

# Constitutional Values and Socioeconomic Justice – Evaluating Corporate Law

By P. M. Vasudev\*

*In recent decades, US economic growth has not ensured shared prosperity. While overall progress has been significant, many families and communities remain excluded, facing insecurity and disaffection. This disconnect challenges the belief that the economy serves all citizens. The nation's founding documents—the Declaration of Independence (1776) and the Constitution—articulated enduring values: liberty, equality, and the promotion of citizens' economic wellbeing. These universal democratic values should guide lawmaking, serving both as standards for developing laws and as metrics for assessing their legitimacy. This essay advances a theory of constitutional values for democratic societies, applying it to corporate law. Drawing on US history, it highlights the deficiencies of corporate law and their consequences for socioeconomic justice.*

**Keywords:** *Constitutional values; Socioeconomic justice; Corporate law; Democracy; General welfare*

## Introduction and Context

National constitutions embody important values – liberty and the democratic/egalitarian principle (United States), solidarity (Italy)<sup>1</sup> and social, political and economic justice (India).<sup>2</sup> The values reflect the history of the respective societies and contemporary notions. In democratic societies, value systems must, normatively, animate governance and the institutional structures constitutions engineer – namely, federal and provincial governments, their respective functions and judicial remedies for citizens.

Constitutions represent value systems.<sup>3</sup> This essay adopts the United States as the model to identify its value system and explore how it shaped the Constitution as well as the developments since then – from the establishment of the First Bank of the United States (1791) to facilitate economic betterment, prohibition on slave import (1808), the New Deal reforms in the 1930s, all the way to the Affordable Healthcare Act.<sup>4</sup> Collective action to promote general welfare, a feature even before the American Revolution, strengthened after the Revolution.

The inequality debate and related political trends stress the need to articulate and emphasize the socioeconomic values informing constitutional democracies. A

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\*Ph.D., Associate Professor, Common Law section, Faculty of Law, University of Ottawa, Ottawa, Canada. Email: p.m.vasudev@uottawa.ca

<sup>1</sup>See generally Golia (2022).

<sup>2</sup>Constitution of India, Preamble.

<sup>3</sup>See Thelen (1988); Liu, Karlan & Schroeder (2010); Reed Amar (2012).

<sup>4</sup>See generally Farnam (1938).

common tendency is to equate democracy with elections.<sup>5</sup> Normatively, a democratic society ought to be more than elections, voting and majorities. If the democratic principle be accepted as the defining societal attribute, the need is to move beyond the formalism of democratic procedures, such as elections.

Comprehensive in both conception and scope, the democratic principle constitutes not merely a political system but a mode of thought and way of life—an aspirational ideal articulated by Walt Whitman (1871). A genuinely democratic society enables individuals to realise their fullest potential while simultaneously participating as members of a community oriented toward harmony. At its core, this principle reflects the ongoing effort to balance individual autonomy with collective responsibility.

The inequality debate occurs in a setting where business corporations are dominant actors. Macroeconomic growth has boosted corporate profits in the recent decades,<sup>6</sup> while outcomes have been subpar for workers and families.<sup>7</sup> The trends can be traced, at least partly, to features in corporate law – top-down organizational structure, shareholder primacy and agency notions. They shape the reality of spiralling corporate profits and executive pay alongside stagnant incomes for working people.<sup>8</sup> The hierarchical structure of corporate law can explain economic inequality that, in turn, breeds among citizens a sense of disempowerment and helplessness.<sup>9</sup>

With the socioeconomic outcomes as the backdrop, corporate law must be evaluated against the constitutional values. The evaluation of corporate law in the concluding part of the essay stresses the need to better align the law, its philosophy and methods with core constitutional values – namely, citizens’ liberty, economic wellbeing and the egalitarian/democratic principle.

## US as the Constitutional Democratic Model

### a. Why US?

Several factors commend the US as the model candidate for the theory of constitutional values.

- A pioneer among national constitutions, the American constitution represents a systematic effort to organize consensual governance with a clearly defined power structure informed by a set of values. Adoption of the constitution marked “a greater tendency to impose certain distinct ideals upon the social structure.”<sup>10</sup>
- The US constitution marked a conscious effort to strike a new path in human development, breaking from the hierarchical/feudal mould inherited from Britain. The constitutional ban on grant of titles of nobility is demonstrative

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<sup>5</sup>Dworkin (1990).

<sup>6</sup>McKinsey (2015).

<sup>7</sup>OECD (2019).

<sup>8</sup>Oxfam (2024).

<sup>9</sup>Advancing a *People-First* Economy (2023).

<sup>10</sup>Farnam (1938) at 7.

(Article 1, Section 9). Greendorfer pointed out it is “[f]ar from being simply a discrete prohibition on government bestowed noble titles”<sup>11</sup>. Robust in conception, the prohibition of titles of nobility affirms and reinforces the foundational principles of equality and democracy. It represents a “structural impediment against the creation of a political aristocracy, a guarantee that there would be no privileged class in the United States”<sup>12</sup>.

- Aspirations to be a global model have been a constant feature in American leadership. Thomas Jefferson wrote, “May it be to the world, what I believe it will be, (to some parts sooner, to others later, but finally to all,) the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government.”<sup>13</sup> Commending the Declaration of Independence (1776), Abraham Lincoln stated in 1860, the Declaration “gave liberty not alone to the people of this country, but hope to all the world, for all future time.”<sup>14</sup>
- Grant of incorporation in the US has historically been guided by public interest considerations<sup>15</sup>. This feature is especially relevant for the effort to evaluate corporate law and its legitimacy from the standpoint of constitutional economic values.

The US constitution represented a sound beginning in setting human progress in a new trajectory. Its architects made no claim to perfection. Keller observed:

“There is still debate as to just what the founders thought they were doing. Perhaps the most persuasive view is that above all they were men of affairs drawing up a no-nonsense document embodying compromises on major public policy issues. Certainly most of their time was given over not to resounding generalities *a la Francaise* but to often rather cynical compromises of conflicts of over slavery and representation, large and small states, commerce and taxation. The general form of the new government – in many respects resting on colonial and even Tudor precedents – was less important to them.”<sup>16</sup>

Smith noted that the founding fathers “were practical men performing the concrete task of establishing a functioning government.”<sup>17</sup> The effort was to preserve the democratic structure of the polity in the face of challenges and compromises. The compromises, outlined below, underscore contemporary notions – for example, racial inequality – and the practical challenges that had to be overcome in adopting the Constitution -

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<sup>11</sup>Greenford (2015) at 41.

<sup>12</sup>Ibid.

<sup>13</sup>Jefferson (1826).

<sup>14</sup>Cited in Willis (1978), Prologue xix.

<sup>15</sup>Davis (1917).

<sup>16</sup>Keller (1988) at 17.

<sup>17</sup>Smith (2001).

- Decision to omit the contentious suffrage issue.<sup>18</sup> However, the subject finally entered in the Constitution in less than a hundred years. The Fifteenth Amendment (1870) aimed to guarantee pan-racial voting rights.
- Unease with slavery and acrimonious debate on the subject culminating in deferment of Congressional jurisdiction over slave trade to 1808, 20 years after the adoption of the Constitution (Article I, section 9).
- Including a lower ratio for enslaved people (three fifth) in determining the number of representatives for each state in the federal legislature (Article I, section 2). The inclusion and the ratio were concessions to the southern states to grant them higher Congressional representation by adding the enslaved population. Without this concession, Alexander Hamilton noted, “no Union could possibly have been formed.”<sup>19</sup>

Additionally, there was the ongoing, sordid saga of colonization. United States as the constitutional model is, therefore, not an unqualified embrace of American exceptionalism. By current standards, the founding fathers’ attitude towards slavery is considered ambivalent. Another complaint is about restrictive notions of equality (patriarchy and limiting suffrage to property owning white men).<sup>20</sup> Warts and all, US offers a working model with a sound starting point for the democratic journey.

