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THE LOGIC OF EGALITARIAN NORMS

KENNETH W. SIMONS

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By:
Kenneth W. Simons*

*Professor of Law, Boston University School of Law. Draft: September 1, 1999.

I am grateful to Larry Alexander, Eric Blumenson, Stan Fisher, Mike Harper, David Lyons, Chris Marx, Richard McAdams, Derek Parfit, Mark Pettit, Larry Sager, and Kate Silbaugh for their helpful advice; to participants in the Boston University School of Law Workshop; and to Michele Booth and James McCarroll for their valuable research assistance. I appreciate the financial support of the George Michaels Faculty Research Fund.

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The ideal of equality is widely invoked in law and morality, but doubts persist that it represents a meaningful, coherent, distinctive norm.

Are those doubts justified? If they are not, what explains their persistence?

These questions come to the fore once again in light of a recent ingenious essay by Christopher J. Peters purporting to show that equality is a self-contradictory or absurd norm.¹ Peters' argument is in the same tradition as Peter Westen's writings in the 1980's,² culminating in his 1990 book.³ Westen, similarly, claimed that equality is an empty, or at least dangerously confusing, idea.⁴ Moreover, outside the legal academy, political theorists and philosophers continue to disagree over the question whether, or in what sense, equality is a meaningful principle.⁵

Thus, most theorists other than Peters agree that meaningful, substantive egalitarian norms exist—most notably, nondiscrimination rights (such as the right not to be disadvantaged on the basis of race or sex) and many distributive justice theories (such as John Rawls' difference principle). But it is much more controversial whether the so-called “formal” principle of equality (that likes should be treated alike, or equals should be treated equally) or the principle of “precedential” or “prescriptive” equality⁶ (that the prior treatment of another, like individual

¹Christopher J. Peters, *Equality Revisited*, 110 *Harv. L. Rev.* 1210 (1997). Peters' specific target is what he calls “prescriptive” equality. See Section C.3 [“Limited to Historical Differences in Treatment”] *infra*.

Kent Greenawalt has replied to certain aspects of Peters' thesis. Greenawalt, “Prescriptive Equality”: Two Steps Forward, 110 *Harv. L. Rev.* 1265 (1997).

²Peter Westen, *The Empty Idea of Equality*, 95 *Harv. L. Rev.* 537 (1982) (“Empty Idea”). Westen's article prompted a number of replies, including Steven J. Burton, *Comment on “Empty Ideas”*: Logical Positivist Analyses of Equality and Rules, 91 *Yale L. J.* 1136 (1982); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 *Mich. L. Rev.* 575 (1983); Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 *Colum. L. Rev.* 1167 (1983); Kenneth L. Karst, *Why Equality Matters*, 17 *Ga. L. Rev.* 245 (1983).

³Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of “Equality” in Moral and Legal Discourse* (1990).

⁴Westen's original article emphasizes the emptiness of equality, while his book puts much greater stress on the complexity, variety, and potential confusion of egalitarian norms. The evolution of Westen's ideas is revealed by the fact that Westen does not cite his original “Empty Idea” essay in the bibliography to his book, and explicitly disowns the title in his Preface. *Id.* at xix-xx (asserting that equality is not meaningless but instead derivative, and acknowledging the usefulness of a certain class of equality rights and of the presumption of equality). However, Westen's “Empty Idea” essay continues to be cited with much greater frequency than his book.

⁵See, e.g., Madison Powers, *Forget about Equality*, 6 *Kennedy Inst. of Ethics J.* 129 (1996); John Kane, *Justice, Impartiality, and Equality: Why the Concept of Justice Does Not Presume Equality*, 24 *Polit. Theory* 375 (1996); Amartya Sen, *On the Status of Equality*, 24 *Polit. Theory* 394 (1996); John Kane, *Basal Inequalities: Reply to Sen*, 24 *Polit. Theory* 401 (1996).

⁶“Precedential” equality is my nomenclature. Peters describes this principle as “prescriptive” equality. See text at notes = *infra*.

gives a second individual a claim to equal treatment) is a genuine principle of equality.⁷

Moreover, the principle of equality prompts several troublesome objections. First, it seems to demand the multiplication of wrongs: if someone in the past was incorrectly given more (or less) than she deserves, then equality seems to demand a repetition of the mistake for all who are similarly situated. Thus, “two wrongs make a right,” in the sense that two wrongs are what equality sometimes requires. Second, sometimes equality seems to demand “leveling down,” to no one’s benefit. If the resources of two groups or classes are to be equalized, then apparently we satisfy equality if we take resources away from the more fortunate group, even if this does not benefit the less fortunate. Third, conventional equality analysis has been criticized by some feminists for endorsing only a superficial form of equal treatment, according to which government satisfies egalitarian norms when it provides veterans’ benefits “equally” to men and women with the same military backgrounds (notwithstanding that men are the predominant beneficiaries), or when it “equally” denies parental leave to both sexes (even though women predominantly suffer the burden of such a policy). And where women are not in fact similarly situated to men (for example, in their ability to bear children), conventional equality analysis seems incapable of criticizing unjust policies (such as a blanket policy of firing pregnant workers).

This article defends the norm of equality against such criticisms. I argue that a single general conception of the right to equal treatment operates not only in the relatively uncontroversial contexts of nondiscrimination rights and distributive justice principles, but also in those contexts (the formal principle and precedential equality) where equality’s force and coherence are in greater doubt. That single conception helps identify when the formal principle and precedential equality do, and when they do not, express a distinctive equality principle.

⁷Consider two recent survey articles on the topic. Richard Arneson identifies two aspects of the ideal of equality—equality of democratic citizenship (assuring equal basic rights to all members of society) and equality of condition or of life prospects. Richard J. Arneson, *Equality*, = 489. Brian Barry distinguishes three roles that the concept of equality plays within political philosophy:

“Equal treatment for equals” specifies that those who are equal in some relevant respect should be treated equally. “Fundamental equality” refers to the idea that all human beings are of equal worth, have equal (fundamental) rights, or should be awarded equal respect and concern. “Social equality” [includes] political equality, economic equality, and equality of status among the members of a society.

Brian Barry, *Equality*, 1 *Encyclopedia of Ethics* 322-323 (Lawrence C. Becker ed. 1992). Barry then suggests that “equal treatment for equals” captures a significant sense of equality, but is an empty formula until the relevant “equals” are specified. So the popular demands for equality must, he concludes, refer to one of the other senses of equality. *Id.* at 323. My analysis of the first formula is a bit different. See text at notes = *infra*.

In brief, the single conception of the right to equal treatment that applies in these different contexts has a relational or comparative logic. In its negative form, it is the conception that certain traits or criteria are impermissible bases for the unequal distribution of treatments. In its positive form, it is the conception that if one person or class of persons obtains a benefit, so should another person or class. In either form, the conception expresses a genuine and distinctive right to equal treatment. The very point of the right is to forbid certain inequalities, or to assure certain equalities. Equality is not simply a consequence of the application of other principles whose point is essentially noncomparative.

This comparative conception has much greater explanatory power than either formal equality, precedential equality, or Peters' so-called nonegalitarian justice (NEJ).⁸ According to NEJ, the injustice of racial discrimination and other forms of invidious discrimination consists solely in the decisionmaker's giving weight to irrelevant criteria. But this reductionist account is grossly deficient. It drastically oversimplifies the moral and legal issues at stake, and also trivializes them.⁹

The basic conception of equality that I defend in this article is simple. But the role of equality in moral and legal argument is complex. The confusions that equality has engendered are due, I believe, not to the obscurity or meaningless of the basic concept but to the widely varying contexts in which equality arguments are employed. More careful attention to those contexts reveals that the various objections to equality—as an empty, confusing, or gratuitous concept; as requiring the multiplication of wrongs or leveling down; or as privileging the status quo, adopting a superficial standard of “sameness,” and devaluing difference—are either overstated or mistaken.

To reject any use of the concept of equality in legal and moral argument¹⁰ would be an enormous mistake. Contrary to Peters and other skeptics, we often do, and we should, care about equality as an independent normative goal. The norm of equality, with its distinctive logic and force, has powerfully shaped the analysis of a range of critical social issues—from the distribution of wealth, opportunities, and legal rights across a society, to the prohibition of invidious criteria such as race or ethnicity, to the requirement that government officials and others act impartially. Our discourse would be greatly impoverished, and moral argument would be greatly and unnecessarily complicated, if we abjured

⁸See Peters, *supra* note 1=, at 1228.

