Equality in the American Context

“Equal,” that word on the newborn American tongue, has a long and complicated history. Its source is the Latin *aequus*, which in Cicero’s time had several meanings: “level,” “even,” “impartial,” “fair,” and “just.” *Ex aequo loco loqui*, which is translated literally as “to speak from an equal position,” meant “to speak in the Senate,” as opposed to *ex inferiore loco*, “in the presence of the judges,” and *ex superiore loco*, “in the presence of the people.” The English word’s record does not begin until sometime between A.D. 1150 and 1350—that gap of over a thousand years is significant—during which time all of those meanings became known. By 1530 it also meant “like” or “identical.”

Contemporary English dictionaries typically begin their definitions of “equal” with “the same” or “identical,” but none stops there. The definitions go on to include such entries as “uniform in operation or effect: Equal laws” (Random House) and “fair, just: equal laws” (Webster’s Third International). So equality has something to do with “same,” with “just,” with “fair,” and with law. But it is not clear just what these relationships are.

We reject the notion that these concepts are mutually interchangeable. Few Americans would be comfortable if “the same” were substituted for “equal” in the Declaration of Independence. For human-kind has known for a long time that all people are not created the same. Even if we forget conventional legal distinctions, such as those between slave and master or citizen and alien, the fixed, natural differences remain. These differences include, in all societies, those between male and female and between young and old. Some of the dif-
Differences among human beings, unlike those just mentioned, are inescapably distinctions that imply superiority or inferiority. Some people are stronger, wiser, more virtuous, or more talented than others. Nor is there some Great Balancing Scale that ensures that these differences among people will cancel each other, so that our cumulative grade point averages, so to speak, will be the same. Some people excel in so many characteristics that it is difficult not to label them better people, and the opposite is also true. But talking this way, about superior and inferior people, makes most of us uneasy. All these fixed, if not natural, differences did not long inhibit thinkers from asserting that human beings are equal.

Philosophical Roots of American Equality

How can one reconcile a belief in equality with all these human differences? Felix Oppenheim has written, "To claim that all men are equal in some respects can only mean that the resemblances are in some way more significant that the differences." Many claims for equality have rested on notions about observable similarities. Some examples are the Stoics' belief in reason; John Calvin's belief in an equal capacity for evil, which prompted his distrust of ecclesiastical hierarchy; and Thomas Hobbes's insistence that human beings have an equal passion for power and a roughly equal ability to pursue it (or to pursue it roughly): "Nature hath made man so equal, in the faculties of body and mind . . . [that] when all is reckoned together, the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he." But even though we are no longer so sure that people are indeed equal in any of these abilities, we have not abandoned the idea of equality.

A look at some relevant works suggests that the resemblances on which arguments for equality depend are often less qualities common to all than what might be called possibilities, or better, entitlements, whether to divine grace, individual rights, or self-government. In this way, equality becomes linked with fairness and justice, and ultimately becomes, at least, equality under law. All of this might seem to be very

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old stuff, and indeed it is. But, as this chapter will show, thinkers have also clung to the idea of equality as capacity, and—particularly as they begin to translate theory into practice—are reluctant to separate equality from judgments of ability. This tension appears early in American history, and it has continued to influence constitutional interpretation up to the present. It is a large part of our present doctrinal problem, but can become part of its solution.

These concepts of equality, fairness, and justice are some of the oldest themes of political philosophy, and they continue to perplex us today. One translation of the Ethics renders Aristotle’s definition of “just” as “(a) lawful and (b) what is ‘equal,’ that is, fair.” Aristotle goes on to refine these definitions, making it clear that the terms “lawful” and “equal” are far from synonymous (though, interestingly, the terms “equal” and “fair” appear to be), but that they do connect at many points. The Politics continues these themes. Although Aristotle was no egalitarian philosopher, arguing as he did that human beings were neither of equal ability nor deserving of equal treatment, his writings do contain a limited notion of equality. Not only does he emphasize proportionate equality, the allotment of equal shares to equals regardless of other differences between them, but his defense of “natural slavery” stresses the nature and the needs of the slave.

We may thus conclude that all men who differ from others as much as the body differs from the soul, or an animal from a man (and this is the case with all whose function is bodily service, and who produce their best when they supply such service)—all such are by nature slaves, and it is better for them, on the very same principle as in the other cases just mentioned [i.e., animals and females], to be ruled by a master.

