

# Equality and Right in the Contemporary World\*

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We will always confront the question of explaining how the United States should present itself to the world. I wish to suggest a response. The constitutional principles of the United States are equality and right, a singular “right,” rather than plural, because the plural form only derives from the fact of egalitarian claims proclaimed as rights. To be sure, there is a right synonymous with individual claims, but there is also a right that is transcendent and therefore singular. Now rights claims, as numerous as are individuals in their desires, multiply themselves to infinity. It is, therefore, necessary to distinguish the right from egalitarian claims.

There has been in the U.S. an evolution in the meaning of equality tending to distinguish it from transcendent right and, by extension, every ethical principle. To understand the sense of this evolution, it is necessary to reconstruct the original status of equality and of right at the time of the founding of the U.S.

## *Equality as a Fundamental Right*

The equality at the base of the consent of the governed was a moral principle corresponding naturally with self-government. The concept of self-government in turn derived from a conception of right, or a manner of acting, in accordance with which the conduct of each individual could be characterized as ordered, disordered, or subject to the government of another. Therefore, the original equality of the Declaration of Independence applied universally to human beings; it established the limits of ethical conduct among men in society; and it reflected a transcendent right (the law of God and of nature) in light of which individuals became bearers of “certain inalienable rights.” The organizing principle of the Declaration of Independence is, in sum, a hierarchical and moral principle.

Since the era when the American Constitution was ratified, America has become a federation of several races and mentalities. However, it remains the country of right where the rule of law applies to all and not just some. It is a democratic country, where the idea of government by the majority includes justice for all. The majority is a republican expedient and sacred to us, not to be mistaken with a class or a caste. When Americans speak of a majority that is not the voice of republican liberty, but rather of one group that opposes other groups in society, they pervert their tradition. Those who defend voting by race or by sex cast a shadow over republicanism. They do more: they stir up antagonisms of race against race, man against woman, faith against faith, without the means for reconciliation. The tensions of contemporary life give rise to such trials, and these trials express an evolution of conceptions of equality and of right. Hence we must reformulate the original conception in order to analyze the contemporary world.

*On Ancient and Modern Equality*

Students of Aristotle know how the idea of equality became the center of political reflection—ancient or modern. We also recognize that the distinction between nature and convention signified that political excellence cannot be fully realized in an actual regime. The ability to govern that belongs to wisdom may not be based on force. Wisdom relates to the modern principle of democratic consent and implies the moral equality of citizens.

For the ancients, moral equality was not the source of politics but furnished the decisive means to give wise direction to politics. It was at the time nothing contradictory to appeal to the idea of consent and, at the same time, to accept slavery—so long as slavery not be founded on interest or on passion. The idea of *consent* derives from the discovery of the right of nature. Thus, consent is not itself prescriptive.

The law of nature, founded in reason or in the human conscience, dominated the conception of modern equality and provoked such a change in the meaning that consent became the source of politics rather than the means to accomplish justice. Justice in turn became a derivative rather than a foundation principle of political life. This change is remarkably described by a classic text of American law, *The Higher Law Background of American Constitutional Law* by Edward Corwin.<sup>1</sup> For this author, the acceptance of the Constitution is, in Hegelian terms, what one can call the Absolute moment—the summit of thoughts and of practices that began with the discovery of the difference between nature and convention.

In sum, the development of universal standards surrounds every actual regime with suspicion. Ancient thought pointed to a single regime perfectly in accord with nature. Whereas men everywhere can honor the minimal demands of society, nowhere can they honor the maximum demands of society. Consequently, men found themselves morally caught between their political demands on the one hand, and the achievement of the good on the other. The politics that we know functions in this in-between state—the triumph of conventionalism and therefore positivism.

Nevertheless, the wise can contribute to the good direction of social life, provided that virtue establishes it; that is, when the right governs in conformity with ethical ordinances. But ethical ordinances imprint themselves only by chance in a rational order.