⁹Peters has a similarly impoverished view of John Rawls' difference principle. See text at notes 141-146= *infra*.

¹⁰This article addresses equality in both law and morality, and it provides numerous examples from each domain. The conceptual and general nature of the argument justifies, I believe, employing the same analysis in both domains. Of course, many moral theories will support egalitarian norms that it would be infeasible to recognize in law. And many legal institutions might value forms of equality (such as requirements of impartiality in administering discretionary benefits or burdens) that moral theories would scant.

the concept of a right to equal treatment, as Peters and other authors suggest.

A final note on terminology. This paper addresses, not every conceptual and normative issue provoked by the term “equality,” but instead the meaning of a right to obtain (or a duty to accord) equal treatment. For convenience, I will employ “equality” as a shorthand for such a right or duty. I will also point out occasions when theorists use the term “equality” in a different sense.

A. The supposed problems with equality

This section briefly reviews some of the principal difficulties that critics have raised about whether equality norms are useful, plausible, or justifiable. Later sections of the paper will address these and other difficulties in more detail. (The supposed problems are closely related.)

1. Emptiness

In his well-known article and in responses to criticism, Westen claimed that equality is a meaningless concept, a pure tautology, which can be completely replaced by other rules or norms.¹¹ The concept of “equality” that Westen is here criticizing, and that he claims is the most basic and general, is the formal principle, “likes should be treated alike.”¹² To use one of his examples, if a standard prescribes that all Rhodes Scholars shall receive fellowships to Oxford, then we would achieve “equality” and would “treat likes alike” simply by implementing the standard faithfully.¹³ Giving fellowships to some Rhodes Scholars but not others, or giving them to no Rhodes Scholars, would violate the precept that likes should be treated alike, but only because the precept itself identifies the standard of “likeness.” The statement of equality collapses into a statement of a right (of any Rhodes Scholar to a fellowship).¹⁴ Equality is a tautology.¹⁵

¹¹Westen, *Empty Idea*, supra note 2=; Westen, *On “Confusing Ideas”*: Reply, 91 *Yale L.J.* 1153 (1982); Westen, *The Meaning of Equality in Law, Science, Math & Morals*: A Reply, 81 *Mich. L. Rev.* 604 (1983); Westen, *To Lure the Tarantula from Its Hold*: A Response, 83 *Colum. L. Rev.* 1186 (1983).

¹²Westen, *Empty Idea*, supra note 2=, at 539.

¹³*Id.* at 545.

¹⁴*Id.* at 542.

¹⁵*Id.* at 547-548. As Westen argues:

To say that two persons are the same in a certain respect is to presuppose a rule—a prescribed standard for treating them—that both fully satisfy. Before such a rule is established, no standard of comparison exists. After such a rule is established, equality between them is a “logical consequence” of the established rule. They are then “equal” in respect of the rule because that is

2. Confusion

Westen, in both his earlier writings and his book, argues that equality arguments often engender confusion. Equality, he claims, masquerades as an independent norm and therefore conceals the real nature of the rights that it incorporates.¹⁶ And equality supports the “fallacy of equivalents,” misleading people into believing that if, say, blacks are considered equal to whites in the sense that blacks are protected from invidious discrimination, then blacks must be equal to whites in the very different context of affirmative action.¹⁷

In his book, Westen asserts a number of other confusions that equality engenders. Prescriptive and descriptive equality are often confused, as in the statement that “all men are created equal.”¹⁸ Equality is assumed to have a unifying feature: arguments for equality in a particular domain are falsely believed to further a general historical movement towards greater equality.¹⁹ And there is a misleading semantic bias in favor of equality, as opposed to inequality.²⁰ Thus, Westen asserts, Abraham Lincoln succeeded in putting Stephen A. Douglas on the defensive by invoking equality as support of the abolition of slavery. But, Westen claims, the concept of equality did not really help Lincoln, and Douglas could just as well have invoked a competing equality to support his position.²¹ Although Lincoln surely had the better argument, Westen

what equal means: “Equally” means “according to one and the same rule.” They are also then entitled to equal treatment under the rule because that is what possessing a rule means: “To conform to a rule is (tautologically) to apply it to the cases to which it applies.”

Id. at 548 (footnotes omitted).

Peters agrees that such “traditional” equality arguments state the tautology that “People identically entitled to a particular treatment are identically entitled to that treatment.” Peters, *supra* note 1=, at 1217.

¹⁶Id. at 580-581. For example, it encourages vague equal protection standards for the evaluation of “fundamental interests” when substantive due process would be a clearer doctrinal approach. Id. at 581 n. 154.

¹⁷Id. at 581-584. See Westen, *Speaking of Equality*, *supra* note 3=, at 269-270. See also id. at 262-265 (arguing that equality in law and morals is confused with mathematical equality; the latter, but not the former, means equality in all respects).

¹⁸Id. at 266-267 [=Spell out his argument; note that W’s sense of prescriptive equality differs from Peters’].

Similarly, Westen asserts, prescriptive equality is often grounded on descriptive equality: people “ought” to be treated equally because they “are” equal. Id. at 266.

¹⁹Id. at 271-274.

²⁰Id. at 274-280.

²¹According to Westen:

[Douglas] could have responded, not by defending inequality, but by advocating a competing equality such as the equal rights of the citizens of each state to

concludes, the reason the argument was better was not its closer affinity with the misleading concept of equality.²²

3. Gratuitousness

Perhaps equality is an unnecessary and superfluous concept. Peters claims that equality is just a descriptive consequence of achieving nonegalitarian justice. “I am not against equality,” Peters reassures us:

Equality, in its descriptive sense, is a necessary product of nonegalitarian justice, and I am all for nonegalitarian justice. If we treat people rightly, we always in some sense treat them equally. Of course I support treating people rightly. But ... if we treat people equally, we do not necessarily treat them rightly.²³

Westen has made the same point.²⁴ Moreover, other theorists similarly doubt that normative equality principles are coherent and meaningful (except insofar as they follow from nonegalitarian principles).²⁵

In the end, Westen concludes that we could remove the term “equal” from the inscription on the United States Supreme Court building, “equal justice under law,” without changing the meaning of the phrase.²⁶

decide for themselves whether to abolish slavery, or the equal right of all persons (free and slave, white and black) to receive the treatments to which they were entitled under state and federal law.

Id. at 282.

²²Id. at 283.

Joseph Raz asserts that “intellectual confusion” is the price of employing two very different conceptions of egalitarianism--the “rhetorical” and the “strict.” Raz, *The Morality of Freedom* 228 (1986). This distinction essentially tracks my distinction between lexical equalities and comparative equality rights. However, insofar as Raz finds comparative equality rights to be meaningful, I do not count his observation about confusion as a criticism of equality.

²³Id. at 1213 (emphasis original).

²⁴Westen, *Empty Idea*, supra note 2=, at 542; Westen, *Speaking of Equality*, supra note 3=, at xix (“[J]ust as all normative disputes are about equality, none is really about equality.”), 127 (to the same effect).

Peters purports to offer an argument that differs from Westen’s insofar as Peters focuses on successive rather than simultaneous unequal treatments. But Westen did address this situation, as well, within his category of “prescriptions as baselines within descriptive standards of comparison.” See Westen, *Speaking of Equality*, supra note 3=, at 87-89, 98-99, 189-192. See also id. at 219-223.

²⁵E.g. John Kane, *Justice, Impartiality, and Equality: Why the Concept of Justice Does Not Presume Equality*, 24 *Polit. Theory* 375 (1996); = reply by Amartya Sen; = rebuttal by Kane; Louis Pojman, *Theories of Equality: A Critical Analysis*, 23 *Behavior & Philos.* 2, 25 (1995). = others.

²⁶Westen, *Empty Idea*, supra note 2=, at 558; see also Westen, *Speaking of Equality*, at xiii (arguing that omission of “equality” from the proposed Equal Rights Amendment would not change the meaning of the Amendment).

