

‘EQUALITY AND CONSTITUTIONALITY’

Cambridge Handbook of Constitutional Theory,

eds. Richard Bellamy and Jeff King, 2023, Ch. 4

Annabelle Lever

Annabelle.lever@sciencespo.fr

What does it mean to treat people as equals when the legacies of feudalism, religious persecution, authoritarian and oligarchic government have shaped the landscape within which we must construct something better? This question has come to dominate much constitutional practice as well as philosophical inquiry in the past 50 years. The combination of Second Wave Feminism with the continuing struggle for racial equality in the 1970s brought into sharp relief the variety of ways in which people can be treated unequally, while respecting the formalities of constitutional government. Most obviously, the content of laws can mistreat them by wrongfully assuming that they are either threats to others, or that, like children, they need to be protected from harm through paternalistic limitations on their freedom of action. Or, as those concerned with class inequality have long noted, formal equality can create legal requirements, permissions, and prohibitions whose burdens fall predictably, and often solely, on groups who are already marginalised, and most in need of state protection. (Kairys, David 1990)

Above all, what these two great political movements made plain, is that a concern for *group inequality* and, specifically, *group injustice* must figure in the formulation and adjudication of individual rights, if legal protections for equality are adequately to combat the causes of inequality. Getting to grips with *that* challenge, it became obvious, required going beyond the familiar analyses of inequality inherited from Liberalism and Marxism, given the many different ways in which people can be equal or unequal. (Hackett and Haslanger 2006, 3 - 15)

In the first part of this chapter, I will seek to illustrate these claims, by focusing on efforts to reframe the theory and practice of constitutional equality given demands for sexual and racial equality. I will then show that analytic philosophy has also come to recognise the various non-reducible dimensions of equality in ways that reinforce the claims of critical legal theory, even as philosophers highlight their disconcerting consequences. If equality has multiple irreducible dimensions, conflicts between the legitimate demands of equality are unavoidable features of law and politics, even in the best possible world, and are likely to be particularly painful when set against a background of historical injustice. The chapter concludes with the challenges to democratic constitutionalism, and the scope for

constructive responses to those challenges, which the rapprochement between critical and analytic thinking on equality suggests.

For the purposes of this chapter, I will use legal and constitutional equality interchangeably, on the assumption that the core idea of constitutional government is government limited by law and, whatever its form, open to legal challenge. Constitutional government sometimes presupposes the existence of a distinctive set of legal norms, called constitutional norms, that provide the standard by which the legitimacy of other laws can be challenged or justified. (Bellamy here...) Likewise, while the values held to prove that government is, or is not, constitutional can be extensive and diverse, I assume that the treatment of people as equal is one of them. Finally, I assume that we are concerned with the challenges of reconciling equality and constitutionality in a government animated by the democratic ideal that people be able to authorise the laws under which they live. I will focus on issues of sexual and racial equality and especially on efforts to highlight the legal significance of their structural dimensions, not because these are the only interesting issues of constitutional equality but because their extent and significance shapes the way that other issues of equality are approached.

Treating People as Equals:

Second Wave Feminism and the struggle for racial equality highlighted the many ways in which apparently constitutional democratic government can coexist with, and even justify, extensive inequalities of rights, liberties and opportunities, as well as unjust differences in income, wealth and status. (Rhode 1991) (Minow 1990) Above all, what these two great movements made plain, is that efforts to counter inequality amongst individuals need to attend to the role of law in replicating and justifying inequality amongst groups, inequalities that certainly have economic consequences, but cannot be reduced to issues of class or of unequal income and wealth. For example, sexual and racial inequality cannot be divorced from violence, and the patterned nature of that violence cannot be explained adequately by class differentials or class conflict. Most violence against women, including rape, happens to them through men that they know, including men with whom they live. Similarly, lynching cannot sensibly be understood in terms of class conflict, rather than efforts to maintain and enforce racial segregation and hierarchy. (Lyons 2013, 29–46; Rosenberg 2004) Hence, the 1980 and 1990s led to new ways of thinking about the relationship between constitutionality and equality conceptually, morally, and empirically, even if those innovations were, and remain, contested.

To understand these developments, it helps to remember that by the 1970s, women had had the right to vote in Europe and America since the turn of the century and, apart from Switzerland, since the end of the Second World War. Yet they commonly laboured under a mass of disabilities that were humiliating and constraining, when not actively exploitative, coercive, and impoverishing. If they were married, they could not open a bank account in their own name without their husband's consent, let alone take out a loan for their professional or personal use; they could be required to give up paid work on marrying and

were constrained in the work that they could apply for, even when single; above all, family law assumed that men were the head of household – be they fathers or husbands – and did little to recognise or protect women’s claims, as distinct from their husbands, in the upbringing of children, the location and direction of family life and assets or, importantly, in sexual and reproductive relations. (Cretney 1998) On the contrary, the idea that rape in marriage is a contradiction in terms encapsulated the idea that, once married, women’s status and rights are replaced by those of their husband. Political parties of the right were, characteristically, wedded to upholding such norms on religious grounds, or because they were familiar, traditional, or ‘natural’. Parties of the left typically supposed that women’s demands could be reduced to those of male workers for better pay, conditions of work, or recognition and, if not, should take a back seat to them. Hence feminist approaches to the law and, particularly, to constitutional law in the US, were motivated by the urgency of moving beyond piecemeal efforts at the reform or effective enforcement of particular laws, and towards a wholesale challenge to the sexually inequalitarian assumptions and ideals that they appeared to share.

