From Equality and the Rule of Law to the Collapse of Egalitarianism

JAMES R. HARRIGAN AND RYAN M. YONK

In considerations of the American regime, the language of egalitarianism is never far from the surface. The reason for this is clear enough: the United States is the only nation the world has ever known to be founded on the principle of human equality. Thomas Jefferson's language in the Declaration of Independence, although familiar, bears revisiting. Echoing or even channeling John Locke, he wrote:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

James R. Harrigan is senior fellow of the Institute of Political Economy at Utah State University and senior research fellow at Strata Policy in Logan, Utah. **Ryan M. Yonk** is assistant research professor in the Department of Economics and Finance at Utah State University, one of the founders of Strata Policy, and a research fellow with the Independent Institute.

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Not only has this assertion become American dogma or even, in the words of Pauline Maier (1997), "American scripture," it has resonated internationally as well, serving as the explicit or implicit framework for every revolution that has been undertaken from 1776 to the present. From the antislavery, women's rights, and civil rights movements in the United States to the Israeli Declaration of Independence (which in an early draft began with the words "When in the course of human events" [Rozin 2009; Shachar 2009]) to Ho Chi Minh's assertion of Vietnamese independence in 1945 (which he began with the sentences "All men are created equal. They are endowed by their Creator with certain inalienable rights, among these are Life, Liberty and the pursuit of Happiness" [Ho 1945]) the logic of the Declaration has been profoundly influential both at home and abroad (Rudoren 2016).

But although the first two paragraphs of the Declaration have undoubtedly been the most influential portion of the document, both in the United States over time and throughout the world, the strength of this influence obscures the comparatively longer portion of the document, the list of offenses committed by King George III against the American people. This middle section comprises roughly two-thirds of the total document and in some respects is a great deal more important than the theoretical underpinnings that begin the document in so high-minded a fashion.

In this section, Jefferson presents twenty-seven grievances against George III on the part of the colonies. These grievances range from the king's exercise of tyrannical authority to Parliament's inappropriate and unchecked meddling in colonial affairs to specific actions undertaken that the colonists felt amounted to acts of war. The list represents the sum total of colonial unhappiness in 1776 and includes grievances that had been festering in most cases for a number of years, dating to at least as early as the Sugar Act of 1764 and the Stamp Act of 1765. None of them, in the minds of the colonists, represented "light and transient causes," as Jefferson put it. Rather, they represented "a long train of abuses and usurpations, pursuing invariably . . . a design to reduce [the people] under absolute Despotism." Indeed, all twenty-seven grievances can be summed up as violations of the rule of law itself.

Further, the second part of the Declaration provides a clear illustration not only that the law must apply to all but also that some laws are so offensive to the notion of equality that they represent an appropriate justification to break the ties that bind politically and to do so with violence.

Although the principle of human equality undoubtedly animated the revolution, it was combined with an appreciation for the rule of law, a combination that drove the conversation both before and after independence had been won. On the eve of the revolution, Thomas Paine made the case most clearly in his widely read pamphlet *Common Sense,* which was perhaps the single greatest summation of the American mind as the colonists moved toward revolution. He wrote:

> But where, say some, is the King of America? I'll tell you, friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Great

> Britain. Yet that we may not appear to be defective even in earthly honours, let a day be solemnly set apart for proclaiming the Charter; let it be brought forth placed on the Divine Law, the Word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other. (1776)

The law is king in America, and indeed it is and must be so in any free country. And in the years that followed America's revolutionary period, a distinct and protracted effort was made to operationalize this concept. The principle of equality stood directly behind every attempt to bolster the rule of law at the expense of the rule of men.

John Adams was the first in the American colonies to refer to a government of laws when he described republics as "a government of laws, and not of men," in his seventh *Novangelus* letter of February 6, 1775 (Adams 1775), and he brought this thought to bear as primary author of the Massachusetts Constitution in 1780, which began with a bill of rights. In that bill of rights, Adams borrowed liberally from Jefferson's language in the Declaration, writing: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

But in the preamble to the Massachusetts Constitution, Adams linked the rights that flow from human equality to the very purpose of government. Echoing Jefferson here, too, he coupled the role of government as protector of the people's safety and happiness, adding prosperity for good measure. But he also stressed the need for equity in the law-making process and for everyone to find security in the laws at all times. In short, he necessarily married egalitarianism to the rule of law.