The opinions of the wise are in effect the dictates of nature itself. The discovery of the law of nature saves men from compromising. Political regimes ought not to arise from unforeseen accidents<sup>2</sup> but should be founded on the idea of consent, which conforms to the universal natural law requiring every sensible individual to obey dictates of nature.

Machiavelli, Bacon, Hobbes, Spinoza, Locke, and others attacked this political model. Corwin, though, insists that equality and consent remain at the center of the law of nature but with a change in meaning: they no longer address any individual soul but become a general rule of the universe.<sup>3</sup> Descriptive laws replace prescriptive laws. Descriptive laws reveal life as it is and yield another foundation for legitimacy. Human society is legitimate when it is constituted as one means to assure the ends of life.

Corwin contrasted the law of nature according to Locke with the English Constitution elaborated by Coke. He embraced the universality of rights underlined by Locke and amplified the segue of objective right into heterogeneous rights—“those rights which are implied in the basic arrangements of society at all times and in all places.”

Locke abandoned a historical method—the *stare decisis* of Coke—and no historical consideration could account for it. This contains the roots of an eventual conflict between the principles of the rule of law and of popular sovereignty, the first expressed in parliamentary sovereignty. It is not at all evident that a right of nature or a transcendent right—even when it is descriptive—can mediate the struggle between legislative supremacy and popular sovereignty. What is missing here, no doubt, is the social contract, which prefigures the distinction between the state and society.

Does the consent belonging to the right of nature obey the same principles as the consent required by the social contract? Consent, according to Locke, furnishes the minimal conditions of society, but Locke also seems to restrict the objectives to the minimal conditions. Therefore, the discovery of individual rights (strictly deduced from the laws of nature) belongs to a system of social interests and a moral horizon. When the principal interest is to preserve one’s own life, however, this minimum becomes a maximum.

It requires no more than the wisdom that any man in principle possesses to understand such a purpose. Also, as a guide for human action, this law of nature acquires the force of a first positive law—the only one whose obedience would be guaranteed by nature. Men can appeal to other laws subordinate to it. This explains, without doubt, why resistance to aggression is a universal option.

The idea of consent assumed importance when it opposed force and wisdom (or revelation) and constituted an alternative to convention. But that consent did not lead to a democratic age. Only consent identified with reason became the exclusive source of political legitimacy, a law above the ordinary law.

### *The Rise of Right and Democracy*

Let us turn to Tocqueville to understand how equality developed in this fashion. His analysis of the 18th century illuminates the practices and the contemporary dilemmas as well as the habits of mind and character that directed them.

In the first chapter of *Democracy in America*, Tocqueville shows how nature or the circumstances anticipate the arrival of a regime of equality in North America. The second chapter explains the political or constitutional dispositions that opened the way to a regime of equality. Chapter three describes the social conditions of a regime of equality, in such manner as to reveal its political practices. Tocqueville’s literary conceit is the different usages of the indigenous Americans and the European pioneers with reference to the natural circumstances and the climate. A second contrast opposes the northern Europeans to those of the south. The consequence of these two contrasts is to elevate the moral and political causes above the natural and climatic causes.

We raise the new American to the level of a paradigm for the study of the nature and origin of the moral and political causes that found democratic civilization. In the first

place, Tocqueville observed the behavior of European pilgrims near the state of nature. Then he highlighted among them their differences and conflicts. The most obvious conflict concerns what President Ford once called the question of the “quality of life” rather than life simply—the debate bearing on knowing how to act and not simply the right to act. All things considered, the pioneers displayed the highest regard for their fellow citizens. They embraced consent by reason of its moral value, but they lacked a theory of the rights of the individual.

The paradox of the American legislation of the pre-Revolutionary era was, therefore, the search for more or less aristocratic—which is to say utopian—objectives by democratic means. According to Tocqueville, democratic means prevailed in a decisive manner over aristocratic objectives. He did not see in this phenomenon a bewildering dislocation: he suggested only, but strongly, that the piety of beginnings was perhaps less surely the goal than a self-preservation tied to the democratic constitution and its insistence on an equality of rights.

