QP-U3FK]; ENCYCLOPEDIA OF THE ENLIGHTENMENT (Ellen J. Wilson & Peter H. Reill eds., 2004).

16. *See* Flavio Silvestrini, *Rethinking the American Exception: Kant's Republicanism and the Foundation of the United States*, 9 POLITICA 32 (2023).

understanding what all persons' equality in their humanness means for just legal adjudication.

Kant sought logical rigor in moral philosophy. Moral judgments require considering the intent of the actor, the conditions in the world in which she operates, and the means of acting at her disposal, and so require at least some, and generally quite a lot of, analysis of experience. In other words, unlike with epistemology,[17] there cannot be purely *a priori* moral judgments. Even so, Kant believed humans can arrive at universal, objective moral principles primarily through theoretical reasoning.[18]

Kant is perhaps most famously known in the realm of moral thought for the Categorical Imperative. As explained in his *Groundwork of the Metaphysics of Morals*,[19] Kant's first formulation of the Categorical Imperative is the dictate to "*act only in accordance with that maxim through which you can at the same time will that it become a universal law*."[20] The idea is to engage in a thought experiment where you turn the action you wish to take into a universal law and see if an inherent contradiction arises; if so, you have a moral imperative not to take that action.

For example, suppose you wish to make false promises (ones you do not intend to keep) when it will get you something you want. Now, imagine everyone made false promises when it would benefit them personally. Pretty quickly, everyone would realize that no one could be counted on to keep their word if there was a way that breaking the promise would benefit them, and people would cease to place any trust in promises. Your desired course of action, making a false promise to achieve some gain for yourself, becomes impossible because nobody is relying on promises anymore. This is the sort of contradiction Kant is talking about with the Categorical Imperative. Engaging in the conduct you want, if everyone did the same, would in some way nullify the requisite preconditions for your ability to act in that way.

Although commonly associated with Kant's Categorical Imperative, this first formulation is only one among many categorical imperatives Kant arrived at in the *Groundwork*. His second formulation of the Categorical Imperative, referred to as the Humanity Principle, is critical for understanding the Self-Evident Universal Equality Principle cited in the U.S. Declaration of Independence. Under this principle, one must "act that you use humanity,

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17. *See generally*, IMMANUEL KANT, CRITIQUE OF PURE REASON (1781) (providing an account of epistemology and logic which accounts for purely deductive or transcendental logic, such as arithmetic, based upon *a priori* knowledge).

18. Contrast Kant's approach with approaches such as those of the American philosopher and psychologist William James, or the French existential philosopher and writer Jean Paul Sartre, whose moral philosophies focus more on the values and moral judgments arising from actions taken, rather than the rational deliberation preceding those actions.

19. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor, trans. & ed., 1997) (1785) [hereinafter GROUNDWORK].

20. *Id.* at 4:421.

whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."[21]

Note that Kant uses the term "humanity" and not "human beings." He is not talking about specific human persons, but rather "humanity." "Humanity," for Kant, refers to the shared characteristics that define and make individuals human, i.e. the humaneness of human beings, include the capacity to reason and thereby formulate moral laws.[22] In other words, "humanity" encompasses the ability to engage in moral reasoning that Jefferson stated was equally shared among human beings, rendering democratic government, government by all people equally, not only possible but morally necessary. The *Groundwork* and the Declaration of Independence are talking about the same fundamental characteristics necessarily shared by humans in virtue of being human. Kant's theory helps connect the dots and flesh out the Declaration's single sentence assertion of this moral necessity.

But what does it mean that we ought not use humanity, ours or someone else's, only as a means, but it also must be an end?[23] Note that Kant is not saying that human beings, ourselves or others, can never be means. The vast majority of tasks and activities that go into creating and maintaining human civilization require using ourselves and others as means. For example, when I go to get a haircut, I am using my barber—as much affection and well-meaning I might feel for him—as a means to make myself look less caveman-ish. Or, even if I am close family friends with my dentist and love him like an uncle, I am still using him as a means to an end when I go for an appointment to resolve a toothache. And if I pull an all-nighter to complete a project for a work, I am using myself, particularly my health and energy, as a means to the end of accomplishing an objective for my employer.

We will often use other people as means; the critical aspect from the perspective of Kantian moral philosophy is that "humanity" cannot *only* be treated as a means. It is not another person (or myself for that matter) that must be treated as an end, but the "humanity" in which that person and myself participate by virtue of our being human beings—that is, our capacity for consciousness and moral and pragmatic reasoning. But what does it mean to treat our humanity as an "end"? We ought not contravene the humanity of others to achieve our own goals and desires, and we have an obligation to help others and ourselves develop to our fullest potential as persons.

The most critical component of treating humanity as an end, however, lies in the human capacity for moral decision-making: freedom, autonomy. The ability to choose this path over that one indicates that people by virtue of their "humanity" have a degree of freedom. Regardless of whether influences outside our consciousness are affecting (some might say, determining) our choices, the very fact of our awareness of options and our sense of being able to choose between them indicates that we have at least a lived experience of freedom and

21. *Id.* at 4:429.

22. *See id.* at 4:439–440.

23. *Id.* at 4:429.

individual will. This is not to say it is an unbounded freedom and an all-powerful will; but acknowledging limits on freedom is not the same as claiming we have no control over lives whatsoever. Consider choice of profession. My physical conditioning and coordination might mean I have close to zero chance of being a professional athlete, and my unease with advanced math limits my STEM career options. Nevertheless, I have been both a journalist and a lawyer, and I experienced the freedom and ability to decide between the two and leave one career for the other. Even if there were strong practical considerations pushing me to one field, I still felt as if I had the choice, and could have remained a journalist if I had really wanted to.

If we are honest with ourselves, even though we often feel and say that we "had no choice" in some of our actions, we experience the ability of being able to decide between option A and option B frequently. As strong as the factors pushing us toward B might be, we know that if we want, we can be obstinate and perhaps even a bit masochistic, and go with A instead. For example, a criminal defendant with a spouse and children to support, when facing a life sentence if convicted of the crime he or she is charged with, may feel that "practically" he or she has no choice but to accept the one-year prison sentence proposed by the prosecutor in a plea deal. But to say that one option is extremely and even impractically costly does not mean it doesn't exist. The defendant still has the ability to opt for trial and hope for an acquittal, even if practically this represents a risky option for the well-being of his or her family. There are very few actual instances in anyone's life where there simply is only one possible course of action, even if there might be many instances where all other options are extremely costly or unlikely to succeed. But it is good to remember that the choice to go with the safe bet *is a choice*: an exercise of will that could have gone another way and was not inexorably forced upon us.

This personal freedom or autonomy we experience for ourselves, and believe from our lived experience of the world that our fellow humans similarly possess, does not represent merely a negative freedom—that is, a freedom not to have our choices dictated or actions limited by others. For Kant, autonomy represents an affirmative freedom. Rather than preventing a limitation on our ability to act, an affirmative freedom creates a new possibility for action that did not exist before. An example of negative liberty is a law prohibiting the government from limiting how much an individual can spend on political campaigning. Affirmative liberty, in contrast, would a law providing an indigent individual funding should they want to campaign for office. The affirmative freedom of autonomy, being able to create make our own moral decisions, for Kant, carried a corresponding duty. Our freedom and capacity to exert individual will and "decide for ourselves" carries the duty to create the law for ourselves. We are not truly free if we believe all of our decisions to be dictated by rules created by others; and our knowledge that we need not follow others' decisions for us, even where this costs us physically, shows us that it is ultimately "me deciding for me." But if we want our choices to be moral, Kant argues, again, we cannot merely decide them on emotional whim or self-interest, but rather must take a more objective approach.[24] We must imagine whether any similarly situated person could take the action we want to take without contradicting or undermining the point of that action (first formulation of the categorical imperative) and further, would themselves freely agree on a rule permitting that action (third and fourth formulations).[25] In other words, moral decisions are not purely subjective—i.e., what I think I should do—but must also be objective—i.e., what any person in the same circumstances would think should or should not be done.

Therefore, in order to attempt to make a moral decision for myself, I need to hypothesize a rule that all other people in my circumstances could be expected to follow. In other words, I am not just making a decision: I am positing a law even if the limit of its practical jurisdiction is myself. But this also illustrates the fullest sense of what it means to treat others necessarily as ends. Every action I take is based on a principle I create, taking into account what I believe others would freely agree to be bound by as well.[26]

The elevator pitch summary of this perspective: As an indication of our freedom and to fully exercise that freedom, we do not merely automatically execute external moral directives but rather make moral decisions for ourselves, even when that decision ultimately is to follow an external moral directive (like a public law, for instance). While subjective in the sense that it is individualized and based on the facts and ideas available to us as individuals, this moral decision can also be objective to the extent it is consistent with the decision we believe other persons in our circumstances would agree to make and be bound by.[27]

This understanding of human decision-making illustrates a model of treating "humanity," that of the decider and all other persons he is hypothesizing, as an end, and not just a means. And it does so in the way most relevant to the Declaration's assertion of self-evident coequality among all the various conceptions of treating "humanity" as an end that Kant describes. Humanity is treated as an "end" because no one's will is overriding another's without their say. Each individual reflecting the indelible signature of "humanity," is treated as deserving of the ability to decide upon the correct moral approach, to give their assent or withhold it, myself as the decision-maker as well as all other individuals whose viewpoint I am hypothesizing. Each

24 *Id.* at 4:440.

25. *See, e.g., id.* at 4:421-23, 4:438–40.

26. *See, e.g., id.* at 4:439.

27. We may not, and indeed need not, do this consciously. We engage in this type of hypothetical exercise, imagining what other persons who find themselves in similar circumstances with similar desires would choose to do, and then conditioning our decisions to be in concert with those hypotheses, frequently, perhaps so frequently that we are not even aware that we are doing it. For example, anytime someone in the course of business attempts to price a good or service to a general consumer audience, they are hypothesizing what price would seem reasonable enough to a generic person in a certain set of circumstances that they would be willing to meet that price on a frequent enough basis to make the business profitable, and then setting the sale price at that hypothetical general assent value.

person is viewed as equally worthy of participating in the decision making, and indeed necessary for reaching the best result, because the proper moral decision is one that that person, and all others in the same position, would agree to. Treating humanity as an end is recognizing that each participant in that humanity has a say in the moral law.[28] For ease of reference, I am going to refer to this as "end-ness," and the principle announced in the Declaration that our system of political and legal authority must honor this end-ness or be illegitimate as the "Foundational Principle."

In concrete and much less awkward terms we might describe this concept as "giving each person her day in court." Or "not depriving him of life, liberty or property without due process of law." We can trace a direct line of logic from the basic principle of coequal end-ness to these deep-seated American legal precepts.

C. Addressing Utilitarianism

First we have to address the philosophical elephant in the room: utilitarianism.[29] Both Kant and the American Framers were more than cognizant of this competing approach to moral reasoning. While the deontological reasoning that arrives at the concept that persons are inherently equal and entitled to treatment as ends on the one hand, and utilitarianism on the other, are undeniably in tension, moreover, they are not entirely mutually exclusive. Utilitarian principles are not wholly absent from the U.S. Declaration of Independence and Constitution. We cannot fully understand the implications of the Declaration's anchoring of its moral argument for democratic revolution in coequal end-ness without appreciating how this argument might have looked had it been instead primarily grounded in utilitarianism.

Utilitarianism emerged in its defined, classical form in the late eighteenth and early nineteenth centuries, but its roots stretch back decades prior in the works of political and moral philosophers including Thomas Hobbes and David Hume. While there are multiple distinct approaches to utilitarianism, such as those of Jeremy Bentham and John Stuart Mill, they all share common characteristics.

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28. This is not to say the moral law is purely relative, or depends on a show of hands, with each individual free to pursue their whim. Both Jefferson and Kant (and many others working off these principles for the past 350 years) would have viewed this understanding of the moral law in the opposite fashion: by recognizing the coequality of decision-making wills across humanity, and postulating that a moral decision is one that serves this principle and seeks the assent of those coequal wills, they would have seen these principles as hemming in the selfish and subjective exercises of power by tyrants whose moral decision-making did not perceive their subjects as coequal deciders and did not limit itself to only those acts subjects would mutually assent to.

29. Technically, utilitarianism is only one, albeit the most well-known, type of consequentialism. Utilitarianism is typically viewed as a single-value type of consequentialism: it judges the moral value of an action in terms of one measure of the Good, such causing pleasure/reducing pain or increasing 'utility' (hence the origin of the doctrine's name). Other types of consequentialism can judge an action according to multiple values or ways of measuring the Good.

First, the value of the outcome is of primary moral significance, not the process used to decide upon that act, including whether any rules, duties, or rights were violated or observed in taking that action. In common parlance, with few exceptions, utilitarianism is an "ends justify the means" approach to moral decision-making—although, it is slightly more accurate to view utilitarianism as a "the-overall-moral-value-of-the-action-taken-as-a-whole-justifies-any-individual-parts-of-the-action-that-might-make-us-morally-squeamish" approach. Getting one's hands dirty is permitted so long as it yields the greatest normative bang for the buck.[30]

Second, under a utilitarian approach, that course of action is of greatest moral value that maximizes the overall moral value in the system. Classical utilitarians such Mill measured moral value in terms of "social utility," which generally meant the promotion of overall happiness or pleasure (or the reduction of pain or suffering). Measuring an act's effect on maximizing social utility can be done through various quantitative or qualitative approaches.

Under a quantitative approach, one could assess the pleasure produced or pain caused by each considered course of action, for each person affected, and then aggregated, measured in terms of variables including its intensity, duration, and fecundity (its ability to lead to further future pleasure or pain). Under a qualitative approach, certain pleasures are deemed qualitatively better than others. Consider that some clams are recorded to have lived for hundreds of years. Given the choice between being an extremely happy clam living an extremely long clam lifespan and being an averagely happy human living an average human lifespan, most, if not all, people addressing the question seriously would still choose to be human. This represents an implicit decision that human happiness is *qualitatively* superior to that of a clam—perhaps because humans experience art, faith, love, fiction, music, science, etc. while clams presumably don't—because the clam in this example is experiencing *quantitatively* more happiness over all those hundreds of years. Qualitatively more valuable pleasures, according to Mill, involve "higher faculties," such as intellectual, emotional and moral pleasures.[31] Thus, it "is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied."[32] One could argue that Mill's "qualitative" view is also a "quantitative" view in different terms: For example, the degree of pleasure accorded an action receives a multiplier to the extent it requires higher faculties to experience.[33] Regardless of whether measured purely quantitatively, qualitatively, or through some combination, the utilitarian moral calculus ultimately still requires a concrete measurement of happiness or pleasure *maximization* or unhappiness *minimization*. It assumes different sources of

30. A utilitarian ethics might say that, in some circumstances, it would be morally permissible for a state to kill five innocent people in return for a terrorist's agreement not to murder 500 others. This is a simplification, but illustrative.

31. John Stuart Mill, *Utilitarianism*, *in* THE COLLECTED WORKS OF JOHN STUART MILL (2024).

32. *Id.* at 19.

33. *Id.* at 16–17.

pleasure and pain are commensurate at least to the extent that they can be stacked up against each other and one column determined to offer *more*. Moral acts and rules alike "are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."[34] To the extent we think this is true, the utilitarian approach offers a tool for determining the comparative *goodness* of ends, and according to Mill, means as well to the extent those means lead to accomplishment of the highest-good ends.

Although often viewed as diametrically opposed, deontological and consequentialist approaches come close to contact in certain places. Consider how our sense of whether an act is likely to produce more Good or harm (the consequentialist focus) is a factor—generally a very significant factor—in our determining, under a deontological approach, whether we should create a rule requiring or forbidding that act. Kant's categorical imperative is almost like a type of rule consequentialism, wherein certain actions are deemed to so reliably result in overall harmful results that there is a general prohibition. This means not requiring individuals to calculate out the amount of pleasure and pain for a particular outcome every time they encounter a recognized set of circumstances. Kantian moral decisions are like a consequentialist rule that defines the Good as treating people as ends in themselves rather than mere means.

Nevertheless, how we frame things—as a matter of utility or deontological duties—matters. This is a reason that the Declaration recognizes as the Foundational Principle the equal rights of human beings by virtue of their being human, not the maximization of happiness or minimization of pain. As explained, even where a utilitarian is looking at the morality of the process, and not just final actions, that morality is always determined based on the overall amount of happiness or utility created.

Utilitarians may see the deaths of innocents as necessary coincidences to effectuate the Good, save a net positive sum of lives, or promote general welfare. But this does not accord with holding human equality as self-evident. The innocent lives ended in an effort to save others are not being treated as coequal deciders whose input matters in the determination of a common future.[35] They are not treated as subjects, but objects to be disposed of as a means to save others.