The theory of constitutional values and the economic interpretation this essay presents are informed by the notion of time as a continuum and developments as evolutionary. It adopts the “constitutional framework” that begins with colonial America, moving on to the Revolutionary War (1776-1783), to the Civil War (1861-65), the Civil Rights Movement (1960s), all the way to the present. The constitutional framework, explained below, underpins the theory of values. This dynamic approach frames the constitutional values theory and represents its distinguishing feature. In this method, the Constitution is neither a starting point nor a culmination, but a major milestone in a progressive journey.

In contrast, earlier economic studies mostly treated the US Constitution as a discrete document. Solely examining the Constitution adopted in 1787 and the surrounding circumstances, Beard concluded the Constitution “was an economic document drawn with superb skill by men whose property interests were immediately at stake.”<sup>21</sup> Beard even neglected the Declaration of Independence (1776). Refuting Beard’s portrayal of the US Constitution, McDonald argued it is the “work of principled and prudential men.”<sup>22</sup> McDonald delved into pre-Revolutionary history, but with the limited objective of questioning Beard’s characterization of the Constitution as an interest-group project.

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<sup>18</sup>Liu, Karlan & Schroeder (2010)

<sup>19</sup>Farnam (1938) at 125.

<sup>20</sup>See Hedges (2018).

<sup>21</sup>Beard (1913) at 188.

<sup>22</sup>McDonald (1958) at Introduction, xx.

## b. Constitutions as Social Compacts

The notion that citizens are the wellspring of governing authority emerged in pre-democratic Europe. Hobbes' *Leviathan* (1651), John Locke's *Two Treatises of Civil Government* (1689) and Jean-Jacques Rousseau's *The Social Contract* (1762) all had citizens at their centre. The horizontal model – citizens coming together and agreeing on governing institutions – represented an ideal.

Hobbes' model, developed in the wake of the English Civil Wars of the 1640s and attendant disorder, posited citizens surrender all rights to the sovereign.<sup>23</sup> Holding absolute powers, the sovereign preserves order and tranquility, to enable peaceful life in conditions that are otherwise impossible.

John Locke's *Two Treatises of Government* targeted two related goals. The first offered a refutation of Filmer (1680) and the imputation of divinity to kings and their powers. Locke's second treatise postulated perfect freedom of action as the "natural state" of humans and political society as a product of human consent.<sup>24</sup> The rationale for humans "in uniting into commonwealths and putting themselves under government is the preservation of property."<sup>25</sup>

Rousseau (1762) introduced the idea of political equality among people and welfare as a public responsibility. This transcended Locke's limited focus on protection of property. Per Rousseau (1762), "the end of political association" is "preservation and prosperity of its members."<sup>26</sup> This placed governance institutions under a duty to promote general welfare.

The US Constitution brought the horizontal citizen-oriented model to fruition. The framing, "we, the people" in the preamble states the principle. It was also the prominent scheme in the constitutions American states adopted during the Revolutionary War (1775-1783). Of the 12 states that adopted constitutions between 1776 and 1780, 8 reflected the social compact theory.<sup>27</sup>

The US, thus, represented the reality of consensual governance engineered by earnest citizens that had staked their lives, or at least liberty and wealth, to get to this point. "We, the people" as the architects of the constitutional structure finds formal validation in the ratification of Declaration of Independence in 1776 and later, the Constitution in 1787, by the elected representatives of the states that formed the union.

## c. The Constitutional Framework – Communitarian/Collective Consciousness

A communitarian spirit informs presenting "We, the people" as the adopters of the constitution. Similar spirit animates the Declaration of Independence, as a statement of citizens in the collective – "we mutually pledge to each other our Lives, our Fortunes and our sacred Honor." The stated purposes to be achieved from the constitution are to "establish Justice, insure domestic Tranquility, provide for the

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<sup>23</sup>Gottlieb (2016).

<sup>24</sup>Locke (1689) at Chapter VIII.

<sup>25</sup>Ibid, at Chapter IX, section 124.

<sup>26</sup>Rousseau (1762) at Book III, Part 9.

<sup>27</sup>Farnam (1938). See also Palmer (1968).

common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity [...].” Each phrase in the stated goals had either specific contextual meaning or set out a vision for the future.<sup>28</sup>

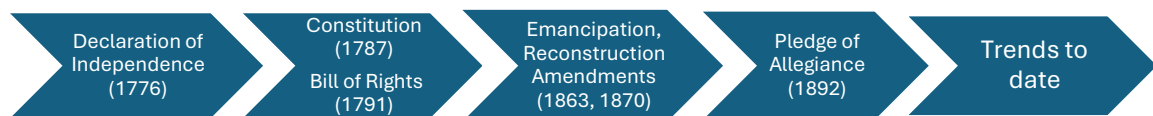
A communitarian ethos informed the American colonies even before the Revolution. Extensive welfare legislation dating back to early 17<sup>th</sup> century demonstrate this fact.<sup>29</sup> The American Revolution reinforced communitarian notions and the collective consciousness.<sup>30</sup> They found formal statement in the social compact in the Declaration of Independence and the Constitution. “We, the People” affirms the origin of the constitutional structure emanate from the people in the collective.

## I. US Constitutional Framework – Elements

The constitutional value system this essay presents is gleaned from the “constitutional framework” that has several parts to it and includes developments over time, shown in the figure below. The constitutional framework represents an integral whole. This method eschews reductionist, formalistic approaches in interpreting facts and drawing conclusions.<sup>31</sup> Continuity of ideas over time underscores the mostly linear evolutionary process as well as the importance of considering the entire constitutional framework, to identify the inherent value system.

The American Revolution (1776-83) represented a watershed for the constitutional discourse, in particular the economic welfare dimension. “The independence of the colonies was brought about by an armed revolution, whose objects were in the main political while its motives were largely economic”<sup>32</sup>. In general, the trajectory since has been towards promoting human equality (abolition of slavery and related) and general welfare (socioeconomic legislation, broadly defined). Alongside, republican and participatory principles strengthened, with the introduction of universal adult suffrage and presidential term limits. It shows the progress has been uniform and in a consistent direction, despite some inevitable contradictions and inconsistencies.

**Figure 1.** *US Constitutional Framework and Its Components*



<sup>28</sup>Welch & Heilpern (2018).

<sup>29</sup>Farnam (1938) at 119.

<sup>30</sup>Wood (1999); Novak (2001).

<sup>31</sup>See, for example, Smith (2001).

<sup>32</sup>Farnam (1938) at 119.

### a. Declaration of Independence

The constitutional value system had its formal origin in the Declaration of Independence adopted in 1776. The Declaration laid the foundations of the constitution. Hailed as the constitution's "soul,"<sup>33</sup> the Declaration famously proclaims human equality and citizens' right to life, liberty and the pursuit of happiness. Declaration of Independence is a "constructive tool for parsing the meaning of the Constitution."<sup>34</sup>

Describing the Declaration as a "political manifesto, comparable to the platform of a political party,"<sup>35</sup> Henry Farnam pointed out it was "the first general statement of the political principles of the United States." This confers the Declaration "a position of recognized authority."<sup>36</sup> Continuing, Farnam noted, "political necessity forced the declaration of a certain theory of government, which in turn implied a certain theory of society."<sup>37</sup> Critiquing the decline of the Declaration in recent decades into a "lustrous artifact of US history," Tsesis<sup>38</sup> stressed its importance as "a statement of a living creed".

### b. The Constitution

Finalized a decade later in 1787, the Constitution sets out the governance structure of the young nation. It lists the branches of government and their functions. Responding to the weaknesses in the earlier Articles of Confederation adopted in 1777, the new version provided for a stronger union of the states and an effective federal government.

A short preamble and conclusion reiterate the value system recorded in the Declaration of Independence. Dismissive attitude towards the preamble fails to consider longstanding trends. Crosskey, for example, argued the preamble is "universally regarded as an empty verbal flourish".<sup>39</sup> The preamble and the conclusion emphasize the continuity that marks (a) welfare traditions dating back to the pre-Revolutionary era, (b) the factors that shaped the Declaration of Independence as well as explicit statements in the Declaration, and (c) the governance framework established under the Constitution with an emphasis on diffused governance, understood as essential for human liberty and restraints on government power.<sup>40</sup>

### c. Bill of Rights

The Bill of Rights, ratified in 1791 shortly after the constitution was adopted in 1787, made the first ten amendments. They responded to "anti-federalists"

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<sup>33</sup>Charles Sumner, Senator and abolitionist, cited in Jager (1969) at 365, fn. 64.