So, too, with the fight against racial inequality. On the one hand, it required fighting legal segregation in schools, on public transport, hotels, restaurants and the like, and on the other it meant challenging apparently race-neutral laws and practices – such as the reliance on local property taxes to fund public schooling or literacy requirements for voting, whose burdens fell disproportionately on members of racial minorities. (Freeman 1990) As with laws that disadvantaged women generally, or in sex-specific social roles such as ‘wife’ and ‘mother’, combatting racial segregation depended on showing that racial equality simply could not be held consistent with laws and customs that systematically demeaned, coerced, and restricted people who were held not to be white. Hence, it required an analysis of the *group wrongs* created by such laws and practices, even if those wrongs presented themselves to a Court in the form of an individual plaintiff, often supported by organisations such as the NAACP and the ACLU.

For these challenges to succeed, it had to be clear that the *intention* to discriminate is not a necessary part of a successful claim against inequality in general, or wrongful discrimination. That is, a successful legal challenge to the practice of firing married women who do not voluntarily leave their jobs; to not hiring women because they might become pregnant, or to not hiring or promoting black workers to ‘front of house’ jobs, could not depend on showing that employers hold some special animus against women as distinct from men, or against black people, as distinct from those considered white. Custom, habit, nature, expense, customer choice and inconvenience could all be cited to explain and justify such behaviour and, therefore, to rebut the claim of personal prejudice or ill-will on the part of a particular employer. (Ronald Dworkin 1994), (Law, Sylvia 1984), (Olsen 1995) (Rhode 1991).

For feminists, then, it was necessary to challenge the idea that marriage can legitimately entail a series of disabilities for women as wives from which men as husbands do not suffer. Indeed, it was necessary to show that those laws and customs constitute unjust forms of discrimination, and reproduce unjust sexual hierarchies, even if some women might not wish or need to work once married, might not desire to open a separate bank account, and might

be ready for sexual intercourse whenever their husbands want. Similarly, challenging racially discriminatory practices meant opening up the most prestigious educational, occupational and recreational establishments, even though their appeal might be limited. It also meant insisting that police harassment of racial minorities is not just a matter of individual bad-luck, or of the odd 'bad-cop' but can be common, even systemic, with racial minorities routinely treated with a violence and contempt from which the white majority rarely suffer. (Engel and Swartz 2013)(Harris 2003) (Lever 2005) (Zack, Naomi 2015)

In short, egalitarian legal theory and practice since the 1970s has been concerned with the way that inequalities can be reproduced independently of the intentions of actors. An important aspect of that demonstration – with relevance to constitutional thought and practice in other domains – has been the insistence that we cannot treat people as equals while supposing that they must think, feel, or behave alike. (Hooks 2000)(Rich 1980) It is therefore no rebuttal to a charge of sexual harassment that other women haven't complained, any more than it would be to a charge of racial discrimination that you were the only one to challenge poor pay and safety at work. Group-based egalitarian arguments, in other words, need not founder on unreasonable demands for unanimity or, even, of majority agreement; however desirable unanimity or consensus might be morally or politically. (Karlan and Cole 2020) Of course, the effects of structural injustice can promote a sense of collective identity, despite significant disagreements about its nature, content and political significance. (McPherson, Lionel K and Shelby, Tommie 2004) However, the ability to identifying group-based obstacles to individual rights turns on the choices or actions that individuals are legally permitted, required or forbidden to make, (and the penalties attached to their options), and not on how many people want or expect to make those choices now or in the future. (See Pettit, in this volume ; (Wolff and de-Shalit 2007)

However, if sexual equality meant women should be able to differ from each other without suffering collective disadvantage as compared to men, it seemed absurd to suppose that women must systematically compare themselves to men for legal claims of sexual inequality to stick. That, indeed, was the problem with the justly ridiculed Supreme Court decision in *Geduldig v Aiello* (417 U.S. 484). Faced with the question of whether it is sexually discriminatory for health insurance to exclude the costs of pregnancy and childbirth from its coverage, the US Supreme Court concluded that there was no injustice to 'pregnant persons' -as though all that mattered to equality is that some women, like some men, do not want to have children, and not the fact that is women, and not men, who become pregnant and give birth. (However, see Bruno Perreau for the ways that technology and politics have complicated these issues recently). (Perreau 2021)

Even where biological difference is not at issue, it is unclear why men should provide the standard that women must meet in order successfully to compete for income, scarce opportunities or to have their claims to respect and freedom recognised. Thus, in an influential essay on 'equality and difference', Catherine MacKinnon summarised the dilemma facing feminist efforts to use the law to protest sexual inequality. (MacKinnon, 1988, 32 -45) She noted that the idea of equality as similar treatment -an ideal identified with liberal, or 'sameness' feminism -predictably reproduces, even exacerbates, substantive

inequalities of rights and opportunities in a world where women have been deprived of income, wealth, opportunity and rights because they are women, rather than men. Efforts to challenge sexual discrimination at work frequently fail because women look less qualified than men, even when they are demonstrably capable of meeting the requirements of a given job, because of the time that they spent raising children, and doing the lion's share of unpaid domestic tasks, that could have been shared with men. But nor will it do, MacKinnon argued, to say that sexual equality requires legal recognition and protection for women's differences from men, as 'difference feminism' suggests. (Hackett and Haslanger 2006) (Minow 1990). Certainly, some of those differences reflect attributes, such as the disposition and ability to care for others, that are valuable, that women often display and with which they often identify. Hence, seeing them purely as the product of oppression, because women are habitually valued for the care they provide, would be wrong.

