3. The human right to moral equality and the constitutional right to equal protection

I. INTRODUCTION

The morality of human rights, as I explained in Chapter 1, consists both of a general requirement—to “act towards all human beings in a spirit of brotherhood”—and of specific requirements: the various rights set forth in the Universal Declaration of Human Rights and/or in one or more of the several international human rights treaties. In Chapter 2, I inquired what reason(s) we have, if any, to accept the general requirement. In this chapter, I explicate and defend a specific requirement: the human right to moral equality; in the next chapter, I explicate and defend another: the human right to moral freedom. Each of those two fundamental human rights, as I explain in this and the next chapter, is closely related to a right—each to a different right—that is part of the constitutional law of the United States: The human right to moral equality is closely related to the constitutional right to the equal protection of the laws, and the human right to moral freedom is closely related to the constitutional “right of privacy” (as it is called). This and the next chapter thus help to illustrate a proposition for which I have contended elsewhere: There is a significant interface between the constitutional law of the United States and the political morality of human rights.1

In discussing the constitutional right to equal protection and the constitutional right of privacy, I rely on a particular answer to this fundamental question: What criteria should we apply to determine whether a right (or other norm) claimed to be part of the constitutional law of the United States is legitimately regarded as such? That five or more justices of the U.S. Supreme Court have ruled that a right is part of the constitutional law of the United

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States does not entail that the right is *legitimately* regarded as such. This is the answer on which I rely:

*First.* R is a constitutional right if constitutional enactors made R a constitutional right—if they entrenched R in the Constitution of the United States; if other, later enactors did not entrench in the Constitution a norm that supersedes R; and if no norm that supersedes R has become constitutional bedrock. (I explain “constitutional bedrock” below.) By constitutional “enactors,” I mean what legal scholar Richard Kay means:

By enactors, I mean the human beings whose approval gave the Constitution the force of law. In the case of the original establishment of the United States Constitution that means the people comprising the majorities in the nine state conventions whose ratification preceded the Constitution entering into force. With respect to the amendments that means the people comprising the majorities in the houses of Congress proposing the amendments and in the ratifying legislatures of the necessary three-quarters of the states.2

*Second.* R is a constitutional right if R is an inescapable inference (a) from the structure of government established by the Constitution, which consists of (i) a separation of powers among the three branches—legislative, executive, and judicial—of the national government and (ii) a division of powers between the national government and state government,3 or (b) from the kind of government (“representative democracy”) presupposed by the Constitution; and if no norm that supersedes R has been entrenched in the Constitution or become constitutional bedrock.

*Third.* R is a constitutional right if R is constitutional bedrock—if R is a bedrock feature of the constitutional law of the United States—in this sense: R has become, in the words of Robert Bork, “so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions,” that the U.S. Supreme Court should and almost certainly will continue to deem R constitutionally authoritative even if it is open to serious question whether enactors ever entrenched R in the Constitution.4 As Michael McConnell has put the point: “[M]any decisions, even some that were questionable or controversial when rendered, have become part of the fabric of American life; it is inconceivable that they would now be overruled. … This overwhelming public acceptance constitutes a mode of popular ratification ….5

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The human right to moral equality

No answer to the “what criteria” question—a question that has long been contested among constitutional theorists—can escape controversy. Nonetheless, no answer is less contentious than the foregoing threefold answer, which is the answer on which I rely in this chapter.6

II. THE HUMAN RIGHT TO MORAL EQUALITY

The specific requirements of the morality of human rights, as I explained in Chapter 1, are specifications, for particular contexts, of the general requirement. By “specification,” I mean “the act of setting a more concrete and categorical requirement in the spirit of [the general requirement], and guided both by a sense of what is practically realizable (or enforceable), and by a recognition of the risk of conflict with other [requirements] or values.”7 Because some of the specifications—some of the rights set forth in the Universal Declaration and/or in one or more of the international human rights treaties—are reasonably contestable specifications of the general requirement, it is not surprising


It is not inconsistent to affirm an originalist response to the question what it means, or should mean, to interpret the constitutional text while also affirming that the constitutional text is not the sole legitimate basis of constitutional adjudication. See Gary Lawson, “Originalism Without Obligation,” 93 Boston University Law Review 1309 (2013); Gary Lawson, “No History, No Certainty, No Legitimacy … No Problem: Originalism and the Limits of Legal Theory,” 64 Florida Law Review 1551 (2012).