In sum, honoring the Foundational Principle of inherent equality requires a rights-focused deontological approach that imposes a moral floor below which our actions cannot go. The Foundational Principle precludes rejecting another person's equal decision-making capacity and making them a means (only) to an end we have determined without them.[36]

34. *Id.*

35. If the innocent people were consulted and agreed to sacrifice themselves for the good of the others, this would be a different matter. In such an instance, there is an argument that they are being treated as ends, despite the harm they will experience, since they are acting as subjects participating in the decision-making.

36. It bears noting that, in the 2024 State of the Union address to Congress, the President of the United States said: "The heart of America is our recognition that all people are created equal and entitled to equal treatment throughout their lives." Joseph R. Biden, Jr., *Address Before a Joint*

How can we tell if a particular rule or action honors other persons as ends by recognizing, and, even if theoretically, incorporating their equal decision-making capacity? Recall that the Declaration's recognition of equal participation in humanity translates to, as Kant and the deontological school of moral reasoning trace out for us, arriving at moral decisions by hypothesizing that the rule I make for myself could be agreed to by all other rational decision makers if presented with the same issue in the same circumstances. But what does this hypothesizing—this thought experiment or imaginary exercise where I consider the perspective of other similarly-situated human decision-makers—look like in practice?

While neither the bare terms of the Declaration nor the Kantian categorical imperative prescribe a necessary method, the twentieth century political and moral philosopher John Rawls, in *A Theory of Justice*,[37] offers an example of one such hypothetical deliberative exercise. Working base on Kant and the social contract theorists, Rawls describes a hypothetical "original position"[38] of the free and equal decision-makers who compose a society, in which they gather to determine the basic principles of the society—i.e., the social contract.[39] Just principles, Rawls argues, are those that all those decision-makers would freely agree to in an original position of equality and objectivity accomplished by imposing a "veil of ignorance."[40] The veil of ignorance creates a starting position of equality and objectivity by depriving the hypothetical members of society of any knowledge of the material circumstances of the identity and station they would inhabit in reality. Rawls explains:

> Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.[41]

In other words, the individual decision-makers have to decide on principles without knowing whether the application of those principles in society would provide them any greater or lesser advantage than it would to

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Session of the Congress on the State of the Union, THE AMERICAN PRESIDENCY PROJECT (2024) https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-30 [https://perma.cc/88RP-FDJS]. The first phrase succinctly summarizes the Foundational Principle animating the framework we are creating here for legal justice in the United States. We will use that phrase to determine what accomplishing the second phrase (entitlement to equal treatment) looks like in practice.

37. JOHN RAWLS, A THEORY OF JUSTICE (1971).

38. *Id.* at 11–12

39. *Id.* Just to be sure, Rawls clarifies that the social contract theory he is describing is defined by the writings of John Locke, Jean-Jacques Rousseau and Immanuel Kant, the same sources of political philosophy animating the theory of governmental legitimacy propounded in the Declaration. *Id.* at 10 n.4.

40. *Id.* at 11–12.

41. *Id.* at 11.

anyone else. This symmetrical position of ignorance means that any agreement reached in this position would be fair because no decision-maker would have an advantage.[42] Further, absent any way to tell how a particular individual would be affected by a particular rule once applied to them in the concrete circumstances of the physical, mental, and economic position they will inhabit, their decision-making necessarily has to be based on a type of objective reasoning. A person must assume they are just as likely to be harmed as helped by a rule adopted in this position. For example, since he or she must assume that, once the veil of ignorance is lifted and the individual learns his or her personal traits and social status, he or she could be in the position of least advantage, he or she naturally would be disinclined to agree to any basic rules for society that do not treat the least advantageously situated persons at least as beneficially as the more advantageously situated.

Because all possible personally differentiating factors are held behind the veil of ignorance, and so zeroed out in the original position, it logically follows that all these anonymous decision-makers would reach the same conclusion as to any proposal. Absent any basis for asserting different desires (because people do not know what they will want), different cognitive biases (because people do not know their psychological makeup), or different principles and values (because people do not know their philosophical, religious, cultural or other conceptions of the good), the theory goes, the reasoning of all the hypothetical persons in the original position is based on the same shared information and perspective and so should be identical. As Rawls puts it: "[S]ince the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments."[43] As a result, the original position does not require hypothesizing multiple different lines of reasoning, because each hypothetical person will be reasoning the same as the others. Rawls's thought experiment thus boils down to this: What would a hypothetical universal person, in a position of ignorance of their physical, psychological, economic and social traits and position, conclude as to the agreeableness of any particular proposal?

Rawls goes on to conclude that these hypothetical persons in the original position would necessarily agree on at least two principles of justice. First, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.[44] Second, social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone's advantage, and attached to positions and offices open to all.[45] In other words, people in the original position, operating behind a veil of ignorance, would all agree that all social values (including liberty and opportunity, income and wealth, and the bases of self-respect) are to be distributed equally unless an

42. *Id.*

43. *Id.* at 120.

44. *Id.* at 60.

45. *Id.*

unequal distribution is to everyone's advantage.[46] These principles for justly designing society as a whole, not for reaching just decisions in legal adjudications within the confines of a society already possessing a democratic legal structure, are not directly pertinent here; but the thought experiment Rawls offers to arrive at them is. As explained, it depicts the type of 'reflective equilibrium' Kant in essence described when he explained that treating humanity as an end means adopting moral decisions that one believes other persons similarly situated would agree to adopt themselves. And treating the humanity in others as an end, in turn, is simply the more philosophically technical formulation of the basic principle the Declaration espouses when it states that the basis of legitimate government is recognizing that all persons are created equal. In sum, Rawls's thought experiment offers one method for evaluating whether a particular rule, principle, decision, or action comports with the Foundational Principle.

But we are getting ahead of ourselves. In the view of Aristotle and many other moral and political philosophers, justice (along with other moral virtues) is not simply a principle thought, decision arrived at, or action taken on one particular occasion. Rather, it is a habit, a skill, a psychological or spiritual muscle we strengthen through practice over time, and understand and utilize better the more and longer we develop it. We would be missing a rich perspective on fair adjudication if we remained purely at the theoretical level and did not incorporate the wisdom of centuries of practitioners in the craft of administering justice rooted in the democratic principles of our nation: America's judges.

II. JUDGING

In my opinion, the United States Supreme Court's decision in *Plyler v. Doe*[47] in 1982 ranks among its top ten most significant. While many can dispute that ranking, *Plyler* offers several insights generally recognized as significant in American constitutional jurisprudence, including one of great importance for the framework we are developing here for just adjudication in the United States.

But first, some background.

In *Plyler*, the Supreme Court addressed the question of whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a state government from denying free public education to unlawfully present child immigrants. The Court held that it does.

The Fourteenth Amendment, passed by Congress in 1865 and ratified by the States in 1868, provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[48] The Amendment has been interpreted by the Supreme Court to provide heightened protection against unequal treatment by state governments based on certain

46. *Id.* at 62.

47. 457 U.S. 202 (1982).

48. U.S. Const. ammd. XIV, § 1.

"suspect classifications" of individuals in those states, including distinctions based on race, national origin, alienage, gender, and parental marital status at birth (i.e., "illegitimacy").[49] State laws drawing distinctions—conferring rights or imposing disabilities on one grouping of persons instead of another—based on suspect characteristics are generally subject to a judicial test referred to as "strict scrutiny."[50] Under strict scrutiny, the distinction drawn by the state must be "narrowly tailored" or "necessary" to serve "a compelling governmental interest." These terms generally mean that the state bears a burden of showing that the law or practice at issue addresses an important need or interest served by state government and there is no way the state can address this need or interest through an alternative "neutral" method, i.e., one that does not draw a distinction based on race, national origin, etc. If the state fails to meet this standard, its law or practice will be struck down as unconstitutional.

While terms like "compelling" and "necessary" are judgment calls that are hardly airtight, whose meaning can vary dramatically depending on the eye of the beholder, application of the Fourteenth Amendment's strict-scrutiny standard tends to be simple and consistent in practice. That is, the idea is that there are generally no good-faith, legitimate reasons for a government to provide less preferential treatment to one group of its citizens based on their race, national origin, gender, and similar biological and historical characteristics outside of their control. So, if a state law is doing that, it is presumptively a denial of equal protection and unconstitutional unless the state can prove the distinction is absolutely necessary to accomplish an important, legitimate, governmental need.

Very few measures subjected to strict or otherwise heightened scrutiny pass muster, for several reasons. Characteristics like race, national origin, and gender are characteristics over which individuals have no control and which have no bearing on an individual's right or capacity to participate in the state community, follow laws, and make moral and prudent private or communal decisions. So, when it comes to state laws that limit or deny opportunities or benefits on the basis of these characteristics, it is generally impossibly hard for a state to prove it has a legitimate, let alone critical, need to disadvantage some of its citizens based on these irrelevant traits. Even with state laws that draw distinctions in order to provide *advantages* based on suspect classifications, unequal treatment is forbidden. For example, the Supreme Court has been critical of arguments for admissions policies that provide preference to students based on their race, despite proponents' arguments that these policies are *necessary* to accomplish the agreed-upon compelling state interest in diversity

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49. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

50. *Id.* Sex and legitimacy distinctions are held to a slightly less rigorous standard known as "intermediate scrutiny," where the distinction must be at least substantially related to serving an important state interest. *Id.* While the rhetoric is less demanding—"important" instead of compelling and "substantially related" rather than "necessary to"—in practice a state distinction that would fail strict scrutiny would in most cases fail intermediate scrutiny, too.

in education, and that such diversity cannot be accomplished through some race-neutral method.[51]

However, undocumented noncitizen status is not a suspect classification, as *Plyler* explained.[52] It is not presumptively an act of invidious discrimination for a state to distinguish among individuals based on whether they are lawfully present in the country, because their potential unlawful presence is something they sometimes have control over, and it has an impact on a number of governmental functions.[53] *Plyler* nevertheless held that the state of Texas denied equal protection by denying free public education to the undocumented children. But before we examine how the Court found the Equal Protection Clause to be violated despite the absence of a suspect classification, the first significant holding by the Supreme Court in *Plyler* is about whom the Fourteenth Amendment covers.

Texas had argued that undocumented noncitizens, because they are unlawfully present in the United States, are not "persons within the jurisdiction" of Texas under the terms of the Fourteenth Amendment, and therefore this clause does not apply to them and does not provide them with any right to equal protection. The Supreme Court flatly rejected this view, holding that Texas's argument itself was doing the very thing the Equal Protection Clause was created to prevent. The Court explained:

> To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.[54]

Although quietly announced in an *obvious* manner in a preliminary point, the import this observation carries is momentous. The basic principle of equal protection prohibits the government from classifying individuals subject to its laws in any way that would permit it to say a group of persons is not entitled to the protections it affords the other individuals subject to its laws. Or, to put a finer point on it and harken back to the circumstances undisputedly motivating

51. *See* Students for Fair Admissions, Inc. v. Harvard, 600 U.S. 181 (2023).

52. *Plyler*, 457 U.S. at 220.

53. This is not to say that distinctions based on unlawful presence are never *in reality* motivated by discriminatory animus, just that there are enough other neutral, non-invidious reasons for a government to distinguish among lawfully and unlawfully present individuals such that one cannot generally presume invidious discrimination the way one can if one sees the government denying a benefit explicitly based on race, for example.

54. *Plyler*, 457 U.S. at 213.

the inclusion of the equal protection component in the Fourteenth Amendment, equal protection prohibits the government from determining that any human beings in its territory are not "persons" subject to legal protection.

Further, the reason Texas's reading of the clause could not possibly be the correct one is that it was inconsistent with the way law in this country works. "[W]ithin its jurisdiction" was intended to mean everyone within a state's boundaries and "upon whom the State would impose the obligations of its laws," the Court explained.[55] In other words, Texas's argument that unlawfully present noncitizens within its boundaries were not "within its jurisdiction" was inconsistent with the fact that, should those noncitizens break the State's criminal laws while they are in Texas, the State would have both the power and the prerogative to arrest those noncitizens or otherwise enforce the State's laws against them. The guarantee of equal protection of the laws goes hand in hand with and is coterminous with the application of the laws.

A corollary of this holding is that, in a sense, equal protection is not merely a right of a particular individual or group subject to a law, but rather an inherent limit placed on the nature of law itself. No matter who the subjects or objects of a state law are, the law is invalid if it provides unjustifiably unequal treatment.[56] In short, the guarantee of equal protection goes along with the law wherever the law goes. Although it may seem tangential at this point, the judicial understanding that the law itself carries a built-in requirement of presumptively evenhanded application, at least under U.S. constitutional norms, is significant for the principles that will be proposed here. A legal determination that fails to even consider the evenhandedness of its decision in terms of how similarly situated people have been treated categorically undermines the Foundational Principle.

Indeed, what it means to treat similarly situated people the same is the second significant holding of *Plyler*, and critical for our purposes here. *Plyler* held that denying free public education to unlawfully present child noncitizens violates the constitutional guarantee of equal protection.[57] At the threshold, the Equal Protection Clause of the Fourteenth Amendment "directs that all persons similarly circumstanced shall be treated alike," the Supreme Court explained.[58] Normally, a court applies a deferential standard in determining whether a law treats similarly situated people alike, except if the law disadvantages a "suspect class" or impinges on a "fundamental right," in which case it is held to more exacting scrutiny.[59]

55. *Id*. at 214.

56. And federal law as well, because the Equal Protection Clause has been held to apply to the federal government as well via reverse incorporation through the Fifth Amendment's Due Process Clause. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

57. *Plyler*, 457 U.S. at 230.

58. *Id*. at 216 (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (internal quotation marks omitted).

59. *Id*. at 216–17.

Plyler held that Texas's education law failed to treat similarly situated persons alike and violated the Equal Protection Clause, even though a distinction based on unlawful presence of noncitizens in the United States is not a suspect classification. Undocumented noncitizens are not a suspect classification because, unlike other distinctions such as race, unlawful presence is not immutable—it is not a characteristic outside the individual's control, but rather a direct result of a person's decision to violate the immigration laws of the United States.[60] Nor, the Court explained, is their undocumented status a legal "irrelevancy" in the same way that race, for example, is.[61] Race, as explained, has no bearing on one's capacity for fulfilling one's civic duties, following laws, making moral decisions, or participating in a democratic society. The same cannot necessarily be said of one's decision to enter or remain in the country unlawfully, and there are reasons a government may wish to distinguish between residents who are lawfully present versus not, in the handing out of benefits or imposition of restrictions, that do not inherently smack of invidious discrimination.

When there is no suspect or quasi-suspect classification at issue, the default standard applied to a governmental distinction is what courts call "rational basis" review.[62] This standard is deferential to the government and upholds its action so long as the action is a rational means to serve a legitimate governmental interest.[63] So long as the purpose is resolving a problem or accomplishing a public goal in which the government has a good-faith interest, and there is a rational connection between that end and the action it takes, courts should uphold it. It does not have to be an efficient, productive, or wise course of action; indeed, the plan does not even have to be reasonable, but merely not irrational or arbitrary. There could even be a more effective means at the government's disposal of achieving that particular end than it is using. Finally, the governmental interest at issue does not even have to be real: the court can hypothesize a legitimate reason why the government would be doing what it is doing even if the government has not proved that to be its actual motivation.[64]

Rational-basis review is in essence merely a "smell" test. The court is simply making sure that the government is not taking a course of action so attenuated from the desired outcome that it is arbitrary or illogical, or acting in

60. *See id.* at 219.

61. *Id*. at 223.

62. The Equal Protection Clause also imposes a heightened standard against governmental action that infringes on a limited group of judicially determined "fundamental rights," such as the rights to vote, travel between states, and not be subject to criminal sterilization. However, the Supreme Court has consistently held that education is not a fundamental right guaranteed by the Constitution. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

63. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441–42 (1985) ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.").

64. *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955).

bad faith, such as acting merely out of a desire to harm an unpopular person or group.[65] Examples of the latter include where the law disadvantaged residents who had more recently moved to the state,[66] or same-sex couples.[67] Good-faith governmental actions, no matter how controversial, misguided, one-sided or ineffective, generally do not fail rational-basis review. Indeed, the rational-basis test is *so* designed to uphold the governmental action at issue that, in the few cases where the governmental action failed to meet it (lacking logical action or having bad-faith animus), judges dispute whether it was rational basis and not some other standard that was actually applied.[68]

Plyler is one of those rare instances where the government failed to pass the smell test. As with the other exceptions to the general rule that rational basis review means a rational governmental action passes muster, some may argue that *Plyler* did not in fact apply true rational basis review at all, but rather a heightened level of review: "rational basis plus."[69] Lending weight to this argument is the Court's reflection that the Texas law could "hardly be considered rational unless it furthers some substantial goal of the State."[70] Rational basis review normally requires only a "legitimate governmental purpose,"[71] and a "legitimate" interest represents an at least rhetorically less demanding requirement than that of a "substantial goal."

A more straightforward view is that *Plyler* did apply a close-to-standard rational basis test and simply found the Texas law irrational—after a fashion. The Court held in effect that it was irrational to deprive children of access to public education for two reasons.