In the third chapter of *Democracy in America*, Tocqueville shows that a social condition is determined by political or constitutional laws—a “spirit” of the laws, so to speak. Tocqueville finds the spirit of the laws of America by analyzing unexpected changes in the laws of inheritance, principally those concerning primogeniture and substitution: this spirit is that of equality.

The first three chapters of *Democracy in America* develop on three levels, each constructed on that immediately preceding, and all together constituting the theoretical foundation of the entire work. The first chapter assigns to the laws a natural and universal foundation that we can consider as valuable not only in what concerns America, but for the whole of political life. Next, Tocqueville considers the particular and moral origins of the American regime. Finally, he analyzes the expression of moral causes in the form of the particular political laws.

### *The Americans According to Tocqueville*

The first chapter portrays most prominently the American continent in all its expansiveness; then it describes the portion most favorable for habitation (the continental territory of the U.S.); lastly, Tocqueville depicts the portion most suitable for civic life: a fertile, and protected region, situated between two great mountain ranges and oceans. Then he speaks of how (along the Atlantic coast, exposed to the elements, a hard, crude, and unfriendly climate) civic life actually established itself and, three hundred years later, would continue to perpetuate itself.

This long apprenticeship of “concentrated efforts of human industry” opens up the interior riches of the country. It is far removed from the indulgence of tropical climates where men, seduced by their passions, reject “concentrated efforts”: that is, regard for the future and the preservation of one’s self and of the human species. The cradle of America, by contrast, “was created to become the domain of intelligence,” the necessary state of “concentrated efforts.” But what does that mean, except that the circumstances—nature—opposed man and had to be tamed?

Yet, another path was open to man, consisting in accommodating himself to an unfriendly nature as a necessary or providential thing. The aborigines adapted in that manner, disdaining all cultivation (neither earth nor their minds)—the exclusive sign of civilization. The Indians were distributed throughout the continent but they remained too primitive to profit from it—which is to say, to possess it. Ownership requires the mastery of nature. The consequence was that they built a society in which each minded his own business, but where no one gave any thought to the human good as such.

Here one may remember that Thomas Jefferson responded to the inquiry about whether the climate in North America does not produce generally inferior creatures.<sup>4</sup> Tocqueville thought that it was not so. Exclusive of the moral and political virtues, the Indians possessed every human quality. Nevertheless, the moral and political causes serve to distinguish an inferior society from a superior one. Thus it is that civilized peoples prevail on the memory of humanity.

Reasoning from effect to the cause, Tocqueville judged that providence could have intended an industrious people to replace the Indian and thus to take advantage of the natural advantages of the country. But he also reasons from cause to effect, and with important differences. The destruction of the Indians began with the arrival of the Europeans. The Europeans who displaced the Indians arrived in America resolved to develop civilization. They brought with them theories to accomplish the task. The uncertainty of their future was, at the time, perfectly clear. In America, therefore, one can observe from its beginning the complete evolution of a society.

Tocqueville described this evolution in chapter two: equality, he said, is its moral and political foundation. But how does one keep morality strong in a democracy? In the beginning the Americans tried to follow holy ordinances on the subject of morality, exerting themselves to unite the extremes of sectarianism and political liberty. In this their error was essential and not incidental: “The inferiority of our nature [is] incapable of firmly grasping the true and the just,” even in circumstances the most favorable to the establishment of a utopia (in New England there was at the beginning a nearly “perfect” democracy). We must not doubt the honest intentions of the Puritans but rather the outcome of appeal to divine law or to the law of nature taken as givens of reason. Piety’s shortfall among the Puritans called for a corrective; so they opened themselves to rational inquiry: “It is religion which leads to enlightenment.” This leads, in fact, to the separation of religion and politics. The Puritans became at one and the same time “ardent sectarians and ambitious innovators.”