6 Cf. Antonin Scalia, A Matter of Interpretation 138–39 (Amy Guttman ed. 1997): Originalism, like any theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of stare decisis; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether Marbury v. Madison was decided correctly. … [O]riginalism will make a difference … not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.

that some who accept the general requirement reject one or more of the specific requirements. For example, and as I explain in the next chapter, some who accept the general requirement are wary about accepting—and some may even reject—the human right to moral freedom. But not all of the specifications are reasonably contestable; some are incontestable, such as the human right to moral equality, which, as I am about to explain, is an entailment of the general requirement and, as such, an incontestable specification: It would make no sense for one who accepts the general requirement to reject the human right to moral equality. Indeed, the human right to moral equality is essentially just an alternative articulation of the general requirement.

Article 1 of the Universal Declaration begins by affirming that “[a]ll human beings are born free and equal in dignity and rights” and then goes on to state that all human beings “should act towards one another in a spirit of brotherhood.” According to Article 1, then, every human being is as worthy as every other human being—no human being is less worthy than any other human being—of being treated “in a spirit of brotherhood.” Thus, the right to moral equality: the right of every human being to be treated as the moral equal of every other human being, in this sense: equally entitled with every other human being to be treated—no less worthy than any other human being of being treated—“in a spirit of brotherhood.”

The human right to moral equality is therefore an entailment of the general requirement: To accept the requirement to “act towards all human beings in a spirit of brotherhood” is necessarily to accept the human right to moral equality; it would make no sense to accept the former and reject the latter.

The most common grounds for treating some human beings as morally inferior—as less worthy than some other human beings, if worthy at all, of being treated “in a spirit of brotherhood”—have been, as listed both in Article 2 of the Universal Declaration and in Article 26 of the International Covenant on Civil and Political Rights, “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Under the right to moral equality, government may not disadvantage any human being based on the view that she—or someone else, someone, for example, to whom she is married—as morally inferior. Similarly, government

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9 See Loving v. Virginia, 388 U.S. 1 (1967). In response to “a now-discredited argument in defense of antimiscegenation laws”—namely, “that whites can marry only within their race; nonwhites can marry only within their race; therefore, antimiscegenation laws do not deny ‘equal options’”—John Corvino has written:
The human right to moral equality may not disadvantage any human being based on a sensibility to the effect that she is morally inferior—a sensibility such as “racially selective sympathy and indifference,” namely, “the unconscious failure to extend to a [racial] minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.” Or, analogously, a sensibility such as sex-selective sympathy and indifference. Government is disadvantaging a human being based at least partly on such a view or sensibility if but for that illicit, demeaning view or sensibility, government would not be disadvantaging her.

The right to moral equality entails not only that government may not deny to any human being the status of citizenship based on the view (or on a sensibility to the effect) that she is morally inferior; it also entails the right to equal citizenship: Government may not disadvantage any citizen based on the view that she is morally inferior. So, for example, government may not abridge—it may not dilute much less deny—any citizen’s right to vote based on the view that she is morally inferior.

The right to moral equality obviously does not require—no sensible right requires—that government treat every human being the same as every other human being. Government need not permit children to vote—or to drive cars. Nor need government distribute food stamps to the affluent. And so on. The examples are countless. But what government may not do is deny a benefit to anyone or impose a cost on anyone—government may not disadvantage any

Putting aside the problematic assumption of two and only two racial groups—whites and nonwhites—the argument does have a kind of formal parity to it. The reason that we regard its conclusion as objectionable nevertheless is that we recognize that the very point of antimiscegenation laws is to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites (that is, unequal).


Cf. Mathias Risse, “Review of Cindy Holder and David Reidy, eds., Human Rights: The Hard Questions” (2013), Notre Dame Philosophical Reviews 2014.1.27: [I]t would not be helpful to appeal to [the human right to democratic governance] under many of the typical circumstances that prevent the emergence of democracy. In particular, if there are substantial concerns that the racial or ethnic constellation in a country would, under the political conditions that one could reasonably expect to obtain, lead to a kind of excessively populist politics that might generate or exacerbate violent conflict, the sheer fact that there is a human right to democracy should not be decisive for anything.

human being—based on the view (or on a sensibility to the effect) that she is morally inferior: less worthy than someone else, if worthy at all, of being treated “in a spirit of brotherhood.”