First, the children did not make the decision to enter or live in the United States unlawfully—that was made by their parents or guardians.[72] While unlawful presence is generally not an immutable characteristic such as race but the result of a person's choice, and not irrelevant for all lawmaking purposes,

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65. *City of Cleburne*, 473 U.S. at 446.

66. Zobel v. Williams, 457 U.S. 55, 63 (1982).

67. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

68. *See, e.g., City of Cleburne,* 473 U.S. at 459 n.4 (Marshall, J., concurring in part and dissenting in part) (explaining "these cases must be and generally have been viewed as intermediate review decisions masquerading in rational-basis language."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–31, p. 1090 n.10 (1978).

69. *See, e.g.*, Maria Pabon Lopez, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1388 (2005) (explaining that "though the Court [in *Plyler*] purported to apply the traditional rational basis test, a close reading of the opinion reveals that the Court actually employed a more demanding standard.");Maria Pabon Lopez & Diomedes J. Tsitouras, *From the Border to the Schoolhouse Gate: Alternative Arguments for Extending Primary Education to Undocumented Alien Children*, 36 HOFSTRA L. REV. 1243, 1260 (2008) (describing *Plyler* as employing rational basis scrutiny "with a bite'").

70. Plyler v. Doe, 457 U.S. 202, 224 (1982).

71. *City of Cleburne*, 473 U.S. at 446.

72. *Plyler*, 457 U.S. at 223 ("Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.").

here it was irrelevant because it was in significant ways "immutable" from the perspective of the targets of the law, children, who presumably could not control their parent's past choice to bring them into the United States unlawfully. So, the State was incongruently penalizing with the "lifetime disability" of a lack of basic education these children for a decision they almost certainly did not make and an action they had no meaningful control over.

Further, this deprivation would also harm the State, because society did not benefit from denying anyone a basic education and thereby increasing the size of the illiterate and uneducated population and decreasing the possibility of those individuals' ability to contribute to the economy, understand and follow laws, and participate responsibly in society.[73] Given the facial irrationality of the State's effort to, in so many words, cut off its nose to spite its face, the Court reasoned, Texas would have to offer an unusually compelling reason for its measure in order to overcome this patent irrationality and show the state had connected the dots rationally between the measure and its likely effects.[74]

However, neither the unlawful status of the children on its face, nor the State's asserted rationales of protecting itself from an influx of illegal immigration—that unlawful child migrants imposed special burdens on the state's ability to provide high-quality public education, and that their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State—actually held water and rationally justified the State's measure, the Court held.[75] Regarding the children's unlawful presence, classification and admission of foreign nationals is a power entrusted by the U.S. Constitution to the federal government and not the States, and while the States may have some role in participating in immigration enforcement to the extent their effort is supported by and consistent with federal law, Texas's education law was not. Nothing in federal immigration law showed a Congressional policy to deny unlawfully present children a public education. Further, the decision whether to deport an immigrant or not is a prerogative of the federal Executive Branch, which may choose to use enforcement resources elsewhere and not deport many or most of those children.[76] Texas's measure would, in that situation, in fact be working at cross purposes with national immigration enforcement policy to, through

73. *Id*. at 223–24 The Court emphasized the importance of literacy in particular:

> Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.

Id. at 223.

74. *Id*. at 223–24.

75. *Id*. at 227-31.

76. *Id*. at 224–26.

prioritization of its enforcement resources elsewhere, provide these children an "inchoate federal permission to remain" in the United States long term.[77]

As for the State's contention that the law prevented it from suffering the deleterious effects of an influx of illegal immigration, the Court held that the evidence did not indicate that illegal immigrants imposed a significant burden on the state's economy. Rather, those immigrants "underutilize public services, while contributing their labor to the local economy and tax money to the state fisc."[78] Further, given the lack of evidence that a free public education was a primary incentive migrate to the United States unlawfully, the Court reasoned that denying this resource would be unlikely to disincentivize that migration.[79]

The State likewise argued that the children's unlawful immigration status made them less likely than other children to remain within Texas and put their state-provided education to use improving the State.[80] However, the Court noted, there was no guarantee that lawfully present children educated in Texas would remain there permanently either.[81] Further, the evidence demonstrated that the majority of the unlawfully present children do in fact remain in the United States (if not necessarily one specific state) indefinitely.[82] Given the fact that most of this population would become a permanent fixture in the country's economy and society, even if there were any marginal benefit to denying them a public education as children, it would be far more costly to the country in the long run to deny them a major means of contributing productively. "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime," the Court explained.[83]

Next, regarding Texas's argument that the burden of educating unlawfully present children detracted from its ability to provide a quality education generally, the Court found no evidence that the marginal decrease in per capita funding the state's schools would materially detract from the quality of education provided to the other students, nor that excluding the migrant children would meaningfully improve the others' education.[84] Further, even if excluding some children could increase the overall quality of education for the remainder, the State still needed to justify choosing to exclude the particular group of children—versus all other possible groups of children—at issue, namely

77. *Id*. at 226. *Plyler* long predated the implementation of the federal Deferred Action for Childhood Arrivals (DACA) program, which expressly provided guaranteed forbearance of deportation for qualifying noncitizens who entered the country unlawfully as children and were attending school and/or working.

78. *Id*. at 228.

79. *Id.*

80. *Id*. at 229–30.

81. *Id*. at 230.

82. *Id.*

83. *Id.*

84. *Id*. at 229.

undocumented noncitizen children.[85] And on that point, the Court succinctly noted, undocumented children were "basically indistinguishable" from lawfully resident children.[86]

The trial court in *Plyler* had found Texas's law to be "irrational" because undocumented children were indistinguishable from lawfully present children "in terms of their needs" and "ineffectual" because "the dominant problem remains unsolved."[87] In other words, the law was not treating like alike. The law was not "irrational" in the sense that it was developed randomly or lacked underlying logic. The logic was plain: the state wished to reduce growing educational expenses attributed to, in the court's words, "[a]n influx of poor, Spanish-speaking children," and it believed targeting unlawfully present children, for elimination of free education would address those costs.[88] Nor was the law "ineffectual" in the strict sense that it had no effect on the problem.[89] Cutting the undocumented population off from free public education would likely reduce some of these costs. The court's criticism, rather, was that the state's approach was indirect and not as effective as more direct approaches more closely responding to the identified problem. As the trial court explained:

> Viewed in light of the state's own statement of the issue with which section 21.031 attempts to deal, the irrationality of its choice of means is clearly revealed. An influx of poor, Spanish-speaking children, especially in the school districts adjacent to Mexico, has occasioned the hardships complained of by defendants. Most of these children are legally present in the United States. If exclusion of certain resident children from the school system is chosen as the method of dealing with inadequate educational facilities, the rational approach is to exclude all such problem children regardless of whether they are legal or illegal residents. It would be easy to define the precise limits of such a group, using the various "problem criteria" such as parental wealth, English-speaking ability, age relative to assigned grade, degree of educability, and the other characteristics the state has urged in this lawsuit as a justification for exclusion. A category of all non-English speaking children whose parents own property valued at less than a given amount would probably take care of the situation nicely, in that it would effectively exclude Mexican immigrants.[90]

The obvious unconstitutionality of such a statutory classification presents an insurmountable obstacle to its enactment into law. Nevertheless, bent on cutting educational costs and unable constitutionally to exclude all such

85. *Id.*

86. *Id*.

87. Doe v. Plyler, 458 F. Supp. 569, 589 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982).

88. *Id*.

89. *Id*.

90. *Id*. at 588.

"problem" children, the state has attempted to shave off a little around the edges, barring the undocumented alien children despite the fact that they are no different for educational purposes from a large proportion of legally resident alien children. The expediency of the state's policy may have been influenced by two actualities: children of illegal aliens had never been explicitly afforded any judicial protection, and little political uproar was likely to be raised in their behalf.[91]

In referring to and adopting the lower court's reasoning in part, the Supreme Court was emphasizing the point that lawful immigration status was not related to the conditions that Texas claimed were increasing education costs—primarily poverty and lack of English proficiency. Lawful immigration status spoke only to whether the child's family fully adhered to immigration laws in entering and staying in the country. It had no inherent bearing on their wealth or language skillset. Unlawfully present immigrants could have economic means and speak English well, and lawfully present individuals could be indigent and lack English proficiency.

In other words, lawful immigration status was an arbitrary characteristic to discriminate on if the cost of education was the issue. Excluding students on that basis was not *wholly* irrational or ineffectual because casting a net that wide would, as the trial court noted, likely catch some of the (unconstitutionally but actually targeted) indigent, non-English proficient population and thereby "shave off a little around the edges" of the educational costs complained of.[92] But so could, for example, denying free public education to all students residing in one geographic quadrant of town, especially if the quadrant was selected based on socioeconomic stereotypes. If a school district could not constitutionally decide to cut off its, say, southernmost students to reduce educational costs, it could no more cut off those without lawful status, a characteristic at least equally lacking a direct relationship to the incursion of educational costs.

Plyler's application of the rational basis test to Texas's law boils down to what it means to treat similarly situated people alike. Individuals do not have to share all the same characteristics and history to be "similarly situated." The universe of "similarly situated" is limited to and by the answer to "similarly situated for what?" In other words, "similarly situated" speaks to characteristics and actions that are logically related to the issue or problem the law at hand seeks to address. In *Plyler*, the problem Texas said the law at issue aimed at solving was increased educational costs. In holding that that lawfully and unlawfully present children were "basically indistinguishable" in terms of their needs[93], the Court was indicating that they required the same degree of education at the same cost and investment of resources, generally speaking, to accomplish the same end goals (literacy, economic productivity, civic knowledge and social engagement in the United States). Texas in effect argued

91. *Id.*

92. *See id.*

93. Plyler v. Doe, 457 U.S. 202, 229 (1982).

that the unlawfully present children would impose higher costs, but the Court rejected that as generally factually inaccurate. Both lawfully and unlawfully present children had the characteristics relevant to the problem at issue to an "indistinguishable" degree: they would require roughly the same investment of resources to achieve the same outcomes.[94] They were similarly situated as far as a law addressing educational costs was concerned.

But having the relevant characteristics to a comparable degree does not conclusively establish that two persons or groups are similarly situated if they differ in the way they possess that characteristic, or whether or not they possess another related characteristic, that is also material and relevant to the problem at issue. For example, Texas argued that the unlawfully present children's lack of lawful immigration status was a characteristic that distinguished them materially from lawfully present children such that the two groups of children were not similarly situated as far as an entitlement to free public education.

However, the Court in *Plyler* rejected this contention. Lawful immigration status was not relevant to the individual or societal need for access to basic education. It did not, as explained, alter the cost and resource investment required to educate the student. Nor did it affect the degree to which the individual would require a basic education to be economically self-sustaining and productive. Finally, lawful immigration status did not alter the degree to which the state and society generally suffer the less literate and educated the populace is. The lack of lawful status did not prevent the unlawfully present children from being similarly situated to the lawfully present ones for the problem presented in *Plyler*, because that immigration status was not relevant to the cost and value of public education.

Unlawful presence also did not distinguish the two groups of children for purposes of their right to public education because the children did not choose or control their immigration status. As *Plyler* suggests, being similarly situated is not just a matter of fact, but of volition too. Individuals must have meaningful control over choosing circumstances or actions if they are going to be the basis upon which the law is going to subtract from their freedom or opportunities. To penalize someone for something they cannot control is irrational from the perspective of law enforcement. The law has neither normative nor deterrent effect in those circumstances. For example, prohibiting certain conditions has no effect on imposing moral justice or conditioning behavior if the individual cannot act in a way to avoid incurring the condition. Depriving unlawfully present children of free public education does not directly punish a decision to flout immigration laws, nor encourage children to enter the country lawfully, since how the children entered the country is their parents' choice and generally is not in the children's power to change. But the Texas law penalized the children most directly and to a much less degree the parents or other adults responsible for their immigration status.

Individuals thus are similarly situated when (1) they share the characteristic or characteristics (such as a particular status, trait, location,

94. *See id.*

history, or past action) that are relevant to resolving the problem or issue at which the law or governmental action is addressed and (2) any relevant characteristic upon which they differ is not one which they have control over or in a meaningful sense chose.

If people are similarly situated, the principle of equal protection dictates, the law must treat them similarly. In other words, the U.S. Constitution prohibits one individual from receiving a materially worse outcome than another who is similarly situated. If the state is going to assign one individual less freedom or opportunity by comparison to another on the basis of characteristics that are either irrelevant (like lawful statuses bearing on wealth) to the governmental objective, or the individual in question had no control over acquiring those characteristics, it is failing to treat like alike, and failing to accord *equal* protection of law to the individual receiving the less favorable outcome.

Providing a less advantageous outcome to that individual is, in an important sense, arbitrary, because their material similarities mean there is no neutral and objective *reason* to differentiate in their treatment. In the same way that, John Rawls argues, assigning civic and economic opportunities on the basis of characteristics such as physical attributes and ethnic status is unjust because these characteristics are arbitrary from a moral perspective—in other words, they are unrelated to whether we would say people *merit* or *deserve* certain outcomes based on choices they have made and actions they have taken—assigning legal rights and obligations on the basis of attributes that did not flow from choices people made is also arbitrary. And to bring this discussion full circle, such arbitrary decision-making, *Plyler* illustrates, cannot meet the most basic requirement of constitutional governance: that those in power are acting rationally and in good faith.

Remember, the point of rational-basis review is to police the legitimate boundaries of lawmaking, leaving the door open to all good faith, even if substantively debatable, measures, while blocking only illogical or "bad faith" laws, such as those intended to disadvantage or stigmatize certain groups or individuals out of bias or animus and absent a legitimate purpose in a democratic society. If a legal action penalizes people who are similarly situated to others it does not penalize, or for circumstances outside of those individuals' control, the seeming arbitrariness of the outcome suggests the governmental decision-maker is acting illogically, out of bias or animus, or for other reasons the decision-maker deems too discreditable to be publicly disclosed—any and all of which do not provide a legitimate basis for governmental action under the U.S. Constitution.

Having found that unlawfully present children were similarly situated to those lawfully present for these reasons, the Supreme Court thus held that the exclusion of the former from free public education could not be squared with the Constitution's requirement that individuals be the subject of good-faith governmental decision-making that treats them rationally and fairly.

III. PROCESS MATTERS

The idea that the law requires the government to act evenly and neutrally among individuals who are similarly situated, and so prohibits the government from taking action to disadvantage certain individuals or groups based on characteristics that are arbitrary from a practical and moral perspective, is not limited to cases where particular groups face disadvantageous treatment and claim denial of equal protection rights. This principle surpasses the scope of a single Amendment, as it grows out of an understanding of what the role of the judicial review is in the democratic structure created by the U.S. Constitution.[95]

In this understanding, as explained in further detail below, the most directly democratically responsible body, the legislature, is to be given wide latitude in governing. Its direct democratic accountability most substantially embodies the foundational principle that we all equally share the right to self-governance by virtue of our equal humanity. The political process—voting and all manner of political activity that goes along with it, such as assembly, petitioning, etc.—ensures that the legislature continues to reflect the will of the coequal voters. Determining social, economic, foreign, and national security policy is not a legitimate role for the courts because judges are not directly democratically accountable.[96] The courts' role in a democracy such as the one created by the Constitution is to ensure the political process is functioning so that the legislature is indeed acting as a legitimate instrument of citizen self-governance. Thus, a court must act forcefully when governmental action threatens to interfere with a fair and equal political process, such as by hindering the rights to vote, assemble, express viewpoints and disseminate information, and associate in organizations.[97]

In its 1938 decision in *United States v. Carolene Products Company*, the U.S. Supreme Court summarized this understanding, explaining that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[98] However, the Court explained, "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," such as that laws restricting "the right to vote," "dissemination of information," "political organizations" and "peaceable assembly," could "be subjected to more exacting judicial scrutiny," which in practice has tended to be strict scrutiny review.[99] The ability to vote and freely communicate is essential to ensuring that the electorate can influence

95. *See id*. at 216 ("The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises.").

96. State judges are often elected. However, this analysis focuses on the federal courts, the judges first and foremost tasked with interpreting the U.S. Constitution and holding the other branches of the federal government in check.

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

98. *Id.* at 152.

99. *Id*. at. 152 n.4. Still, Court declined to rule directly on the question. *Id.*

and alter the will of lawmakers so that the people are in fact, and not just in theory, engaging in self-governing.

The Court in *Carolene Products* added that laws directed at "particular religious . . . or racial minorities" may entail "similar considerations" because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[100] In other words, minority groups deserve special solicitude under various constitutional guarantees. Even where a law does not directly target a minority group's political access or power, the Court recognized, laws that target a minority group on a social or economic basis can nevertheless indirectly affect their ability to make use of the levers of government to protect their rights and interests. Although the Supreme Court did not in *Carolene Products* elaborate on this connection between social and economic discrimination and a group's ability to participate in and utilize the democratic process, the multiple intersections between socio-economic position and political capacity are fairly readily apparent. The Supreme Court has addressed them in other noteworthy lines of cases.