<sup>34</sup>Tsesis (2016) at 370.

<sup>35</sup>Farnam (1938) at 122.

<sup>36</sup>Ibid.

<sup>37</sup>Ibid.

<sup>38</sup>Thesis (2017) at 5.

<sup>39</sup>Crosskey (1953) at 374.

<sup>40</sup>There is a recent revival of interest in the preamble. For a literature review, see Welch & Heilpern (2018).

concerns about a powerful central government.<sup>41</sup> The Bill affirmed specific rights of citizens, including peaceful assembly, freedom of religion and expression. It aimed to limit government and check legislative overreach – ends considered necessary to assure citizens' liberty. The ninth and tenth amendments affirm people retain the powers not delegated to the governance institutions at the federal and provincial levels.

#### **d. Emancipation Proclamation, Pledge of Allegiance and Constitutional Amendments**

The Emancipation Proclamation (1863) ended slavery – a major blot on the republic's egalitarian values. The Reconstruction Amendments, thirteenth to fifteenth, were adopted after the end of the Civil War (1861-65). These amendments "constitutionalized" the abolition of slavery and affirmed human equality. The Thirteenth Amendment ended slavery, Fourteenth granted citizenship and equality for emancipated slaves and the Fifteenth assured pan-racial voting rights.

With the Pledge of Allegiance, citizens swear loyalty to "one nation under God, indivisible, with liberty and justice for all." The Pledge, originally crafted in 1892, reflects the developments till date – namely, overcoming secession by the southern states and commitment to unity, the end of slavery and the affirmation of equal status and protection for emancipated slaves. Now a part of the US Code, the Pledge of Allegiance, with its ideal of liberty and justice for all, succinctly stated the constitutional value system at the start of a new era. For the present and the future, it is necessary to expand notions of justice to include the economic dimension also. This is elaborated in the conclusion.

A total of 27 amendments have been made to the constitution as of 2025. Among those made in the 20<sup>th</sup> century, the three below are significant from the "value system" perspective.

- Nineteenth Amendment (1920) – voting rights guaranteed for women, ending gender discrimination in citizens' civic participation.
- Twenty-second Amendment (1951) – term limit set for presidents, to strengthen the nation's republican/ democratic character.
- Twenty-sixth Amendment (1971) – voting age lowered to 18, expands civic participation by including younger citizens in the political process.

Trends in the neoliberal era starting from the 1980s marked a significant turn. They culminated in the rise of Donald Trump, a development that calls into question the future of the constitutional order, at least in the short term.<sup>42</sup> The discussion in this essay is on the premise Trump represents a temporary blip in the march of humanity and not a halt or reversal of the trends have been at work for several centuries now.

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<sup>41</sup>Labunsi (2006).

<sup>42</sup>For an account of the systemic problems in the recent decades, see Jansson (1997) and Sandel (2022).

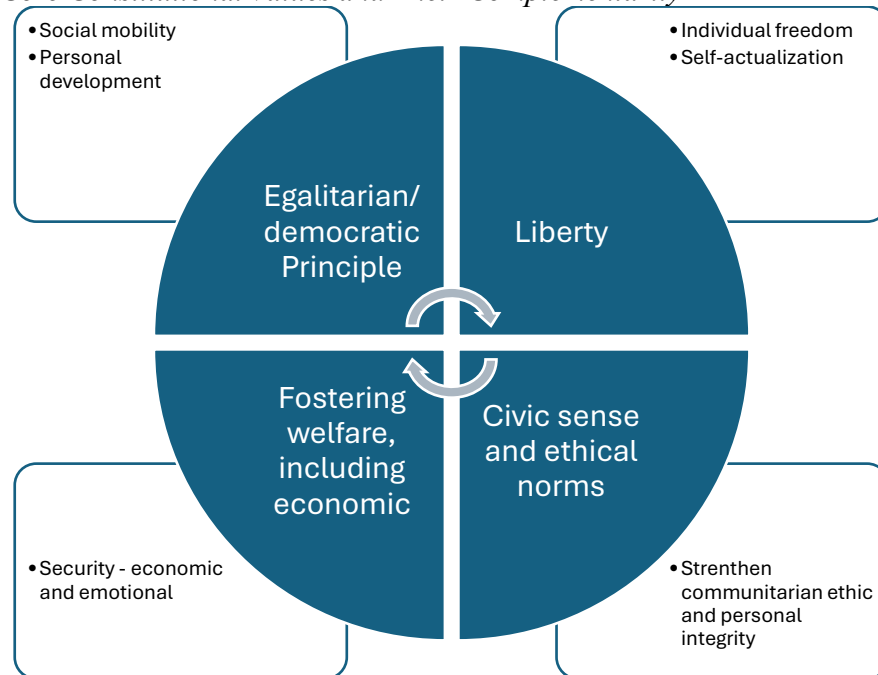
## II. Constitutional Values

### a. An Outline

The US constitutional framework is informed by a value system that has shaped trends and events.<sup>43</sup> In no particular order, liberty, the democratic/egalitarian principle, fostering welfare and civic sense can be identified as the core values informing the US constitutional framework. These values are a fair interpretation of the famous phrases in the Declaration of Independence – namely, “all men are created equal” and are entitled to “life, liberty and the pursuit of happiness.” This essay aims to construct a comprehensive and inclusive theory of the value system.

The values, shown in the figure below, represent equal and integral parts of a composite ideal. The individual values include components or elements that provide substance to each value. Together, they form a comprehensive value system. Normatively, the constitutional value system must shape public policy and legislation, by providing a moral compass to lawmaking and implementation of laws.

**Figure 2.** *Core Constitutional Values and Their Complementarity*



### b. Values – Their Interconnectedness and Balancing

Each constitutional value is distinctive, yet connected with the other values. Liberty and equality represent different aspects of a single political ideal.<sup>44</sup> Similarly, Sen (1992) advocated an integral understanding of liberty and equality. Recognizing the interconnectedness is important in fostering value-based governance.

<sup>43</sup>Farnam (1938); Thelen (1988); Liu, Karlan & Schroeder (2010); Reed Amar (2012).

<sup>44</sup>Dworkin (1987).

Representing integral parts of a coherent system, the values are complementary and reinforce one another.

To explain, the egalitarian principle fosters social mobility and personal development by opening up more opportunities to all. Better education and personal development would, in turn, promote meaningful exercise of liberty and self-actualization by individual humans. The egalitarian principle and liberty would be more substantive when complemented by general welfare including economic security. Civic sense and moral integrity lubricate the system, minimize friction and facilitate smooth functioning.

In applying the value system, it would often be necessary to make adjustments among individual values, as needed. This approach can impart a fair balance to the system. In a given context, one value (for example, liberty) might have to be curbed, to better promote another (general welfare).<sup>45</sup> The balancing approach offers a pathway to manage tensions among the values and preserve the integrity of the value system.

Franklin Roosevelt's discussion of liberty and his reference to Lincoln's sheep/wolf idiom illustrates the need for the balancing approach. Responding to criticism their actions – end of slavery (Lincoln) and New Deal economic regulation (Roosevelt) – undermined liberty, the leaders explained curtailing the wolf's liberty was imperative to protect the sheep.<sup>46</sup> The contextual need was to restrict the liberty of some to engage in actions that are in conflict with other values – slavery and the egalitarian principle, economic regulation to foster general welfare. Balancing the values would be an ongoing necessity in dynamic societies. Changing circumstances would warrant nuanced public policy responses.

Viewing the values as integral and mutually accommodative eschews binary methods and yes/no choices, or subordinating one value to another. The balancing approach can address complaints about the incompatibility between the ideals of liberty and equality. The context will dictate the adjustments needed, with ethical norms – civic sense and moral integrity – providing safeguards against abuse and ensuring public policy effectively addresses the targeted needs.