And Peters, in the same vein, concludes that we could remove the term “equal” from the language of the equal protection clause itself without changing the meaning of that clause.²⁷

The claim that egalitarian principles are gratuitous presupposes that some other standard is meaningful. What are the concepts of “rights” or “nonegalitarian justice” from which “equality” arguments supposedly derive, and to which they can supposedly be reduced? Westen and Peters offer similar definitions.

According to Westen, “[r]ights ... means all claims that can justly be made by or on behalf of an individual or group of individuals to some condition or power—except claims that ‘people who are alike be treated alike.’”²⁸ According to Peters, “nonegalitarian justice” means “treatment of a person in accordance with the net effect of all the relevant criteria and only the relevant criteria, provided that considerations of nontautological equality cannot be relevant criteria.”²⁹

What about nondiscrimination rights, such as the right not to be disadvantaged because of race? Are they not essentially about equality? No, according to Peters. Consider Yick Wo v. Hopkins, for example, where the city denied permits to operate laundries to all Chinese applicants but granted permits to almost all Caucasian applicants.³⁰ The Supreme Court relied on the equal protection clause to invalidate the policy. But Peters asserts that the injustice in Yick Wo is not a failure to respect equality. Rather, it reflects the principle that no one should be denied or granted a privilege based on an irrelevant characteristic. Race is such a characteristic. Even if only one person had been denied or granted a permit based on an irrelevant criterion, Peters claims, the same injustice would have been done; and this shows that the right is not based on equality.³¹

4. The multiplication of wrongs

One of the most common objections to equality is the complaint that equality requires the multiplication of wrongs. “The fullest, nontautological claim of the egalitarian,” says Peters, “comes down to this: sometimes a person should be treated wrongly simply because another, identically situated person has been treated wrongly.”³² (The wrong,

²⁷Peters, supra note 1=, at 1258.

²⁸Westen, Empty Idea, supra note 2=, at 540 (footnote omitted).

²⁹Peters, supra note 1=, at 1228 (emphasis omitted). Peters believes that his formulation differs from Westen’s insofar as “nontautological equality” differs from “likes should be treated alike.” However, Peters ignores Westen’s more complex analysis in *Speaking of Equality*. See note 24= supra.

³⁰118 U.S. 356 (1886).

³¹Peters, supra note 1=, at 1219-1220; see also *id.* at 1258-1259. I will discuss, and criticize, this “one person reductio” below. text at notes == infra.

³²Peters, supra note 1=, at 1212 (emphasis original). See also *id.* at 1225-1226 n. 31, 1226, 1227, 1250, 1252, 1252 n. 61, 1257, 1263, 1264.

Peters explains, can consist in undeserved beneficial treatment as well as undeserved detrimental treatment.³³)

Others have emphasized the same objection.³⁴ Consider the question whether a later court should invoke equality as a reason to follow an earlier court's precedent, even when the later court believes the precedent to be mistaken. According to Larry Alexander (as well as Peters³⁵), the answer is no: "intertemporal equality cannot convert an otherwise morally erroneous decision into a correct one."³⁶ Alexander makes the point vividly:

³³Id. at 1212.

³⁴Peter Westen cites the following example from William Frankena: "If a ruler were to boil his subjects in oil, jumping in afterwards himself, it would be an injustice, but it would be no inequality in treatment." Frankena, *The Concept of Social Justice* =17 (cited in Westen, *Speaking of Equality*, supra note 3=, at 90). See also =other cites=.

The objection is often asserted by death penalty proponents. One major argument against the death penalty is that it is administered in a highly arbitrary way, where "arbitrary" includes the unjustified imposition of a death sentence on some but not all of those who deserve it. Ernest van den Haag has forcefully responded with the multiplication of wrong objection:

[Some] appear to prefer equal injustice—letting all get away with murder if some do—to unequal justice: punishing some guilty offenders according to desert, even if others get away. Equal justice is best, but unattainable. Unequal justice is our lot in this world. It is the only justice we can ever have, for not all murderers can be apprehended or convicted, or sentenced equally in different courts. We should constantly try to bring every offender to justice. But meanwhile unequal justice is the only justice we have, and certainly better than unequal injustice—giving no murderer the punishment his crime deserves.

Ernest van den Haag, *Refuting Reiman and Nathanson*, in *Punishment and the Death Penalty* 207, 214 (Robert M. Baird & Stuart E. Rosenbaum eds., 1995). See also Ernest van den Haag, *The Collapse of the Case against Capital Punishment*, *National Review*, March 31, 1978, p. 397:

[T]he abolitionist argument from capriciousness, or discretion, or discrimination, would be more persuasive if it were alleged that those selectively executed are not guilty. But the argument merely maintains that some other guilty but more favored persons, or groups, escape the death penalty. This is hardly sufficient for letting anyone else found guilty escape the penalty. On the contrary, that some guilty persons or groups elude it argues for extending the death penalty to them.

³⁵Peters' objections to equality were first stated in the context of his objection to using equality to justify precedential constraints. See Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 *Yale L. J.* 2031, 2055-2064 (1996). See also Peters, supra note 1=, at 1226 n. 32, 1263.

³⁶Larry Alexander, *Constrained by Precedent*, 63 *S. Cal. L. Rev.* 1, 10 (1989). See also Larry Alexander, *Bad Beginnings*, 145 *U. Pa. L. Rev.* 57, 85-86 (1996); Larry Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 *L. & Phil.* 419, 427-430 (1987); David Lyons, *Formal Justice and Judicial Precedent*, 38 *Vand. L. Rev.* 495, 505, 508 (1985).

To take an extreme example, if most members of a particular group of people have been subjected to grossly unjust treatment—say, slavery or genocide—seeing that the rest of the members are subjected to the same treatment is no less wrong despite its furtherance of “equality.” Neither two nor two million wrongs can make a right, however much they equalize situations. Nor is the two millionth wrong somehow less wrong than the first.³⁷

5. Leveling down and waste

Suppose a class of persons fails to obtain a benefit that another class obtains, or suffers a burden that another class avoids. And suppose the inequality is unjustifiable. Equality is satisfied, it seems, either by giving the relevant benefit to (or withholding the burden from) both classes, or by denying the benefit (or extending the burden) to both classes. The latter option amounts to “leveling down” the more fortunate. But this seems indefensible. How can we justify an outcome that makes some people worse off and no one better off?³⁸ Here is an example from philosopher Derek Parfit:

Consider ... those Egalitarians who regret the inequalities in our natural endowments. On their view, it would be in one way better if we removed the eyes of the sighted, not to give them to the blind, but simply to make the sighted blind. That would be in one way better even if it was in no way better for the blind. This we may find impossible to believe.³⁹

Similarly, equality seems to demand waste: if equal extension of a benefit to all is infeasible, then the only apparent option consistent with equality is wasteful withholding of the benefit from all, even though it is

³⁷Id. at 10.

³⁸See Arneson, *supra* note 7=, at 501-502; Dennis McKerlie, *Equality and Priority*, 6 *Utilitas* 25, 27 (1994); Dennis McKerlie, *Critical Notice of Temkin, Inequality*, 25 *Can. J. Phil.* 623, 633-636 (1995); McKerlie, *Equality*, 106 *Ethics* 274, = (1996); Derek Parfit, *Equality or Priority?*, *The Lindley Lecture*, Univ. of Kansas, Nov. 21, 1991, pp. 17-18, 23-24; Madison Powers, *Forget about Equality*, 6 *Kennedy Inst. of Ethics J.* 129 (1996)(=); Larry S. Temkin, *Inequality*, Ch. 9 (1993); Pojman, *supra* note 25=, at 11.

³⁹Parfit, *id.* at 17. Parfit continues with another example:

Egalitarians would avoid this form of the objection if what they think bad is only inequality in resources. But they must admit that, on their view, it would in one way better if, in some natural disaster those who are better off lost all of their extra resources, in a way that benefitted no one. This conclusion may seem almost as implausible.

feasible and socially valuable to benefit some.⁴⁰ Consider one of Peters' examples. If a lifeboat will hold only ten of eleven survivors of a shipwreck, and all eleven have an equal right to a place in the lifeboat, then equality demands either the impossible (saving all) or the unthinkable (letting all eleven drown). That is, since we must, by hypothesis, let at least one drown, and since the other ten are similarly situated, equality demands that we let them drown, too. Only nonegalitarian principles, Peters concludes, can explain the decision to save some but not all.⁴¹

6. Privileging the status quo

Feminist scholars have provided some of the most detailed, thoughtful analyses of the concept of equality.⁴² One important critique that some feminists have developed is the claim that conventional equality analysis privileges the status quo.