“For them”: slavery is good primarily for slaves, coincidentally for the master, as patriarchy is good primarily for women and children, coincidentally for the family head. There appears to be an implicit assumption that the needs of women, children, and slaves have equal ranking with those of the master. It would be dangerous to conclude too much from this passage—it does, after all, liken slaves and women to animals, who presumably enjoy no equality—but this passage needs attention because defenses of slavery will be of concern in this book, and because Aristotle’s defense of slavery is vastly more humane than some American arguments. Aristotle endorses inegalitarian social ar-

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rangements, but his defense may arise from an unarticulated premise that each individual has a right to that status which is best for her or him. What is so very vulnerable about his argument is not that premise but the insistence that some people are destined by nature for subjugation.

Whatever Aristotle's premises were, he really cannot be regarded as a forerunner of egalitarian philosophy. I include him not only for his special relevance in American history but also because, on analysis, his philosophy turns out to be less antagonistic to this strain of philosophy than might be supposed. (Interestingly, Jefferson numbered him among his intellectual ancestors.) The Greek and Roman Stoics were the first egalitarian philosophers. They propounded ideas about human equality, especially the capacity to reason, which were antithetical to those of Aristotle and Plato, but even the Stoics had little to say about political arrangements, and later thinkers did not view themselves as their spiritual heirs.

Egalitarian notions permeate early Christian thought, but these writers were uneasy about the relationship, if any, between spiritual equality and social institutions. The New Testament speaks to this issue in "profoundly dualistic" ways. The parable of the laborers in the vineyard compares the kingdom of heaven to a vintner who pays all his laborers the same wage, no matter how long they worked. When the first workers "grumbled ... saying, 'Those last worked only one hour, and you have made them equal to us who have borne the burden of the day and the scorching heat,'" the owner replied, "Friend, I am doing you no wrong; did you not agree with me for a denarius? Take what belongs to you, and go; I choose to give to this last as I give to you." Jesus concludes, "So the last will be first, and the first last." The Gospels' exhortations to the rich and powerful suggest that this parable was far from being a defense of arbitrary power on the part of owners. A premise of equal respect and concern appears to transcend any notion of proportional reward and to demand equal treatment.

But it is problematical what conclusions, if any, about equality on earth follow from this concept of divine justice. That question is not clarified by a more famous passage: Paul's statement that "there is

7See Lakoff, Equality in Political Philosophy, chap. 2.
9Matt. 20:1–16.
neither Jew nor Greek, there is neither slave nor free, for you are all one in Christ Jesus.”

Only one of those three paired classifications, “slave” and “free,” refers to a difference that is purely conventional. “Jew” and “Greek” might be legal classifications, but they are more likely to refer to fixed ethnic backgrounds; and, of course, “male” and “female” refer to natural, immutable characteristics. Here again it is impossible to draw any conclusions about earthly status. Paul himself, at least, saw no apparent contradiction between this assertion and his equally famous exhortation: “Wives, be subject to your husbands as to the Lord.” But certain elements of the Christian tradition, “the unity of all souls in Christ and the equal promise of salvation,” are egalitarian in philosophy.

These Greek, Roman, and Christian writings never move in any clear way from notions of human equality to ideas about society and politics. It is not until the Reformation that Christian doctrines of equality shift emphasis from heaven to earth. Martin Luther “offered a view of Christian equality that in a number of ways resembles and presages a modern liberal view.” Luther’s advocacy of the “priesthood of all believers” derived from his belief that all people were equally capable of achieving salvation, spiritual enlightenment, and virtue. These capacities were more important for him than the differences between sacred and secular vocations stressed by the Catholic hierarchy.

But neither Luther nor any other reformer went so far as to transform an argument for religious equality on earth into one for political equality. That step had to wait until the Puritan Revolution in England. The Levellers, in particular, founded their political philosophy on a belief in spiritual equality similar to Luther’s. “By nature,” wrote John Lilburne, “all [are] equal and alike in power, dignity, authority, and majesty, none having by nature any authority, dominion, or magisterial power one over or above another.” Therefore, “neither have they, or can they exercise any, but merely by ... mutual agreement or consent.” Perhaps the most eloquent statement of Leveller philosophy is contained in Colonel Rainborough’s famous response to Ireton