Classical Indian thought recognized the plurality of human values and the need to balance them appropriately. Relationships (Kama), economic pursuits (Artha) and right conduct (Dharma) represent the Purushartha, or the elements of human life. The elements operate together and the effort must be to strike the right balance among them. To illustrate, right conduct (Dharma) can check unethical practices in economic pursuits (Artha). Similarly, Dharma would encourage humans to be truthful in relationships (Kama). The goal posited from the practice of Purushartha is liberation (Moksha). Liberation, or fulfillment, is achieved here and now, in temporal life; it is not held out as an after-life reward. The importance of Purushartha is extensively discussed in *Kama Sutra*.<sup>47</sup>

In balancing the values, observance of ethical norms can guard against special interests and their influence distorting public policy. Inculcating this approach to

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<sup>45</sup>On the tension between the concepts of equality and liberty, see May, Sistare & Schonscheck (1997).

<sup>46</sup>Roosevelt (1936).

<sup>47</sup>Rocher (1985).

governance can engender a self-balancing structure with innate flexibility to produce optimal outcomes, overall. Current polarization in politics and skepticism about governance institutions stress the need to revive idealism and reclaim the moral language. Adherence to a set of values transcending narrow ideologies can produce better socioeconomic outcomes than simplistic majoritarian rule. This can help counter systemic ills and the cynicism they breed over time.

### III. Value #1 – Egalitarian/Democratic Principle – Evolution and Instrumental Value

#### a. The Egalitarian Principle *vis-à-vis* Equality

The egalitarian principle conceives all humans as equal in basic worth and stresses similar respect and consideration for all.<sup>48</sup> It has the individual human at its centre and amelioration as the subtext. As a constitutional value, the egalitarian/democratic concept is preferable to “equality,” which is rather amorphous and problematic.<sup>49</sup>

At one end, equality means equal treatment of all humans or equal status for all. This reflects the human history of unequal treatment, exemplified by the caste system in India and feudal system/ slavery in Europe and America. The tradition found startling expression in *Dred Scott v Sandford* (1857). The US Supreme Court ruled black slaves were disentitled from constitutional protections available for white citizens. The ruling was a milestone in the run-up to the American Civil War (1861-65), fought on the moral principle of slavery. Denial of voting rights to women and white men without property is another example.

At the other end, notions of equality have informed efforts to contrive outcomes. It found expression in Karl Marx’s utopian slogan “From each according to his ability, to each according to his need.”<sup>50</sup> Critiquing the principle, Hicks<sup>51</sup> rightly predicted it would lead to absolutism and oppression – predictions that came true with the totalitarian states established in the aftermath of the Bolshevik Revolution (1917). Among neoliberal critics of public regulation, a strand stressed the individuality of human qualities and argued equality, understood as equality of reward/outcome for all, is unnatural.<sup>52</sup> At any rate, experience shows the problems with the Marxian approach and efforts to contrive outcomes.

Negative in origin and principle, the equality argument generally targeted discriminatory treatment among humans and poor economic outcomes from conventional property ownership and financial systems. Egalitarianism, on the other hand, is affirmative. It aims to assure active consideration of everyone’s interests in policy, lawmaking and implementation. As a constitutional value, the egalitarian principle combines with the other values – namely, liberty, welfare and civic sense;

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<sup>48</sup>Dworkin (1974).

<sup>49</sup>On the complexities in the sweeping concept of equality, see Rae (1981), Sen (1992).

<sup>50</sup>Marx (1875).

<sup>51</sup>Hicks (1900).

<sup>52</sup>Rothbard (1974).

in a robust and activist version, the egalitarian principle can contribute to amelioration and progress.

### **b. The Egalitarian Principle – Its Evolution**

The democratic principle and notions of equality can be traced to Jesus Christ's teachings and the spread of Christianity. These "social innovations" are implicit in the non-hierarchical framing – "children of god," a recurring feature in the New Testament.<sup>53</sup> The egalitarian principle finds formal statement in the Declaration of Independence, in the phrase that "all men are created equal."

The Declaration's affirmation of equality needs unpacking. It was made amidst the contemporary reality of slavery, restrictive voting rights (to white male property owners), racial discrimination and patriarchy.

- On one hand, the Declaration stressed equality of status between the American colonists and the British people, in the face of discrimination against Americans. "No one saw more clearly than John Adams the distinction the Parliament made between American and British subjects."<sup>54</sup>
- On another, the Declaration affirmed equality of status among all the European settlers in the American colonies. "White servitude," a product of the practice of bringing indentured servants from Europe, was an early feature in the American colonies.<sup>55</sup> "In the seventeenth century, white slavery had disappeared from civilized states, but the enslavement of Indians and Negroes was recognized as a device which might legitimately be used to aid colonization."<sup>56</sup> The Declaration recognized the progress made with regard to human servitude and affirmed all the colonists deserved respect and dignity.

Egalitarian outlook, even among the colonial settlers, was not yet a reality, despite a progressive mindset among the power-wielding elite. The progressive feature is evident in the establishment of a free public school in Connecticut in 1641.<sup>57</sup> There were also complaints about the "elite" background of state representatives.<sup>58</sup> The American Revolution strengthened progressive notions.

"Though the states retained [ ] certain class distinctions [ ] inherited from the mother country and [suffrage qualification norms] put political power into the hands of the property owners, many of them adopted at the outset of their independent political life certain general principles which were destined in time to lead to a more democratic policy."<sup>59</sup>

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<sup>53</sup>See example, 1 John 3, Galatians 3:26, Romans 8:14.

<sup>54</sup>Lovejoy (1968) at 182.

<sup>55</sup>Farnam (1938).

<sup>56</sup>Ibid at 64.

<sup>57</sup>Farnam (1938).

<sup>58</sup>Main (1968).

<sup>59</sup>Farnam (1938) at 122.

The constitutional ban on titles of nobility also affirmed the egalitarian principle.<sup>60</sup> The ban aimed to promote equality of status among the settlers and check hereditary privileges common in aristocracies. Again, shades of the egalitarian principle are apparent in the debate on slavery in the Continental Congress. The debate and the hesitant intervention it spawned – federal jurisdiction over slavery from 1808 – reflect human values transcending racial distinctions.

A degree of cosmopolitanism and openness characterise the Declaration of Independence. Proclaiming the separation from Britain, it states “[we] hold them (the British people), as we hold *the rest of mankind*, Enemies in War, in Peace Friends” (emphasis added). It is a different matter American foreign policy as it developed from the 19<sup>th</sup> century had a largely expansionist/ interventionist ethos. This, arguably, ill accords with the constitutional values. The subject is beyond the scope of this essay.

The restriction of voting rights to white property-owning men is complicated and warrants a nuanced review. Obviously not egalitarian, it was a racial and economic status-based rule, unacceptable in the current milieu. A general attitude of apprehension and distrust towards the “masses” dates back to Socrates (470-399 BC) and Plato (428-348 BC).<sup>61</sup> It is not as though the principle of the rule, inherited from Britain, continued in the American republic without debate or question. Jefferson pointed out how restrictive suffrage enabled corruption in Britain. “The government of Great-Britain has been corrupted, because but one man in ten has a right to vote for members of parliament. The sellers of the government therefore get nine-tenths of their price clear. It has been thought that corruption is restrained by confining the right of suffrage to a few of the wealthier of the people: but it would be more effectually restrained by an extension of that right to such numbers as would bid defiance to the means of corruption.”<sup>62</sup>

For starters, the suffrage subject was left out in the Constitution; it was left to the states. In an environment riven by divisions on slavery and the reach of the national government, the omission of suffrage from the federal structure represented a political compromise (Liu et al 2010). The overriding priority was “to form more perfect union,” learning from the experience of the short-lived Articles of Confederation adopted in 1777.

In the milieu marked by slavery and ongoing colonization, it was premature to speak of universal suffrage – beyond ethnic European settlers. The subject, however, received attention from both John Adams and Thomas Jefferson.

Writing shortly before the adoption of the Declaration of Independence, Adams (1776) discussed the different dimensions.

- About women, Adams<sup>63</sup> commented, “their Delicacy renders them unfit for Practice and Experience, in the great Business of Life, and the hardy Enterprizes of War, as well as the arduous Cares of State. Besides, their attention is So much engaged with the necessary Nurture of their Children,

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<sup>60</sup>Greendorfer (2015).