> The end of the institution, maintenance and administration of government, is to secure the existence of the body-politic; to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquillity [*sic*], their natural rights, and the blessings of life: And whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.
>
> The body-politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of

> them; that every man may, at all times, find his security in them. (Massachusetts Constitution 1780)

The U.S. Constitution, drafted some seven years later in Philadelphia in the summer of 1787, was similarly informed by the principles of human equality and the rule of law, although neither appears explicitly in the document. The logic of the Declaration of Independence was simply assumed, and the rule of law was the very project of the Constitution itself. Everything the delegates to the federal Constitutional Convention did was in pursuance of the rule of law for the young nation, and this goal could be undertaken only in a condition defined by general human equality.

What emerged from their efforts was an institutional government that was designed, following Jefferson, to effect the safety and happiness of the people. The negative-rights regime that emerged was perfectly consonant theoretically with the equality espoused in the Declaration, even if that stated egalitarian bedrock was, for many, more aspiration than reality. A condition of general equality could be fostered and ensured only by the rule of law, not by men. And the rule of law required that certain things be removed from the purview of government in the form of entrenched negative rights. And virtually every right asserted by the Founding generation was distinctly negative in nature.

The Bill of Rights illustrates this well enough with its opening phrase: "Congress shall make no law" (amend. I). There are, quite simply, any number of things that government cannot legitimately do. As such, the line from equality to rights to the rule of law to institutional government results necessarily in a relatively small government. That is not to say it results in a weak government, which had been the problem under the previous Articles of Confederation. Indeed, according to Alexander Hamilton in *Federalist No. 23*, a government "at least equally energetic with the one proposed" was necessary ([1787] 2001, 112). The inherent friction between a limited government that could secure negative rights and an energetic or powerful government that could in both theory and fact do a great deal more would come to define the long-term expansion of positive rights in the United States. Just as a regime typified by negative rights leads necessarily to a small government that is by definition and nature limited, a regime typified or even featuring positive rights necessarily tends to the opposite.

This dual understanding of the rule of law and of the fundamental equality that proceeds and therefore governs citizens' relationships to that law represents American scripture at its most pure. It is in their union that the American Idea is given its fullest and most eloquent expression, and their union has important practical implications for public policy. Equality that precedes law necessitates an understanding that the law must apply to all equally, and if all are equal before that law, they must also be equal in their liberty. Liberty thus understood necessitates a regime that is comfortable with and even features unequal outcomes. But once the United States dedicated itself to the pursuance of positive liberty in the name of compressing the range of outcomes

experienced in the nation, different rules and a large, powerful government were the inevitable results. In pursuance of these goals, the government grew and became a threat to the liberty that egalitarianism made possible in the first instance.