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10 Gal. 3:28.
11 Eph. 5:22. See also Titus 2:3–5.
13 Ibid., p. 128.
in the Putney debates of 1647. Opposing Ireton's recommendation of property qualifications for voting, Rainborough declared: "For really I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, sir, I think it is clear, that every man that is to live under a government ought first by his own consent to put himself under that Government." 16

Once this connection between equality and government was made, the principles of the Declaration were in sight. John Locke, writing at about the time of the Restoration, provided a strong link between British and American revolutionary thought, and in the process faced squarely the tension between equality and human differences. Early in the Second Treatise on Civil Government, Locke appears to ground equality in human capacity for reason and ability to know natural law, but he does not maintain consistently throughout his writings that human beings are equal in these ways. 17 Indeed, when he asserts a natural, inalienable equality among individuals, he appears to acknowledge the opposite.

By the statement "all men are by nature equal," I cannot be supposed to understand all sorts of equality. Age or virtue may give men a just precedence; excellence of parts and merit may place others above the common level; birth may subject some, and alliance or benefits others, to pay an observance to those whom nature, gratitude, or other respects may have made it due; and yet all this consists with the equality I there spoke of as being proper to the business at hand, being that equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other men. 18

Here Locke denies that an equal right to freedom depends on an equal endowment of any trait, such a virtue, wisdom, or merit. People vary widely in possession of such excellent attributes, but the equal natural right that Locke propounds is independent of similarities in ability or character. A person is entitled to it by virtue of being human. The law of nature confers an equality on each individual, much as the vintner did in the parable. In a sense, natural rights takes the place, in Locke's thought, that divine grace had in the Gospels. And, inevitably, this equality has compelling consequences for secular authority.

17 E.g., chaps. 2.4, 6.63, (1690), ed. Russell Kirk (Chicago: Henry Regnery, 1955), pp. 3, 43. See Conduct of Understanding (1697); Lakoff, Equality in Political Philosophy, chap. 5.
18 Treatise, 6.54, p. 37.
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Equality as Entitlement

Locke and the Puritans provided rhetorical resources that the Americans used extensively in their fight for independence. The Declaration of Independence echoes these themes:

We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these rights are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that when any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, laying its foundations upon such principles, and organizing its powers in such form, as to them shall be most likely to effect their safety and happiness.

Eloquent, but not original. Years later, John Adams insisted that there was no idea here “but what had been hackneyed in Congress for two years before.” But that was what the Declaration was for: not to be original political philosophy, but to express “what everyone was thinking.” 19 The crucial elements of the statement are derived from what has gone before. A traditional scholarly analysis—traditional, at least, since the early twentieth century—would go something like this: Human beings are equal because God has made them equal in a certain respect; that is, God has given to each of them, equally, certain specified rights. Certain conclusions about government follow from this equality. Jefferson’s “rough draft” of the Declaration (apparently his second draft, which he submitted to the committee of the Continental Congress) spelled out these conclusions: “that all men are created equal and independent, that from that equal creation they derive rights, inherent and inalienable.” 20 Until recently, that has been about it, as far as equality is concerned. Carl Becker’s Declaration of Independence, published in 1922, was acknowledged to be the definitive work on the document, and it “enshrined the Lockean interpretation of its content.” 21

But in 1978 Garry Wills questioned the received Lockean natural rights interpretation. Wills emphasized Locke, too, but it was the Locke of the Essay on Human Understanding rather than the Second Treat-

21 Wills, Inventing America, p. xxiv.
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tise, the Enlightenment Locke rather than the “liberal” Locke. Wills argued that Locke's greatest influence on Jefferson and his contemporaries came not through his political theory but through his epistemology and psychology. Not only did Jefferson’s writings indicate this intellectual lineage, but Jefferson owed far less to Locke than to some later thinkers who had built on him, most notably three Scots, Thomas Reid, Francis Hutcheson, and David Hume. From these leaders of the English and Scottish Enlightenment, Wills argues, Jefferson gleaned two influential ideas. First was an “egalitarian epistemology”: a belief in a common sense, in a faculty of simple perception, which all rational adults possess. Second was a concept of what Hutcheson called a “moral sense,” Hume called “moral taste,” and Jefferson himself called “a sense of right and wrong.” And it was with this ability to make moral judgments that all men were equally endowed.

Wills argues that the natural rights content of Jefferson’s thought has been overstressed and the Enlightenment content all but ignored. “All men are created equal” means not simply equal in possession of natural rights but equal in moral sense; and it is this moral sense that entitles men to these rights. If Wills is correct, our common understanding of the Declaration is wrong.