<sup>61</sup>See the discussion by Kronman (2004).

<sup>62</sup>Jefferson (1785) at Query XIV, Laws.

<sup>63</sup>Adams (1776)

that Nature has made them fittest for domestic Cares.” Therefore, granting them voting rights was infeasible.

- The exclusion of men without property reflected similar thinking. Stating “very few Men, who have no Property, have any Judgment of their own,” Adams continued, “They talk and vote as they are directed by Some Man of Property, who has attached their Minds to his Interest.” The remedy was to democratize property ownership and make everyone a property owner. “If the Multitude is possessed of the Ballance of real Estate, the Multitude will have the Ballance of Power, and in that Case the Multitude will take Care of the Liberty, Virtue, and Interest of the Multitude in all Acts of Government”<sup>64</sup>.

Thomas Jefferson looked to education as the corrective. Arguing against rule by elites, Jefferson urged, “The influence over government must be shared among all the people.” To this end, “[people’s] minds must be improved to a certain degree. [ ] An amendment of our constitution must here come in aid of the public education”<sup>65</sup>.

John Adams’ and Thomas Jefferson’s views were visionary by prevailing standards. At a minimum, their beliefs were, undeniably, earnest. This is evident from the corrective measures the leaders proposed.

In the following decades, the egalitarian principle strengthened and provided a moral compass in policy development. Abraham Lincoln’s reference in the Gettysburg address (1863) to “a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal” echoed the Declaration of Independence. By this time, “all men” had expanded to include black people. The Reconstruction Amendments adopted after the Civil War constitutionalized pan-racial equality of status following the abolition of slavery. Tracing the constitutional journey, Reed Amar pointed out:

“From the founding to the present, America’s written Constitution has traced a clear and remarkable trajectory, visible at every moment of enactment and amendment along the way. With the ill-fated exception of Prohibition, none of its amendments aimed to diminish liberty or reduce equality. On the contrary, most amendments have expanded freedom and egalitarianism”<sup>66</sup>.

Over the 20<sup>th</sup> century, the egalitarian/democratic principle strengthened further and now informs several aspects of life.<sup>67</sup> Respect for the individual expanded to education, sports and recreation (desegregation), penal law (decriminalization of homosexuality), family law (acceptance of same-sex marriages).

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<sup>64</sup>Adams (1776)

<sup>65</sup>Jefferson (1785).

<sup>66</sup>Reed Amar (2012), at 452.

<sup>67</sup>See generally Purdy (2004).

### c. Egalitarianism – Economic Dimension

In recent times, the egalitarian discourse has gravitated towards economics. Half a century ago, articulating the “proper goals of economic policy,” Stigler<sup>68</sup> observed, “The goal of equality, or at least of much reduced inequality, has become one of the great forces of our times”.<sup>69</sup> The trend can be explained in terms of expansive notions of justice; logically, they lead to recognition of the detrimental impact of deep economic disparities.

The application of unrefined notions of liberty to economic issues erodes the democratic principle. The method constrains meaningful public policy measures and legislation on economic subjects. Denning pointed out, “theories of ‘democracy’ promoted by the ‘Washington Consensus,’ [...] insist that economic or social democracy has nothing to do with political democracy”<sup>70</sup>. Per Levine “there is a role for democratic government to remedy the deficiencies of market outcomes”<sup>71</sup>. In a similar vein, Shapiro<sup>72</sup> explained political democracy does not lead to better distributional outcomes and there is no correlation between the two.

The result is increasing concentration of wealth and power and deepening inequality that, in turn, undermine the egalitarian principle. Economic inequality strikes at the roots of egalitarianism by stratifying the society into more equals and less equals. From here, the problem spreads to the other constitutional values. Resource constraints limit liberty and freedom for the less equals and impair their capacity to seek betterment (“general welfare”). Civic disengagement and moral decay would be the logical fallouts of sustained, deep inequality. These would be the consequences at the individual human level as well as the societal level, collectively.

At the institutional level, economic inequality undermines the democratic character of the society and corrodes governance institutions. The problem is more serious when corporations – entities engineered by legislation – are an important factor in rising inequality. Viewed thus, it is clear public policy makes a contribution to societal inequality. As such, public policy has a responsibility to take corrective action. These subjects are discussed in the conclusion.

## IV. Value #2 – Liberty and Freedom

### a. Liberty and Its Contours

Liberty, another omnibus term, varies in meaning depending on the context.

- In the Declaration of Independence, the liberty narrative was mainly political – about shaking off British control of the colonies.

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<sup>68</sup>Stigler (1975) at 284.

<sup>69</sup>Recent works on inequality and its socioeconomic implications include Piketty (2014), Wolf (2023), and Sharma (2024).

<sup>70</sup>Denning (2004) at 147.

<sup>71</sup>Levine (2004) at 170.

<sup>72</sup>Shapiro (2004).

- The First Amendment's concern for liberty was, likewise, political. The listed freedoms – of religion, expression and assembly – have both internal and external dimensions. With religion, freedom of conscience (having one's beliefs) and religious practices are internal in character, intrinsic to an individual self. Freedom of expression and right of assembly, on the other hand, are mainly external. They enable spreading ideas and mobilizing support, including for the purpose of opposing the ruling power.
- In the Civil War era, the emphasis turned to ending slavery and freeing slaves.
- In the personal/family realm, the liberty narrative shaped the decriminalization of homosexuality, acceptance of same-sex marriage and assisted suicide.<sup>73</sup>
- In the economic field, liberty was invoked to oppose the restrictions on corporate enterprises applied in the 19<sup>th</sup> century and regulation of business activity in the 20<sup>th</sup> century.

### **b. Liberty – Individual and Collective Dimensions**

As a concept, liberty stresses freedom for individuals to lead their own lives and pursue the goals they select. The principle eschews overbearing authority. A setting that cherishes freedom can enable the “pursuit of happiness” affirmed in the Declaration of Independence (1776). John Stuart Mills’ definition of individual freedom remains a classic.

“The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest”<sup>74</sup>.

In Mills’ conception, an individual’s liberty ends where it interferes with similar liberty for others. This is individualistic; its concern is with interactions among individual humans and related outcomes. The approach must be modified for the present age, marked by corporate dominance in the economic space and urban agglomerations where people live in close propinquity.

The setting calls for a more collective vision. The endeavour must be to preserve individuality and freedom in a communitarian environment.<sup>75</sup> In the communitarian setting, the principle must equally stress balancing personal liberty with societal wellbeing. A nuanced conception of liberty can be instrumental in developing norms to influence behaviour and check trends that are inimical to the constitutional value system, overall.

For instance, “liberty” for excessive concentration of wealth would undermine the egalitarian principle and increase fellow citizens’ vulnerability and, thereby, their liberty. In the corporate context, relevant for this essay, concentration of economic power is facilitated by unbridled expansion through mergers and acquisitions.

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<sup>73</sup>On developments in assisted suicide, see Moffatt (1997).

<sup>74</sup>Mills (1859).

<sup>75</sup>For a communitarian interpretation of the individual self, see Werhane (1997).

Alongside, the financial markets with their speculative principle breed instant billionaires, further undermining citizens' liberty.

The democratic project must aim for an institutional setting that fosters legitimate individual liberty. Legitimacy of liberty would depend on its compatibility with other constitutional values. Institutional engineering guided by constitutional values can produce better democratic outcomes without unfairly compromising liberty. It can be a method to limit concentration of wealth and consequent erosion of constitutional values. This would be the task for democratic governance.

“One of the fundamental aims of democratic rule is to provide a framework of laws and institutions and, in the view of many, material support to enable those living within this framework, and drawing on this support, to pursue the ideal of individuality as fully as they can”<sup>76</sup>.

## V. Value #3 – General Welfare

“General welfare,” yet another omnibus term, means overall wellbeing, at the collective/societal level. Welfare is multi-dimensional, covering economic condition, health, education, personal development et al.<sup>77</sup> When recognized as a constitutional value, public policy must, normatively, aim to promote the general welfare in a broad sense, consistent with the other values.