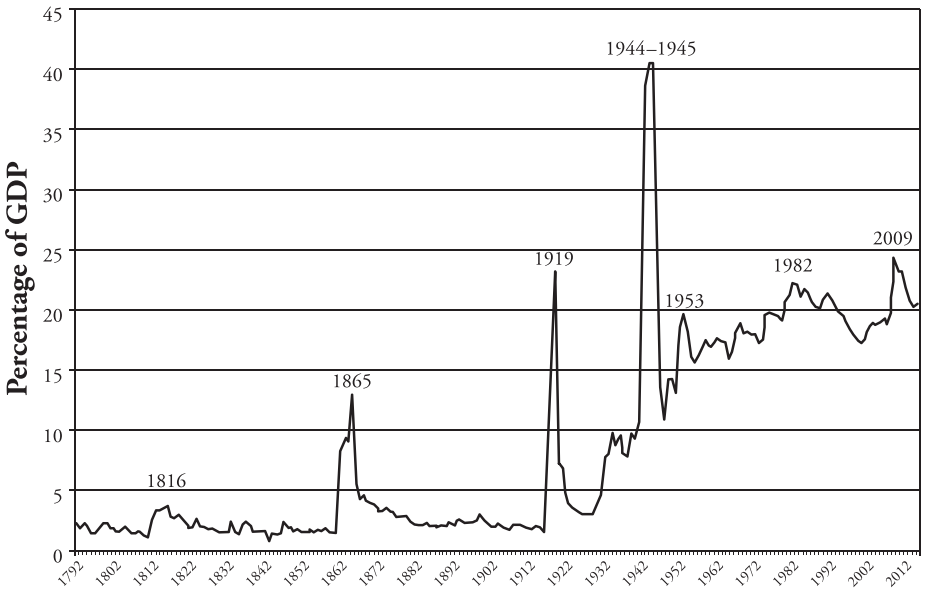
The growth of the federal government over time has been unmistakable. At the time of the first census in 1790, there were 1,000 federal employees. By 1962, the first year data were systematically collected, the number had grown to 2,515,000. By 2014, the last year for which data are available, there were 2,726,000 (Office of Personnel Management n.d.). This growth is similarly reflected in the amount of regulation imposed on the American people. The first issue of the *Federal Register*, which contained 16 pages of official rules, was released in March 1936. By 2015, it had more than 80,000 pages. These are imperfect proxies, though, given the paucity of data in the early years of the republic regarding federal employees and the fact that the *Federal Register* was not even published for the first time until 146 years after the first census. A far better metric is federal spending relative to gross domestic product (GDP).

During the period from the Founding to the Civil War, spending relative to GDP was between 1 and 3 percent every year. From 1870 until World War I, spending relative to GDP again hovered largely between 1 and 3 percent. But from World War I on, a new pattern emerged, and we have lived in this new pattern ever since. A new plateau is evident after the Great War, and this level of government spending relative to GDP was roughly twice as high as it had previously been. The two world wars certainly obscure the trend, but beginning about 1930 a distinct upward trend of government spending is clearly evident. It was at this time that Americans' understanding of the proper role, size, and scope of government underwent a sea change that clearly found its intellectual roots in the Progressive Era, beginning at least as early as the publication of *The Promise of American Life* by Herbert Croly in 1909, but found its political purchase once the dust from the war had settled.

From that point forward, Americans came to understand the role of government not in terms of negative liberty, which had to that point yielded a government that rarely spent anything approaching 5 percent of GDP, to one that they conceived in terms of positive liberty. This new, more comprehensive kind of liberty would shake the very foundations of Jeffersonian equality, a vision of equality of opportunity, replacing it with one defined more in terms of equality of outcome than had been previously contemplated. And all of this would play out in the realm of public policy. The data tell a very clear story (see figure 1).

From the close of World War I on, the energy idealized by Hamilton overtook the egalitarianism espoused by Jefferson as a regime feature. And although the law from that point forward was still king in the United States, any pretense toward strict, fundamental equality was missing. Indeed, from the dawn of the Progressive Era, the government became deeply involved in deciding the question of who would have to forfeit some of their negative rights in the form of taxes on their property so that others might enjoy a new set of positive rights in the form of all manner of social welfare programs.

Figure 1
U.S. Federal Government Spending as a Percentage of GDP, 1792–2015



Source: Data taken from U.S. Bureau of the Census 1949; "Historical Debt Outstanding—Annual" 2015; U.S. Office of Management and Budget 2016; Johnston and Williamson 2017.

The language of this shift was firmly in place by 1944, when on January 11 President Franklin D. Roosevelt offered a "Second Bill of Rights" in his State of the Union Address. The implication was clear: the negative rights enshrined in the Bill of Rights were no longer sufficient. Roosevelt announced "new" rights, including the right to a job; "decent" housing, food, clothing, and leisure; medical care; social security; and unemployment insurance. He even claimed the right of farmers to sell their products, which would give them "a decent living." Roosevelt did not indicate where the corresponding responsibilities to provide for these rights would come to rest, but the conclusion was unavoidable: some of the American people would be expected to provide for others.