First, there is the direct impact of economic power on political advocacy. The lesson of the Supreme Court's line of cases starting with *Buckley v. Valeo*[101] (and famously including *Citizens United v. Federal Election Commission*[102]) is that the ability to spend money on communication is inextricably intertwined with the ability to engage in political communication protected by the First Amendment's free speech guarantee. If the ability to spend money on activities such as supporting candidates or broadcasting viewpoints roughly equates to the ability to engage in political speech, it follows that any law disadvantaging a group's access to the means to acquire money directly limits the amount of political speech and viable campaigns for public office that that group can fund, thus limiting that group's ability to engage in democratic self-representation. One can (and many do) disagree with the wisdom for a healthy democracy of striking down limitations on campaign expenditures accomplished by *Buckley* and its progeny. In Buckley, the Supreme Court recognized the democratic merit of limiting the amount of campaign contributions in order to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections," but ultimately rejected this approach in favor of the freedom embodied by the constitutional protection on speech, holding that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[103] In other words, constitutional values created a conflict between equality aims and freedom aims, and the Court came down on the side of freedom in this First Amendment speech context.

100. *Id.*
101. 424 U.S. 1 (1976).
102. 558 U.S. 310 (2010).
103. *Buckley*, 424 U.S. at 48–49.

As this example illustrates, sometimes there is tension between U.S. constitutional guarantees, especially between provisions that provide freedom from government restriction and provisions that guarantee equal treatment or the ability to exercise a right. A classic example is the tension between the Establishment and Free Exercise Clauses of the First Amendment. The Establishment Clause has generally been interpreted to prohibit the government from promoting religious belief, but the Free Exercise Clause, as interpreted, sometimes requires the government to make exceptions or provide favorable treatment for particular religious practices so as to not infringe on their customs of worship. The *Kennedy v. Bremerton School District*[104] case illustrates this tension. In that case, a public high school prohibited its football coach from publicly praying on the football field during football games, a practice the coach said he felt his religious faith required, because, the school argued, permitting him, a governmental employee, to engage in this public display of religious worship would give an impression that the school was favoring religious belief in violation of the Establishment Clause. Accepting for the purposes of this example the validity of both the coach's and the school district's respective interpretations of the constitutional provisions they were each relying on, the Free Exercise Clause required the school district to permit the coach's prayer, and the Establishment Clause forbade it. How could the same action be (arguably) constitutionally required and prohibited?[105]

The Constitution embodies the Framers' (and later Amenders') attempt to transform certain generally-agreed-upon democratic values into legal guarantees. But the guarantees are not absolute because any one underlying value—freedom from government restriction and interference in private lives, liberty to pursue individual principles and goals, equality before the law and in governing power, due process before denial of life, liberty, and property, etc. — cannot be observed absolutely without restricting the expression of the other values. For example, the Supreme Court has repeatedly observed, "while the Constitution protects against invasions of individual rights, it is not a suicide pact."[106] Constitutional rights are not so absolute that they must be vindicated at the cost of wholly sacrificing other pieces of the nation's constitutional framework including, at the extreme, the federal government's duty to protect its citizens against violent crime and international security threats.

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104. 597 U.S. 507 (2022).

105. As noted, I am accepting the validity of both sides' interpretations of the respective Clauses upon which their arguments rely for purposes of demonstrating the competition that can exist between constitutional guarantees. However, applying these theories to the facts presented in the case, the Supreme Court ultimately resolved the matter in the coach's favor in part by finding that permitting his football-field prayer would not violate the Establishment Clause because his "private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion" to participate in religious worship. *Kennedy*, 597 U.S. at 537.

106. *See, e.g.,* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963); Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964) (quoting *Mendoza-Martinez*, 372 U.S. at 160).

Turning back to the impact of discriminatory social or economic laws on political rights, in the campaign-expenditure-restriction cases, the Supreme Court recognized the tension between the democratic values of (1) citizens' equal ability to influence the political process and (2) their freedom from government restriction on political speech. In *Buckley*, the Supreme Court effectively split the baby, holding that the First Amendment permitted capping contributions to candidates, because extravagant direct contributions raised too high the possibility of *quid pro quo* corruption in the democratic process, but did not permit caps on the amount candidates or parties could spend on campaigning or on independent communications to endorse candidates.[107] Political expenditures by candidates using their own funds, or that were independent and outside of the candidates' control, did not substantially raise the specter of *quid pro quo* corruption in the way contributions to candidates did. Absent such a compelling reason, restricting such expenditures rather appeared more on the side of an attempt by the government to determine how much speech regarding political campaigns was appropriate, a determination the First Amendment rendered off limits to the government and reserved for the people to decide themselves.[108] Notice that this decision adopts a more absolute reading of the right to free speech at the cost of forestalling an effort to equalize influence, but that safeguarding the integrity of the self-governing framework by preventing corruption in the election process trumps an expansive reading of free speech.

However one feels about how the Court has come down on the balance between freedom from government restriction and equalization of individuals' influence on the political process, its campaign expenditure cases illustrate the direct impact that economic power has on political influence.

Second, noteworthy Supreme Court precedent recognizes that discrimination creates a psychological stigma that can permanently depress individuals' intellectual and psychosocial development and therefore power within society. In *Brown v. Board of Education of Topeka, Shawnee County, Kan.*,[109] the Supreme Court famously overturned the "separate but equal" rule upheld in *Plessy v. Ferguson*[110] and held that racially segregated public schooling violated the Fourteenth Amendment's guarantee of equal protection. Noting evidence that the school districts at issue had equalized the segregated schools for white and nonwhite children "with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors," the Supreme Court nevertheless held that racially-separated schooling could never provide equal educational opportunities when all of the impacts of segregation were considered.[111]

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107. *See generally Buckley*, 424 U.S. 1.

108. *Id.* at 44–58.

109. 347 U.S. 483 (1954).

110. 163 U.S. 537 (1896).

111. *Brown v. Bd. of Educ.*, 347 U.S. at 492.

The reason is that segregation creates inherent disadvantages in terms of intangible factors. The very act of separating one race from another could not but suggest a social view of the inferiority of the excluded race, or else why go through the bother of excluding those individuals at the high cost of providing equal, duplicate "tangible" resources? This perception of inferiority created not only an immediate emotional stigma, but had lasting consequences for the segregated children's intellectual and psychological development. As *Brown* expressed it:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation of white and [nonwhite] children in public schools has a detrimental effect upon the [nonwhite] children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [nonwhite] group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of [nonwhite] children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.[112]

The sense of inferiority imparted by legally, that is, societally, sanctioned segregation impedes the intellectual and psychosocial development of children. Although the Supreme Court did not explicitly drop the other shoe in this line of thought in *Brown*, it should come as no surprise that this impeded intellectual and psychosocial development translates into reduced economic productivity.[113] Numerous studies have demonstrated the persistent effect that racial segregation and other forms of discrimination against black Americans has on economic development. For example, as of 2016, the median American white family had

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112. *Id*. at 494.

113. It bears noting, that even before one reaches the impact of discriminatory social stigma on economic opportunities and political influence, the Supreme Court has since recognized that the unjustified imposition of stigma itself by state law is prohibited by "our basic charter." Obergefell v. Hodges, 576 U.S. 644, 671 (2015). *Obergefell* held that the Fourteenth Amendment prohibits a state from denying marriage licenses to same-sex couples, in part based on the same recognition as in Brown that differential treatment causes meaningful intangible harms apart from its material consequences:

> [B]y virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.

Id. at 670.

more than ten times the wealth of the median black family.[114] Because wealth affects one's magnitude of influence in the political process, as the *Buckley* line of cases implicitly recognized, *Brown* and *Buckley* together illustrate how the line from racial discrimination runs directly to diminution of a racial group's ability to operate the levers of the political process to safeguard its interests, as *Carolene Products* foretold.

The point of this tangent into the unelected federal judiciary's discerned role in decision-making in a democracy is this: value judgments are appropriate for elected representatives because they are accountable to, and so reflect the will of, the electorate. The court's job is to ensure there is a fair, unbiased, and uncorrupted procedure in place for ensuring that the democratic process functions effectively—all individuals and groups have a reasonable opportunity[115] to advocate for their interests and protect their rights through that process. If we accept the logic of the Supreme Court's conclusion, the upshot for the theory advanced here is that legal justice in a democracy is first concerned with ensuring the proper procedure is followed in order to permit people to work out the right outcome. Legal justice is still concerned with value judgments and substantive outcomes, but its first focus is ensuring there is an unbiased and rationally-functioning decision-making procedure to guarantee the accuracy and fairness of those judgments and outcomes.

But is it not a bit much to say some aspect of legal justice itself, and not merely consistency with U.S. constitutional norms, requires an emphasis on integrity of decision-making procedure? The initial proponents of a famous legal philosophy movement often called Legal Process Theory would beg to differ. The fathers of this movement, Professors Henry M. Hart Jr. and Albert M. Sacks, in their 1958 publication, *The Legal Process: Basic Problems in the Making and Application of Law,* claim the "central idea of law" itself is what they termed "the principle of institutional settlement."[116] This principle provides that the rule of law in a society such as the United States's entails a duty for individuals to follow "decisions which are the duly arrived at result of duly

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114. NICK NOEL ET AL., THE ECONOMIC IMPACT OF CLOSING THE RACIAL WEALTH GAP (2019). The economic costs of racism are not limited to those discriminated against, but ultimately cost the entire society. For example, the wealth disparity between white and black Americans will cost the national economy $1 trillion to $1.5 trillion in lost consumption and investment between 2019 and 2028, representing a gross domestic product (GDP) loss of four to six percent in 2028. Joseph Losavio, *What Racism Costs Us All*, INTERNATIONAL MONETARY FUND: FIN. & DEV. (Sept. 2020).

115. As explained, the prevailing paradigm of U.S. constitutional law does not seek to guarantee equality of outcome or even equality of the means of influencing the outcome (*see generally, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Washington v. Davis, 426 U.S. 229 (1976)), but only equality under the law (that is, lack of intentional unjustified discrimination, bias or corruption. *See Washington*, 426 U.S.; United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

116. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (1994).

established procedures . . . unless and until they are duly changed."[117] The vernacular version of this is now a familiar argument in legal circles, and is often used to oppose perceived "judicial activism." The argument goes: a provision should not be interpreted to lend an unreasonably unnatural (if pragmatically useful) interpretation that the drafters did not mean; the allegedly "natural reading" of the provision is the law, whether we like it or not, unless and until the legislature amends it.

The basic idea is that the outcome of a decision-making procedure that the individuals subject to it agreed to has a strong normative value, regardless of whether we personally disagree with the ultimate decision or not. In a society governed by law, we have a duty to abide by the outcome of that procedure, even if we disagree with its wisdom, unless and until we are able to lever the same decision-making procedure to change the law. As Hart and Sacks expressed it, "When the principle of institutional settlement is plainly applicable," that is, when the agreed-upon decision-making procedure was correctly followed by the appropriate social institution,

> we say that the law "is" thus and so, and brush aside further discussion of what it "ought" to be. Yet the "is" is not really an "is" but a special kind of "ought"—a statement that, for the reasons just reviewed, a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind "ought" to be accepted as binding upon the whole society unless and until it has been duly changed.[118]

To say we "ought" to follow such a decision is to say we have a normative or moral duty to do so. The basis for this moral argument has a social-contract-theory origin with parallel to the political philosophy propounded by Thomas Hobbes. In his *Leviathan*, Hobbes argued that the basis of political power was human beings' (theoretical) decision to surrender their natural rights to do whatever they please to a ruler in return for security.[119] In a type of parallel, under Hart and Sacks' view, individuals in a society realize they have a common interest in resolving disputes through peaceable, and not violent, means because this leads to maximizing the happiness of the majority.[120] They collectively thus agree to each abide by the outcome of a peaceful decision-making procedure. They agree, recognizing that procedure may not reach a decision in their favor, because even when not, their ability to count on others also abiding by the decision creates reliability. Individuals can anticipate the actions others will take in conformity with the decision and therefore shape their conduct to mitigate anticipated negative effects of the decision.[121]

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117. *Id.*

118. *Id.* at 5.

119. *See generally* THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL (1651).

120. Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 29 (2013).

121. *Id.* at 29–30.

Now, Hart and Sacks' social contract theory has its basis in consequentialist moral philosophy.[122] For these legal process theorists, the purpose of society, and the institutions and rules created to manage it, is to "maximize the total satisfactions of valid human wants."[123] One of the requirements to achieve this "maximization" is a system for resolving disputes and determining permissible conduct in a society without resort to violence, which has a disintegrating effect on social cooperation, making the maximization of valid human wants harder to achieve.[124] As we saw, however, the Foundational Principle is not a consequentialist one of maximizing the overall good of society, but rather a deontological one of recognizing the rights and coequal governing authority of individuals.

Nevertheless, the Legal Process theorists' argument for the moral value of following an agreed-upon social decision-making procedure regardless of individual outcome makes as much sense, indeed more, in a deontological perspective based on the Foundational Principle. The foundational principle itself entails the moral duty to abide by the outcome of a mutually agreed upon decision-making process. If all persons have an equal right to govern, then—as the Declaration asserts—the only legitimate government reflects the consent of all the governed. Unless a society is small enough where all participants can equally participate in each and every decision, there will have to be some delegation of decision-making to individuals and/or institutions chosen by those participants and vested with the authority to make those decisions on their behalf, according to a procedure they agree upon. And that decision will have to be observed as the governing rule unless and until it is changed via the agreed-upon procedure. If those delegates' authority to make those decisions reflects the communal will of the coequal participants, a participant would violate that coequality by failing to adhere to a decision reached by those with the delegated authority, because he would in effect be acting as if he had greater governing authority than the other participants. He would violate the principle of coequal governing authority by determining that he had greater authority (to do as he wishes) than everyone else with whom he had agreed to be bound by the decision-making body, because he would be saying that, unlike everyone else, he did not have to adhere to his initial agreement to be bound. Likewise, were he to argue that he was not merely "going maverick" to achieve some personal aim but rather was attempting to change what he viewed as an unwise or immoral social decision, his unilateral attempt to change the decision would have the effect of denying the rest of the community their equal right to determine the agreed-upon procedure for reaching and changing decisions.

Theoretically, every participant could take the stance that they were not bound by the outcome of the decision-making process they all agreed to, and the principle of governing equality would not be violated because each person would have the same prerogative *vis a vis* a communal decision.

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122. *Id.* at 24.

123. *Id.* at 21 (quoting HART & SACKS, *supra* note 114, at 103).

124. *Id.* at 26; HART & SACKS, *supra* note 114, at 4.

However, this categorically would not result in a just decision-making principle for society. As Hart and Sacks pointed out, if individuals cannot rely on other individuals to adhere to the decisions made by the communally authorized decision-maker, then they have no reliability incentive for following decisions with consequences adverse to them. The peaceful decision-making procedure breaks down because no one can trust if and when the other will follow the official decision, and dispute resolution disintegrates into violence.

A lawless society where individual violence is the fundamental decision-making tool not only has consequentialist ramifications in terms of making it harder for the majority to maximize their potential, but it is doubly immoral from a deontological perspective focused on recognizing humanity as an end. First, because part of engaging in moral decision-making where humanity must be treated as an end requires that I decide on a rule of conduct that I think others would agree to if in the same circumstances, violating my promise to honor the outcome of a communally delegated decision is doing the inverse: breaking a rule of conduct that all others did agree upon. Second, and more fundamentally, using force to accomplish my end at the cost of harm or loss to another, based on my individual judgment and not a communally delegated authorization of force for a morally-defensible purpose (such as undergirds the use of force by police or military defense bodies), uses the target of that force merely as a means and fails to recognize her value as an end. The use of force overrides the principle of coequal consent and negates her capacity to make decisions for herself.

In sum then, a framework for justice arising from the Foundational Principle in a society too large for direct democracy necessarily requires some delegation and utilization of decision-making authority through a mutually-agreed upon procedure, and imposes a qualified[125] moral imperative for individuals to abide by the decisions reached through that decision-making process unless and until the decision is changed through the agreed-upon procedure. More simply put, recognizing other people as ends and not merely means requires, at the outset, adhering to democratically agreed-upon procedure.