### a. Pre- Constitutional Pedigree

Promoting the general welfare has been a constant goal of public policy in America.<sup>78</sup> Henry Farnam's magisterial study spanning early colonial periods to 1860 mapped the extensive social and welfare legislation enacted, both before and after the Revolutionary War. The laws covered wage and price regulation, elementary and higher education, protecting the supply of essential commodities, worker welfare and health insurance for seamen<sup>79</sup>. Strong communitarian principles animated public policy. About the Plymouth Code enacted between 1623 and 1627, Farnam noted:

“These laws all clearly indicate the purpose of restraining the individual in his economic actions for the sake of promoting abundance or preventing loss of wealth in the interest of the community”.<sup>80</sup>

The record of numerous laws on diverse subjects, Farnam pointed out, refuted a common European view that government in America was merely “a night-watchman” or “an insurance company, created to ward off danger to life and

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<sup>76</sup>Kronman (2004) at 23.

<sup>77</sup>For a historical exploration of the welfare concept in Anglo-American thought, see Ford (2023).

<sup>78</sup>At any rate, public welfare initiatives remain a fact of life, affirming the constitutional goal to “promote the general welfare” of citizens.

<sup>79</sup>Farnam (1938).

<sup>80</sup>Farnam (1938) at 19.

property, and maintained by regular premiums in the form of taxes”<sup>81</sup>. Governments were actively concerned with fostering community welfare, as subsequent studies also affirm<sup>82</sup>. In sum, promoting the general welfare *is* clearly a founding principle of the American project. The tradition explains the trends in post-colonial America, discussed below.

### b. “General Welfare” Provisions and their Interpretation

To “promote the general welfare” is among the goals stated in the preamble to the US Constitution. General welfare provisions were also a feature in the aborted Articles of Confederation adopted in 1777 (Articles III and VIII).<sup>83</sup> Formal statements of the civic goal to promote welfare date back to Aristotle (384-322 BC) and Plato (428-348 BC).<sup>84</sup>

A second reference to general welfare is among the three justifications for Congress to levy taxes, the other two being repayment of debt and providing for common defence. The wording in Article I, section 8 - “for the common defense and general welfare” – has been traced to Roger Sherman (Massachusetts), a signatory to the Declaration of Independence, the Articles of Confederation and the Constitution.<sup>85</sup>

Tension has been constant among the ideals of citizens’ liberty, the related concept of limited government and expansive governmental welfarist initiatives that often curtail liberty and enlarge the government.<sup>86</sup> The “general welfare” clause has been debated and litigated, primarily from the prism of checking federal powers and preserving the ideal of limited government. Inquiries and questions have varied.

- Do exhortations of goals in the preamble empower Congress to take action to pursue the goals?
  - The issue figured in Attorney General Edmund Randolph’s advice to President George Washington on Congressional powers to charter the First Bank of the United States (1791). Randolph’s advice was the preamble does not grant any actionable powers. Opposing the chartering of the bank, Thomas Jefferson argued the general welfare clause was limited in scope.<sup>87</sup>
- Is the reference to general welfare in Article I, section 8 limited to specifying it as a purpose for which tax revenues can be applied, or does it present general welfare as an end in itself – an independent goal to pursue?
  - About 150 years after Jefferson’s interpretation, above, President Franklin Roosevelt<sup>88</sup> argued the opposite, in promoting the

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<sup>81</sup>Farnam (1938) at 6.

<sup>82</sup>Wood (1999) and Novak (2001).

<sup>83</sup>Herbert, Jr. (1937).

<sup>84</sup>Ibid.

<sup>85</sup>Herbert, Jr. (1937).

<sup>86</sup>Hoffer (2013).

<sup>87</sup>Coblentz (2015).

<sup>88</sup>Roosevelt (1937).

interventionist measures under the New Deal. Adopting a conjunctive approach, Roosevelt asserted the preamble together with Article I, section 8, granted the Congress residual jurisdiction “to meet each and every problem which then had a national character and which could not be met by merely local action.”<sup>89</sup> Schwartz (2022)<sup>90</sup> offered a similarly expansive interpretation of the general welfare clause.

- In applying tax revenues, is the federal government limited to purposes for which it is empowered by the Constitution?
  - The issue dates back to the constitutional debates between the federalists and anti-federalists. It was about the scope of federal jurisdiction under the “general welfare” clause. James Madison, a federalist, attempted to allay anti-federalists’ concerns about expansive federal jurisdiction. Corwin observed, “(James) Madison, [ ] in answering the alarmist arguments of opponents of the Constitution, in *Federalist*, number 41, not only confines Congress's power to promote the general welfare to its fiscal power, but also restricts the "general welfare" which Congress may thus promote to that welfare which it may further promote by its other delegated powers.”<sup>91</sup> Corwin also clarified Madison’s line of argument had a limited goal – addressing anti- federalists’ concerns and persuading them to adopt the constitution.

Neglect of pre-colonial history and an attitude of resistance to powerful central government that emerged with the American Revolution underpinned the fractious debates on federal initiatives to promote general welfare in early 20<sup>th</sup> century. Tucker, a critic of expansive public welfare initiatives, disparaged the general welfare clause as “a power as broad as the boundless seas and infinite as the firmament, embracing the whole field of human desires and human cupidity[...].”<sup>92</sup>

### c. General Welfare as a Constitutional Value

The metrics used in the constitutional litigation would be less relevant, in fact inappropriate, when the promotion of welfare is conceived as a “value,” instead of a “power.” In a setting that views general welfare as a constitutional value shaping policy, the concept of “power” would be incongruent. The metric must, normatively, shift to devising optimal methods to produce outcomes that promote general welfare – in democratic terms, this would be the greatest good of the greatest number.

The constitutional value framework is concerned with substantive principles and goals. Integral in conception, it eschews fragmented, choppy approaches that often characterize legal analysis and judicial rulings. This can be traced to the tradition of advocacy in adversarial litigation in common law courts and judges making binary choices in deciding disputes. The integral method makes no serious

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<sup>89</sup>For a discussion of the terms, federal, central and national in the context of public welfare initiatives and the implications, see Corwin (1923).

<sup>90</sup>Schwartz (2022).

<sup>91</sup>Corwin (1923) at 552.

<sup>92</sup>Tucker (1927) at 367.

distinction between the preamble and the contents of the Constitution, in the absence of some glaring inconsistency.<sup>93</sup>

With the general welfare provision, it is fair to state there is no major inconsistency that warrants a dissecting approach<sup>94</sup> and making choices. In the constitutional value framework, the issue whether the preamble confers a power or its binding nature would be less relevant. *Jacobson v Massachusetts* (1905) is commonly cited for the proposition the preamble has no binding effect. Upholding compulsory vaccination in *Jacobson*, the US Supreme Court rejected that mandatory vaccination violated liberty affirmed in the preamble. Significantly, the ruling did not discuss “general welfare” also affirmed in the preamble.

#### d. General Welfare – Practice

At any rate, practice affirms general welfare as a constitution value. This is true from the First Bank of the United States (1791) to the enactment of the *Affordable Care Act* (2010). In his final address to the Congress, George Washington was expansive in outlining federal responsibilities. The subjects Washington covered were agriculture, manufacture and higher education. Corwin pointed out, “none of [these] can be vindicated except by reference to the ‘general welfare’ clause”<sup>95</sup>.

Federal welfare initiatives from early 19<sup>th</sup> to early 20<sup>th</sup> century covered agriculture, fisheries, mining, and importantly, education. Comprehensive attention was given to education – from elementary and secondary to vocational training and higher learning. With mechanization of agriculture and industrialization gaining momentum, education became broader. Congress enacted a bill in 1859 for “the endowment, support, and maintenance of at least one college [in each State] where the leading object shall be, without excluding other scientific or classical studies, to teach such branches of learning as are related to agriculture and the mechanic arts.”<sup>96</sup>

Public welfare initiatives continued and expanded through the 20<sup>th</sup> century (Katz 2006). Franklin Roosevelt’s New Deal included minimum wages for workers, support for labour unions, public investment in infrastructure to stimulate economic activity and employment and a tax-funded social security program for assured retirement income. Expansion in public welfare programs continued in the post-World War II decades as well, until the 1980s when neoliberal philosophy became influential. Neoliberal philosophy professed faith in the ability of “markets” to deliver socioeconomic progress and abhorred public initiatives. Terming the trend, “War on Welfare,” Katz (2006) described the decline in public welfare initiatives from the 1980s.