What began as a demand for equality before the law rooted in individual natural rights gave way to a public-policy approach that focused instead on achieving particular outcomes for ever larger groups over time. Simply put, the goal was no longer to render all equal before the law; rather, it was to render social outcomes more equal over time or to work from egalitarian principles to what might be termed "equalitarian" principles. Roosevelt's positive-rights revolution was at hand, and it came at the expense of America's foundational negative rights.

Although Social Security, Medicare, Medicaid, and even the recent Affordable Care Act of 2010 receive the lion's share of the redistributionist consideration, with

good reason, virtually any piece of legislation with a financial component illustrates the point. Each of the various and sundry agricultural subsidies in the United States, for example, is an attempt to guarantee some form of outcome equality. The current Agriculture Risk Coverage (ARC) program does so in the form of providing guaranteed base incomes to farmers.

The ARC program exists ostensibly to protect farmers from crop-price volatility by guaranteeing at least some revenue. Individual farms can elect to participate in ARC-County or ARC-Individual, which differ only in how payments are calculated. Under ARC-County, the program creates a "benchmark revenue" using five-year Olympic averages for a county's yield and marketing-year average price for a given crop. ARC-County guarantees 86 percent of that benchmark revenue to farmers who elect to participate in the program (as opposed to other, mutually exclusive programs). When actual county yield dips below that 86 percent, government payments make up the difference. ARC-Individual is essentially the same program but uses the individual farm's averages and actual yield rather than the county's. Both programs have payment rates capped at 10 percent of benchmark revenue (U.S. Department of Agriculture n.d.).

Although perhaps better than previous forms of farm subsidies, the ARC program includes important and damaging disincentives to good farm management. By guaranteeing subsidy payments for commodities based on historical yields and prices, government provides farmers protection against potential demand or yield reductions. And although the design of the policy (by setting the guarantee at only 86 percent of the benchmark, for example) is clearly intended to discourage negative behavior on the part of farmers, reducing incentives for any activity, in this case productivity, necessarily precipitates a reduction in that activity.

The ARC program is emblematic of modern American legislation. It may be a godsend to frugal but unlucky farmers, but its benefits also accrue to farmers in many cases precisely because those farmers made poor decisions. It does so at the literal expense of all American taxpayers in the name of an enhanced form of equality that goes well beyond the nation's founding and animating principle. The ARC is hardly unique in this respect. The United States as a nation has been walking this new road for so long that it is no longer all that new. And the American people have clearly come to expect it.

The genie will likely never fit back into the bottle. The impulse away from equality under the law toward a regime that aspires to something approaching equality of outcome, even if it achieves something only more akin to a mandatory minimum standard in all that it touches, is one that by definition appeals to a majoritarian impulse. Indeed, the only limitation on such regimes is the outer limit of how deeply the government can tax the people in the name of such programs. Here, a pragmatic concern ultimately trumps a theoretical one. As the sustained growth of expenditures relative to GDP illustrates, though, the United States has likely not approached that outer limit to this point.

Policy makers, of course, are largely unconcerned with recapturing the original conception of equality. There is no profit to them in telling the American public what

they cannot have. Redistributive policies are in the end extremely well supported, and policy makers roll them back at their own electoral peril. The ARC is clearly an example of concentrated benefits and dispersed costs, but larger and costlier programs are just as well ensconced, enjoying broad appeal precisely because of their expected broad payouts. Social Security did not become "the third rail of American politics" by accident. Medicare and the Affordable Care Act are no different. Whether these programs benefit a thin slice or a broad swath of the American electorate, their continued existence seems assured no matter how deeply that continued existence undermines the founding principle of human equality or the subsequent principle of equality under the law.

Although the outer limits of what the American taxpayer will accept are yet unknown, the massive costs of these sorts of programs are well established. The ongoing problem with budget deficits in the United States and the concern about the $20 trillion debt that has resulted indicate at the very least that the nation is uncomfortable with the costs of such things. But this concern is a matter of degree. The American people are simply not uncomfortable with the idea of equalitarian policy making and have not been for nearly a century. This discomfort is not brought about by a disagreement of kind.