Let us now distinguish between the social state of a people and their political state. Such is the orientation of chapter three of *Democracy in America*, in which the political law explains the political state, while “facts and the laws together” explain the social state. In their politics the Americans initially adopted expressions of natural aristocracy. At the same time, in their society, “a certain middling level” prevailed. Thereafter, sooner or later the social state had to shape the political state to its own measure. Equality, developed outside of politics, came to shape the soul of politics.

The rest of *Democracy in America* develops the principles thus elaborated. It is by means of these principles that Tocqueville explains the character and the future of democracy in the 19th century but not without noticing equality and the danger of the

“tyranny of the majority.” At the end of the 20th century, we are led to slightly different reflections, flowing directly from the war of the American Union. In completing that trial Americans discovered the new (or better, latent) problem: that of race. The contemporary political world emerged from the consequent re-elaboration of the meaning of equality and of right.

### *The New Meaning of Equality and of Right*

Let us highlight the essentials of the change in the meaning of equality and of right: the burial of the individual in the play of social competition. The idea evolved as isolated from all transcendent right and denuded of ethical references. Equality was now established on a base of by definition ephemeral material and social preoccupations.

In the 19th century, the American development of equality undermined the authority of the wise. In the struggle between wisdom and force, the tyranny of the majority supplanted force by the principle of consent. The equality that had silenced force and privileged wisdom in political life in its own turn became a rival to wisdom. Democratic citizens lost an awareness of the limits of their own understanding, but true citizenship was realized.

Today everything is different. Equality separates the people in place of uniting them. It has no other standards than material references. The new equality is strictly relative, conditional, independent of all ethical conceptions; that is to say, rules of conduct which apply themselves by definition to individuals. The new equality not only rejects wisdom but also consent. It is a purely positive and ephemeral equality—an equality of groups and uniquely so. It deals with individuals, with their conditions, without, however, offering a guide for their conduct. That is to say there is no one single rule that one could apply to everybody, and therefore it is necessary to adjust the rules to the circumstances. To equalize conditions, finally, it is necessary to have different rules for different individuals; no one law can equally govern all. It is therefore pluralism that constitutes the foundation of this new equality.

Contemporary pluralism in the United States differs profoundly from the first ideas of social organization that prevailed during the founding era.<sup>5</sup> The original organization prescribed a political process meant to “harmonize, assimilate, and protect” the diverse interests of parties, which constituted the thirteen member states of the American confederation before 1789. That is, the founders strove to make one people out of many peoples (*e pluribus unum*). Therefore, the constitutional institutions brought the appropriate response to the plurality of views and ends to the exact extent that the Constitution wished to coordinate them. In effect, a dynamic society passed through several stages to the end of attaining ultimate unity. Pluralism is one of these stages. For the Americans, it was the authors of *The Federalist* who had elaborated most fully the idea of the unity of a free and republican nation—the last stage of political development in a dynamic society.

Contemporary pluralism, by contrast, values social differences and turns these differences into forces hostile to the development of ultimate unity. The present gambit in the U.S. is to achieve the original promise before the process of disintegration proceeds

too far to be stopped. We seek so to harmonize and to assimilate all Americans that we will soon no longer hear of minorities. We hope in our turn to make the common good prevail over particular interests.

Everyone has heard it said that, for one hundred and twenty years, the central power (and sometimes those in the states) has attempted to manage a diversity of races and cultures deriving from the four corners of the earth. What Tocqueville called the history of the “three races in America” constituted the first significant sketch of an inquiry into the problem of race in the U.S., which, fifty years ago, Myrdal took up again in his *American Dilemma*. Together, these two interpretations of political life offer us an America that defines itself dynamically by its project of integration and assimilation, where what matters is “melting” the diverse peoples into one people. Our laws and regulations seem to take this ideal for the base, and, besides, the entire history of immigration in the U.S. is characterized above all by the passage of inhabitants from the “old world,” where men identify themselves in the tracks of their ancestors, to the broad and wide spaces of America, where they lose even their memories. It is a global transformation, a metamorphosis which is called the melting pot. Ronald Reagan, during his presidency, called this the new man the human being “renewed.”