Reflecting the *Zeitgeist*, the “general welfare” clause did not feature in the constitutional challenge to the *Affordable Care Act* (*National Federation of Independent Business v Sebelius*) (2012). Quite ironically, the US Supreme Court

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<sup>93</sup>For a persuasive argument to include the preamble contents in constitutional interpretation, see Welch & Helipern (2018).

<sup>94</sup>There has been a related issue about a punctuation in Article I, Clause 8 and its impact on the extent of federal jurisdiction under the said provision. See Corwin (1923) and Herbert, Jr. (1927).

<sup>95</sup>Corwin (1923) at 556.

<sup>96</sup>Cited in Corwin (1923) at 570.

held the federal “tax and spend” power in Article 1, Section 8 enabled the levy of penalty for failure to procure health insurance. The “general welfare” provision received no attention.

#### e. General Welfare – As Empowerment, not Breeding Dependence

Historically, concern for citizens’ economic welfare extended beyond bare sustenance or amelioration for the poor. The *Homestead Act of 1862* is illustrative. It enabled conditional grant of land to citizens, to promote economic empowerment as well as productive use of land, mainly through farming. A total of 287.5 million acres of federal lands were distributed to people starting from the 1860s and continuing for several decades.<sup>97</sup> The *Homestead Act* represented a public policy endeavour to empower citizens and facilitate economic security and independence through hard work – ends consistent with the spirit of the American Revolution. The legislation had its share of weaknesses and abuse by moneyed interests.<sup>98</sup> Black applicants were discriminated against despite their explicit eligibility to seek land grants.<sup>99</sup>

In the recent decades, legislation targeted housing improvements for black communities across the country. This began with the *Fair Housing Act of 1968*, followed by the *Equal Credit Opportunity Act of 1974* and the *Home Mortgage Disclosure Act of 1975*. The *Community Reinvestment Act of 1977* extended the affirmative action principle to lending and encouraged banks to meet “the credit needs of the communities, including low-and-moderate-income neighbourhoods, consistent with safe and sound banking operations. Policy encouragement to affirmative lending was instrumental in the development of credit derivatives and unethical financial practices that culminated in the Credit Crisis of 2008-09.<sup>100</sup> The experience underscores the need for civic sense and ethical norms, discussed below.

## VI. Value #4 – Civic Sense and Ethical Norms

### a. The Concepts

Civic sense and ethical norms represent “soft” values. They inform the other values – the egalitarian/democratic principle, liberty and welfare – and lubricate the smooth operation of the socioeconomic polity. Providing a moral compass, civic sense and ethical norms promote efficient functioning and minimize friction.

Civic sense stresses the collective – individual citizens as units of the society. It encourages responsible conduct that is mindful of impact on others. Responsible citizenship is aligned with the communitarian ethos. Civic sense as a cultural trait sensitizes citizens to their role as members of the civil society. Ethical norms, on the

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<sup>97</sup>Shanks (2005).

<sup>98</sup>Gates (1962).

<sup>99</sup>Shanks (2005).

<sup>100</sup>Vasudev (2015).

other hand, are individual and inward looking. They encourage individual citizens to “do the right thing.” This is about moral rectitude as an internal quality.

Civic sense and ethical norms are complementary and reinforce each other. Both are important for a functional society that cherishes individual autonomy conditioned by a communitarian sense of moral responsibility. As constitutional values, civic sense and ethical norms can produce better outcomes, socioeconomic and even spiritual.

### **b. Civic Sense and Ethical Norms as a Constitutional Value**

The Declaration of Independence (1776) acknowledges a moral order, with the statements below:

“... appealing to the Supreme Judge of the world for *the rectitude of our intentions*, do, in the Name, and by Authority of *the good People of these Colonies* ...”

“... with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and *our sacred Honor*” (emphasis added).

The “Supreme Judge” and “divine Providence” the Declaration invoked were clear references to the Judeo-Christian conception of god as compassionate, merciful and protective of the righteous. They also reflect the karmic principle that right actions produce right results. Significantly, the Declaration did not use explicit Christian terms but secular ones, in referring to the metaphysical dimension.<sup>101</sup> The framing implies religiosity goes hand in hand with moral conduct. The two are understood as complementary.

The moral tone in the Declaration of Independence was neither accidental nor mere rhetorical flourish. The Declaration is a carefully crafted document and the handiwork of a distinguished group. Drafted principally by Thomas Jefferson (Virginia), its preparation was overseen by a committee comprising John Adams (Massachusetts), Benjamin Franklin (Pennsylvania), Robert Livingston (New York) and Roger Sherman (Connecticut).<sup>102</sup> Their initial version was debated in the Continental Congress for several days. A quarter of the original draft was deleted, and the final version was unanimously adopted by the 56 delegates from the 13 colonies. The deliberation that preceded the Declaration and unanimous adoption underscore the respect the important ideas it embodies warrant.

To remind, the Declaration marked the launch of the Revolutionary War (1776-1783). Its authors as well as the members of the Continental Congress that ratified the Declaration faced a serious threat if they were to lose the war – a war launched with relatively meagre resources against an organized army. Outcomes were uncertain. Defeat would likely lead to charges of treason and prosecution. These realities underscore the vulnerability of the leaders that made a bold move in declaring independence. It was more than simply contesting a political election, with loss as a possibility.

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<sup>101</sup>Welch & Heilpern (2018) offer a detailed account of the influence of Christian/Biblical ideals on the founding fathers and the constitution-making process.

<sup>102</sup>Becker (1942); Boyd (1976).

The founding fathers had evident conviction in their cause and its ethical justifications. Treating the ideals recorded in the Declaration in earnest, as aspirational standards, can be more productive in reinventing the constitutional values. This is essential in the project to reshape governance institutions to actualize the values. Appreciating the importance of moral integrity, John Adams (1798) emphasized, “Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other.”

### c. Civic Sense and Ethical Norms – Role in Governance

Civic sense and ethical norms ensure the integrity of governance institutions. With the collective pledge in the Declaration of Independence, “the good people of the colonies” (stressing moral character) committed their “lives,” (readiness to risk it for the cause), “fortunes” (material belongings), and “honour,” which is the sense of integrity, pride and self-respect that inform actions. The moral courage to take the vow is founded in the conviction in “the rectitude of [ ] intentions.”

The values the Declaration swears to have eternal merit, not confined to the specific period or events associated with the Declaration. It represents an ongoing pledge. These are the values by which the society that adopted the Declaration of Independence swears to live by forever. It implicitly binds future generations. Continuing temporal reach is affirmed in the Preamble to the US Constitution, in its reference to “ourselves and our Posterity.”

The interpretation advocated above can take the discourse in democratic societies beyond the formalism of elections and majorities. The democratic process would no longer just be about hitting the magic number of requisite votes and pushing legislation through to enactment. These steps remain, but they are more formal.

The substantive standard for legislation would be its compliance with the constitutional values – the egalitarian principle, liberty and general welfare. Moral integrity must inform legislation representing statements of public policy. Legislation’s legitimacy and constitutional validity would be evaluated by these standards.

Legislation would be informed by moral integrity, consistent with the other constitutional values. Logically, the same standards would govern the machinery developed for the implementation of legislative policy and rules. Constitutional values as guiding principles can be effective in countering known ills – corruption,<sup>103</sup> regulatory capture,<sup>104</sup> and special interests’ influence.<sup>105</sup>

## VII. Corporate Law and Constitutional Values

This concluding part evaluates corporate law from the lens of the constitutional values discussed above. Business corporations are major actors in the socio-economy. Legislation that creates and governs corporations shapes their conduct. “Establish justice” is among the goals the Preamble to the US Constitution

<sup>103</sup>Glaeser & Goldin (2008).