Equality for women requires reconsidering the social value and respect accorded to typically female activities, attributes, and dispositions, as 'difference feminists' insist, just as 'sameness' feminists are right to demand that women, like men, should be able to share in, and compete for, the good things in life. However, instead of trying to choose between these contrasting, and partly persuasive views of sexual equality, MacKinnon argued that we should place questions about sexual equality in their proper political context. The ways in which men and women differ from each are not reducible to natural facts, arising independently from politics. (Mill, John Stuart 1969) Hence, MacKinnon claimed, the test of sexual equality is whether a given law or practice subordinates women to men, rather than whether it justifies that subordination on the grounds that women are, or are not, like men. Biology, like other natural facts – or, indeed, like custom and personal preference – may have a legitimate place in legal arguments about equality. But that role, if any, requires legal argument and justification because law, no more than philosophy, is required to 'mirror nature'. (Rorty 1979) (Karlson and Cole 2020) (Taub and Schneider 1990)

MacKinnon's critique of legal theory and practice helps to highlight two distinctive elements in contemporary reflection on equality and law that transcend her understanding of the causes of sexual inequality, or of the best way to remedy them. The first is the insistence that problems of inequality are best understood as problems of *subordination* or *unequal power*, rather than of arbitrary *differences* between people who should really be treated the same. As feminists have insisted, 'an equal opportunity harasser' – or a boss who sexually harasses male as well as female employees – does not make sexual harassment ok. Nor, importantly, does it alter the reasons to consider sexual harassment by bosses or fellow employees a threat to equality of opportunity, because of its consequences for the stability of women's employment, their prospects of promotion, and their willingness and ability to compete for otherwise desirable forms of work. (Halley, Janet 2000) (MacKinnon, Catherine A 1979).

The second element highlighted by MacKinnon's 'subordination' approach to equality, is that unless one adopts an explicitly political and critical perspective on the social world, one will consistently fail to recognise inequality for what it is, and will therefore be blind to, or actively support, laws that permit coercion, exploitation, marginalisation and

impoverishment because one sees them as the legally permitted consequences of morally permissible choices, or as the unchangeable expression of ‘natural’ differences. (Haslanger, Sally 2012) For example, the staggering differences in wealth between white and black people in the contemporary US are often seen and justified as the outcomes of individual choice, luck and/or differences of character and talent, rather than the result of slavery, segregation and of post-war government subsidies for home ownership, from which black people were deliberately excluded. (Hamilton and Darity Jr. 2010) (King 1997) (Rothstein 2017) Likewise, the ‘feminisation of poverty’, remarked in many countries since the 1980s, is treated as the natural consequence of more liberal conditions of divorce, and not of the way that legislatures, employers and courts value women’s time, activities, opportunities and security, including their access to adequate pensions in old age. (Glendon, Mary Ann 1991), (Okin 1989) (Pateman 1988)

Taken together, these two elements in contemporary reflections on equality and law draw our attention to the epistemology of injustice. Specifically, they force us to reflect on the way that apparently rational, empirically well-supported and impartial claims about people’s natures, circumstances and actions require careful scrutiny, given our habituation to injustice and difficulty in recognising it for what it is. The literature, in this respect, is now enormous, but it can be helpful to look at Kimberlé Crenshaw’s important critique of American discrimination law, and its failure to recognise the way that racial and sexual injustice intersect, in order to grasp the epistemic problem and its relationship to legal practice, and our conceptions of constitutional government. (Crenshaw 1994 or in Kairys, 1990) (Collins 2008) (Perreau 2021) (Mercat-Bruns 2015; 2018; 2021; 2016)

The practical, legal problem that forms the subject of Crenshaw’s paper is this: that an otherwise attractive and fair rule, ‘last hired, first fired’, which seeks to protect older and more expensive workers from being replaced by younger and cheaper ones, will predictably have unfair consequences for black women, given that racial and sexual discrimination meant that they were less likely to be hired for attractive jobs than white men and women, or black men. (p. 41) However those unfair consequences will not look unfair if legal protections against sex discrimination assume that sex discrimination is the *only* form of discrimination from which its victims suffer, and that victims of race discrimination would have done just fine were it not for the racial discrimination to which they fell victim. Such ‘but for’ analyses of discrimination (p. 45) have the unfortunate effect of taking white women as the paradigmatic victims of sex discrimination – and of class discrimination too. (42) They therefore make it seem that if black women are hired later than white women and men, and therefore fired before white women and men, the harm they have suffered, if there is one, cannot be one of *sex* discrimination but of *racial* discrimination. Yet, of course, as women, black women, like white women, will have been hired after white men and will therefore be vulnerable to being fired before white men. Conversely, these ‘but for’ models of race discrimination have the unfortunate effect of suggesting that the firing of black women cannot be a form of *race* discrimination, because if they are fired when black men are not fired, what they must be suffering from is *sex* discrimination and not *race* discrimination. Yet this is to ignore the fact that black women, like black men, were unable

to be hired when white men and, subsequently, white women were hired, because they were black.

Despite laws that are supposed to protect them from racial and sexual discrimination, then, black women can find themselves in a situation where they are held to have been treated equally although sexual and racial discrimination are both operative and hamper their life chances. As Crenshaw concludes, unless one recognises that sex discrimination happens to black women as well as white women and that it may operate in a different way in the two cases, one will blind oneself to what sex discrimination looks like. Worse, one will not only fail to remedy it, but will replicate and justify it in ways that confuse freedom for black women with what, for everyone else, would be understood as unjustified constraint; and will confuse equality for black women with what, for everyone else, would be understood as failures of recognition, protection, and remedial action. Similarly, unless one recognises that racial discrimination happens to black women as well as black men, but may take different forms and have different effects, one will fail to see rape, murder, harassment, exploitation, silencing and stereotyping as forms of racism, and will suppose that brutal, degrading, invasive and coercive treatment are an appropriate reflection of their needs and deserts. (Roberts 1997)