Wills is certainly right to refuse to let us neglect a significant part of Jefferson’s theory of equality. Jefferson’s debt to the great Scottish Enlightenment philosophers is, as Wills argues, evident and profound. As we shall see, it can provide an explanation of aspects of Jefferson’s thought that otherwise can only appear self-contradictory. But there is no sound justification for discarding Locke. As Wills himself notes, the Second Treatise was much read in the colonies by the time of the Revolution. Furthermore, it is not possible to prove from the number of times a book is mentioned that one mode of thought had more influence than another, on Jefferson or any other writer. What we can conclude from Wills on the one hand and Becker on the other is either that Jefferson believed in an equality of natural rights or an equality in a certain human capacity that was the basis for these rights, or both—or that he never sorted out exactly what he meant by equality. For the purposes of understanding what the word “equal” means in the Constitution, it may not make all that much difference—a puzzling statement I shall later defend.

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The Declaration is the basis for American thought about equality, and it was to shape and influence many of the arguments made long afterward in favor of constitutional change. The idea of equality has wound a long, tortuous path from its beginnings to the American colonists, but certain themes have remained constant: a notion that in some way each person counts for the same as anyone else; that each is equal before God or nature; that each is entitled to some sort of equal ranking or, as Dworkin put it, equal respect and concern. "The poorest he hath a life to live, as the greatest he"; or, in A. D. Lindsay's paraphrase, the stupidest he as the cleverest he. Even Aristotle, who may appear to be keeping strange company in this group, seems to recognize that those he considers inferior have lives to live, as do masters; these lives turn out to differ greatly, but to be based on a reckoning, however wrong, of the needs and interests of the people involved. For all these writers, reflection seems to lead to a premise of a basic entitlement to equal respect and concern. For some, this premise apparently rests on a still deeper premise of equality in some human attribute—reason for the Stoics, grace for the Christians, "moral sense" for the Scots. But the premise is just that—a premise, an a priori assumption about human nature rather than any kind of demonstration, let alone proof, that human beings are equal in any capacity. By 1776 this idea was so much a part of American culture that such a statement could be made in a document written to express the unity of "one people."

Philosophy and Society: The Terrible Contradiction

But if, by 1776, that was how people thought, it was not how they lived. Perfect coincidence between ideals and practice is rare, but in colonial America the dissonance was jarring. Actually there was not one contradiction but at least two, one of which is obvious and the other buried in contemporary language.

I have written deliberately of "human beings," but the writers I have discussed usually refer to "men." In the eighteenth century, this word had the same two meanings it has now: the generic one, "human being," as distinguished from other forms of life, and "adult male human being," as distinguished from woman or child. When Rainborough, Locke, or Jefferson argued that men were equal, were they including women?

Rainborough spoke of “he” who had a right to live, but John Lilburne had written that “every individual man and woman in the world” was descended from Adam and Eve, and thus “all were by nature equal.” The colonists did not speak to this question. Perhaps they did not see a question there. The very language in which they thought and wrote obscured it. (We find here, of course, a basis for a powerful argument against the generic use of “man.”) And the issue was not forced on them. Feminist thought was barely alive in the 1770s.

In the colonies, only Abigail Adams was putting such thoughts on paper, and she only in her correspondence. Her famous letter to her husband, written while he was attending the Second Continental Congress, three months before the Declaration—“If particular care and attention is not paid to the Ladies we are determined to foment a rebellion”—was ahead of its time; his response—“I cannot but laugh”—was uncharacteristic of their correspondence. The first American feminist tract, Judith Sargent Murray’s On the Equality of the Sexes, was not published until 1790. The problem disturbs us, but it is futile to look to eighteenth-century American writers for much help.

The second problem was always present, a painful tension for American revolutionaries. This, of course, was the contradiction between the ideals of the Declaration and the institution of slavery. It was almost as old as the colonies themselves. The first shipment of American slaves had landed at Jamestown, Virginia, in 1619, and by 1700 slavery was firmly established in the southern colonies. Revolutionary America had known a century and a half of slavery, and the practice showed no signs of dying out. So there flourished, side by side, an egalitarian natural rights philosophy and an institution antithetical to it.