<sup>104</sup>Dal Bo (2006).

<sup>105</sup>McCormick & Tollison (1981); Sunstein (1985).

proclaims. Corporate law is an appropriate candidate to examine whether and how it contributes to fostering socioeconomic justice. The exercise can reveal the problems in the regime and offer pathways for correction and amelioration.

### a. The Two Parts of Corporate Law – Legislation and Common Law

Corporations are legislative creatures engineered under legislation. They derive their existence from statutes and are subject to several mandatory rules. Additionally, corporations are governed by the common law on crucial subjects, mainly corporate purpose. The two sets of laws are outlined below.

Incorporation, as stated, is granted by legislation. This reflects both historical practice dating to monarchical times and the practical need for legislative rules to attain corporate attributes – entity status, organizational continuity/perpetual succession and legal protection for corporate actors (directors, executives and shareholders). In granting incorporation and conferring the attributes, legislation also places the resulting entities under binding rules.

Mandatory rules include an organizational structure. Shareholders, as the contributors of capital, elect directors who are charged with the management of corporations. Normative financial rules aim to protect creditors, reflecting their relative vulnerability in the corporate framework. These rules continue despite the much-vaunted “race to laxity” among the American states since late 19<sup>th</sup> century. Looser rules expanded corporate power by lifting ceilings on capital, permitting multiple business activities and ability to merge with other corporations. Lax rules on share issue and consideration payable for shares also financialized corporations.<sup>106</sup>

Legislation, however, does not define the character of corporations or their purpose/goal. As a result, these issues have been left to judges and theorists. As discussed below, developments moved in a shareholder-centric direction that accentuates profit maximization.

### b. Common Law, Shareholder Primacy and Corporate Practice

Shareholder-centric interpretations of corporations began in late 18<sup>th</sup> century, with the introduction of general legislation that offered incorporation to all on complying with the prescribed procedure. This altered the earlier regime that required individual legislative charters for each incorporation. In the new setting, it was argued corporations represent agglomerations of shareholders.<sup>107</sup>

Another theory was corporations represent shareholders’ property (Berle & Means 1932). The trends entrenched shareholder primacy as the common law principle of corporations. Per shareholder primacy, corporate purpose is to serve shareholders and this is accomplished through profit/value maximization. *Dodge v Ford Motors* (1919) is generally cited as the authority for this proposition.<sup>108</sup> This principle of shareholder primacy continues at common law.<sup>109</sup>

<sup>106</sup>Vasudev (2021).

<sup>107</sup>*Santa Clara v Southern Pacific* (1886). See generally Horwitz (1985).

<sup>108</sup>For a contrarian view that questions the interpretation, see Vasudev (2021).

<sup>109</sup>*eBay v Newmark* (2010), *In re Trados* (2013).

In the legislative structure, as noted, shareholders (as the financiers) elect directors that manage (or oversee) the management of corporations. This structure was used to assimilate shareholders to principals and directors/executives to agents. This further affirms directors and executives' duty to serve shareholders (Berle & Means 1932, Jensen & Meckling 1976). In the 1980s, several American states amended their legislation to permit managements to also consider non-shareholder interests in policies and decisions.<sup>110</sup> But this effort has hardly been impactful. Socioeconomic and corporate trends indicate the entrenchment of shareholder primacy and the inefficacy of the stakeholder statutes.<sup>111</sup>

In the economic sense, shareholders are best served by maximizing profits/value. Executives are incentivized to pursue profit/value maximization by linking their reward to financial performance, measured mainly in terms of earnings and shareholder value (that tracks dividends and share price movements in the stock market). Linking executive pay to shareholder value, prevalent since the 1990s, continues to the present.<sup>112</sup>

The principal-agent paradigm, effective in delivering shareholder value, is problematic from the constitutional values prism. Its feudal, hierarchical conception contradicts the egalitarian principle. In its economic dimension, the model leads to shareholders appropriating the gains from business success, sidelining/neglecting workers, which is one among the stakeholders that make a crucial contribution to the success. This, in turn, deepens inequality and reinforces the feudal principle. The consequences of shareholder primacy are evident from macroeconomic data, discussed below.

### c. Corporate and Socioeconomic Outcomes – Divergent Trends

Corporate growth has been significant in the recent decades. McKinsey (2015) reported the following trends since 1980:

From 1980 to 2013, global (corporate) revenues nearly doubled in real terms—and the biggest corporations more than tripled their earnings before interest and taxes. Thanks to sharp declines in statutory corporate tax rates and borrowing costs, net incomes after interest and taxes rose fivefold. . . The biggest firms have been the biggest winners. In fact, among the world's public companies, just 10 percent of firms account for 80 percent of profits.

OECD (2019) offers a telling contrast in broad socioeconomic trends since the 1980s:

- Across OECD countries, rise in real median incomes was, on average, one-third less than the top 10%.
- Middle class's share of income shrank during the period. From four times greater than the upper-income group in the 1980s, middle class's share fell to under three times by mid-2010s.

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<sup>110</sup>Vasudev (2021).

<sup>111</sup>McKinsey (2015); OECD (2019); Oxfam (2024).

<sup>112</sup>Millon (1991); Groysberg, Abbott, Marino & Aksoy (2021).

- Growth for middle income groups was slower than upper and top income groups for three decades.
- Middle incomes in OECD countries barely grew in real terms since 2009.

Oxfam (2024) identified a link between the divergent trends of corporate growth and socioeconomic stagnation. Critiquing shareholder primacy, the Oxfam (2024, 1) labeled it “an extractive corporate model” that aims “to extract value from corporations for the short-term benefit of shareholders and executives.”

Corporate law can be identified as a causal factor in the socioeconomic trends. Legislative omission to spell out the character of business corporations has given rise to shareholder-centric theories. They undermine corporate responsibility and encourage corporations to pursue narrow profit/value maximization with little regard for broader socioeconomic impact.

From the constitutional values prism, legislative intervention is warranted for corrective action. A legislative statement that corporations represent communities of interests that include all stakeholders – shareholders and non-shareholders – would be consistent with the constitutional values. This can veer corporations away from shareholder primacy, towards inclusive governance, and affirm the egalitarian principle in the corporate structure.

#### **d. Corporate Legislation – Its Making and Legitimacy**

Another serious issue is with the constitutional/democratic legitimacy of current American corporate law. Development history reveals the “special interests” character of corporate legislation.<sup>113</sup> New Jersey loosened its rules to attract entrepreneurs to the state and generate revenue from the franchise tax levied on them. Delaware soon followed and it emerged the winner.<sup>114</sup>

*Allgeyer v Louisiana* (1897) enabled corporate mobility across states. This made it possible for New Jersey or Delaware corporations to do business anywhere in the country. These developments compelled other states to also dilute their legislation, if only to prevent corporate exodus from their jurisdictions.<sup>115</sup> In this process, the task of preparing corporate legislation passed to the American Bar Association (ABA). The Model Business Corporation Act (MBCA) crafted by ABA has been adopted in 36 states.<sup>116</sup>

The pedigree of corporate law raises serious questions about its legitimacy from the standpoint of constitutional values. The socioeconomic outcomes in the reign of current corporate law further undermine its legitimacy. With this experience, constitutional values offer a helpful platform for the reform project.

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<sup>113</sup>Kirk (1984); Dodd (1935).

<sup>114</sup>Kirk (1984). See also Berle (1929).

<sup>115</sup>Dodd (1935).

<sup>116</sup>ABA (2025).

## VIII. Conclusion

Enduring values underpin the US constitutional framework, with legislation serving as the key instrument for realising them in democratic governance. As statements of public policy, laws must be more than formal enactments of majority will. Reducing the legislative process to majoritarian approval risks turning democracy into a mere numbers game and eroding constitutional principles.<sup>117</sup>

Instead, constitutional values should guide lawmaking beyond majoritarianism toward utilitarianism,<sup>118</sup> reflecting the ideal of securing the greatest good for the greatest number. Legislation grounded in these values can more effectively promote justice, a central constitutional objective.

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<sup>117</sup>Rosanvallon (2011).

<sup>118</sup>Bentham (1789).

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