While this discussion of the significance of adhering to accepted procedure in a democratic society has focused primarily on the creation of law by a legislating body, the principle applies to legal adjudications as well. Determination through the proper procedure is a prerequisite for the legitimacy of the outcome reached in an adjudication. Appropriate procedure is what determines the form and thoroughness of the inquiry and ensures that sufficient evidence and law supports each and every outcome. Further, the same consequentialist and deontological concerns support ensuring a fair and consistent process in the legal realm as the political. Individuals in society have similarly agreed to use the court process, rather than personal force, to resolve disputes and address social threats and to be bound by the outcome of that process. To the extent people are not able to receive a fair and accurate hearing

125. We will see later why this moral imperative is not absolute.

and do not feel that their interests are sufficiently vindicated through that process, they will eventually decide to take justice into their own hands. As in the political context, this will lead to social disorder and violence. Further, treating humans as an end means giving each individual sufficient procedure to ensure his story is heard and he has his "day in court" and so gets to participate meaningfully in the adjudication, regardless of whether he ultimately wins.

The threshold requirement for a just adjudication then is the proper utilization of just procedure to achieve the decision, again where "just" means consistent with the Foundational Principle.

IV. Procedural Justice

The first principle of legal justice we can extract as a corollary of the Foundational Principle addresses the procedural requirements of adjudications. It is this:

Each individual subject to the law is equally entitled to the full measure of procedure practically sufficient to safeguard against erroneous deprivations of personal interests.

What do we mean by procedure? Generally speaking, this term refers to the rules governing the process by which courts hear cases and render judgments. As we shall see in the illustrations below, examples of procedure include the type and timing of the hearing or trial an individual receives, how evidence is examined (rules regarding witness testimony, physical evidence, cross examination, etc.), the burden of proof and legal standards that must be met to enter judgment against a party (guilt beyond a reasonable doubt, substantial support in the record, clear and convincing evidence, etc.), and the ability to object, seek reconsideration and/or appeal an adverse judgment.

Now, to the two operative points of the procedural principle:

First, individuals are equally entitled to the appropriate procedure. As a matter of deontological morality, equal treatment of the members of a community is necessitated by the Foundational Principle of a coequal right to self-governance and essential to treating other human decision-makers as ends. To provide an individual anything less than the degree of legal procedure provided to similarly situated others would violate the categorical moral reasoning principle that one must act in a way that other persons considering the same issue in the same circumstances would be able to agree to as well. Other individuals honoring the concept of humans as ends could not decide to accord to some individuals a less robust procedure than that deemed necessary to safeguard the interests of others in similar circumstances, because that decision means that subset of individuals does not have the same chance to safeguard the interests that the community has decided (by passing laws and creating legal rights and benefits) individuals have a legitimate interest in.

Second, the procedure individuals receive must be sufficient or "full." Full procedure means that each individual receives the full measure of legal process and procedure that the community has deemed practically necessary to safeguard the particular interests at issue. The "full" amount of procedure will vary depending on the interest at issue and will depend on both the inherent nature of the interest and the value of that interest. The nature of the interest means the kind of thing it is, to put it simply—is it a person's property, freedom, or bodily integrity? The value of that interest, for our purposes, is reflected in the judgments by democratically-elected lawmakers to create the rights and benefits legally embodying and protecting that interest. For example, lawmakers determine what type of physical or psychological harm rises to the level of a harm legally actionable, or what particular rights a property holder can vindicate in court if someone trespasses on those rights.

The U.S. Supreme Court's procedural due process jurisprudence is illustrative on the issue of determining sufficient procedure.

The Fifth and Fourteenth Amendments to the U.S. Constitution bar the federal and state governments, respectively, from "depriv[ing] any person of life, liberty, or property, without due process of law."[126] The judiciary's so-called "procedural due process" decisions elaborate on what process the government must provide a person with before it can deprive her of a protected liberty or property interest.[127] To say a liberty or property interest is "protected" means that law provides a benefit or protects (partially or fully) an individual's claim to such an interest.[128] Examples of protected liberty or property interests include receiving social welfare or disability benefits, a government-provided office or job, not being evicted from leased housing, etc.[129]

If a government action threatens to interfere with or deprive a protected liberty or property interest, the U.S. Supreme Court has held, the affected individual must receive sufficient legal process *to safeguard that interest from wrongful deprivation*.[130] As a result, governmental agencies at the local and national level have developed all manner of procedural safeguards and adjudicatory processes for individuals to receive (1) notice of governmental action adverse to their interests and (2) the opportunity to be heard in a meaningful manner and challenge that action before the governmental decision-maker himself or an objective party with authority to prevent the action.[131] If an individual claims that these existing administrative processes are insufficient,

126. U.S. CONST. amends. V, XIV, § 1.

127. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Despite the amendments' textual reference to "life," the Supreme Court addresses procedural requirements for depriving a person of life, i.e., capital punishment, pursuant to the Sixth Amendment's requirement of proof beyond a reasonable doubt for criminal convictions and the Eighth Amendment's prohibition on cruel and unusual punishment. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

128. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

129. *See, e.g., id.* at 578; *Mathews*, 424 U.S. at 332; Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Richmond Tenants Org., v. Kemp, 956 F.2d 1300, 1307 (4th Cir. 1992).

130. *Mathews*, 424 U.S. at 333.

131. *See id.*

they can obtain a federal court order providing them with additional or substitute procedure under the Fifth and/or Fourteenth Amendments.[132]

Under Supreme Court precedent, in determining whether a person is owed greater or a different type of procedure than the government is currently providing her, a court will balance the weight of the individual's interest that will be affected by the governmental action, the risk of an erroneous deprivation of that interest under the current procedure in place and the probable value of additional or different procedure, and the governmental interest in adhering to the process that exists.[133]

Under application of this balancing test, the nature of the interest plays a significant role in determining the process. Due process generally requires a meaningful opportunity to be heard before the decision-maker if a protected interest is at stake.[134] In order to be able to present one's case to the decision-maker in a meaningful manner—that is, in a way practically capable of swaying the decision-maker's judgment and altering a possibly erroneous decision before it has irreversible effect—one must, as an initial matter, receive notice of the pending action, what its basis is, when it is going to occur, and the timing and location of the hearing or trial where one can defend one's interest.

The nature of the interest and the circumstances of the individual together dictate the contours the notice must take. Because the purpose of the notice is to provide the individual with the opportunity to defend her interest, the notice must both be delivered in time to permit the individual to raise her defense to the decision-maker before a final decision is made, and understandably relay the reasoning for the planned action so the individual can demonstrate errors in this reasoning (should they exist) in their defense.[135]

In terms of the delivery of the notice, the Supreme Court has logically explained that the notice cannot be merely formal, but must be reasonably intended to provide actual notice The notice must be "reasonably calculated, under all the circumstances" to make interested parties aware of the action and afford them the opportunity to present their objections or defenses.[136] Breaking this down further, this means the notice both must convey the required information, in a manner that is intelligible and reasonably likely under the circumstances to reach and inform the anticipated affected individuals, and it must do so with reasonably sufficient time for the affected individuals to make their arguments to the decision-maker at the designated time (i.e., the hearing or trial).[137]

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132. *See id.* at 335

133. *Id.*

134. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*.") (emphasis added).

135. *See id.* at 314.

136. *Id.*

137. *Id.*

The circumstances that gave rise to this explanation by the Court of the notice requirement show what it does, and does not, mean for notice to be reasonably calculated to provide actual notice. In *Mullane v. Central Hanover Bank & Trust Co.*, a bank supervising a large common trust fund, which included the assets of hundreds or thousands of individual trusts, estates, and other funds, sought court settlement of its account as trustee of the fund.[138] The only notice provided to the beneficiaries of all the trusts in the common fund, many of whom did not reside in New York, was the minimal New York State statutory notice requirement of publication of a small ad in a local New York newspaper once per week for four weeks.[139] The Supreme Court held that this newspaper publication failed to provide adequate notice under due process with regard to those beneficiaries whose names and addresses the bank had possession of. The Court reasoned that a bank trustee who *actually desired* to provide the beneficiaries notice, as opposed to going through a "mere" formal "gesture," would not simply rely on the chance that they might come across the ad in the newspaper, when the bank had their names and addresses and so had the means to mail notice to the individuals directly.[140] The Court thus held that due process required utilizing the reasonably available methods of providing notice to affected individuals that someone concerned with actually notifying them would use, as opposed to someone concerned only with providing the minimally required amount of notice so as to obtain legal cover if and when individuals later claimed they were not notified.[141]

As for its contents, the Supreme Court has held, the notice must announce the action, the basis or reasoning underlying the action, and the time, place, and manner in which objections to that action can be presented to the decision-maker. Regarding reasoning, the notice must include the factual and legal basis for action against the individual's interest—in other words, the relevant circumstances existing in the world pertaining to that interest and how they meet (or do not meet) the standard created by the relevant law for receiving, maintaining, or being deprived of that interest. For example, in the context of being stripped of a government job, the factual basis would be the relevant events, statements, actions and/or other circumstances underlying the management's desire to fire the employee. The legal basis would be how those circumstances rise to the level permitting the employee to be fired under the governing employment standard or rule.[142]

As with notice, the nature of the interest also dictates the form of the hearing (i.e., written submissions, oral argument, evidentiary hearing with ability to present and cross-examine witnesses, etc.) and its timing (whether it must occur before, or may occur after, the deprivation). If the interest is one affecting a person's physical survival—for example, welfare benefits if the

138. *Id.* at 309.

139. *Id.* at 309–10.

140. *Id.* at 315.

141. *Id.* at 320.

142. Bd. of Regents v. Roth, 408 U.S. 564, 573, 573 n.12 (1972).

individual is indigent—the hearing must occur before the government deprives the person of that interest.[143]The reasoning is simple: The person may not be alive still for reinstatement or reimbursement after the fact if the benefits they need to pay for food and rent are cut off weeks or months before the hearing can occur.[144] There is less need for a prior hearing where the presence of the interest is not critical for immediate survival, or where reinstatement and remuneration after the fact, should the deprivation be determined erroneous, would fully redress any injury caused by the temporary deprivation.[145] Thus, for example, the Supreme Court has held that the termination of disability benefits, although having a substantial impact on a person's livelihood because disability benefits by definition compensate one for the inability to work, nevertheless does not require a pre-termination evidentiary hearing like welfare benefits.[146] This is because disability benefits are not based on financial need, and a person receiving disability benefits may have access to other funds and, even if not, would be eligible for welfare benefits if the lack of disability income dropped him or her below the eligible subsistence level.[147]

Likewise, the nature of the interest will suggest the format the hearing must take to safeguard against an erroneous deprivation of that interest. If the determination of the individual's claim to the interest will depend heavily on a determination of fact, there must be procedures adapted to reliably determine facts based on the type of evidence likely to be presented. If the evidence is largely from lay (non-expert) witnesses, this ordinarily means it will be presented in the form of testimony from the affected individual, the governmental investigator or enforcement officer, and other witnesses. Where the interest is insubstantial and the determination only temporary in effect, the decision-maker may be able to make a proportionally reliable determination of fact solely from written declarations of the witnesses. [148] However, the risk of an erroneous determination rises substantially where the decision-maker cannot verify the accuracy and credibility of a witness's testimony through live examination.[149] Thus, permanent, substantial deprivations likely dictate the need for an evidentiary hearing where witness testimony can be presented to the decision-maker and adverse witnesses confronted and cross-examined in front of that decision-maker to verify their accuracy and credibility.[150] An example,

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143. Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding due process required an evidentiary hearing prior to termination of welfare benefits).

144. *See id.*

145. Mathews v. Eldridge, 424 U.S. 319, 340–43 (1976).

146. *Id.*

147. *Id.*

148. *See* Greene v. McElroy, 360 U.S. 474, 496 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination.").

149. *See id.*

150. *See Goldberg*, 397 U.S. at 269; *McElroy*, 360 U.S. at 496.

again, is determinations regarding public assistance benefits for welfare recipients, in which the accuracy and credibility of the individual's claims regarding his living situation will often figure significantly.[151]

To the extent that the determination depends primarily on testimony from professional experts operating at arm's length from the individual affected, there may be comparatively less need for full, live witness examination as credibility and bias may be less at issue. Consider the disability-benefit context, where the professional opinions of a medical expert who examined the individual are normally critical facts in deciding whether the individual is entitled to disability benefits.[152] Such experts are likely to be operating at arm's length from both parties and present similar findings in a normalized format in hundreds of cases before the same judge or hearing officer. The findings of the expert's examinations and application of the disability standards are far more efficiently conveyed in a routinized written report format than via the different methods of direct examination likely to be employed by many different attorneys who otherwise would have to draw out that expert's findings in live testimony in court. Live questioning is only more useful in these cases in response to the expert report—for the purpose of cross-examining the medical expert to elicit possible errors and oversights in the examination of the particular individual in that case. Some courts, for example, permit expert witnesses to provide their direct testimony via writing; experts are called in for live testimony if, and only to the extent that, the opposing party wishes to cross-examine them.[153]

There are several procedural aspects that may be relevant to whether an affected individual receives reasonable notice and an ability to be meaningfully heard depending on the circumstances, such as whether lay individuals may be represented by attorneys, what may be admitted into evidence, what type of individual will serve as decision-maker, what action may be taken in a preliminary manner prior to the hearing, whether there is an opportunity for appeal, etc. We need not go into all possible examples and procedural nuances here, as the point is the same across the board. The type of interest at issue and the circumstances of the affected individual will dictate the form that the hearing or trial procedure must take to provide the individual a meaningful opportunity to defend against an erroneous outcome.

The U.S. Supreme Court's discussion of the requirements of procedural due process is useful for providing examples of what sufficient procedure looks like in a given context and the rationale that gets one there from the first principle of a "meaningful opportunity to be heard." But these are offered merely as illustrations of the type of reasoning that may be utilized in applying the procedural corollary of the Foundational Principle. Remember, this

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151. *See Goldberg*, 397 U.S. at 269.

152. Indeed, some courts go so far as to hold that the expert opinion of a disability-benefit claimant's treating physician regarding the nature and degree of the individual's ability is (rebuttably) presumptively binding on the administrative tribunal addressing the disability benefits claim. *See, e.g.*, Hidalgo v. Bowen, 822 F.2d 294, 296–97 (2d Cir. 1987).

153. Use of Written Declarations on Direct Testimony, 9 No. 10 Fed. Litig. 317 (Jan. 1995).

is a meta-principle of legal ethics flowing from the very nature of human existence and democratic governance. It is a shared value to be used to test legal decisions—past and future—to ensure they are just. The mere fact that a court may have reached a certain conclusion about the type of procedure an individual was entitled to in a given case does not mean that determination was just if it was not consistent with the requirement of the Foundational Principle that all individuals receive the full amount of procedure necessary to reasonably avoid a wrongful deprivation under the circumstances.

In other words, justice does not demand adequate procedure to safeguard against an erroneous deprivation simply because American due process precedent often requires this. Rather, it is the logic of the Foundational Principle that dictates this procedural norm.

Treating humanity as an end requires that we not deprive a participant in that humanity of life, liberty, or property without doing so through a set of procedures that individual would reasonably agree ensures the accuracy of the legal and factual basis for that deprivation. Or, employing Kant's categorical reasoning in reverse, treating our fellows as ends and not simply means, means we owe to others the measure of procedural safeguards we ourselves would reasonably desire if in their shoes. Rawls' "original position" technique demonstrates how this conclusion would be reached as a matter of deontological reasoning.

Recall that this technique involves imagining the hypothetical deliberation of individuals operating behind a veil of ignorance as to their physical, social, and economic status—and thus, importantly for this context, ignorance as to any circumstances suggesting the likelihood they could find themselves facing loss of life, liberty, or property in criminal or civil legal proceedings. Faced with the possibility that he could be in this position, such an individual would naturally want the full amount and type of process and procedural protection determined practically necessary to prevent erroneous deprivation of his interests. Individuals in the original position would not work out the details of what type and amount of process is necessary to reasonably prevent a wrongful deprivation in each and every possible case, especially because the veil of ignorance means they would not be privy to many of the concrete factual circumstances required to determine the appropriate process in particular contexts. However, as explained, what we are talking about here are the process rules and procedures that ensure: (1) the affected individual can present the important evidence in an intelligible way to the decision-maker before that decision-maker makes any irreversible decisions; (2) the decision-maker must consider this evidence; and (3) her decision must be supported by a sufficient majority of the evidence to justify depriving someone of life, liberty, or property. In other words, what is at issue is the degree and type of procedure necessary to ensure the adjudication is factually accurate, meets the relevant legal standard, and occurs in a timely manner.

Balanced against this, considering the possibility they would never have interests subject to an adjudication, individuals in the original position would be considering the cost to society of providing that degree of process to every person. For example, the hypothetical individuals would contemplate higher taxes to pay for more judges and more courtroom space to conduct more and longer hearings, more funding for appointed counsel, etc.