Early feminist legal challenges to discriminatory practices tended to adopt a "sameness" approach, demanding that women obtain what men already were entitled to (in the way of job opportunities or other legal privileges). But this approach defines equality in terms of the male standard. It therefore fails to address ways in which women are different from men (such as their capacity for bearing children).⁴³ It also fails to challenge the legitimacy of the male standard itself.⁴⁴ For example, if women's equality means only that women are entitled to work conditions equal to men's, and if those work conditions are defined according to a male standard that downplays family responsibilities relative to efficient work production, then promoting equality means promoting an unacceptable and unjust status quo.

Moreover, conventional equality analysis might only guarantee a superficial form of equal treatment.⁴⁵ The conventional analysis might require that female military veterans receive the same civil service job preference or other benefits that male veterans with the same length and type of service receive; but it does not seem to permit a more basic

⁴⁰See Raz, *supra* note 22, at 227, 235; Greenawalt, *supra* note 1, at 1277 n. 41.

⁴¹Peters, *supra* note 1, at 1237-1238. Peters concludes that each person should be given an equal (10/11) chance at the scarce benefit, and asserts that this principle is grounded in nonegalitarian justice. *Id.* at 1240-1243. Below, I will endorse his conclusion but challenge the assertion that nonegalitarian justice is the operative principle here. =discuss later= text at notes = *infra*.

⁴²For a helpful overview, see D. Kelly Weisberg, Introduction, *Feminist Legal Theory: Foundations* 121-127, 211-220 (Weisberg, ed. 1993).

⁴³See *id.* See also Anne Dailey, *Feminism's Return to Liberalism* 102 *Yale L. J.* 1265 (1993); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990); Cynthia Ward, *On Difference and Equality*, 3 *Legal Theory* 65 (1997).

⁴⁴See Weisberg, *id.*

⁴⁵A closely related complaint is that conventional equality analysis creates an illusion of neutrality. See Mary Becker, *Prince Charming: Abstract Equality*, 1988 *S. Ct. Rev.* 201, =.

challenge to the veterans' preference itself, a preference that inures largely to the benefit of men.⁴⁶ Similarly, a policy of "equally" denying parental leave to both men and women, or of "equally" denying reimbursement for all "voluntarily" incurred medical expenses including pregnancy, can nevertheless be unjust insofar as each policy burdens women much more severely than men; but conventional equality analysis might be inadequate to express this injustice.

7. Privileging sameness and devaluing difference

A related feminist critique is that conventional equality analysis privileges the idea of "sameness" and devalues the ways in which women are different from men.

Legal treatment of pregnancy is the central illustration of this critique. In two much-criticized decisions, the Supreme Court rejected the claim that discrimination according to pregnancy is sex discrimination.⁴⁷ For many feminists, these decisions reflect a defect in conventional or "formal" equality analysis. That analysis requires equal treatment only if women are similarly situated to men (with respect to the purpose of the law or policy). But if women have a distinctive condition or quality, such as the capacity to bear children, they are not similarly situated. It then seems that conventional equality norms cannot justify policies that protect women from unfair treatment premised on these distinctive conditions (for example, a policy forbidding employers from firing all pregnant workers).

One response to these concerns is to endorse "special treatment" rather than "equal treatment." But a norm of "special treatment" can be criticized as patronizing and paternalistic. If "special" and "equal" treatment are each problematic justifications for policies recognizing the distinctiveness and social importance of sex-specific conditions, we are pushed towards the unpalatable conclusion that such policies are not justifiable at all.

B. What equality is

Rather than respond immediately to these objections to egalitarian arguments, I will present what I believe to be a more persuasive account of the logic and force of equality. A later section addresses the supposed problems directly, and shows that equality analysis, if carefully employed, is robust enough to avoid these objections..

⁴⁶See *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979)(upholding an absolute lifetime civil service job preference for veterans with passing scores on examination, even though 98% of the beneficiaries of this preference were male).

⁴⁷*General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (Title VII analysis); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (equal protection analysis).

I begin with a simple example of a genuine right to equal treatment. Suppose my daughter reports that a new girl has just joined her kindergarten class. Some members of the class had refused to let the new girl contribute to their joint art project because "she talks funny": she has a foreign accent. The teacher became angry with the class about this. Why would the teacher be angry? A natural answer, and one that I would try to explain to my daughter, is that the exclusionary behavior of some members of the class was unfair, for it unfairly singled out one girl in a way that hurt her feelings, for no good reason. A slightly more formal answer is that each girl in the class has a right, or is entitled, to equal treatment from her peers with respect to participating in school activities; more generally, each girl has a right to be treated with equal respect.

Notwithstanding straightforward examples such as this, the meaning of a right to equal treatment can be surprisingly complex or ambiguous.

1. One meaning of "A and B should be treated equally"

"Equality" can be used in either a descriptive or prescriptive sense. Even in its prescriptive or normative⁴⁸ sense, it is crucially ambiguous. Suppose my children Bonnie and Clyde would like to have dessert after eating their dinner tonight. And suppose they assert that they are "normatively equal" in the sense that they "should be treated equally" in that respect. Such normative equality can mean:

- (1) Equal entitlement of two or more persons to a particular treatment, as a result of each person's independent right to that treatment.

Consider an example:

(1A) I have promised Bonnie that she may have dessert if she finishes her dinner, calls back a friend, and picks up her room. I have promised Clyde that he may have dessert if he finishes his dinner, packs up his sports equipment for tomorrow, and practices his piano. Each is entitled to dessert. Their entitlements are equal.

But normative equality can also mean:

⁴⁸I employ the term "normative equality" in this section rather than "prescriptive equality" simply to avoid confusion with Peters' narrower conception of "prescriptive equality," discussed below. It is unfortunate that Peters has employed the general term in such a specialized way. "Precedential equality" might have suited Peters' purposes better while avoiding confusion, as I will explain. text at notes 123-139= *infra*.

(2) A right to equal treatment, the point of which is to equalize treatment between two or more persons in some respect.

Consider another example:

(2A) I have promised my children that if I permit either one of them to have dessert, I will permit the other to have dessert, too.

The first sense of normative “equality” is trivial and derivative. Equality of entitlements in (1A) is merely a consequence of applying two separate rules or principles.⁴⁹ Here is a more extreme example:

(1B) Jones is a convicted murderer who has been sentenced to death. Because of Jones' moderate mental illness and doubts about his guilt, the governor exercises clemency and reduces his sentence to life imprisonment. Smith is a repeat felon who violates the state's “three strikes and you're out” provision, and therefore is sentenced to life imprisonment. Jones and Smith each independently deserves a punishment of life imprisonment. They deserve the same punishment.

Are Jones and Smith entitled to equal treatment? Not in any important sense. They have no right to equal treatment as such, but only separate rights to treatments which, as it turns out, are equal.

Two criteria of genuine equality rights help us to see why cases such as (1A) and (1B) do not exemplify genuine equality rights. One criterion expresses the point that inequality is a distinct additional wrong, beyond the fact of denial of a benefit. This first (“distinctive wrong”) criterion therefore asks whether unequal (as opposed to simple) denial of the benefit creates an additional wrong. In cases such as (1A) and (1B), the answer is no. The second (remedial) criterion recognizes that the wrong of inequality can be redressed either by extending benefits to all relevant persons or by denying benefits to all: it asks whether equal and uniform denial of the benefit to all persons is better in any respect than unequal denial. And again, in cases such as (1A) and (1B), the answer is no: uniform denial is not better, but is instead the worst state of affairs.⁵⁰

Consider the first, “distinctive wrong” criterion. If beneficial treatment were unequally distributed to the persons or classes who rely on the supposed equality right expressed in (1), the denial of the benefit to one person or group would violate their independent rights, but it would not violate any right to equal treatment. If the governor's pardon of Jones is

⁴⁹In an earlier article, I spell out this point in more detail. Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. Rev. 387, 393-416 (1985). See also Raz, *supra* note 22, at 225; Parfit, *supra* note =, at =.