As (in part) a right against government, the right to moral equality is often articulated as the right to “the equal protection of the law.” Some examples:

- Article 26 of the International Covenant on Civil and Political Rights:

  All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- The African Charter on Human and People’s Rights states, in Article 2, that:

  [e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

  The Charter then states, in Article 3: “1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.”

- Article 24 of the American Convention on Human Rights: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

- Article 15(1) of the Canadian Charter of Rights and Freedoms:

  Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

- Article 9 of the South African Constitution:

  1. Everyone is equal before the law and has the right to equal protection and benefit of the law. … 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
III. THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION

Like the preceding provisions, the Fourteenth Amendment of the Constitution of the United States—specifically, the second sentence of section one of the Fourteenth Amendment—speaks, inter alia, of equal protection:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added.)

What did the enactors of the Fourteenth Amendment mean by “the equal protection of the laws;” that is, precisely what is the right to equal protection that the enactors constitutionalized? That question has long been, and remains, contested, but, as it happens, the controversy matters little: Even if we assume that it is not the particular right to equal protection that the enactors constitutionalized, a right to equal protection is now constitutional bedrock, and that right—the bedrock constitutional right to equal protection—protects against the same kinds of government action that the human right to moral equality protects against. That is the sense in which, as I said at the beginning of this chapter, the constitutional right to equal protection is closely related to the human right to moral equality.

Assume, for the sake of discussion, that the Fourteenth Amendment’s enactors did not constitutionalize the right to moral equality. Now imagine a law—that fits this profile: “based on one or another view that the enactors constitutionalized. That question has long been, and remains, contested, but, as it happens, the controversy matters little: Even if we assume that it is not the particular right to equal protection that the enactors constitutionalized, a right to equal protection is now constitutional bedrock, and that right—the bedrock constitutional right to equal protection—protects against the same kinds of government action that the human right to moral equality protects against. That is the sense in which, as I said at the beginning of this chapter, the constitutional right to equal protection is closely related to the human right to moral equality.

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There is no shortage of radical egalitarian thought at the time, coming from figures who were by no means marginalized. Thaddeus Stevens chose to be buried in a black cemetery, with the inscription on his stone reading “Finding other Cemeteries limited as to Race by Charter Rules, I have chosen this that I might illustrate in my death, the Principles which I advocated through a long life: EQUALITY OF MAN BEFORE HIS CREATOR.”

For my own effort, years ago, to discern what rights the Fourteenth Amendment’s enactors entrenched when they added section one of the Fourteenth Amendment, including the equal protection clause, to the Constitution of the United States, see Michael J. Perry, We the People: The Supreme Court and the Fourteenth Amendment 48–87 (1999). Ilan Wurman reaches conclusions that are very close to my own. See Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment (2020).
that some persons (members of a racial minority, for example, or women, or children born out of wedlock) are morally inferior.” The Supreme Court of the United States would not dream of ruling that any such law—or any other government action based on any such view—complies with the constitutional right to equal protection.¹³ Not even in its notorious “separate but equal” opinion in Plessy v. Ferguson, decided about one hundred and twenty-five years ago, in 1896, did the Supreme Court deny that a law or other government action based on the view that one or more persons are by virtue of their race morally inferior violates the Fourteenth Amendment. Instead, the Court implausibly denied that the law at issue in the case was based on such a view:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.¹⁴

In his passionate, prophetic dissent in Plessy, Justice Harlan articulated the true significance of the challenged law:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominent, ruling class of citizens. There is no caste here. … What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.¹⁵

Sixteen years before its decision in Plessy, and just 12 years after ratification of the Fourteenth Amendment, the Supreme Court, in Strauder v. West Virginia, wrote:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimu-