Given the *shared* and *marginal* contribution to the administrative cost that funding full process entails, balanced against the *individual* and potentially *ruinous* possibility of being unfairly deprived of life, liberty, or property due to absence of a procedural safeguard (such as adequate notice of an adverse action, a pre-deprivation hearing, the ability to cross-examine adverse witnesses, appointed competent counsel, etc.), one need not be a behavioral economist trained in game theory[154] to understand that individuals in this hypothetical position would more often than not willingly assume the marginal social cost to ensure maximal protection should their neck ever be on the line. This conclusion is rational because the potential costs are diffuse but the potential benefits concentrated, with dramatic consequences for the individual's life.[155] Thus, anonymous individuals in the original position, who do not know their personal traits or place in society and whether they would be the subject of an adjudication or not, would conclude that any legal adjudications must afford the individual the full amount of procedure practically necessary to ensure accurate and lawful decisions and thereby prevent wrongful deprivations.

Because the point of the original position is to demonstrate what rules and principles all people would agree to be bound by as a matter of practical reasoning without the bias of knowing their position in the world, the outcome of this hypothetical deliberation is what all other reasonable individuals considering the same circumstances would agree to—that is, the type of decision that treats all persons as ends and reflects their status as coequal participants in social decision-making. This outcome of original position deliberation concerning the procedural requirements of legal adjudications is therefore what the Foundational Principle requires.

A final note on the procedural corollary: The amount of procedure individuals are all entitled to is that deemed *practically* sufficient to safeguard their interests against erroneous deprivation. The procedure need not be so bulletproof to ensure that erroneous deprivations can never possibly happen. It is impossible to conceive of an adjudication process that would always fully prevent any error (human, technical, or otherwise) from occurring. Further, endeavoring to provide a process guaranteeing a one-hundred percent error-free certainty would inevitably result in indefinitely prolonged adjudications, with an infinite regress of procedural safeguard after procedural safeguard, each testing or backstopping the previous one to ensure no possibility of error. Delay from attempting to obtain certainty would prejudice the party on the other side of the case, as it would delay their receipt of an outcome potentially in their

154. *See, generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (explaining that rational actors will be drawn to actions involving diffused costs paired with concentrated benefits).

155. *Id.*

favor and affecting their interests.[156] Even in criminal cases, with the highest procedural burden—the need to prove guilt beyond a reasonable doubt—there is no requirement for "mathematical certainty."[157] If administering justice required an "absolute or mathematical certainty," in the words of one court, "practically every criminal would be set free to prey upon the community. Such a rule would be wholly impracticable and would break down the forces of law and order, and make the lawless supreme."[158]

Requiring that procedural safeguards guarantee an absolute or mathematical certainty of the accuracy of the determination against the individual would prevent any adjudication from occurring at all given the limitations of court proceedings to finite evidence and imperfect human faculties. The government could not enforce criminal laws against violators and private parties could not enforce civil laws against tortfeasors and contract breachers. Such a logjammed system would not honor the Foundational Principle because the requirement for certainty would make the perfect the enemy of the good and prevent any justice (however occasionally flawed) from occurring whatsoever, contravening the imperative to treat humanity as an end by permitting individuals deviating from this principle to use others as means and violate their legal rights with impunity. For these reasons, individuals deliberating in the original position behind a veil of ignorance, because they cannot know which side of the adjudication they would be on (if any), would be equally sensitive to the concerns about delayed or denied justice to the party bringing the suit or society in general where the government is the other litigant. They would be, as well, aware of the practical impossibility of achieving certainty in human processes. Thus, they would not, on balance, decide to require any greater degree of process than one practically sufficient to avoid erroneous deprivations.

As with the procedural corollary generally, what process is "practically sufficient to avoid erroneous deprivations" depends on the particular circumstances and individual interests at issue in the case. The particular judge or other person adjudicating the case will be in the best position to determine what is practically sufficient in those circumstances, using the considerations outlined here as guidelines.

In conclusion, application of the Foundational Principle dictates the same conclusion United States courts have largely reached through their common-law development of the concept of procedural due process: The implications of our recognition of individual's coequality as human decision-makers demand that, when the law would impose a personal deprivation, individuals are all equally entitled to the full degree of procedure deemed necessary to prevent erroneous deprivations of their life, liberty, or property.

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156. *See* Dietrich v. Boeing Co., 14 F.4th 1089, 1095 (9th Cir. 2021) (lamenting delay to merits disposition due to parties litigating a procedural issue as "delays that conflict with one of the basic principles of our legal system—justice delayed is justice denied").

157. Holland v. United States, 348 U.S. 121, 138 (1954).

158. Gilday v. Callahan, 59 F.3d 257, 266 (1st Cir. 1995).

V. SUBSTANTIVE JUSTICE

The first principle of legal justice addresses procedure. It addresses protections in the process individuals undergo when a court or administrative tribunal is adjudicating their interests, regardless of the merit of the individual's claim or defense, or the outcome he or she deserves. As we saw, those protections involve notice of the detrimental decision or action, the opportunity to be heard on the matter by the person making the decision, mechanisms for presenting evidence and argument in support of one's position, and the burden of proof that must be met to effect a personal deprivation of life, liberty, or property.

Providing each individual the complete amount of procedure practically necessary to prevent wrongful deprivation by the law is necessary for a just legal decision. But it is by no means sufficient; it is merely the threshold requirement. Justice has substantive requirements too. The Foundational Principle has direct implications for the substance of legal adjudication in addition to procedure.

Before we get into those implications, however, what is substantive justice? There are at least two competing views.[159]

Philosophers since the days of Plato have defined justice as "giving each her due." In law school, this is taught as the deontological justification for criminal punishment. Under this view, the punishment one receives for a crime should equate to the amount of wrongdoing or harm inflicted. The Code of Hammurabi's dictate of "an eye for an eye" is a classic example of this view. The idea is that justice is receiving a consequence directly corresponding to the legal or moral merits of one's decisions and actions.

I and others like to think of this view of justice as "horizontal fairness." The term will make more sense, when we contrast it with the second view, "vertical fairness."

Whereas horizontal fairness addresses what outcome an individual should receive in isolation, based on his own decisions and actions, vertical fairness addresses what outcome an individual should receive by comparison to what outcome other people have received for making those same decisions and actions. As one Supreme Court justice observed: "The Equal Protection Clause epitomizes justice more than any other provision of the Constitution."[160] And, as we saw before, the core principle of equal protection is treating like alike. Under this view, the judge's job in dispensing justice is ensuring that an individual receives the same or similar outcome as other individuals who are "similarly situated" before the law by virtue of having made the same or

159. There are additional views of justice, especially in the context of criminal law, including restorative justice. This article does not seek to denigrate or ignore the value of those perspectives. However, they largely are different approaches to determining horizontal justice, competing with the theory of "giving each her due," and can be substituted into this approach for that view at will without materially altering the conclusions reached here.

160. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

materially comparable decisions or actions in the same or materially comparable circumstances.

Which view is correct? Both. Both horizontal and vertical views represent valid views and necessary components in a justice determination that, as their names imply, are not contradictory or mutually exclusive, but rather speak to different dimensions of a multidimensional inquiry. Justice is not a singular value. I do not intend to inflict any post-traumatic stress from forcing the recollection of high school algebra, but justice, it turns out, is best illustrated on an X/Y axis.

Hopefully this visual now makes the "horizontal" and "vertical" terminology clear. Vertical fairness is vertical in the sense that, very roughly speaking, its value rises or falls on a theoretical Y axis as the individual's normative blameworthiness rises or falls along the X axis. And horizontal fairness is horizontal in the sense that it looks out to the left and right, at other similar individuals, and draws a horizontal line across to intersect with their outcomes. The Y value of the justice equation, therefore, increases the more the determination in the case at hand approximates other determinations in similarly situated cases.

This is not to say that adjudicating a case is a simple matter of math, and judges can reach just conclusions simply by plugging in numbers and charting lines. The X/Y plane is merely a (very) loosely analogous visual showing how the two dimensions of the justice component intersect—and the necessity of examining both in an adjudication. At this basic level, at least one principle of mathematical reasoning *does* apply. A "derivative" function can tell us what direction things are changing. In algebra, the slope of a straight line is represented by the change in Y coordinates over the change in X coordinates, or $\Delta Y/\Delta X$. If the change in Y value is zero, the slope of the line equals zero, and the derivative function's output is zero. A non-linear change in the underlying relationship will result in an increasing derivative output (increasing slope), and negative derivatives mean that there is an inverted correlation between the underlying variables. This reasoning applies in legal determinations too. While there is no particular mathematical X/Y value that corresponds to justice in a given case, the "justice derivative" value of the determination function will by definition have zero or null justice value—that is, be necessarily unjust—if horizontal or vertical justice is not changing in-line with the other. So, we want rules and systems that result in a consistent or positive "justice derivative."

The reasoning underlying this analogy is hopefully apparent and intuitive. Say a judge sentences a person to prison simply by looking at what sentence other individuals charged with the same offense received, without considering exactly what the individual here did, and under what circumstances, to see if there were any mitigating factors (such as physical or psychological coercion, mental illness, or a good-faith, but ultimately unreasonable, belief that self-defense was necessary) that should warrant a lighter sentence than in other cases of that type. In other words, the court looked only at the vertical component and wholly ignored the horizontal one. It asked only what other similarly situated individuals received (and did so in a grossly oversimplified way, to boot) and did not examine what particular outcome corresponded to the precise level of blameworthiness manifested by the individual's particular actions in the particular circumstances. No one would say that such a generic determination based on an incomplete and unnuanced inquiry was fair to that defendant.

Next, flip the example. The judge sentences the person to prison based purely on the judge's assessment of the level of legal offense or moral depravity illustrated by his conduct, without looking to see what other similarly situated individuals convicted of the same crime received. And, because this particular judge is rather morally offended by, say, public drunkenness, the individual ends up with the maximum sentence of two years in prison when most others convicted of that crime in that jurisdiction receive, for example, six months of community service. This hypothetical assessment, which ignored the vertical component and examined the individual's conduct solely in isolation, also strikes us as, in a meaningful sense, unfair.

However, while both components must have a value to have a line with a slope and likewise must be represented in an adjudication to ensure a "fair" outcome, this fact does not mean that the components are fully complementary. There is oftentimes a tension between the two components, approaching the level of a zero-sum game in more extreme contexts. The desire to fashion a sentence nuanced to an individual's particular circumstances can conflict with the desire to keep that sentence comparable to others convicted of the same offense. The more one tries to keep outcomes broadly constant, the less leeway one has to provide significant departures in individual cases. Reaching a *just* legal determination, then, is striking the proper balance between vertical and horizontal fairness equities in a particular case.

Now that we have a sense of the substantive components in legal determinations, let's turn to the implications of the Foundational Principle for substantive justice. They boil down to the following formulation, which I will provide upfront and then offer the justification for:

Individuals must receive substantially similar outcomes as other similarly situated individuals, except where all reasonable persons in the society, without knowing whether they were the individual in question, would agree on a departure under the circumstances.

There are two main pieces to this formulation. This section will elaborate on the first, and the next, the second.

Individuals must receive substantially similar outcomes as other similarly situated individuals.

One may think this formulation tips the scales toward horizontal fairness by making similar outcomes longitudinally the norm. That is not wrong, at least insofar as we are talking about the theoretical median and not necessarily the real-life mode. Even though departures are presented as exceptions, this does not entail that the number of such exceptional occasions must be small; there could be many, depending on the facts of individual cases. Rather, the idea is that horizontal fairness is the universal starting point and baseline, and any deviation from that must be independently justified by the particular circumstances.

Why is horizontal fairness the baseline? Two main reasons. First, the Foundational Principle is primarily a, and the strongest possible, justification for horizontal fairness. If we accept that all humans are equal in their possession of humanness—specifically, here and for the Framers, in their consciousness and pragmatic and moral decision-making capacity—and therefore inherent authority to govern society (or rather, no one has any greater authority to govern than any other save by their consent), legal decision-making in line with this axiom must also reflect this equality by ensuring similar legal outcomes for similar moral and pragmatic decisions. To offer one individual worse treatment for the same decision or action as another is to, in effect, deny the inherent equal worth of the first individual and also make that person only a means in a scheme designed to preserve the end-ness of the individuals receiving the better treatment.

Moreover, we can be assured this fundamental baseline is just because unbiased individuals would freely consent to it in the original position. Absent knowledge of what position he or she might end up in society, and what traits and predilections he or she might have, individuals operating behind the veil of ignorance would choose to adopt equal treatment as the norm because this would permit rational decision-making in society and reduce the chances such individuals may be subject to harmful treatment based on arbitrary factors. In other words, longitudinally consistent legal outcomes create a standard the individual could use his or her pragmatic and moral decision-making capacity to shape his or her conduct in reliance on. If a person knows that choosing A in B situation will lead to C legal outcome, because everyone else who has chosen A in B has received C, then she can generally rely on the fact that she, too, will receive C if she chooses A, and will not end up with D (much worse than C) based on factors unrelated to choosing A.

Indeed, the whole point of the original position thought experiment is to remove all the arbitrary factors from individuals' decision-making when choosing fair principles to govern society.[161] It follows that individuals in this position would be incentivized to choose a legal adjudication principle that ensures that any arbitrary factors that are (re)introduced by virtue of these individuals' (re)emergence into the real world, with all the attendant implications for disparate physical, social, and economic statuses, will not contribute to disparate legal outcomes when those individuals are held to account for violating those governing principles. The horizontal fairness baseline permits individuals, allowing for the chance they might inherit less favorable traits and positions in society, to minimize the deleterious impacts those traits and positions would have on their legal outcomes, at least, by in essence assuring traits and positions over which they had no control or otherwise did not choose to acquire could generally not be held against them in the legal sphere. Individuals in the original position would only agree to receive

161. *See* RAWLS *supra* note 37, at 11–12.

at least as favorable an outcome as those in better positions or with more attractive traits when both individuals took substantially the same action (a circumstance over which they would have control and thus would have the ability to decide whether it is in their best interest or not). In other words, individuals in the original position would opt for the horizontal fairness baseline I described because it would minimize the number of factors outside their control that they could be held legally accountable for and increase their ability to make better decisions for themselves by offering guidance for shaping their conduct around predictable legal outcomes.

The second reason that horizontal fairness is the norm is that the Foundational Principle, on its own terms, is more agnostic about what an individual's actions should earn her as an absolute matter, in contrast to its stronger and clearer implication that that outcome, whatever it is, must be comparable to the outcome others receive for the same action. It is not wholly agnostic on this point, because it dictates that all humans must be treated as ends, not merely means, and this requirement of end-ness sets a normative floor that exists in terms of the "exception" to the horizontal norm in the formula I offered, described further below. But apart from this "exception," the Foundational Principle does not have direct implications for the types of legal outcomes that society may justly determine that a certain type of decision or action merits.

This is due to (1) the nature of what it means for an action to "merit" a certain response by society and (2) the pluralistic structure of society, preserved in the United States through constitutional guarantees. To say that a person is due, or deserves, a certain benefit or punishment as a result of a certain type of action is at heart a normative or moral judgment about the rightness or wrongness of their conduct. There is an inescapable moral component to adjudication, as jurists such as Oliver Wendell Holmes Jr. recognized.[162] However, there is a broad potential range of moral perspectives. Via the First Amendment, the Constitution prohibits the government from taking action that, in effect, outlaws any ideologies or religious or spiritual beliefs, and likewise prohibits the government from requiring that individuals comply with any particular viewpoints or creeds. This constitutional structure allows individuals to engage in a broad range of philosophical and religious beliefs, which means they may disagree on particular value judgments, such as the moral character of various actions. As a result of this structure, the constitution assigns the determination of the social implications of value judgments to the democratic process. As the Supreme Court recognized in *Carolene Products Co.*, the democratically elected legislatures have the primary job of making social and economic judgments for the well-being of society, and the courts' job is to ensure the political process is fairly functioning to ensure that those legislative judgments do, in fact, represent the will of the people.

162. OLIVER WENDELL HOLMES JR., THE COMMON LAW 25 (American Bar Association 2009).

The upshot of this constitutional system is that, in the United States, the vertical component—what an individual is due in either the criminal or civil law context—is generally determined by the political branches, outside of the courtroom. For example, the federal and state legislatures establish in statutes what actions are criminally prohibited and the range of permissible sentences and other punishments for those criminal offenses. Congress creates whole regimes of substantive law to determine what is condoned or proscribed behavior, and thus what individuals are due for taking certain actions in those spheres, in realms such as tax (Internal Revenue Code), business practices (Sherman Anti-Trust Act, consumer protection laws, etc.), immigration (Immigration and Nationality Act), the market (Securities and Exchange Acts), interaction with the natural world (National Environmental Protection Act), healthcare (Affordable Care Act), and so on. And state legislatures do the same within the spheres the Constitution assigns to state governance.