⁵⁰This assertion must be qualified, however, in the case of what I call impure equality rights. See Section B.3= *infra*.

not given proper legal effect, then Jones has a valid complaint that he should receive the benefit of the pardon, but Jones has no independent right of equal treatment with Smith. Whether or not Smith receives the proper legal punishment of life imprisonment is irrelevant to Jones' entitlement. Similarly, if, under (1A), one child does and the other does not receive dessert, the disappointed child can validly complain that I failed to honor my promise, but cannot validly complain that I failed to treat him or her equally, as I should have.⁵¹

Now consider the second, remedial criterion. Under a proper understanding of the principles in (1), considered by themselves, equal and uniform denial of the benefit to all persons is the worst state of affairs, and most certainly is worse than unequal denial. If Smith and Jones both suffer the death penalty, rather than the term of life imprisonment to which each is separately entitled, this is a worse state of affairs than one in which only Jones or only Smith is denied what he deserves. And if I fail to honor my promises (in (1A)) to both children, I bring about a worse state of affairs than if I fail to honor one only promise.

Contrast principle (2). Here, equality plays a more fundamental role. The very point of the principle is to achieve equality. And unequal distribution of benefits necessarily violates the principle, while equal distribution does not. But equal distribution satisfying the equality principle can consist either of equal conferral of the benefits or of equal denial. It is consistent with (2A) for me to give dessert to both children, or to neither. Or, to return to the kindergarten example, perhaps the children may do individual art projects, but once they choose to do a group project, they should not exclude any child from the project (at least absent a strong reason).

Consider, then, how the two criteria would apply to principle (2). As to the first ("distinctive wrong") criterion, unequal (as opposed to simple) denial of the benefit does create an additional wrong under principle (2). Indeed, it might create the only type of wrong, if the decisionmaker violates no rights and otherwise does no wrong in declining to confer the benefit. Giving dessert to one child but not the other violates an equality principle (namely, (2A)), quite apart from whether either child was promised dessert (e.g., under a principle such as (1A)).

And, as to the second (remedial) criterion, it is now no longer the case that equal and uniform denial of the benefit to all persons is the worst state of affairs. Rather, from the perspective of respecting the equality right in (2), uniform denial of the benefit is indeed a better state of affairs than unequal denial. From the perspective of respecting my children's right to equal treatment as expressed in (2A), it is better if I give dessert to neither than if I give it to one; and it is neither better nor worse if I give dessert to both rather than to neither.

⁵¹This example does raise a doubt. If I honor my promise as to one child, should I not honor my promise as to another? And doesn't that deeper obligation express a genuine egalitarian duty? I explore this point further below. See Section D.1= infra.

Still, is it better, all things considered, to give dessert to one than to none? The answer depends on the force of other moral or legal reasons for actions, as we shall see.⁵²

2. A comparative right

The equality principle expressed in (2) is one important category of comparative right--that is, a right whose point is to equalize the treatments of different persons, or to create some other relative relationship in those treatments.⁵³ Comparative rights can guarantee relationships other than equality.⁵⁴ They might guarantee preference for one group as compared to

⁵²Section D.4= *infra*.

⁵³The first explicit account of comparative rights or comparative justice is Joel Feinberg, *Noncomparative Justice*, 83 *Phil. Rev.* 237 (1974). See also Joel Feinberg, *Social Philosophy* ch. 7 (1973). Other important accounts include Joseph Raz, *supra* note 22=, Ch. 9; and Joshua Hoffman, *A New Theory of Comparative and Noncomparative Justice*, 70 *Phil. Stud.* 165 (1993). In the legal literature, see Greenawalt, *supra* note 2=, at 1178-1183; Simons, *supra* note 48=, *passim*; Westen, *Speaking of Equality*, *supra* note 3=, at 131-145. As applied to the debate over the capricious implementation of the death penalty, see Stephen Nathanson, *Does It Matter If the Death Penalty Is Arbitrarily Administered?*, 14 *Phil. & Pub. Aff.* 161, 163, 167-168 (1985).

This article discusses comparative equality rights. Most of the analysis would also, however, apply to and explain a duty to treat people equally, even if no right corresponded to that duty. A teleological view, for example, might decline to recognize rights in victims of equality, but might justify a duty to bring about the best state of affairs, which in turn is defined in part as the reduction or elimination of certain inequalities. (On Raz's view of rights, to have a right is to have an interest that grounds another's duty. Raz, *supra* note 22=, Ch. 7. So an egalitarian right does imply a duty; but an egalitarian duty does not imply that anyone has a right against the dutyholder.)

One possible difference between the duty and the right is this: government might have a duty to level down, yet it might be the case that no one has a right that inequality be leveled down, since leveling down makes no one better off. Whether this conclusion follows, however, depends on whether inequality creates any special injury apart from the relative level of tangible benefits or resources. See text at notes = *infra*.

⁵⁴See Simons, *supra* note 48=, at 438 n. 114:

In general, comparative rights are of this form:

(A) If class T obtains benefit or burden B, then class S should obtain f(B)

where f(B) is some function of B. If the function is equality, i.e., f(B) = B, then the result is a comparative equality right:

(B) If class T obtains B, then class S should obtain B.

(For a similar account, see Raz, *supra* note =, at 225: "(6) All F's who do not have G have a right to G if some Fs have G.")

This account does not accurately describe nondiscrimination rights, however. Such rights have a logic of the following form:

another, as in some affirmative action plans; or they might guarantee, not strict equality, but instead constraints upon inequality. (Rawls' difference principle is an example.⁵⁵)

Nondiscrimination rights clearly are comparative. The point of the right is to forbid the government or other duty-holder from discriminating against certain persons or classes on the basis of specified traits or reasons. Egalitarian political theories are also obviously comparative. Their point is to assure a specified form of equality (or to forbid specified forms of inequality) in resources, opportunities, or rights.⁵⁶

Comparative rights have several important characteristics. First, their requirements are contingent. Comparative rights do not, by themselves, require anything. But, when conjoined with actual treatments or other entitlements, they can require a particular form of treatment. Thus, the right expressed in (2A) provides that if one child obtains dessert, so shall the other. Similarly, the effect of a right not to be discriminated against on the basis of race depends on what initial treatment the decisionmaker has chosen to provide. If an employer offers a particular level of pay to entry-level whites, he must offer that level to entry-level blacks. However, he may lower the level of pay to entry-level whites, so long as the pay he offers to entry-level blacks is no lower.

This last example underscores a second important feature of comparative rights: flexibility. Any distribution of treatments that satisfies the requisite comparative relationship will satisfy the right. Under (2A), I may give dessert to both children, or to neither. And, in the discriminatory pay scale example, the employer may (putting aside for now other legal and moral constraints) raise or lower the pay scale as much as he likes, so long as he does not vary pay along racial lines.⁵⁷

(N) Characteristic R shall not be used to permit or justify the unequal distribution of B.

The relation between negative equality rights (such as nondiscrimination rights (N)) and positive equality rights (such as (B)) seems to be as follows:

(N*) If class T obtains B, and if class S would otherwise be entitled to B except for S's possession of characteristic R, then S should obtain B.

For a less formal analysis of discriminatory motives and stereotypes, see text at notes = infra [B.4=, Equality of Respect].

⁵⁵“Social and economic inequalities are to be arranged so that they are ... to the greatest benefit of the least advantaged.” John Rawls, *A Theory of Justice* 83 (1971).

⁵⁶See, e.g., David Miller, *Arguments for Equality*, in 7 *Midwest Studies in Philosophy* 73 (P. French et al eds. 1982).