The different dimensions of equality and contemporary analytic philosophy

These important and influential claims about equality and constitutionality now find an echo in some parts of analytic philosophy. Indeed, analytic debates about equality, although often frustratingly abstract, hypothetical and idealised for those used to critical theory, reinforce and, sometimes, supplement, these ideas of equality. For example, Thomas Scanlon emphasises the *comparative* dimension of claims to equality, and argues that ‘People have good reason to object to stigmatizing differences in status, to objectionable forms of control, and to social institutions that are unfair, even if eliminating these things would not increase their welfare’. (Scanlon, Timothy M 2018, 6-7) And, like Young, Scanlon insists that, ‘Recognizing the diversity of the reasons for objecting to inequality is important...because it helps us to understand the differences between the kinds of inequality that we face...These different forms of inequality are subject to different combinations of moral objections’. (4)

Hence, Scanlon’s analysis of equality emphasises the multiple dimensions of inequality, and suggests ways of distinguishing claims to equality, which in their nature are comparative, from humanitarian, prioritarian or sufficientarian concerns, which need not be. (1-3, 29 -32, 154) Our objections to inequality may not be egalitarian ‘all the way down’, Scanlon emphasises, in that our reasons to care about equality may be consequentialist, rather than based on the thought that there is something intrinsically objectionable to people being unequal. But in so far as they are concerns with people’s *comparative* standing, treatment, and situation, they will still be egalitarian. As Martin O’Neill summarises Scanlon’s ideas, ‘We don’t just want to see equal distribution of some *thing*. We want to live together, on terms of equal recognition, in ways that avoid interpersonal domination, prevent the emergence of stigmatizing differences in status, allow people to retain the self-respect that comes with seeing themselves as equal to others, and preserve the kind of background equality that can

be a precondition for fair competition in the political and economic domains'. (O'Neill, Martin 2016) (Anderson, Elizabeth 2010) (Lippert-Rasmussen, Kasper 2018)

In short, despite the different forms that equality can take, and the different reasons to care about it, Scanlon insists that objections to inequality can be logically coherent, morally justified and perfectly reasonable. Just as analytic philosophy in the 1970s and 1980s highlighted the conceptual and moral complexity of claims to 'liberty', and of the legal relations which might instantiate that ideal, so analytic philosophy since the 1980s has come to recognise the moral and conceptual complexity of claims to equality. Admittedly the process has proceeded in fits and starts, as efforts to bring conceptual clarity to complex claims about equality and justice led some analytic philosophers into a debate about 'the metric' of equality, as though liberties, opportunities, income, wealth and the 'social bases of self-respect' must be seen as equalising people along one dimension of life. (R. Dworkin 2000) (G. A. Cohen 2008) However, as Rawls argued, liberties are not fully fungible, so that trading off freedom of religion for political freedom does not protect some core thing, 'liberty' while (re)distributing it across different pots, as though it were water. Nor can we treat people as equals, given reasonable disagreement about facts and values, and suppose that one primary good, or essential all-purpose good, can be traded off against another – as though some given amount of income or wealth might make up for racial, religious or sexual discrimination and harassment. (Rawls 1972) (R. Dworkin 1977) (Walzer, Michael, 1983.) (Wolff and de-Shalit 2007) Hence, while analytic philosophers are still concerned carefully to distinguish various consequentialist and non-consequentialist conceptions of equality, and to clarify the ways in which luck might reflect or undermine it, they have tended to show that, as with 'liberty', 'property', 'wellbeing', 'rights', what looks at first sight like a simple noun – 'equality' - is best thought of as short-hand for a variety of concerns with the things that people can have and can be, and with the ways that they can relate to each other, and to the non-human world.

Indeed, the implication of Iris Marion Young's dissection of the different faces of structural injustice is that opposition to subordination, no more than opposition to domination or oppression, relieves us of the need to distinguish the different dimensions of equality for philosophical and practical purposes. (Hackett and Haslanger 2006) Unfortunately, not only does that mean that it is often far more difficult to tell how unequal people are than we might have thought (or hoped), it is also the case that alleviating one form of inequality might exacerbate another or, at a minimum, use resources for one group that might have benefited another. (Wolff and de-Shalit 2007) Hence, while there is something satisfying, as well as reassuring, in the way that analytic and critical thinkers have come to stress the different dimensions of equality, their agreement on this point forces us to confront an often unpalatable truth: that a commitment to equality is intensely political not merely because it requires us to reject political forms and ideals that presuppose the justice of hierarchical arrangements, but because that commitment forces us to confront serious conflicts of interest, need, and right between people whose claims may be genuinely compelling. In short, the unfortunate consequence of agreement on the multiple dimensions of equality is that we can no longer pretend that conflicts amongst the deserving are merely an artefact of questionable methodological assumptions – too individualist, sexist, capitalist, racist, say –

or of questionable philosophical or political methods – too analytic, empirical, idealised, realist. Instead, one must confront the fact that in theory, as well as in practice, conflicting demands for equality will be as important for us as conflicts between equality and life, liberty, happiness, and solidarity.

Democracy and Constitutionality

Democratic government is meant to enable people to address their conflicting claims in ways that reflect the value of constitutional government, and itself to instantiate a compelling conception of people as equals, that can then be used to determine whether some people are wrongly subordinated to others. However, this picture of democracy is, clearly, too simple given what we have learned about the way that sexual and racial inequality are replicated and justified. Just as law cannot be seen as an apolitical realm of expert and principled judgement, to be distinguished from politics as an unappetising mix of arm-twisting, back-scratching and number-counting (R. Dworkin 1985) (Waldron 2008) so democratic politics cannot be seen as a realm of free collective expression and deliberation, contrasted with the expensive, individualised, often technocratic sphere of legal judgements and reasoning. As feminist and critical race theorists have shown, without specific efforts to address the problem, representative democracy is as likely to reproduce and justify, as to overturn, individual disadvantages based on ascriptive group inequalities. ((Guinier, Lani 1994) (Williams 1998) In such circumstances, democratic elections - and the legislative bodies that they constitute - become the means by which power is transferred from one sphere of life to another, and imposed upon unwilling, or largely helpless, individuals.