However, we are focused here on principles for just legal adjudication. This is not to say that these principles do not apply by analogy to legislative deliberations in the United States. They do, because they flow from the Foundational Principle, which is the basic principle providing legitimacy to the democratic system of governance the United States created when it renounced British rule. The Foundational Principle, therefore, underlies and should guide all aspects of the legitimate exercise of political power in the United States. The Foundational Principle necessarily has corollaries guiding legislative and executive judgments in the same way the corollaries described here pertain to legal judgments. But these are beyond the scope of this article and will require elaboration in a different context. Since courts primarily[163] inherit the value judgments determining what societal response a particular action merits from the substantive law created by legislators, the Foundational Principle lacks the same direct and substantive implications for judges' determination of the vertical component in adjudication as it does for the horizontal fairness dictate that, whatever society's democratically decided values may be on a particular issue, they be applied evenly to all individuals who engage in similar conduct under similar circumstances.

VI. AN EXCEPTION TO EVERY RULE

In this section, we turn to the second part of the Foundational Principle's dictate for the substance of legal adjudication:

163. I say "primarily" because, to the extent there are still certain legal areas where the legislature has not directly spoken and courts are engaging in common-law adjudication, the normative judgments underlying the vertical component will be determined by the judiciary in these rare confines. These situations present all the more reason to ensure the normative framework the judge is bringing to bear is based on the Foundational Principle, a metaethical value necessarily shared by all individuals in United States society by virtue of their participation therein, and not a normative framework personal to the judge's ideological or religious background and not necessarily shared by the litigants in his courtroom.

. . . except where all reasonable persons in the society, without knowing whether they were the individual in question, would agree on a departure under the circumstances.

Before we get into the justification for this "exception" to the horizontal fairness norm established by the first piece, including the reasons anonymous persons in the original position would choose to adopt such a rule, some background is in order as to why an "exception" is even necessary given what we have discussed so far.

Recall in the last section we discussed how legal adjudications have two components, vertical and horizontal fairness—what an individual's actions merit them in terms of their rightness or wrongness, and in terms of what outcomes others who have engaged in similar conduct have received. Further, the Foundational Principle, which at heart is an equality principle, calls for a baseline in legal adjudication of equal treatment for comparable conduct, i.e., horizontal fairness. The Principle has fewer implications for vertical fairness, because this inquiry involves value judgments primarily assigned to the democratic process in the pluralist normative society created by the United States's constitutional structure.

However, the Foundational Principle does have some implications for vertical fairness. The most important of these is the so-called "exception" to horizontal fairness as the norm. Individuals are to receive the same outcome as similarly situated individuals except where all reasonable persons, without knowing whether they would be the individual in question—in other words, as I am sure you have guessed by now, hypothetical persons in the original position deliberating behind the veil of ignorance—would agree the individual should receive a different outcome under the circumstances.

Although I sometimes phrase this as an "exception" to the horizontal norm, it is more appropriately viewed as a "safety valve." Treating individuals who make the same choices in the same circumstances equally reflects their status as humans with equal decision-making capacity and governing authority. But equal treatment does not on its own guarantee that the treatment is just, because justice involves the vertical component as well. If the outcome an individual would receive is wholly incongruent with the rightness or wrongness of her decisions or actions that it cannot be said that the outcome is what she is due based on the normative value of her decision, there is no vertical fairness and justice is lacking. This is so even if that outcome is the same that other individuals in her position received under the same circumstances.

I am sure at some point in elementary school everyone reading this article was told: "Just because everyone else is doing it, it doesn't make it right." This principle applies to the courts, too. Now, the fact that other judges have rendered the same decision cannot be ignored. A number of minds reaching the same conclusion lends weight to the potential validity of that conclusion. However, moral validity, like scientific validity, is not a democratic determination, and the masses can be wrong. Just as the United States Constitution provides checks on the power of the majority to shape the country totally to its will—i.e., through procedural hurdles, individual rights that cannot be violated even for those in the minority, and judicial review—so too the Foundational Principle requires a check on the primacy of horizontal fairness when the outcomes being equally granted are at base unmerited by the circumstances. It also dictates a check when the outcomes are categorically inconsistent with the status of human beings who can, under the principle of self-evident equality and its ramifications, never be treated solely as means by the law, but must also be served as ends. Treating person C the same as B, who received the same as A, may be fair in terms of equal treatment, but is still unjust if person A did not merit the outcome he received to begin with. Using this same example, it is also possible that the outcome given A was appropriate at the time, but in the years between A's case and C's case, society develops—scientific discoveries, technological developments, or changes in ethical or legal philosophies occur—and the same outcome A received would now generally be deemed wholly incongruent to the rightness or wrongness of C's action in the same circumstances.

"I thought in the last section you argued that the value-laden judgments about the moral merit of individual actions should be left to the democratic process," you may be thinking. That proposition is generally true, for the reasons we looked at there. However, it is possible that, even following valid democratic processes, popularly elected lawmaking bodies on occasion reach conclusions about the legal outcomes individuals should receive that are so wholly incongruent to the rightness or wrongness of individuals' actions, or their status as human beings who can never be treated solely as means, that such a result would wholly ignore the requirement of vertical fairness.[164]

One of the best illustrations of how and why the democratic process might so totally fail in creating just substantive law comes from the writing and experience of perhaps the most famous recent proponent of this concept, the American Civil Rights Movement leader, Dr. Martin Luther King Jr.

In April 1963, King and leaders from the Alabama Christian Movement for Human Rights and the Southern Christian Leadership Conference commenced the Birmingham Campaign, or Project C, a campaign of demonstrations, sit-ins, and other nonviolent resistance in opposition to municipal racial segregation ordinances in Birmingham, Alabama.[165] After leading a Good Friday demonstration, King was arrested (along with fifty

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164. Recall that one of the necessary requirements of justice flowing from its multi-dimensional nature is that both the horizontal and vertical components receive some consideration and have some value, however minimal. Ignoring either component of justice, i.e., giving it zero value, both mathematically and logically means the determination overall will have no value—that is, it will be unjust.

165. *See generally* Barbara Maranzani, "*Behind Martin Luther King Jr.'s Searing 'Letter from Birmingham Jail*,' HISTORY (last updated June 30, 2025), https://www.history.com/articles/kings-letter-from-birmingham-jail-50-years-later [https://perma.cc/BX9Q-VKXE]; Jonathan Bass *"Letter from Birmingham Jail*," ENCYCLOPEDIA OF ALABAMA (last updated Feb. 7, 2025), https://encyclopediaofalabama.org/article/letter-from-birmingham-jail/ [https://perma.cc/R3QG-2BLV]; *Letter from Birmingham Jail*, THE MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (last visited July 17, 2025), https://kinginstitute.stanford.edu/letter-birmingham-jail [https://perma.cc/FP6U-EY8F].

others) on April 12, 1963, for violating a recently passed local ordinance prohibiting permit-less public gatherings, and placed in solitary confinement in Birmingham city jail. That same day, eight local Christian and Jewish religious leaders published a letter in the Birmingham News calling King an "outside agitator," and criticizing his civil disobedience tactics and "willingness to break laws" in certain circumstances.[166] The religious leaders in particular took issue with the apparent inconsistency of King's adamant support for following the law in the context of the Supreme Court's *Brown v. Board of Education, Topeka* decision ending segregation in public schools, but willingness to violate laws promoting segregation.[167]

King's now-famous response was to differentiate between just laws and unjust laws. He argued that there is no duty to comply with an unjust law because, in the words of the early Christian saint and theologian, Augustine of Hippo, "[a]n unjust law is no law at all."[168] King went on to explain how to differentiate just from unjust laws: "A just law is a man-made code that squares with the moral law, or the law of God. An unjust law is a code that is out of harmony with the moral law."[169]

But what does "out of harmony with the moral law" mean exactly? King's ensuing example in the context of segregation illustrates that he was speaking of the same deontological view of human beings as ends and not solely means, due to their equal autonomy, that Jefferson and Kant discussed. King explained:

> Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. *It gives the segregator a false sense of superiority and the segregated a false sense of inferiority.* To use the words of Martin Buber, the great Jewish philosopher, segregation substitutes an "I-it" relationship for the "I-thou" relationship and *ends up relegating persons to the status of things*. So segregation is not only politically, economically, and sociologically unsound, but it is morally wrong and sinful.[170]

The italicized phrases illustrate that, for King, the reason segregation laws are immoral and hence unjust is because they undermine the equality of persons in their shared personhood. Rather than dealing with all persons as autonomous subjects with coequal authority to determine society's direction, segregation relegates some persons (the segregated) to the status of objects subject to determination of other persons privileged to maintain the autonomy and governing authority (the segregators) that all persons inherently have. In other words, the segregated are no longer ends entitled to participate in the communal

166. Martin Luther King Jr., *"Letter from Birmingham Jail*," ATLANTIC. MONTHLY (Aug. 1963).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* (emphasis added).

decision-making—apparent from the fact that they did not and would never choose to enact segregation laws, which operate to their sole detriment—but only means subject to the decisions of the segregators as to what is in the segregators' best interest.

King's next example of unjust laws underscores that unjust laws are those that violate the basic axiom of equal human-ness that is the Foundational Principle itself:

> An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal. On the other hand, a just law is a code that a majority compels a minority to follow, and that it is willing to follow itself. This is sameness made legal.[171]

Recall Kant's explanation that one of the requirements of treating humans as ends is that when reasoning on the proper course of action, we choose a course of action that other persons encountering these circumstances could agree with.[172] By deciding on a rule that, in good faith, I reason that all other similarly situated persons would be willing to agree to follow, I am respecting their end-ness, their inherent decision-making capacity as humans, and not instead imposing my will upon them by choosing a rule advantageous to me but potentially disadvantageous to others.

King's majority-minority discussion above offers a concrete example of societal reasoning that does not treat all persons as ends. When a majority adopts a rule that it will require the minority to follow but will not itself adhere to, it is not honoring the end-ness or humanity of the minority because it is not engaged in good faith reasoning on a rule of conduct that all parties would agree to be bound by. And, employing classic deontological reasoning, King threads the needle on the exact manner in which this type of lawmaking is immoral and hence unjust: It uses the law to perpetuate and enforce a falseness—that persons are not all equal by virtue of being persons and some may be treated as means, not ends—that contradicts the basic principles upon which such a law can be promulgated in a democracy to begin with. The majority King references is only in power because centuries ago the United States threw off authoritarian rule as illegitimate and created a democratic structure based on the rationale that no human being inherently has any greater right to rule than any other and any legitimate exercise of power must be accountable to all the persons in the society. Segregation is unjust because, not only is it unfair to the segregated, it contradicts the basic principle underlying majoritarian lawmaking in this country. In other words, to accept the legitimacy of segregation laws is to nullify the legitimacy of democratically created law generally. And because the principle underlying King's position is the same self-evident principle the Declaration relied on to establish the United States as a philosophical and legal matter—that all persons are equal by virtue of sharing in the same

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171. *Id.*

172. *See supra* notes 12–14 and accompanying text.

characteristics that define what it is to be human—and segregation contradicts this principle, it is necessarily invalid and not binding within the United States.

King provides additional examples of laws that are unjust based on the same violation of the self-evident principle of equal governing authority that supports all democratic society: when a law is "inflicted upon a minority which that minority had no part in enacting or creating because it did not have the unhampered right to vote," and when a law "is just on its face and unjust in its application" in that it is only enforced against those in the minority."[173] The unifying characteristic of all King's examples is that they involve the creation or enforcement of law that violates the Foundational Principle by denying the equal decision-making authority and end-ness of all persons in the society.

Now, let's connect this discussion back to the rule of substantive justice described above. As *Letter from Birmingham Jail* illustrates, the Foundational Principle provides a check, or floor if you will, on the vertical fairness component of legal adjudicating. *A just legal decision cannot contradict the Foundational Principle.* A decision would do so by adopting a position or rendering an outcome that denies the fundamental equality and shared decision-making authority of the individual in question or treats him or her as only a means and not an end.

But how do we go about navigating the perilous nuances of what particular decisions and actions may violate this principle of equality, or treat individuals as means and not ends in practice? After all, as discussed above,[174] one of the basic reasons for adopting horizontal equality as the norm and imposing vertical fairness only to police the boundaries is the pluralism of ideological backgrounds and value judgments that comprise a democratic society such as ours with safeguards for individual belief. Such a pluralist society will inevitably involve multiple different, and potentially conflicting, views on what types of decisions do or do not violate basic human equality or treat some persons as means. For example, many currently believe that decisions permitting capital sentences or euthanasia or abortion necessarily treat persons only as means because taking the individual's life is inconsistent with treating him or her as an end, and others disagree. Some argue that providing societal assistance to advance the socio-economic position of historically disadvantaged groups undermines their basic equality and autonomy as persons, and others argue that *not* providing such societal assistance where it is warranted is what undermines equality and autonomy.

These value disagreements are deeply engrained in American society, and this article does not purport to offer a solution for reconciling them wholesale. However, the substantive corollary of the Foundational Principle *does* offer a method for determining when a legal judgment would violate the basic principle of equality or treat some persons as means in the context of a particular case: *where all reasonable persons in the society, without knowing whether they were the individual in question, would agree on a departure under the circumstances*

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173. *Id.*

174. *Supra* Part V.

from the norm of generally applying the law consistently. This is a particularization of the same original-position inquiry inherited from the deontologists and social contractarians we have been coming back to throughout.

As Kant and Rawls showed, the categorical imperative and social contract concepts of justice arrive at a fair outcome through achieving a reflexive equilibrium, where all parties freely consent to the outcome. Determining when such a reflexive equilibrium exists necessitates an original position type of inquiry, implicit if not conscious, to test a proposal to see if all parties would freely consent. The "all reasonable persons in society" test tees up the original position inquiry, and the "without knowing whether they were the individual in question" clause invokes the veil of ignorance. Because preventing individuals from knowing their particular circumstances prevents them from being biased based on how they think a decision might work to their practical advantage, in reality, any hypothetical person's decision as to what is fair and what they would consent to is the same as every other hypothetical person's decision. As a result, the decision of "all reasonable persons" is the same decision as any single reasonable person would reach behind the veil of ignorance.

Lawyers and students of the law will be familiar with the term "reasonable person." A "reasonable person" describes an objective, fictitious individual who operates rationally, prudently, and with common sense and concern for the impact of their actions and who is law-abiding.[175] A "reasonable person" is not a particular, actual person, who may at times act irrationally, imprudently, or recklessly, or break laws. The involvement of the "reasonable person" in the substantive justice formulation parallels the prerequisites Rawls described for hypothetical individuals in the original position: They will be rational; will have the basic knowledge required to agree to rules affecting political, economic, and social institutions; and will abide by the rules they agree to. The "reasonable" modifier here requires that the adjudicator applying this test envision the hypothetical individual making the decision, without knowing whether it would apply to her or harm her, as one who is rational, knowledgeable, ethical, and generally predisposed to following laws.

Putting all the pieces together, the "exception" part of the substantive justice formulation provides a safety valve against interpreting and applying laws in such a way that they would violate the Foundational Principle because, properly applied, the test prevents outcomes that violate baseline equality or treat some individuals merely as means.[176] This is because this test guarantees

175. *See*, *e.g.*, *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

176. These rules for just adjudications apply to both the interpretation of the statute or other source of law at issue, and the manner of its application to the parties at issue in the case. Much ink has been spilled and intellectual battle lines sharply drawn in recent decades over the proper method of statutory interpretation (*see, e.g.*, Scalia, *supra* note 159 at 1183–85), and this article does not purport to pick sides, as the principles described here are not about how a statute is interpreted, but merely articulate shared universal values to inform that interpretation, applicable wherever or whenever the judge might have instead, consciously or unconsciously, relied on their own particular background understandings of the world.

baseline equality and end-ness by requiring the free consent of all the hypothetical individuals, and no individual in the original position, without knowing whether or how he or she may be affected by the particular legal ruling at issue, would freely consent to an outcome that would arbitrarily prejudice him or her if they were the individual facing judgment.

Would not such a hypothetical person decide against the imposition of any sort of legal penalty or detriment, you wonder, since they do not know if they would be the person facing judgment and categorical amnesty ensures they would never be punished? No. First, all legal cases are in some sense zero-sum. There are always a winner and a loser. Even where the case is a criminal prosecution and the criminal defendant may be the only identifiable individual facing implications for his life, liberty, and property, there is still someone on the other side of the legal "v." In federal prosecutions, it is typically the "United States," but with state or local crimes, the nomenclature differs. I appreciate when a state styles its criminal cases, "People v. X," because this formulation most clearly conveys this point: The rest of society is on the other side of the criminal case. If a criminal goes free, the rest of us lose, to a greater or lesser degree, because a potentially dangerous and ill-intentioned person is back on the street, and further crime—to which the rest of us may fall victim—is incentivized because the message has been sent to others with similar criminal inclinations that they too could get away with it. And the ramifications for letting the defendant off the hook are more directly and immediately felt in all manner of civil cases, where a particular individual or entity (or individuals or entities) are on the other side of the "v." and stand to lose (or fail to be compensated) some aspect of their property, livelihood, reputation, or physical well-being at issue. Because the hypothetical persons in the substantive justice formulation are reasonable, they rationally recognize they could just as easily be the party who suffers if the defendant wins. Further, because they are ethical and generally law-abiding, they would not want to create rules or norms that encourage unethical conduct or lawbreaking, which they recognize would both increase their personal danger and also deteriorate social trust and reliability in the society over time. But, in order to ensure they also were not likely to be penalized by the law, hypothetical reasonable persons would choose rules and norms that only held them accountable for actions over which they had conscious and meaningful control—in other words, as we described above, they would opt for a system where they could rationally and reliably avoid adverse legal consequences by choosing actions that did not violate legal norms. All this boils down to the same dynamic we saw above with the vertical component of justice: Individuals in the original position would freely agree to *rational* rules that imposed consequences as a result of individuals' conscious choices and not *arbitrary* rules that imposed consequences based on circumstances individuals do not have a chance to choose or control, because such a system would give them autonomy over their lives and allow them to act rationally with predictable consequences.