There were efforts at intellectual reconciliation. A defense of slavery based on Aristotle was not among them; given the Declaration’s commitment to natural rights, it would have had some rough going. A few proslavery tracts based a defense of slavery on the notion that blacks were too inferior to enjoy rights, and sometimes went so far as to deny that blacks were fully human, ranking them somewhere between people and apes. But the striking aspect of colonial thought is that there were few proslavery writers. Usually the contradiction between natural rights philosophy and slavery was not explained away, but acknowledged.

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26 Woodhouse, Puritanism and Liberty, p. 317.
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and deplored. One historian has gone so far as to suggest that "in retrospect, the pity of antislavery's failure was that in the decade after the Revolution, success against slavery itself seemed almost within reach." 

There was that deleted section of the "rough draft" of the Declaration, written by Jefferson and vetted by his committee of editors, proclaiming that King George III "has waged cruel war against human nature itself, violating it's [sic] most sacred rights of life and liberty, in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere ... determined to keep open a market where MEN should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce." The king's share of the blame may be doubted; in fact, Wills has suggested that for Jefferson the king's real crime was an attempt to incite insurrection and thus free slaves. But the antislavery import of the passage is beyond question.

Jefferson's was not a lonely voice. Vocal opposition to slavery existed by the time of the Revolution—much of it, though not all, from Quakers—and these arguments often relied on natural rights philosophy. The following statements of three pamphleteers are typical. David Cooper wrote that "every individual of the human species by the law of nature comes into the world entitled to freedom at a proper age." Arthur Lee termed slavery a "violation of justice ... i.e., to give every man his due." John Allen defended "the sacred rights and privileges of the Africans." These tracts did not stimulate a dialogue with slaveowners. Instead:

The ideology of the Revolution was, in a very genuine sense, what white men in America were fighting for, and even the more socially conservative gentlemen throughout the new nation—and there were many—felt


31 *Inventing America*, pp. 70–75.

that slavery must somehow, someday, be brought to an end. Especially in view of the way their grandchildren were talking after 1830, it is important to bear in mind that during the Revolutionary War, despite the virtual absence of antislavery pronouncements in the Lower South and the cautiousness of Virginians on the subject, no one in the South stood up in public to endorse Negro slavery. It is no news, of course, that social institutions do not necessarily correspond to social ideals. Economics and pragmatics get us further toward understanding the persistence of slavery than philosophy can. But the philosophy itself was not so powerful an antislavery force as it might have been. There were tensions not only between theory and practice but within the theory itself, and those tensions reflect the profound distinction between a notion of equality as capacity and one of equality as entitlement. Many colonists could see that “all men” meant Negroes, too, and that “inalienable rights of life and liberty” meant no slavery. But it was one thing to recognize that logical imperative and another to endorse it.

Perhaps no people could have been eager to admit to full citizenship a group so different from themselves. “The physiognomic distinction would not down.” But the difference was not one of appearance alone. To most observers, the vast majority of Negroes seemed grossly inferior to whites in almost every observable human trait; they were “brutish, ignorant, idle, crafty, treacherous, bloody, thievish, mistrustful, and superstitious.”

How one interpreted that phenomenon, of course, depended on basic beliefs about human nature. In this era, these beliefs were undergoing drastic change. The Revolutionary period was a critical juncture in the eighteenth-century version of the “nature versus nurture” controversy. Environmentalism was replacing notions of inherent nature as an explanation of human differences. The antislavery version of this argument insisted that the Negroes’ deficiencies were the results of the conditions in which they were kept.

For example, Levi Hart of Connecticut declared: “There is no apparent want of capacity in the Negroes in general to conduct their own affairs and provide for themselves, but what is the natural consequence of the servile state they are in and the treatment they receive.” Anthony Benezet, an early Quaker opponent of slavery, wrote that in Africa the Negroes were the equals of anyone else. But the force of his observations is weakened by the fact that they are second-
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hand, based on the accounts of others rather than on his own travels; most observers contradicted him.\textsuperscript{35} A third explanation comes from Alexander Hamilton, surely a socially conservative gentleman. During the war, while he was Washington’s aide-de-camp, he wrote to John Jay, president of the Continental Congress, on the subject of Negroes in combat: “I frequently hear it objected . . . that they are too stupid to make soldiers. This is so far from appearing to me a valid objection that I think their want of cultivation (\textit{for I think their natural faculties are probably as good as ours}) joined to that habit of subordination which they acquire from a life of servitude, will make them sooner become soldiers than our white inhabitants.”\textsuperscript{36} After the Revolution, both Hamilton and Jay helped found the New York City Manumission Society.