To see the problem, and its relevance to constitutional government, it helps to understand the limitations of influential and attractive conceptions of pluralist democracy, such as Robert Dahl's, or that of John Hart Ely. (J. Cohen 2003) (Dahl 1998) (Guinier, Lani 1994; Williams 1998; Mansbridge 1999; Phillips 1995; Lukes 2021) Against a background of civil and political rights and freedoms, Dahl hoped that individuals would be able to form and join political parties, unions, interest groups and other associations in order to advance their interests as they see them. Universal suffrage, equally weighted votes and majority rule would then work to ensure that political competition was fairly decided, in ways that would have normative force for political losers, as well as for political winners. Hence, Ely and Dahl supposed, the justification for removing decisions from the ordinary democratic process – whether to have them adjudicated by constitutional courts or by special super-majoritarian political procedures – is that core rights of political choice and equality are at stake in ways that would call into question the legitimacy of political procedures and, therefore, of political results.

However, the ability to form, join and leave a political association is no real protection against forms of oppression based on people's ascriptive, rather than voluntary, ties and the problem is exacerbated by the ways that our ascriptive ties – ties of sex, race, disability and, in many ways, also of class and religion – in fact reflect longstanding hierarchies of power and status, or the contemporary disadvantages generated by their existence in the past.

Hence political theorists of representation have argued forcefully that democratic forms of representation must accommodate forms of group rights that liberal and pluralist views of democracy prevent. They must do so, not because groups are more important than individuals, or that it is groups *rather than* individuals who are properly seen as the bearers of moral or legal rights, but because in political, as in legal fora, we cannot protect the rights of individuals if we ignore the groups to which they belong. (See Guinier, Mansbridge, Phillips, Williams *supra*).

Once one recognises that problems of inequality often present themselves very similarly in legal and political settings and in ways that are mutually reinforcing, it becomes clear that our understanding of constitutionality, as of equality, simply cannot depend on sharp distinctions between law and politics. Specifically, failures adequately to include and represent disadvantaged groups as a matter of course in democratic decisions often call into question the *constitutionality* not just the *democratic quality* of the decisions that have been made. (Williams, 1998 *supra*, p193-4.) For example, where representatives are overwhelmingly male, and drawn from socially advantaged groups, the laws that they pass will frequently not bind them substantively, in that their ability to pursue their own interests will be unconstrained, unharmed and at no risk from the law, even if its misconceived or flawed. Men passing restrictive abortion laws, that necessarily affect women in the first instance, is an obvious example of the problem. (Roberts 1997) (Schwartz 2020). Likewise, if wealthy legislators pass legislation on poverty-relief, or the terms of welfare and income support, it is most unlikely that they will suffer if their legislation is callous, arbitrary, or riven by sexual, racial, religious and class prejudice. (King 1995) (Pateman 1988) In such circumstances, where ruler and ruled constitute two different and, sometimes, opposed social groups, it is difficult to distinguish constitutional government from the pervasive, albeit ceremonial, imposition of the wills of some people on those less fortunate than they.

Inadequate forms of political representation, then, not only threaten the ideal of democratic government, but of constitutional government as well. The use of law as a medium of government is not the prerogative of constitutional governments; and absolute monarchs may well abide by the laws that they pass. The trouble is that their subjects have no means to ensure that their legitimate interests' figure in the content and justification of laws, and not means to ensure that laws will not be changed simply because they have become an inconvenience to their rulers. In short, if the aim of constitutional government is not simply to ensure that laws are fairly applied, but to prevent capricious, ill-informed, selfish, corrupt and cruel legislation, (Waldron 2013) then failures of democratic representation erode the differences between constitutional and unconstitutional government. Constitutional equality, then, cannot be divorced from the degree to which democratic forms of inclusion and participation structure social relations, however important it may be to be able to distinguish undemocratic governments by the degree to which they recognise, respect, and support the rule of law. Our ability to distinguish constitutional from absolute government, however benevolent, depends on our ability to see law-making interpretation and execution as expressions of citizens' political *agency* and not merely a reflection of their legitimate *interests*. (Zurn 2007) Hence, norms of constitutional equality, as well as of democracy, can motivate efforts better to include citizens – especially those from disadvantaged groups – in

the different phases of making, interpreting, judging and implementing law. (Cohen, Joshua and Sabel, Charles 1997) (White 2020) lever forthcoming

For example, democratic constitutionalism means that members from historically disadvantaged groups should be able to advance their interests *as a matter of course* within the political process and be seen as fully representative of citizens' entitlements to rule as those from more favoured backgrounds. There are a variety of measures through which this might be realised, including the promotion of more descriptively representative elected legislatures, the greater use of lotteries, citizen-initiated referenda, special efforts to support participation by the electorally marginalised, as well as the more effective insulation of electoral competition from disparities in income and wealth (J. Cohen 2003) (Cagé, Julia 2018) (White 2020) (Zurn 2007)

However, the differences between absolute government and democratic government are not reducible to the character of the legislatures they produce. Where undemocratic governments can, quite coherently, see citizens simply as the objects of law, to be organised, pacified, argued over by legal and political professionals, democracy demands respect for people's judicial, as well as legislative, capacities and their interest in defending their rights, and those of others. Of course, democratic principles are scarcely so transparent or specific as to preclude ongoing debate about the justification of strong forms of judicial review, or the relative merits of adversarial and non-adversarial legal systems. (Lever 2009) (Waldron 2006) Indeed, it is doubtful that democratic principles can be specified with such precision and certainty as to preclude significant differences in legal or political institutions; and their application, one might suppose, must be context-dependent and, at least in part, reflective of the people whose institutions they are to be.