The ongoing question of these policies does not concern their conformity with the principle of equality but rather their sustainability. The federal debt is $20 trillion, but when unfunded liabilities are factored in, there is really a $120 to $200 trillion shortfall. Unfunded liabilities are simply financial promises the government has made to people in the future, the majority of which comprise future Social Security, Medicare, Medicaid, and veterans' benefits. Although estimating unfunded liabilities is difficult, requiring the estimation of future interest, inflation, population growth, and mortality rates, even the lowest estimates exceed the annual economic output of the entire planet. Sustainability is undoubtedly in question moving forward even if equality under the law is not.

The move away from egalitarianism has yielded a situation with no logical, theoretical limit. As laudable or desirable as equality in the form of social outcomes might have been or indeed might be, the difficulties that have emerged are simply undeniable. As the government has grown in both size and scope, and as the nation's financial situation has become more dire, it has become clear that the present growth trajectory cannot continue indefinitely. How far it can continue and what will ultimately stall its growth are still open questions.

Once the outer limit has been reached, though, some rational, political limit on the amount of redistribution will of necessity have to be implemented. America's political development has seen expenditures relative to GDP expand from well less than 5 percent throughout much of the nation's history to more than 20 percent presently. Throughout most of this period of growth, the United States has accrued an ever-increasing debt. Sooner or later a line will have to be drawn. And when that line is drawn, it will call an end, of sorts, to the equalitarian experiment. The problem is ultimately that there is simply no obvious principled limit, even if there might be a technical one. The American people might not be able to afford a certain percentage of

GDP dedicated to these types of expenditures, but that is not to say there is a reason they should not be expected to forfeit their negative rights in the bargain. This question becomes simply a technical matter to be adjusted by policy experts over time, as so many political questions did beginning in the Progressive Era.

In the final analysis, a regime cannot be based on notions of both positive and negative liberty because the former undermines the latter in every instance. That said, there is no escaping politically some amount of redistribution in the name of the common good. The real question is how much of this redistribution a nation based on simple human equality can withstand. All evidence points to the fact that we are nearing that limit at present, and when unfunded liabilities are considered, we might have reached that limit some time ago.

The language of equality is never far below the surface in American political thought, but the nature of that equality undergoes consistent reinterpretation with each succeeding generation. Our present understanding, couched in the language of the Founders but derived more clearly from the Progressives, suffers from a lack of commitment on the one hand and a lack of resources on the other. We have come to the point where the problems of our current understanding of equality can be addressed only by using our former understanding of equality.

Theoretically, this outcome would be the best possible one. But it will not come to pass for such high-minded reasons. Like the melding of positive and negative liberty into an incoherent amalgamation of political thought, it will come to pass as a result of political expedience and necessity. As such, the human equality put forth as a self-evident truth by Thomas Jefferson and the rule of law rather than of men that necessarily followed will not be rescued. They will simply be resuscitated to some degree.

What will emerge will be some form of limitation on government, even if that limitation is not defined ultimately by clear formulations of human equality. As such, a government of laws in the purest sense is likely out of reach. What might well be possible, though, is a government that lives within certain prescribed limits, even if those limits are born of pragmatism rather than of principle. Compared to what we have had for nearly one hundred years and to what we are likely to have for the foreseeable future, this outcome might be the best possible one.

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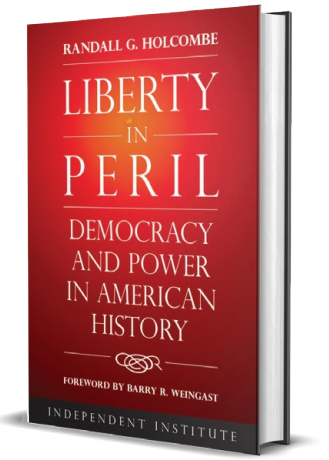

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