Environmentalist theories appealed to opponents of slavery. When evidence of Negro equality was lacking, they often set out to produce some, and with marked success. Benezet, for example, opened a school, and found Negroes educable. Other activists had similar results. When talented individuals were found—the poets Phillis Wheatley and Ignatius Sancho, for example, and the scientist Benjamin Banneker—their accomplishments were seized upon as evidence of equal abilities.

The order in which these intellectual steps were taken is important. Observers did not conclude from evidence of Negro intelligence, virtue, or any other capacity that slavery violated their natural rights. Instead, they started from natural rights premises and then went looking for evidence of equality. By the century’s end, there was enough evidence to provide a basis for challenging the prevailing beliefs about Negro inferiority.\textsuperscript{37}

But for many people the dilemma was not so simply solved. This number included Thomas Jefferson himself. He was America’s leading natural rights philosopher, and he opposed slavery. The deleted passage from the Declaration is proof of that. For Jefferson, human rights derived from a person’s nature as a biological being, and persons included blacks. But he did own slaves throughout his adult life, and he was convinced of the Negro’s innate inferiority.

Why he was, and remained, so convinced is a mystery. The environmentalist position was available to him, since many of his contempo-

\textsuperscript{35}Levi Hart, “Thoughts on Abolition” (1775); Anthony Benezet, \textit{An Account of Guinea} (1771); both in Bruns, ed., \textit{Am I Not a Man}. See Jordan, \textit{White over Black}, p. 282; Davis, \textit{Problem of Slavery}, chap. 15.

\textsuperscript{36}Hamilton to Jay, March 14, 1779, in Bruns, \textit{Am I Not a Man}, p. 449. Emphasis supplied.

\textsuperscript{37}See Jordan, \textit{White over Black}, chaps. 6 and 7; Davis, \textit{Problem of Slavery}, chap. 15.
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aries took it. He himself explained differences between whites and American Indians in environmentalist terms. And during his lifetime, some of his conclusions were disproved. But Jefferson's belief in Negro inferiority survived, inconsistent as it was with his philosophy. All his life he held two conflicting ideas in his mind, and through his writings he made it easy for his compatriots to do the same.

Notes on Virginia, written in the early 1780s, was widely read in Jefferson's lifetime. It contains the fullest expression of his racial views. Even outside of slavery, he insisted, the black race was deficient.

Comparing them by their faculties of memory, reason, and imagination, it appears to me, that in memory they are equal to the whites; in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and that in imagination they are dull, tasteless, and anomalous.... It will be right to make great allowances for the differences of condition, of education, of conversation, of the sphere in which they move. Many millions of them have been brought to, and born in America. Most of them indeed have been confined to tillage, to their own society; yet many have been so situated, they might have availed themselves of the conversation of their masters; many have been brought up to the handicraft arts, and from that circumstance have always been associated with the whites. Some have been liberally educated.... But never yet could I find that a black had uttered a thought above the level of plain narration; never saw even an elementary trait of painting or sculpture.

... I advance it, therefore, as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind.

Considering that slaves were often forbidden by law to learn to read and write, this judgment seems both harsh and premature. Furthermore, by 1780 a handful of free Negroes, such as the poets Wheatley and Sancho, had shown some degree of the abilities that Jefferson denied they possessed. He dismissed them peremptorily. It is possible to sympathize with Jefferson a bit. Neither was a great poet, but their work was at least equal to that of some of their white contemporaries.

The quoted passages give the impression that Jefferson wanted to believe in Negro inferiority. His "suspicion" never changed much, although arguments for and evidence of Negro equality proliferated in the years between the Notes and his death. His correspondence with Benjamin Banneker is revealing, as it may have been to their contemporaries, for it was soon published in pamphlet form. Banneker, an

38 Notes on Virginia, Query VI; Koch and Peden, eds., Life and Selected Writings, pp. 210-13.
39 Notes on Virginia, Query XIV; Life and Selected Writings, pp. 257-58, 262.
astronomer and surveyor who had demonstrated his understanding of Euclid, had sent Jefferson, then secretary of state, a copy of his almanac. Thanking him, Jefferson wrote, "No body wished more than I do to see such proofs as you exhibit, that nature has given to our black brethren, talent equal to those of the other colors of men, and that the appearance of a want of them is owing merely to the degraded condition of their existence." But this statement implies that he needed more proof before changing his views. Jefferson could not reach a resolution of this issue.