And persons in the original position would wish to avoid a certain type of arbitrary outcome in the criminal context in particular. In order to maintain security in society, promote honesty and ethical conduct, and avoid incentivizing harmful or larcenous behavior, persons in the original position would choose legal norms and outcomes that corresponded to the ethical merit—the rightfulness or wrongfulness—of a person's actions, and were not based on factors wholly unrelated to that rightfulness or wrongfulness. Again, there are many different beliefs about what constitutes an ethical choice, or right versus wrong. Neither persons in the original position nor a judge applying this justice principle need resolve exactly how rightful or wrongful the conduct at issue in the case was under any particular moral standard. The inquiry asks only: Are the factors and considerations upon which the person stands to lose life, liberty or property by applying the horizontal norm *wholly unrelated* to the rightfulness or wrongfulness of the course of conduct they decided upon—that is, wholly unrelated to the ethical quality of their decision, however right or wrong the decider may subjectively believe it to be? Reasonable persons in the original position recognize that they incentivize honest and fair behavior and deter harmful and deceitful behavior by hinging criminal legal consequences on individuals' choices that correspond to these ethical concerns, and not choices concerning, for example, their approach to politics, religion, business and economics, entertainment, and cultural practices (to the extent these normally amoral choices do not also involve a component of ethical choice in the circumstances). In sum, reasonable persons would reject legal outcomes that hinged on other qualities or characteristics of a person's life besides their decision to engage in unethical conduct and were, for this reason, arbitrary from a moral perspective. They would not agree to subject themselves to potential criminal punishment for decisions that were a matter of personal belief or taste lacking connection to ethically *wrongful* behavior—decisions harmful to themselves, others or society.

There may be other ways in which legal outcomes would fail to obtain reflexive equilibrium by hypothetical individuals reasoning behind a veil of ignorance and thus violate the Foundational Principle. The types of arbitrary legal decision-making outlined above are only examples and not meant to be an exhaustive list. In all instances when applying this principle, an adjudicator should go through the whole hypothetical inquiry, plug in all the relevant facts and circumstances, and ask himself: Would reasonable individuals who do not know whether they would be affected by the decision at issue never agree to the outcome that horizontal application of the legal norm or precedent would yield? Generally, rejection by reasonable persons would occur where the presumptive outcome runs too high a risk of penalizing individuals too substantially based on a factor too far outside their choice or control that they do not believe there is any way for them to take reasonable precautions against it in real life. But there may be other reasons why reasonable persons would also necessarily balk at a particular outcome.

This situation represents an exception and is expected rarely to occur. Situations where all reasonable persons would agree that the norm necessarily cannot be applied are exceptional. The inquiry, after all, is not whether reasonable persons could arrive at a better outcome, or where they could disagree on whether the proposed outcome was just. The Foundational Principle recognizes that the value judgments underlying the law generally are appropriately established through the democratic process. The role of legal adjudication is not to second-guess or substitute the judge's own value judgments for those of the elected legislature. Accordingly, the substantive justice principle gives broad latitude to those value judgments encoded in the substantive law. Where reasonable persons could disagree over whether application of a legal norm is fair—where some might agree to it without knowing how it would impact them and others would not—an outcome that satisfies horizontal fairness by treating like, alike satisfies the Foundational Principle. So too do legal outcomes that individuals may or may not agree to in the original position. The Foundational Principle only prohibits legal outcomes that are fully inconsistent with basic human equality and deny the human traits that demonstrate that equality: our inherent consciousness and moral and pragmatic decision-making capacity. Simply receiving an unfavorable legal outcome—suffering a loss of property or freedom—does not deny a person their inherent equal status as a human being. Indeed, where the person merited such a punishment by intentionally engaging in conduct that harmed others, fully honoring her status as a conscious, moral decision-making being arguably *requires* that she suffer some legal detriment that corresponds to the wrongfulness of the action she chose. To do otherwise would deny the autonomy of her conscious choice and suggest she is not capable of moral decision-making after all.

Thus, the "exception" clause in the substantive justice corollary to the Foundational Principle is not a "law must have no negative personal consequences that anyone anywhere would disagree with" principle. It is rather simply a safety valve against legal outcomes that are fundamentally inconsistent with the self-evident equality proposition at the heart of democracy—that is, only the outcomes that treat an individual purely as a means and not a human end. The original position test in the substantive principle "exception" is designed to ferret these cases out and should be applied with this goal in mind. It requires an exception be made only where no reasonable individual, not knowing how or if it would affect him or her, could agree to the outcome under the circumstances because it imposed a harm based on such arbitrary reasoning that there was no way for any individual to reliably avoid it through their choices—by choosing law-abiding behavior within their conscious control. Because such an outcome fully denies the value of the person's autonomy and decision-making capacity and is not one to which they would agree under any circumstances, it fails to treat him or her as an end and violates the Foundational Principle.

The example of segregation laws from *Letter from Birmingham Jail* provides a good example that underscores the meaning of this "exception." No reasonable person behind the veil of ignorance would agree to a legal rule that imposes a detriment or stigma on an individual because of her race or ethnicity, because the risk is too high such a law would harm that individual, once she lifted the veil of ignorance and assumed her particular place in society, for something she could not control or prevent through appropriate, ethical conduct. After all, one's race or ethnicity is outside her control to alter, not a product of her conscious choice, and wholly unrelated to the ethical value of her decisions and actions. And on the other side of the ledger, a segregation law offers little utility for promoting a safe and law-abiding society for the same reasons: Again, it imposes a penalty based on a factor outside of a person's control and unrelated to her moral decision-making capacity. Hence, the Foundational Principle would prohibit an outcome in the proceeding that imposed a punishment for violating a racial segregation law regardless of whether similarly situated individuals had received such an outcome previously.

As this example shows, sometimes the exception will yield a categorical result. For example, as with segregation, to the extent the legal norm being applied turns on a factor outside the individual's control such as their race, there is no application of it that does not violate the Foundational Principle, and the "exception" would be categorical. Such a law would be unjust on its face. However, sometimes the legal norm at issue does not turn on arbitrary factors and only in the particular circumstances of the case would it impose a legal detriment based on factors outside the person's choice or control and unrelated to the ethical merit of their decision-making. For example, consider a statute that imposes a two-year driving license suspension for running a red traffic light in circumstances posing a danger of bodily harm to pedestrians. Like many traffic offenses, the statute is strict liability, meaning that the government does not have to show the driver intentionally ran the red light or knew doing so posed a risk to pedestrians; simply establishing that this was the factual case is sufficient to impose liability, regardless of the driver's intent or knowledge. The law does not facially turn on arbitrary factors, but rather a decision and action normally within an individual's choice and control, and related to their moral decision-making—like choosing to create an unacceptable risk of seriously harming others by driving a car through a red light in an intersection with pedestrians present.

But consider a scenario where the driver in fact intended and tried to stop at the red light, but a previously unknown manufacturing defect kicked in at just that moment and prevented the car's brakes from working properly. This scenario might be far-fetched, but in the unlikely event it occurred, a judge may well determine that all reasonable persons reasoning behind the veil of ignorance would agree that a departure was warranted. The imposition of a potentially seriously detrimental penalty (if, say, the defendant has to be able to drive to maintain employment) turns on a factor that, in these circumstances, was arbitrary: His running of the red was practically outside the driver's control in the moment, was contrary to his choice to follow the law, and turned on a freak chance that no one knew of and the driver could not reasonably have taken precautions to avoid. Imposing the penalty in these circumstances, further, could not promote a safe and law-abiding society because, again, there is nothing a normal driver could do to prevent such a freak occurrence.

So, a judge applying the substantive justice principle would ask herself: Does treating this person like other similarly situated persons considered under the relevant law who have made the same choices lead to an outcome that, under the particular circumstances, any reasonable person in society would have to agree imposes some legal disability or detriment on the person in a sufficiently arbitrarily way, and without a sufficiently likely positive impact on promoting security and ethical, lawful conduct in society, that no reasonable person would be willing to agree to such a legal rule?[177] If so, the Foundational Principle dictates that "a departure is warranted under the circumstances" from application of the horizontal norm to treat this person the same under the law as other similarly situated persons.[178] The principle does not specify the exact direction and degree of departure from the horizontal norm that the outcome will take. That ultimate determination should of course be guided by the judge's understanding as to *why* reasonable persons would agree that a departure is warranted in the first place but will otherwise rely on the judge's judgment and experience and the particular facts of the case.

Notice how the contours of the substantive justice principle correspond to the central thrust of the Foundational Principle. The characteristics of human beings that make them self-evidently equal are the characteristics that make them human to begin with: their consciousness and pragmatic and moral decision-making capacity. The moral dictate that we all be treated as ends and not merely means flows from this recognition that we all possess subjectivity (corresponding to our consciousness) and autonomy (corresponding to our decision-making capacity) and thus cannot logically be treated as objects (mere means). Paralleling the Foundational Principle, the substantive justice corollary therefore dictates that courts recognize people's equal status as ends and so generally treat them equally, providing the same type of outcome for the same type of action, except where such horizontally even treatment would fail to treat the individual in question as an end under the particular circumstances.

Finally, it bears emphasizing that the substantive justice principle applies to the overall outcome of a legal adjudication *and* whatever part(s) of the judge's process of reasoning that are essential to reaching the outcome. In the introduction, I distinguished between a judge's *interpretation* of a written source of law on the one hand, and the *application* of that interpretation to the facts at issue in a particular case. The substantive justice principle potentially applies to both of these actions. The Foundational Principle is not simply a method of statutory interpretation, or a method of factual reasoning. It is a principle of shared ethical values, necessary to everyone participating in our democratic structure, intended to substitute for the personal values judges are currently bringing into their legal reasoning. It is "meta" jurisprudence, if you will. And because it is a set of background values intended to inform and provide guidance in navigating the vagaries, meaning-assessments, and judgment calls involved in legal decision-making, it applies in every aspect of a legal adjudication where dispositive decision-making occurs.

So, for instance, the corollaries of the Foundational Principle apply to statutory interpretation to the extent that that is the primary driver of the outcome in a given case. A common application of the Principle in statutory

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177. Unlike some other legal tests, this principle encompasses far more than "immutable characteristics" such as race or ethnicity and involves any circumstance a reasonable person would deem beyond the individual in question's choice or control under the particular circumstances.

178. *See supra* Part VI.

interpretation would be where the court is engaging in categorical reasoning. A prime example is the segregation code addressed previously in this Part. Because the nature of racial segregation laws is to always impose a legal harm based on factors outside of individuals' choice and control, and unrelated to their ethical decision-making, a court could (and of course should, and many essentially did, albeit in other terms) determine that all reasonable persons in the original position would not agree to be bound by such racial legal differentiations. Accordingly, the court would logically determine that all laws that impose segregated outcomes on the basis of race violate the Foundational Principle.[179]

On the other hand, and likely much more frequently in circumstances such as criminal prosecutions and civil tort suits, the statute's meaning is not in dispute so much as how that statute applies to the facts of the case. In those cases, the procedural and substantive principles of just adjudications would have greater bearing on those application-of-law-to-fact determinations. Here, the Foundational Principle should guide the determination whether a party violated the law—i.e., were other individuals who took comparable actions in comparable circumstances deemed to violate the relevant provision (and do the particular circumstances here warrant a different outcome under the "safety valve"). The Principle should also guide determining what the remedy should be if the law was violated—i.e., is this the length of prison term or monetary penalty similarly situated entities received for the same actions (and does the "safety valve" apply)—and any other determination in the proceeding with the ability to impose a legal boon or detriment on a party.

APPLICATION AND CONCLUSION

The theory laid out here is not an attempt to replace the United States Constitution with some other constitutional norm to guide legal interpretation. Nor is it an attempt to say the Constitution or any other source of law must be interpreted in conformity with social contract theory or any other political philosophy or view of individual rights a particular court thinks is relevant to United States jurisprudence, such as the Supreme Court arguably did for a period of time in social and economic cases beginning with *Lochner v. New York*.[180]

Rather, this is a theory of legal metaethics arising from the axiom of democratic governance announced in the Declaration of Independence and underlying the entirety of our American system: We are all equal in being human. By being homo sapiens, we, by definition, possess the characteristics that make us capable of self-governing: consciousness and moral and pragmatic

179. In some circumstances, application of this principle may operate somewhat like an informal canon of statutory construction: Where the meaning of a statute is fairly susceptible of more than one interpretation, and interpreting the provision one way would make the legal outcome unjust by violating either the procedural or substantive justice principles described above, the court would interpret the provision in the way that upholds the Foundational Principle.

180. 198 U.S. 45 (1905).

decision-making capacity. We thus equally share the right to guide and shape society to permit our individual and communal flourishing. This equality in our possession of human-ness, self-evident to any person who interacts with any other person, provided the moral legitimacy for throwing off authoritarian rule in favor of government by the people in 1776 and, to this day, serves as our basis for the conclusion that democratic governance is the only morally justified exercise of political power.

If there are any shared values in our pluralistic society, the Foundational Principle, central and necessary to the United States and what it means to be American, must be one of them. And if any values or norms outside the plain text of the law on the books are going to guide our legal decision-making, it is only fair and appropriate that it be a shared value like this, not a judge's *personal* political, religious, cultural, or social values.

To the extent this theory has relied on particular philosophical or jurisprudential theories, it was only to explain what the terms of the Foundational Principle mean based on the ideas that underlie it, not to suggest that these philosophies comprise some sort of super-constitution that interpretation of the Constitution must adhere to. Legal decision-making in the United States need not adhere to Kantian or Rawlsian ethics. Those theories are merely offered to explain what the principle of self-evident equality stated in the Declaration means on the philosophical level. The theories help us understand the moral implications of the Foundational Principle. But they do not do the work of translating those philosophical and moral implications into legal principles. That work is the work of the law, shared by judges, lawyers, and lay participants alike. And it remains far from complete.

The procedural and substantive principles for just adjudication I laid out here are corollaries for practical implementation that I believe logically flow from the Foundational Principle. But they are just that—my interpretation of what the Foundational Principle demands. I believe this interpretation is sound and compelling for all the reasons offered in the preceding pages. But the reader should feel free to test and reject my conclusions if he or she disagrees with this reasoning. The critical point here is the Foundational Principle itself. It is an undisputable axiom of our experience and necessary to what it means to be American. It is a value we all share simply by being human beings in the United States and can therefore offer a common ground to begin a discussion of how to make our society more just.

For this reason, the Foundational Principle has implications for all of our political and legal decision-making as a society, not just that done in the courtroom. Others can, if they choose, look into the implications of this principle for legislating or executing the laws. It is in these arenas where the Foundational Principle may indeed have its strongest impact. After all, as explained, the Foundational Principle is not a "meta" constitution or source of law. It is not a basis for ignoring or striking down constitutional or statutory provisions. The corollaries I laid out here can guide judges in applying legal precedent to the facts of a case in a fair way and offer interpretive assistance—

a thumb on the scale, so to speak—in interpreting provisions that fairly could be read multiple ways.

However, it may very well be that existing legal (or even constitutional) provisions directly conflict with the Foundational Principle, and what we deem to be its reasonable dictates, in an unambiguous way. Judges cannot be the heroes in these cases; the constitutional framework does not permit them to rewrite laws. In these tough cases of direct conflict, where we think a written source of law irreconcilably violates the principle of self-evident equality, we must look to the legislators to write new laws, or we must initiate the constitutional amendment process.

Finally, in these instances where positive law directly conflicts with the dictates of the Foundational Principle, unless and until new laws replace the unambiguously flawed ones through the democratic process, it may well be that the only path available for breathing life into the Foundational Principle in these circumstances is the one well-trod by Dr. King: civil disobedience.[181] The point of the Foundational Principle, as morally true in 2026 as it was in 1776, is that the right and obligation to make just decisions for society does not rest with a few socially-privileged people holding power—every human being in society shares it.

We cannot forget the idea that birthed the American democratic experiment: Any legitimate government must be accountable to the people, who ultimately own the job of making just decisions for society. Let's get to work.

181. For a thoughtful proposal for improving legal justice through ordinary citizens' civil disobedience in the courtroom, *see* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009).