One need not, then, assume that democracies must use lay judges and juries in order to recognise their democratic appeal, and their significance for democratic norms of constitutional government. (Dzur 2012) (Lever 2009) (Schwartzberg, Melissa 2018) The case for lay juries as instruments of democratic constitutionalism is not that citizens are epistemically better judges of facts and law than professional judges, nor that they are the most convenient way of doing justice, either. Such empirical claims may or may not be true, although where professional lawyers are scarce citizen juries may, indeed, be an effective way of resolving disputes, and the diversity of citizens chosen by lot may have epistemic benefits that legal professionals lack. (Lever 2017; Schwartzberg, Melissa 2018) The point, rather, is that citizens are entitled to share, as equals, in the government of their country; and interpreting and applying law is an important aspect of governing.

Thus, a concern for constitutional government, not merely for democracy, can underpin efforts to institutionalise lay participation in the judicial as well as legislative and executive aspects of politics, and might support Dzur's lament for the increasing marginalisation of lay juries, even in countries famed for their use. (Dzur 2013) Moreover, as legalised forms of judgement are not the prerogative of the criminal law, but inherent to the modern administrative state, some forms of direct citizen presence, participation and oversight in

legal matters will likely apply to the processes by which social security, employment, health, housing, and other benefits are routinely granted or denied to individuals. So far philosophers have paid relatively attention to the different forms that such citizen presence might take in the administrative and executive aspects of government. But that is beginning to change, as political philosophers recognise that democratic equality means treating citizens as rule-makers or rulers, and not just as the beneficiaries or victims of decisions made by others. (Brown, Alexander 2017) (Cohen, Joshua and Sabel, Charles 1997) (Heath, Joseph 2020) (Fung, Archon and Wright, Eric Olin 2003) (Fung 2004).

Conclusion

In a world deeply scarred by injustice, it has often seemed that a commitment to equality puts us on a collision course with constitutional government, because the substantive demands of the former conflict with the formal demands of the latter. We have also seen that the challenges of reconciling equality and constitutionalism do not vanish once we accept the legitimacy of democratic government. On the contrary, the extent and severity of those challenges become all too apparent, as we realise that democratic elections, by themselves, are an insufficient remedy for the inequalities which undemocratic governments authored and allowed.

Social movements - and the philosophical, legal, and political reflection which they have inspired - highlight the urgency of democratising our legal practices and institutions, and their critique of current practices can suggest ways in which we might do so. They have also highlighted the inadequacy of the ways we think about, and practice, democracy. At one time, it may have seemed that there was some special type of democracy we could embrace, to make our laws more consistent with people's claims to equality. But given how little we know about the differences between democratic and undemocratic government, and how imperfect are the forms of democracy with which we are familiar, such hopes seem misplaced. Rather, it seems that we must negotiate our way amongst competing, if plausible, conceptions of democracy, each with their own advantages and disadvantages, based on what we learn about the causes and consequences of inequality as we go.

There is, then, something utopian about democratic ideals of constitutionalism. We may hope, with Rawls, that democratic constitutionalism is realistically utopian, even if our realities and utopias are different from his. (Rawls 1993) More optimistically, we might hope that conflicts between constitutionalism and democracy are less inevitable than they might seem when legal equality is reduced to treating 'like cases alike'. Such a conception of equality, indeed, appears to limit the appeal of constitutional government and to set it on a collision course with democratic politics. But as we have seen, while equality is an inherently comparative ideal, its content and justification require philosophical, empirical as well as legal reflection to determine the relevant basis for comparison, and what it is that a concern for equality requires us to compare.

Nor is that all. Although legal reflection and judgement are often contrasted with their political equivalents, politics can inspire and motivate legal progress not simply because of the political and legal challenges which it creates, but because of the knowledge and

epistemic reflection which social movements mobilise. Finally, we have seen that an analysis of inequality suggests that failures of constitutionalism and democracy often have a common cause and may be susceptible to common remedies. These commonalities become apparent when we supplement familiar ideas of equality as similar treatment with a critical awareness of the ways that people are socially differentiated, of the role of politics in creating and justifying that differentiation, and of the significance for democratic norms of our ability to see each other as equal rulers. So understood, democratic constitutionalism permits and often requires efforts to make our legal and political institutions more inclusive than they are at present, while supporting more expansive and less institutionally differentiated conceptions of politics and law. In short, we have seen that the equality which constitutional democracy requires is demanding. So, while it would be foolish to suppose that conflicts between constitutionalism and democracy are impossible, or that they can leave the practice of equality untouched, we have reasons to think that constitutional democracy is realistically utopian, and that the forms of equality which it requires are amenable to, and deserve, our best efforts.

ACKNOWLEDGEMENTS: Many thanks to Richard Bellamy and Jeff King for inviting me to write this chapter; and for carefully editing for me. Many thanks also to Chiara Destri, Valeria Ottonelli, Attila Mraz, Melissa Williams, and Stuart White for helping me to clarify my ideas and to avoiding pitfalls into which I was about to land. Bruno Perreau and Marie Mercat-Brun helped me with references to French and European cases. Finally, a thank you to Lea Ypi, for comments on an early draft, which made me think about the utopian elements of democratic constitutionalism.