¹³ In Loving v. Virginia, the Supreme Court declared that “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” 388 U.S. 1, 10 (1967) (emphasis added). Cf. Antonin Scalia and Brian A. Garner, Reading the Law: The Interpretation of Legal Texts 88 (2012): “[T]he Equal Protection Clause … can reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally.”
¹⁴ Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
¹⁵ Id. at 559–60.
lant to that race prejudice which is an impediment to securing to individuals of the face that equal justice which the law aims to secure to all others.16

The human right to moral equality, in the guise of the constitutional right to equal protection, is clearly a bedrock feature—and has long been a bedrock feature—of the constitutional law of the United States.17 It is also constitutional bedrock that the right to equal protection applies to the federal government as well as to the states.18

16 *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (emphasis added)


The so-called “rationality” (or “rational basis”) requirement is one of the most familiar aspects of the Supreme Court’s equal protection doctrine. For a collection of the relevant caselaw, see, e.g., Choper et al., n. 17, at 1332–51. That requirement is best understood as an implication of the right to moral equality: If it is not “rational”—reasonable, plausible—to believe that a particular instance of government’s disadvantaging some persons relative to some other persons serves a “legitimate” government interest—if it is not “rational” to believe that a particular instance of such disadvantaging serves, in other words, any aspect of the common good—then presumably government, even if it is not doing anything otherwise constitutionally problematic, is simply “playing favorites” (by disfavoring some persons relative to some others) and thereby violating the right to moral equality. As a federal appeals court put the point in 2008

merely economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review. … [E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate government interest.

Like the human right to moral equality, the constitutional right to equal protection forbids more than racist government action; it forbids any government action that fails to treat some persons as the moral equals of some other persons—that fails to treat some persons as entitled to the same respect and concern to which other persons are entitled. So, for example, the Supreme Court has struck down many laws based on what the Court recently described as “overbroad generalizations about the way men and women are[,] ... about the different talents, capacities, or preferences of males and females.” Government action based on such a generalization violates the constitutional right to equal protection if in the Court’s judgment, government, by relying on the generalization, treats some persons—often (some) women, but sometimes (some) men—in a demeaning way—a way that, all things considered, does not respect, that discounts if not disregards, their welfare or abilities—thereby failing to treat them as moral equals. Demeaning government action of a sexist sort no less than that of a racist sort violates the constitutional right to equal protection.

That the human right to moral equality is the core of the constitutional right to equal protection does not mean that, as a matter of existing constitutional doctrine, the former right exhausts the content of the latter right. The Supreme Court has struck down some laws on the basis of the constitutional right to equal protection without regard to whether the law was based on the view that some persons are morally inferior. That aspect of the Court’s equal protection doctrine—the so-called “fundamental interests” aspect—is not my concern here. For a collection of the relevant caselaw, see, e.g., Choper et al., n. 17, 1551–644.


21 Consider the implications of the fact that under the human right to moral equality, government may not disadvantage any human being based either on the view that she is morally inferior or on a sensibility to that effect—a sensibility such as “racially selective sympathy and indifference,” namely, “the unconscious failure to extend to a [racial] minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.” Government action can violate the right to moral equality—and, therefore, the right to equal protection—unintentionally. As Robin Kar and John Lindo have explained:

Many people who treat each other differently ... exhibit unconscious patterns of attention, inference and concern, which make it easier for them to identify the interests of their in-group while overlooking those of out-groups. This explains why democratic processes cannot be relied upon to guarantee the equal treatment of persons under the law.

Robin Bradley Kar and John Lindo, “Race and the Law in the Genomic Age: A Problem for Equal Treatment under the Law,” in Roger Brownsword, Eloise Scotford, and
ADDITIONAL READING


In the introduction to this chapter, I wrote that “[n]o answer to the ‘what criteria’ question—a question that has long been contested among constitutional theorists—can escape controversy.” I am one of the constitutional theorists who has contested the question—and my views have changed over the years. See Michael J. Perry, The Constitution, the Courts, and Human Rights (1982); Michael J. Perry, The Constitution in the Courts: Law or Politics? (Oxford University Press 1994); Michael J. Perry, We the People: The Supreme Court and the Fourteenth Amendment (Oxford University Press 1999); Michael J. Perry, A Global Political Morality: Human Rights, Democracy, and Constitutionalism 95-164 (2017).