Two modern scholars interpret him in sharply different ways. Winthrop Jordan has written that Jefferson could not rid himself of the suspicion that the Negro was naturally inferior. If this were indeed the case, it was axiomatic that the Creator had so created the Negro and no amount of education or freedom or any other tinkering could undo the facts of nature. Thus Jefferson suspected that the Creator might have created men unequal, and he could not say this without giving his assertion exactly the same logical force as his famous statement to the contrary. His science-theology rammed squarely into his larger faith, and the result was intellectual wreckage.

Wreckage, maybe, but some wreckage—and well worth a closer examination. Even when a person's thoughts are self-contradictory, the particular contradictions they contain may be of interest. Jefferson's belief in equality did not prevent him from holding contrary beliefs about Negroes. Even though there were good reasons for abandoning these beliefs, he never did so. His belief in equality did, however, prevent him from supporting slavery.

Jefferson's philosophy did not dictate conclusions about the actual abilities of human beings, but it did dictate conclusions about their legal status. Emancipation and separation would be preferable to full citizenship in the new country, but at any rate, men created equal must be free. For the first time, entitlement did not depend on a notion of capacity and similarity.

But maybe it was not wreckage at all. Garry Wills finds no contradiction. His analysis of the Notes begins not at the passage just cited, but a few pages later:

Whether further observation will or will not verify the conjecture that nature has been less bountiful to them in the endowments of the head, I

40 Jefferson to Banneker, August 30, 1791, in Life and Selected Writings, p. 508.
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believe that, in those of the heart, she will be found to have done them justice. That disposition to theft with which they have been branded, must be ascribed to their situation, and not to any depravity of the moral sense. The man in whose favor no laws of property exist, probably feels himself less bound to respect those made in favor of others ... we find among them numerous instances of the most rigid integrity, and as many as among their better instructed masters, of benevolence, gratitude, and unshaken fidelity.42

Winthrop Jordan agrees that for Jefferson “the ‘moral sense’ was as fully developed in Negroes as in whites.”43 Where he and Wills differ is about the relative weight Jefferson gave to moral and intellectual faculties. Jordan implicitly attributes to Jefferson the notion that intelligence is the preeminent human capacity. Wills insists that Jefferson, like his Scottish intellectual forebears, ranked “moral sense” as “the faculty that gives man his unique dignity, that grounds his rights, that makes him self-governing.”44 Again, if Wills is right, we must revise our thinking about Jefferson. Belief in the intellectual inferiority of blacks would be compatible with the great principles of the Declaration, for intelligence is not the primary human trait.

It cannot be said that Wills, relying heavily as he does on extrapolations from the Scots and on quotations from Jefferson’s personal, and sometimes flirtatious, letters, has proved his case.45 But Jordan does not prove his, either. Trying to resolve this question of interpretation would be less useful than examining the passage just quoted to see what can be learned from it.

The mode of reasoning here is similar to that in the discussion of Negro intelligence. What differs is that suddenly Jefferson has become an environmentalist. Unwilling to discount nature as a cause of intellectual deficiencies, he is ready to discount it in the case of observed moral deficiency, that is, theft. Indeed, Jefferson sweeps away empirical evidence of moral incapacity as vigorously as he sweeps aside similar evidence of intellectual capacity. That, as Jordan points out, appears inconsistent.46 Indeed, whenever I use the Notes in classes in American political theory, some keen-eyed student makes this point, as it was made in classes I attended as a student.

The criticism is less than devastating. There is no reason to assume

43 White over Black, p. 439.
44 Inventing America, p. 227.
46 White over Black, p. 439.
that intelligence and morality are the same kinds of capacities; one may be subject to environmental influences and the other not. But the criticism is not answered simply by the assertion that Jefferson thought virtue more important than brains. No conclusion follows from that rank ordering about the effect of personal situations. The most striking contradiction is the different treatment Jefferson gives to evidence of intelligence and evidence of virtue. Just as he seems to want to believe that Negroes are less intelligent than whites, he seems to want to believe that they are as moral. In each case, he discounts conflicting evidence.