BIBLIOGRAPHY

- Anderson, Elizabeth. 2010. *The Imperative of Integration*. Princeton, N.J: Princeton University Press.
- Brown, Alexander. 2017. *A Theory of Legitimate Expectations for Public Administration*. Oxford England ; Oxford University Press.
- Cagé, Julia. 2018. *Le Prix de La Démocratie*. Paris, France: Fayard.
- Cohen, G. A. 2008. *Rescuing Justice and Equality*. Cambridge, Mass.: Harvard University Press.
- Cohen, Joshua. 2003. "Procedure and Substance in Deliberative Democracy." In *Philosophy and Democracy*, edited by T. Christiano, 1–17. Oxford: Oxford University Press.
- Cohen, Joshua and Sabel, Charles. 1997. "Directly Deliberative Polyarchy." *European Law Journal* 3 (4): 313–42.
- Collins, Patricia Hill. 2008. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. 1st edition. New York: Routledge.
- Crenshaw, Kimberlé. 1994. "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist

- Politics.” In *Living With Contradictions: Controversies in Feminist Social Ethics*, edited by Alison M. Jaggar, 39–52. Boulder, Colorado: Westview Press.
- Cretney, Stephen. 1998. *Law, Law Reform and the Family*. Oxford: Oxford University Press.
- Dahl, Robert Alan. 1998. *On Democracy*. New Haven: Yale University Press.
- Dworkin, R. 1977. *Taking Rights Seriously*. Edited by null. Vol. null. Null. Cambridge MA.:Harvard University Press.
- . 1985. *A Matter of Principle*. Edited by null. Vol. null. Null.
- . 2000. *Sovereign Virtue: The Theory and Practice of Equality*. Edited by null. Vol. null. Null.
- Dworkin, Ronald. 1994. *Life’s Dominion: An Argument about Abortion, Euthanasia and Individual Freedom*. New York: Vintage Press.
- Dzur, Albert W. 2012. *Punishment, Participatory Democracy and the Jury*. Oxford: Oxford University Press.
- . 2013. “Twelve Absent Men: Rebuilding the American Jury.” *The Boston Review* 38 (4):30–35.
- Freeman, Alan. 1990. “Antidiscrimination Law: The View from 1989.” In *The Politics of Law: A Progressive Critique*, 1990th ed., 121–50. New York: Pantheon Books.
- Fung, Archon. 2004. *Empowered Participation: Reinventing Urban Democracy*. Princeton: Princeton University Press.
- Fung, Archon and Wright, Eric Olin. 2003. *Deepening Democracy: Institutional Innovation in Empowered Participatory Governance*. London: Verso Books.
- Guinier, Lani. 1994. *Tyranny of the Majority: Fundamental Fairness in Representative Democracy*. New York, NY: The Free Press.
- Hackett, Elizabeth, and Sally Haslanger. 2006. *Theorizing Feminisms: A Reader*. Oxford University Press.
- Hamilton, Darrick, and William Darity Jr. 2010. “Can ‘baby Bonds’ Eliminate the Racial Wealth Gap in Putative Post-Racial America?” *Review of Black Political Economy* 37(3–4): 207–16.
- Harris, David A. 2003. *Profiles in Injustice: Why Racial Profiling Cannot Work*. New York: New Press.
- Haslanger, Sally. 2012. *Resisting Reality: Social Construction and Social Critique*. Oxford: Oxford University Press.
- Heath, Joseph. 2020. *The Machinery of Government: Public Administration and the Liberal State*. Oxford : New York: Oxford University Press.
- Kairys, David. 1990. *The Politics of Law: A Progressive Critique*. New York, NY: Pantheon Books.
- Karlan, Pamela, and David Cole. 2020. “Ruth Bader Ginsburg, 1933 -2020.” *New York Review of Books*, October. <https://www.nybooks.com/articles/2020/10/22/ruth-bader-ginsburg/>.
- King, Desmond. 1995. *Actively Seeking Work? The Politics of Unemployment and Welfare Policy in the United States and Great Britain*. Chicago: University of Chicago Press.
- . 1997. *Separate and Unequal: Black Americans and the US Federal Government*. Oxford : New York: Oxford University Press.
- Law, Sylvia. 1984. “Rethinking Sex and the Constitution.” *University of Pennsylvania Law Review* 132.
- Lever, Annabelle. 2005. “Why Racial Profiling Is Hard to Justify.” *Philosophy and Public Affairs* 33 (1).