⁵⁷Of course, the decisionmaker's flexibility depends on the scope of the comparative right. S might have a right to equal treatment with T with respect to some benefits but not others. (Women might have a right not to suffer discrimination with respect to job opportunities, but not with respect to obtaining private dinner invitations.) And the right might be, not to equality, but to the minimization of inequality, either within a certain range or subject to certain compelling reasons. (The difference principle exemplifies the latter; a guaranteed minimum income computed as a percentage of the

This point, that comparative rights may be flexibly satisfied, also implies that their violation may be flexibly remedied. If a court finds an equal protection violation, it may, consistently with the egalitarian norms embodied in the equal protection clause, permit the wrongdoer to respond either by extending or denying the benefits to both classes in question.⁵⁸ (In the case of burdens, it may permit the wrongdoer to either extend them to, or remove them from, both classes.) Of course, other moral and legal principles might constrain these options. For example, if the relatively advantaged beneficiaries have a contractual or moral right to rely on continued receipt of the benefits, then extension of benefits might be the only acceptable option.⁵⁹ Still, the equality right itself would be satisfied by either type of remedy.⁶⁰

mean income would exemplify the former.) Further, equality as to B might be guaranteed only as to a certain range of B. For example, legal or moral principles might require equal basic health care, but permit unequal distribution of elective or cosmetic surgery.

⁵⁸This feature accounts for the otherwise inexplicable standing doctrine in equal protection cases: the complainant has standing to object to the more favorable discriminatory treatment of others even if the remedy for the discrimination might level down the benefits of others, thus leaving the complainant with the same benefits. See *Heckler v. Mathews*, 465 U.S. 728, 738-39 (1984); *Orr v. Orr*, 440 U.S. 268 (1979). Indeed, a complainant has standing even if the remedy would only directly benefit others in his class (such as other white applicants objecting to an affirmative action program). The theory in this last category of cases is that the injury from the equality violation “is the denial of equal treatment resulting from the imposition of the [racial] barrier, not the ultimate inability to obtain the benefit.” *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 653, 666 (1993). See generally Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, §2.5.3 (1997); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 89-90 (5th ed. 1995).

⁵⁹When a legislature prospectively restricts benefits, it often “grandfathers” some past beneficiaries, continuing at least some of their benefits for some period of time, while imposing the new restrictions on all new beneficiaries. A strict “leveling up” requirement would forbid such grandfather provisions.

Moreover, even if a grandfather clause is the legislature’s response to a judicial finding that it has violated equality principles, it might be upheld, if the protected beneficiaries have a strong reliance interest. See *Heckler v. Mathews*, 465 U.S. 728, 746 (1984) (“We have recognized, in a number of contexts, the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time.”). See also *Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992); *Sklar v. Byrne*, 727 F.2d 633, 639-642 (7th Cir. 1984).

⁶⁰In his book, Peter Westen now concedes that equality rights have this type of distinctive flexibility. Westen, *Speaking of Equality*, *supra* note 3=, at 134. My arguments explicating equality as a comparative right might have influenced Westen to change his view. *Id.* at xx.

However, Westen continues to understate the distinctiveness of equality rights. Thus, with respect to the claim by Raz and me that the very point of equality rights is to achieve equality in treatment, Westen partially demurs: “[W]hile all rights aim toward equality, only antidiscrimination rights aim solely toward equality. All rights require, and (if faithfully applied) result in, relationships of equality.” *Id.* at 140. I disagree that noncomparative rights aim toward equality at all. Rather, equality is their incidental effect, a mere byproduct of requiring the duty-holder to provide a specified form of noncomparative treatment to a class of persons. And even this effect depends on the

In this analysis of flexibility, I have been assuming a “pure” equality right. But some equality rights are neither so pure nor so flexible. The next section explores the interesting category of “impure” equality rights, which cannot be honored by leveling down benefits, denying them to all (nor by leveling up burdens, thus extending them to all).

Consider now a third important feature of comparative rights, including equality rights: their generality. Comparative rights have a distinctive shape or logical structure, but their content is otherwise unspecified. Accordingly, the comparative shape can accommodate an enormous range of different specific rights. The actual content of the equality right depends on the context, including the function of the right in a larger legal or moral system. Equality principles can govern issues as momentous as the distribution of primary social goods (liberty and opportunity, income and wealth, and the bases of self-respect) in the basic structure of society, as in Rawls’ difference principle,⁶¹ or as mundane as the distribution of dessert to one’s children.⁶² Equality rights potentially apply to burdens as well as to benefits⁶³; to omissions as well as acts; to multiple as well as single decisionmakers; to simultaneous as well as successive decisions⁶⁴; to moral as well as legal rules; to higher-level as well as lower-level principles⁶⁵; and to positive as well as negative rights.⁶⁶ Equality rights can demand quantitatively identical treatment of classes, but they can also require the reduction or minimization of inequality (for example, the amelioration of past discrimination against women, blacks, and other historically disadvantaged groups; or the prohibition of social inequalities that are not to the benefit of the worst off⁶⁷). And equality rights can address not just the treatments distributed by a decisionmaker,

right having the form of an entitlement under a classification or rule, rather than the form of an entitlement held by uniquely specified individuals. See text at notes 107-109= *infra*.

⁶¹Rawls, *supra* note 51=, at 62.

⁶²For discussion of the scope of equality principles, varying according to subjects, domain, and other factors, see William B. Griffith, *Equality and Egalitarianism: Framing the Contemporary Debate*, 7 *Can. J. L. & Juris.* 5 (1994); Douglas Rae et al., *Equalities* (1981).

⁶³However, in his response to Peters, Greenawalt clarifies that he is agnostic about whether “the principle of equality should authorize giving people worse [rather than better] treatment than they otherwise deserve.” Greenawalt, *supra* note 1=, at 1289 (footnote omitted).

⁶⁴Compare a situation in which an employer first hires a white person, then later refuses to hire an equally qualified black, with a situation in which the hiring decisions are made simultaneously.

⁶⁵In a legal system, egalitarian norms can be constitutional, statutory, or common law. See Simons, *supra* note 48=, at 423.

⁶⁶See text at notes 56= *supra*.

⁶⁷See generally Rawls, *supra* note 51=.

but the deeper and more subtle question of how a distributional decision affects the status of different social groups.⁶⁸

The justification of an equality right might be consequentialist (or instrumental): a society might prohibit racial discrimination in order to prevent racial strife. But the justification might also be deontological: the victim of racism has a special grievance because the perpetrator has treated her with egregious disrespect.⁶⁹

Comparative rights can extend to both traits and interests. Thus, in equal protection law, government requires an unusually strong justification in order to discriminate based on the trait of race or gender, or in order to discriminate against those exercising a right to free speech or a similarly fundamental interest. And equality rights can forbid not only any use of a trait, but also explicit reliance on particular factors as reasons for a decision, or even bringing about a particular type of effect on those with the trait. Thus, Title VII forbids not only “disparate treatment” on the basis of race and gender, but also certain forms of “disparate impact” or effect.⁷⁰

⁶⁸This distinction might help explain the feminist debate over whether women should frame their claims of unjust treatment in terms of “sameness” or instead “difference.” See Section B.4= and text at notes 233-237= *infra*.

⁶⁹For discussion of the distinction between deontological and teleological (including consequentialist) accounts of equality in the context of distributive justice, see Larry Temkin, *supra* note 38?=: Parfit, *supra* note 38=: Dennis McKerlie, *Equality*, 106 *Ethics* 274 (1996).

Peters apparently assumes that equality rights, to be genuine, must be deontological. But he does not explain his assumption. For example, in replying to Greenawalt’s views, he concedes that “good consequentialist reasons” may explain “why certain kinds of decisionmakers should avoid the appearance of partiality or bias,” but he concludes that these considerations (which I would certainly classify as egalitarian) are entirely a matter of nonegalitarian justice, not of deontological equality. Peters, *supra* note 1=, at 1239-1239 n. 46. And, in discussing the Lucky/ Unlucky lottery hypothetical, he concedes that permitting the inequality might undermine confidence in government, or reduce the willingness of people to play the lottery. Therefore, he concludes, our real concern is nonegalitarian justice, not equality. See also *id.* at 1250 n. 58 (“We favor equal treatment of children by their parents ... because we want children to feel that they are equally loved and that their parents are unbiased and impartial...”). But again, it is not clear why equality should not be considered an important and distinctive legal and moral concept simply because its value is viewed as instrumental rather than intrinsic.

⁷⁰=cites=

Consider also the Supreme Court’s treatment of wealth discriminations. The Court forbids explicit use of wealth to discriminate between classes of citizens, and forbids intentional discrimination against the poor, but permits most classifications that disproportionately affect the poor, such as fee requirements that the poor find much more difficult to meet. See *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988); ==explicit discrim. cite=.