I am, on this subject, skeptical, because I am not certain that one can summarize America in the idea of the experience of pluralism—a concept, besides, that was only invented at the beginning of the twentieth century.<sup>6</sup>

I know moreover and much more importantly that an entirely different conception led the American founders to adopt the maxim *e pluribus unum*.

### *The Errors of the Twentieth Century*

The existence of social classes, of pluralism, and of “multiculturalism” constitutes, among Americans, a language that has significations much more general than that concerning the status of blacks in the constitutional tradition. At the beginning of the twentieth century, the historian Charles Beard published works maintaining the thesis that the “Federalists,” and particularly Alexander Hamilton, defended a particular class—in general, the “well-to-do.” Beard was evidently more scientific than I: after having examined a list of deputies to the “Constitutional Convention of 1787,” he arranged them according to their diverse types of wealth.

The principal distinction Beard employed was that of “realty” and “personalty.” This vocabulary indicates movable and unmovable holdings, the last corresponding to land and the first to equities, which become wealth only by their transferability. Beard thought that the “Federalists” (that is, the nationalists) included for the most part the owners of personalty. It was also they who controlled the Constitutional Convention of 1787 and who, by extension, embraced the commercial interests of people like themselves.

Beard’s model was principally an effort to explain the American experience following the analysis of European politics, a politics based on, as before, classes and social rankings. Now, this politics, or mode of analysis, received its definitive form in the work of Karl Marx in the nineteenth century. Marx’s analysis supposed the distinction

between the proletariat and the bourgeoisie, as well as an eventual conflict between them. To the extent that this historical conflict constituted a scientific fact, it was necessary to apply it to the human race everywhere. Beard's model derived its inspiration from that "scientific fact" and from the belief that it exists no less in America than elsewhere, and that, if it could not be seen, then some phenomenon there obscures it.

It is in this context that the social science of Arthur Bentley provides the term pluralism as a social descriptor. Today, in America, no term is more frequently invoked to describe social and political life. It is one of those words that is so ubiquitous that we dare not doubt its meaning. To inquire about that meaning is to display an unacceptable ignorance. Nevertheless, as a new term, its meaning is unclear. It is therefore permitted to ask just what are the facts of political and social life that it explains.

Bentley held to a proposition much like Beard's, only less direct. The term "pluralism" penetrates the camouflage of a class conflict disguised as groups or factions. Representation in the U.S., according to Bentley, connotes the diverse influences of factions. This is what Bentley calls "the fundamental fact of representation": Americans participate in politics or even in society only in more or less apparent groups. They do not participate in power as individuals, as (republican) theory supports. We here rediscover the hypothesis of Marx, according to which the individual does not have a place in society: he is either a capitalist or a proletarian, and may, under different names, express the same pluralist phenomenon. Here we find in Bentley the main basis of pluralism, a concept by which we analyze a political system by means of the relative positions of the diverse groups in the heart of the society. These groups are only a modified and disguised version of historical classes. But what matters is that they have become the motive force of the new equality, an equality rather relative than moral, and which, above all, focuses on the problem of race.

### *Equality and Right: A Response to Pluralism*

The problem of race in the U.S. today poses fearful questions for Americans, but it is neither the question of Union nor that of equality, in the most meaningful sense anyway. At the constitutional level, the question of union is a political question rather than a social question. Aristotle addressed the social question when he wrote that, to make a people, it is necessary that the people intermarry. Pluralism, therefore, is not properly a species of politics, but a stage of society. In every independent and dynamic state, characterized by political union (a union of constitutional wills) and liberty, pluralism will not last.

This is where Tocqueville and Myrdal erred. Tocqueville erred when he did not foresee the brothers' war that put an end to American slavery. Myrdal erred next, because he did not any better foresee how the prejudice of color would be transformed into an advantage of color by the means of programs distributing rights and resources following formulas of proportionality. Tocqueville did not see the extent to which the Americans were reformers, politically speaking. Myrdal did not see how far the Americans would go, even at the expense of their founding principles, in order to change their social state.