If equality in moral sense was what mattered to Jefferson, why did he need to believe that Negroes possessed it? Like opponents of slavery who searched for evidence of Negro intelligence, Jefferson searched, although not so hard, for evidence of virtue. His assumptions seemed to dictate his findings, not his findings his conclusions. He could not show—any more than Hume or Hutcheson could—that such equality existed. He assumed it existed. Whether Jefferson's belief in equality came from his concept of moral sense or his ideas about divine intention, the crux of the Declaration, for our purposes, is, first, that the belief is derived from a preconceived assumption, and second, that this equality entails individual rights that preclude slavery. If Jordan is right and Jefferson has contradicted himself, his belief in an equality of entitlement was so strong that it was independent of his beliefs about abilities. If Wills is right and Jefferson was consistent, his belief in equal virtue was so strong that it led him to discount evidence to the contrary. The two scholars cannot both be right, but here it may not matter who is right.

The Constitution of 1787

If the new nation had indeed taken action to end slavery, a logical place to start would have been the constitutional convention in Philadelphia in 1787. The issue was raised, but just barely. We have no evidence that delegates discussed the merits of slavery until three months into the meetings. In August, as they considered a preliminary draft constitution, two delegates did attack slavery, although their optimism about the possibility of success is open to question.

Gouverneur Morris of Pennsylvania objected to the inclusion of slave populations in apportioning seats in the House of Representatives among the states. He had made this objection before, but now he made a speech. As James Madison records it. "He never would concur
in upholding slavery. It was a nefarious institution—It was the curse of heaven on the states where it prevailed. . . . Upon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them citizens and let them vote. Are they property? Why then is no other property included?” 47 His motion to delete the clause failed, with no real debate.

Two weeks later, Luther Martin of Maryland provoked a little more reaction by recommending the prohibition of further importation, calling slavery “inconsistent with the principles of the Revolution and dishonorable to the American character.” 48 The nature of the ensuing discussion is striking. One anthologist called it “the most strident debate of the Convention,” but Madison’s notes give no impression of stridency. 49

Only George Mason, from Virginia of all places, agreed with Martin. His opponents did not engage him on the merits of the issue and try to resolve the inconsistency for him. In one way or another, some dismissed moral questions as inapaptate. John Rutledge of South Carolina declared, “Religion and humanity had nothing to do with the question. Interest alone is the governing principle with Nations—The true question at present is whether the Southern states shall or shall not be parties to the Union. If the Northern states consult their interest, they will not oppose the increase of slaves which will increase the commodities of which they will become the carriers.” 50

Oliver Ellsworth of Connecticut did not find moral principles irrelevant for government in general, only for a national government in this particular. “The morality or wisdom of slavery are considerations belonging to the States themselves.” The convention then voted to permit “the Migration or Importation of such persons as any of the States now existing shall think proper to admit,” though in the final draft this license was extended only to 1808. In addition to this and the three-fifths clause, the Constitution contained a provision that “any person bound to Service or Labor” who fled across state lines should be returned to the master. 51 It passed without recorded debate.

This record leaves the impression of a collective wish to drop the slavery issue as quickly as possible. It was that volatile. Whether or not the differences between North and South were reconcilable at that

48Ibid., 2:364-65 (August 21).
49Bruns, ed., Am I Not a Man, p. 522.
51Ibid., pp. 364, 371, 577; see also remarks of Baldwin of Georgia and Gerry of Massachusetts, pp. 370-72.
Equality under the Constitution

point, no one wanted to risk a try. The chance for abolition, if one had ever existed, was lost. The record shows, too, how easy it was becoming to disattend to the issue by defusing the responsibility for slavery. Jefferson had tried to blame the king, and been edited. Now Ellsworth insisted that the issue was for the states to decide. Morris’ and Martin’s angry no was met not with a deeply felt yes, but with “It’s always been this way,” “Government is not based on morality,” and “It’s up to the states to decide.” But chiefly with silence.

So by 1787 slavery had provoked intense opposition and tacit support. But in order to survive, entrenched institutions do not need defenders who match their opponents in intensity. So slavery endured, but the questions were not put to rest. In the next seventy years, the abolitionist movement—the nation’s first great civil rights struggle—would return again and again to the principles of the Declaration. In this conflict, a proslavery reaction developed, and the issue was joined more clearly. The courts, after preliminary skirmishes, took the proslavery side. Ultimately the theory of natural rights and the institution of slavery could not coexist. After a great civil war, the victors wrote their theory into the Constitution. The history and context of that great change are the subjects of the next chapter.