Peters asserts that justice requires not just the correct outcome, but also that the reasons actually relied upon were the morally relevant ones. Peters, *supra* note 1=, at 1229, 1230. This need not be so. An equality right (as well as other rights and justice principles) might be concerned only with reasons, or only with outcomes, or with both. In Title VII, for example, disparate impact cases involve only outcome, while disparate

Finally, equality rights can take the form of a decisionmaker's duty to provide a rational explanation of a difference in treatment. In equal protection doctrine, for example, the government must give at least a minimal explanation of the reason or reasons justifying any distinction of which the plaintiff complains. I will say more about such a "demand for reasons" later.⁷¹ For now, notice that the demand for reasons is one possible, and nonmysterious, sense of a "presumption of equality."⁷² The stringency of such a demand depends both on the strength (and other characteristics) of the reason that the duty-holder must offer, and on the scope of the cases to which the demand applies. Thus, such a demand might be satisfied by a slight or implausible justification, or September 1, 1999 it might instead require a powerful actual reason. And it might apply only in cases where the duty-holder owes a special relationship to recipients of the treatment, or instead in all cases in which people are treated differently. For example, a parent's duty to explain differences in treatment to a child might require a relatively strong justification, but the duty is limited to the narrow domain of decisions affecting his own children.⁷³ Conversely, the government's duty under equal protection doctrine to justify most legislative classifications requires only a very weak justification, but the duty applies to the very wide domain of all classifications affecting any citizens.

The generality of equality norms understandably prompts the complaint (voiced especially by many feminists) that equality is indeterminate, and hence not a very useful norm.⁷⁴ This complaint has some bite. The norm of equality ordinarily has such positive connotations that people with widely varying ideologies are tempted to invoke it on their side.⁷⁵ But the complaint is overstated, for several reasons. First, equality only describes a general concept, a concept that must be given particular content in order to have determinate meaning in any social context. Second, even as a general concept, equality has distinctive features that are worth analyzing and attending to, if it is to be useful in moral and legal debate. Third, the complaint that equality is indeterminate sometimes really reflects a much narrower complaint: that some specific conception of equality is indeterminate, or is less determinate than its proponents

treatment cases typically involve a combination of impermissible reason and discriminatory outcome.

⁷¹See text at notes 172-180= *infra*. In earlier writing, I employed the misleading term "implicit comparative rights" for this idea. Simons, *supra* note 48=, at 421-427.

⁷²See Simons, *supra* note 48=, at 456-459 (citing literature); Westen, *supra* note 3=, at =.

⁷³The parent's duty to explain or justify other distinctions in treatment, such as distinctions among friends or other family members, might be less stringent.

⁷⁴See, e.g., Diana Majury, *Strategizing in Equality*, =; Lucinda Findley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, =.

⁷⁵See Westen, *supra* note 3=, at =.

believe.⁷⁶ When that is so, of course, the appropriate response is to clarify that conception of equality.

3. Pure and impure equality rights

We can distinguish pure from impure equality rights: the former permit greater remedial flexibility than the latter. Pure equality rights requires equality as to some benefit or burden, and are satisfied either by leveling up or by leveling down. Impure equality rights are asymmetrical and more directly beneficial to recipients: they require leveling up benefits (or leveling down burdens)⁷⁷ until both classes are equally benefited (or equally relieved of the burden).

Many legal equality rights are pure. The equal protection clause guarantees this form of equality.⁷⁸ Contrast an impure equality right:

(2B) (Impure equality right) If D impermissibly discriminates against class S and in favor of class T in the distribution of B, providing smaller benefit B₁ to S and larger benefit B₂ to T, then S's benefits shall be raised to B₂.

Some antidiscrimination legislation requires leveling up, including the Age Discrimination in Employment Act⁷⁹ and the Equal Pay Act.⁸⁰

⁷⁶I believe that this is the essence of the critique of some feminists. For example, they might object (and with good reason) that modern equal protection doctrine addressing sex discrimination improperly restricts its focus to whether a classification adequately furthers a legislative purpose and thus "treats like alike." See text at notes 227-237= *infra*.

⁷⁷The "leveling down" objection normally refers to leveling down benefits, not burdens. But insofar as relief from a burden is a kind of benefit, the leveling down objection sensibly includes an objection to "leveling down" that kind of benefit as well, i.e., denying all persons relief from the burden (or, more simply, extending the burden to all).

⁷⁸There are some exceptions, as noted shortly. But we should distinguish, and not count as a genuine exception, situations in which a successful plaintiff in an individual equal protection or antidiscrimination rights case obtains a "make whole" remedy that rewards her but not others who are similarly situated. Such a remedy might be awarded merely for instrumental reasons, to encourage the bringing of lawsuits. The more important question is whether the class of which she is a part is entitled to be leveled up. If not, then the equality right that she asserts does not demand leveling up.

⁷⁹Age Discrimination in Employment Act, 29 U.S.C. §621 (1994)("It shall be unlawful for an employer [to discriminate against an employee because of the employee's age] or (3) to reduce the wage rate of any employee in order to comply with this chapter.")

⁸⁰Equal Pay Act of 1963, 29 U.S.C. §206 (1994)("[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the [nondiscrimination] provisions of this subsection, reduce the wage rate of any employee."). See, e.g., *E.E.O.C. v. Romeo Community Schools*, 976 F.2d 985, 988 (6th Cir. 1992). For discussion, see Susan M. Omilian & Jean P. Kamp, *Sex-Based*

Which type of equality right one endorses depends in part on whether the underlying justification for the right is teleological or deontological. As Derek Parfit has pointed out, a teleological approach to equality will be (in my terminology) pure: the teleological approach states that inequality is to some extent intrinsically bad, however it is produced, and that equality is to some extent good, whoever is benefited or harmed by the elimination of inequality.⁸¹ Accordingly, one has a moral reason to eliminate inequality in either direction. By contrast, a deontological approach can recognize impure as well as pure equality rights.⁸² If our approach is deontological, for example, we might recognize rights in the victims of equality; our moral concern need not be limited to the intrinsic or consequential badness of inequality itself. And we might believe that victims are entitled, not just to have inequality eliminated, but to have it eliminated in a way that directly improves their welfare.

An impure equality right lacks the flexibility of a pure equality right. Accordingly, recognizing impure rights will often be impractical. (The discriminator might not be able to afford to raise the benefit level up.) Still, the impure right could have some force—for example, it could require government to increase S's benefits at least for some defined period of time, or to as high a level as is feasible. Or we might recognize a modified impure equality right, permitting leveling down if but only if this benefits

Employment Discrimination (1990 & 1996 Supp.). The Equal Pay Act redresses certain forms of sex discrimination in employment.

What are the limits of these statutory obligations to level up? The case law is unclear. The employer is not required to maintain a wage level or a set of employment positions indefinitely. Thus, under the ADEA, even if a plaintiff was illegally denied a position because of age, "if a reduction-in-force or a legitimate reorganization eliminated plaintiff's job, reinstatement would not be required." Mack A. Player, *Employment Discrimination Law* 554 (1988). But presumably the reason, to be "legitimate," must be other than a simple desire to level down to rectify the inequality. By contrast, effectuating that desire is a perfectly legitimate remedial response to the violation of pure equality rights.

⁸¹Parfit is discussing the view that inequality is an intrinsically bad consequence or state of affairs, to be distinguished from the more typical teleological view that inequality is often bad because it leads to further bad consequences, such as envy, civil strife, or inefficiency. Teleologists (including consequentialists) can compare the value of outcomes by their degree of equality, as well as by the aggregate well-being they produce. See Parfit, *supra* note 38, at 5-6.