As for us, today” latecomers, we would deceive ourselves still more if we do not understand that the shiny allure of pluralism is only a reflection of liberty.

We must take two precautions to understand American pluralism. First, one must avoid confounding pluralism with the multiplicity of interests spoken of by James Madison in *The Federalist Papers*; the latter has little to do with the question of race and culture. On the other hand, one must never neglect the principle on which the American constitutional union was established as a foundation for social pluralism. The authors of *The Federalist Papers* advanced the idea of harmonizing individuals whose interests and sentiments were exceedingly diverse; to accomplish this, they sought from government nothing less than to create homogeneity precisely where, theretofore, diversity existed. They conceived a government to fashion the minds and the characters of citizens so that they could become more homogeneous in their sentiments and their interests.

The term “Constitution” is too narrowly interpreted as a structure of institutions and laws. This aspect is only the transmissible part—the Persian fire—of a given society; it comprises these characteristics, but every society can obtain the same by means of election. By contrast, there are other characteristics of a given society that no other society can possess. This non-transferable part of every society is included in the definition of a constitution as an “arrangement of offices;” it is what we call “a way of life,”<sup>7</sup> and it corresponds to a dream of unity.

Publius’s design was to constitute a union that could protect itself, either by its well-being or by its riches, to the extent that it spread its republicanism, which is to say, equality and self-government in the society. That is the American response to pluralism: it is the original response; it is also an eternal response. It permits the systematic promotion of the common good in the face of particular interests.

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### Endnotes

\* Originally published as “Égalité et droit dans le monde actuel” in *Éthique et droit à l’Âge démocratique*, (Caen, France: Centre de Philosophie Politique et Juridique), 1990: 18 (pp. 175-88). The author wishes to thank Dr. Cary Federman for his translation of the French text. This version (English translation) was published in *The Good Society: A PEGS Journal*, vol. 9, no. 1 (1999): p. 84-89.

<sup>1</sup> Edward S. Corwin. *The “Higher Law” Background of American Constitutional Law* (Ithaca, NY: Cornell University Press, 1955), cf. pp., 5, 6, 61, 67, 72, 87.

<sup>2</sup> See *The Federalist Papers*, para. 1.

<sup>3</sup> See Montesquieu, *De l’Esprit des Lois*, livre I.

<sup>4</sup> Thomas Jefferson, *Notes on the State of Virginia*, 1783.

<sup>5</sup> In the following paragraphs, I repeat the elements of a discourse presented to an international colloquium, “Il Nuovo Pluralismo Culturale e Razziale della Society Europea,” which took place

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November 9-11, 1989, at Villa Albrizzi-Franchetti (Preganziol) and was organized by the Provincia di Treviso and l'Instituto Internazionale J, Maritain, Centro Studi e Ricerche, Treviso, Italy.

<sup>6</sup> Originally found in the work of Arthur F. Bentley, *The Process of Government*, ed. by Peter H. Odegard (Cambridge, Harvard University Press, 1967). In the beginning, Bentley use the terms “pressure” and “force” to sustain the idea that “The phenomena of government are from start to finish phenomena of force.” The fact achieved, he went right to the end: “we shall never find a group interest of the society as a whole. We shall always find that the political interests and activities of any given group—and there are no political phenomena except group phenomena—are directed against other activities of men, who appear in other groups, political or other. The phenomena of political life which we study will always divide the society in which they occur.... The society itself is nothing other than the complex of groups that compose it” (p. 222).

<sup>7</sup> See W.B. Allen, “Justice and the General Good: Federalist 51,” in *Saving the Revolution: The Federalist Papers and the American founding*, edited by Charles R. Kesler (New York: The Free Press, 1987), p. 140. It is correct to say “regime” rather than “government” here (in speaking of the “safety” of the regime, particularly with respect to its operations), for when all operate jointly, their actions are probably determined by the type of regime. Thus, Aristotle defines a “regime” as an arrangement of offices and means more than simply an institutional structure. He means the human characteristics which predominate in a society and which give to the society its own character.