- . 2009. “Democracy and Judicial Review: Are They Really Incompatible?” *Perspectives on Politics* 7 (4): 805–22.
- . 2017. “Democracy, Epistemology and the Problem of All-White Juries.” *Journal of Applied Philosophy* 34 (4): 541–56.
- Lippert-Rasmussen, Kasper. 2018. *Relational Egalitarianism: Living as Equals*. Cambridge [England] ; Cambridge University Press.
- Lukes, Steven. 2021. *Power: A Radical View*. 3rd ed. Red Globe Press.
- Lyons, David. 2013. *Confronting Injustice: Moral History and Political Theory*. Oxford England ; Oxford University Press.
- Mansbridge, Jane. 1999. “Should Blacks Represent Blacks and Women Represent Women? A Contingent ‘Yes.’” *Journal of Politics* 61 (3): 628–57.
- McPherson, Lionel K and Shelby, Tommie. 2004. “Blackness and Blood: Interpreting African American Identity.” *Philosophy & Public Affairs* 32 (2): 171–92.
- Mercat-Bruns, Marie. 2015. “Les Discriminations Multiples et l’identité Au Travail Au Croisement Des Questions de Libertés et d’égalité.” *RDT*, 28.
- . 2016. *Discrimination at Work : Comparing European, French, and American Law*. University of California Press. <https://doi.org/10.1525/luminos.11>.
- . 2018. “Multiple Discrimination and Intersectionality: Issues of Equality and Liberty.” *ISSJ*, 1.
- . 2021. “Discrimination Intersectionnelle : Une Notion Émergente En Droit Du Travail.” *Bulletin Joly Travail*.
- Mill, John Stuart. 1969. *The Subjection of Women*. London: Longmans, Green, and Co.
- Minow, Martha. 1990. *Making All the Difference: Inclusion, Exclusion, and American Law*. First Edition. Ithaca: Cornell University Press.
- Okin, Susan. 1989. *Justice, Gender and the Family*. New York: Basic Books.
- Olsen, Frances E. 1995. *Feminist Legal Theory*. 2 vols. NYU Press.
- O’Neill, Martin. 2016. “What We Owe Each Other: T.M.Scanlon’s Egalitarian Philosophy.” *Boston Review*, June 2, 2016. <http://bostonreview.net/books-ideas/martin-oneill-tm-scanlon-inequality>.
- Pateman, Carole. 1988. “The Patriarchal Welfare State.” In *Democracy and the Welfare State*, edited by Amy Gutmann. Princeton, NJ: Princeton University Press.
- Perreau, Bruno. 2021. “Les Analogies Du Genre: Différence, Intra-sectionnalité et Droit.” In *Genre, Droit et Politique*, edited by Charles Bosvieux-Onyekwelu and Véronique Mottier, ch 11. Paris, France: LGDJ.
- Phillips, Anne. 1995. *The Politics of Presence*. Oxford: Oxford University Press.
- Rawls, John. 1972. *A Theory of Justice*. Cambridge MA: Harvard University Press.
- . 1993. *Political Liberalism*. New York, NY: Columbia University Press.
- Rhode, Deborah L. 1991. *Justice and Gender: Sex Discrimination and the Law*. Revised edition. Cambridge, Mass.: Harvard University Press.
- Rich, Adrienne. 1980. “Compulsory Heterosexuality and Lesbian Existence.” *Signs* 5 (4): 631.
- Roberts, Dorothy. 1997. *Killing the Black Body: Race, Reproduction and the Meaning of Liberty*. New York: Pantheon Books.
- Rorty, Richard. 1979. *Philosophy and the Mirror of Nature*. New Jersey: Princeton University Press.
- Rosenberg, Alex. 2004. “On the Priority of Intellectual Property Rights, Especially in Biotechnology.” *Politics, Philosophy and Economics* 3 (1): 77–95.

- Scanlon, Timothy M. 2018. *Why Does Inequality Matter?* Oxford England ; Oxford University Press.
- Schwartz, Madeleine. 2020. "Criminalizing A Constitutional Right." *New York Review of Books*, December 3, 2020. <https://www.nybooks.com/articles/2020/12/03/criminalizing-abortion-constitutional-right/>.
- Schwartzberg, Melissa. 2018. "Justifying the Jury: Reconciling Justice, Equality and Democracy." *American Political Science Review* 112 (3): 446–58.
- Taub, Nadine, and Elizabeth M Schneider. 1990. "Women's Subordination and the Role of Law." In *The Politics of Law: A Progressive Critique*, 152–76. New York, NY: Pantheon Books.
- Waldron, Jeremy. 2006. "The Core of the Case Against Judicial Review." *Yale Law Journal* 115(6): 1346.
- . 2008. *The Dignity of Legislation*. Cambridge: Cambridge University Press.
- . 2013. "Separation of Powers in Thought and Practice." *Boston College Law Review* 54(2): 433.
- Walzer, Michael. 1983. *Spheres of Justice: A Defence of Pluralism and Equality*. New York, NY: Basic Books.
- White, Stuart. 2020. "Citizens' Assemblies and Radical Democracy." In *Radical Republicanism: Recovering the Tradition's Popular Heritage*, 81–102. Oxford: Oxford University Press.
- Williams, Melissa S. 1998. *Trust and Memory: Marginalised Groups and the Failure of Liberal Representation*. Princeton: Princeton University Press.
- Wolff, Johnathan, and Avner de-Shalit. 2007. *Disadvantage*. Oxford: Oxford University Press.
- Zack, Naomi. 2015. *White Privilege and Black Rights: The Injustice of U.S. Police Racial Profiling and Homicide*. New York, NY: Rowman and Littlefield.
- Zurn, Christopher F. 2007. *Deliberative Democracy and the Institutions of Judicial Review*. Cambridge: Cambridge University Press.

Works I recommend

- Collins, Patricia Hill. 2008. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. New York: Routledge.
- Dworkin, Ronald. *Sovereign Virtue: The Theory and Practice of Equality*. (Harvard University Press 2002)
- Kairys, David. Ed. 1990. *The Politics of Law: A Progressive Critique*. New York, NY: Pantheon Books.
- Elizabeth Hackett, Elizabeth and Sally Haslanger Eds. *Theorising Feminisms: A Reader* (Oxford University Press, 2006)
- Lyons, David. 2013. *Confronting Injustice: Moral History and Political Theory*. Oxford England ; Oxford University Press.
- Marie Mercat-Bruns —. 2016. *Discrimination at Work : Comparing European, French, and American Law*. University of California Press. <https://doi.org/10.1525/luminos.11>.
- MacKinnon, Catherine A. *Feminism Unmodified: Discourses on Life and Law*, (Harvard University Press 1987)

Olsen, Frances E. 1995. *Feminist Legal Theory*. 2 vols. NYU Press.

Scanlon, Timothy M. 2018. *Why Does Inequality Matter?* Oxford England ; Oxford University Press.

Williams, Melissa S. 1998. *Trust and Memory: Marginalised Groups and the Failure of Liberal Representation*. Princeton: Princeton University Press.

Wolff, Johnathan, and Avner de-Shalit. 2007. *Disadvantage*. Oxford: Oxford University Press.

Morrison, Toni ed. *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* (Tandem Library, 1992)

Anthony, Louise M. and Charlotte Witt eds. *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Westview Press, Boulder, Colorado, 2001)

Roberts, Dorothy. 1997. *Killing the Black Body: Race, Reproduction and the Meaning of Liberty*. New York: Pantheon Books.

Waldron, Jeremy. 1993. *Liberal Rights: Collected Essays 1981 -1991* (Cambridge University Press, 1993).