⁸²See Parfit, *supra* note 38, at 18:

If we are Deontic Egalitarians, we do not believe that inequality is bad, so we are not forced to admit that ... it would be in one way better if inequalities were removed by levelling down. We can believe that we have a reason to remove inequality only when, and only because, our way of doing so benefits the people who are worse off. Or we might believe that, when some people are worse off than others, through no fault or choice of theirs, they have a special claim to be raised up to the level of the others, but they have no claim that others be brought down to their level.

the victims of inequality by leveling them up.⁸³ (The government would be permitted to lower T's benefits in order to fund an increase to S.⁸⁴)

If the benefit at issue is discretionary, however, then an impure right is often no more beneficial to victims of inequality than a pure right is. For, insofar as the decisionmaker (D) has discretion to retract the benefit, he may retract it as to both classes, effectively leveling down. For example, welfare benefits are usually viewed as fully discretionary in this sense. Therefore, a wrongfully discriminatory distribution of such benefits can be remedied prospectively by leveling down, even if the victims of the discrimination have an ostensible (impure) right to be leveled up.

On the other hand, sometimes a benefit is discretionary only in the sense of being optional: D could initially decline to confer it. Once D does confer it, however, it becomes vested: D has no discretion to retract it. An impure equality right indeed provides a special benefit to victims in this situation, i.e., when the benefit is optional but vested. For example, suppose an employer promises to give a lifetime annuity to men but not to women. Women have a right to be leveled up; the employer has no discretion to level down. (But the benefit was optional: D could have declined in the first instance to provide an annuity to either group.)

Finally, if the benefit is nondiscretionary (i.e., not optional) in the first instance, and it is provided to some but denied to others, then the impure form of the equality right is always possible. Suppose a nation guarantees all citizens a constitutional right to vote, but this right is actually provided to men but not to women. And suppose that, in addition to a noncomparative claim, women have an equality claim not to be

⁸³With respect to the remedial, leveling down v. up issue, we can imagine categories of equality right other than pure, impure, and modified impure. Suppose S obtains 10, T obtains 20, and this inequality is unjustifiable. A super leveling down principle would justify leveling down of both groups (e.g., if this were the only feasible way to achieve equality). It would justify reducing both S and T to 9. Conversely, a super leveling up principle would justify leveling up of both groups (e.g., increasing both S and T to 21).

More unusual categories are also imaginable. A leapfrog leveling down principle would justify moving the higher group to a level lower than that of the lower group (e.g., lowering T to 9), if this move reduces inequality. And a leapfrog leveling up principle would justify moving the lower group to a level higher than that of the higher group (e.g. raising S to 21). (These last two categories might be the only realistic options in some indivisible benefit cases. =discuss?=) For a thorough analysis of the different measures of inequality, see Temkin, supra note 38=.

The persuasiveness of Rawls' difference principle relies in part on our moral objections to a super leveling down principle. He assumes that we start from a position of equality of primary social goods (including liberty, wealth and income), and that social and political institutions (including a market system) are permissible if the inequalities that they produce benefit all citizens, including those who are worst off. Rawls, supra note 51=, at 14-15, 78. Rejecting his solution would, in effect, amount to insistence on super leveling down, a scenario that not only does not help the worst off, but actually worsens their position relative to what it would have been. See Parfit, supra note 38=, at =; Temkin, supra note 38=, at =.

⁸⁴Of course, the permissibility of even limited leveling down depends on the force of T's right to the existing level of benefits.

disadvantaged on the basis of sex. Their equality claim could be impure, i.e. a claim to be leveled up.

Do impure equality rights make sense? Are they really equality rights at all, insofar as they require that inequality be eliminated in only one way?⁸⁵ Yes, they are still genuine equality rights, and they still are flexible in the relevant way, for the decisionmaker could have avoided any problem in the first instance by treating the groups equally, providing benefits at either the lower or the higher level. To be sure, he may not remedy an impure equality right violation by leveling down. But initially he could have “leveled down”—or, more precisely, he could have declined to level up unequally.⁸⁶

For example, an employer might have discretion over the decision whether to provide a wage increase to workers in a particular job category. Suppose he increases wages for men but not women, or for a job category in which men predominate but not for a similar job category in which women predominate. It is intelligible to demand that he remedy his equality violation by leveling up rather than down, even though he could initially have provided lower, equal wages to both categories of workers. Impure equality rights respond to history: they demand that actual inequality be rectified in the way that more tangibly benefits the victims.⁸⁷

Impure equality rights are most plausible when the equality right involves an impermissible trait such as race or gender, and less plausible when it involves a positive right to equal distribution of an opportunity or resource. When an impermissible trait is employed, the victims often suffer a special kind of harm, in the form of stigma, insult and disrespect. Leveling benefits down after such a harm has been inflicted is often inadequate: it equalizes tangible benefits but leaves the special harm unremedied. In a real sense, it adds injury (the denial of benefits) to

⁸⁵Raz seems to suggest a negative answer, though he does not specifically address what I call “impure” equality rights:

It is only the effect of other principles which can explain our preference for giving the benefit to those who lack it to denying it to those who have it. This preference cannot be explained on the basis of the egalitarian principles themselves.

Raz, *supra* note 22=, at 227.

⁸⁶An interesting example is the enactment of the Equal Pay Act. Apparently employers wanted the freedom to reduce wages to comply with the Act. Instead, Congress postponed the effective date of the Act for a year. “This will give time for unions, employers, and employees to make adjustments or changes in the job classifications, wage rates, and so forth, if necessary.” Congressional Record, 8687, House, May 23, 1963 (Remarks of Congressman Griffin).

⁸⁷This is not to say, however, that impure equality rights are only defensible when the person under the duty to rectify the inequality is the person who created the inequality. For example, government might also have a duty to rectify inequalities that are not of its own making, such as private discrimination, or natural inequalities in talents. And this duty could be a duty to level up.

insult.⁸⁸ Leveling up, by contrast, at least offers the salve of tangible benefits.

When a positive right is violated, however, the injury often consists entirely of the inequality of tangible benefits. For example, if students in poor school districts have the right to educational resources equal to those available to students in the wealthiest districts of the state, then the injury from inequality might be the unequal educational opportunity that such unequal resources often create. Leveling down might adequately redress that concern.⁸⁹

4. Equality of respect

One of the most important and most widely recognized egalitarian norms is the fundamental duty of equal respect and concern. Ronald Dworkin has most famously insisted that government must show equal concern for the interests of all citizens.⁹⁰ However, even libertarian theorist Robert Nozick appears to recognize a variant of the principle.⁹¹

Many different versions of this norm are possible. A duty of equal concern might be owed only by government, or also by employers, or indeed (in certain respects) by all persons. With respect to government, the duty might merely be a procedural requirement, that all citizens have an equal right to elect representatives. Or it might include a more substantive duty of representatives and other government officials to consider the interests of all citizens equally when enacting legislation or adopting administrative rules. And it might include a duty to provide an appropriately “neutral” or “public interest” justification of any distinctions in treatment.

⁸⁸See note 93, *infra*.

⁸⁹On the other hand, the concern could be broader, namely, a belief that the opportunities already being offered in wealthy districts should be granted to the poor. In that case, leveling up could be required. (If the right to equal educational spending were constitutionalized, it might forbid the state from adopting a formula requiring wealthier districts to lower their spending, a formula that might save the state money compared to the state subsidizing the poorer districts.)

⁹⁰See Ronald Dworkin, *Taking Rights Seriously* 227-228 (1977). For discussion, see Simons, *supra* note 48, at 480 n. 229

⁹¹Robert Nozick, *Anarchy, State and Utopia* 223 (1974) (emphasis original):

That differences in treatment need to be justified does fit contemporary governments. Here [unlike the situation of private persons, who are entitled to transfer property as they wish,] there is a centralized process treating all, with no entitlement to bestow treatment according to whim.

Of course, since Nozick would radically limit the legitimate domain of government decisions, the actual scope of his principle would be much narrower than the scope of Dworkin’s.

The notion of equal concern is especially valuable because it usually embodies a deeper conception of equality than the superficial conception of equalizing material benefits or burdens.⁹² For example, if an employer fires pregnant women who are still able to perform their jobs, the employer treats all nonpregnant people the same, and does not explicitly treat men and women differently; but if an employer equally sensitive to the interests of women and men would not adopt such a policy, then the policy violates a deeper egalitarian norm. If a city closes a swimming pool rather than desegregating it, the city treats blacks and whites “equally” only in a superficial sense, if the motivation is to avoid integration and the action stigmatizes blacks.⁹³

As these examples illustrate, the duty to show equal concern and respect can help explain why discriminatory motivations, and also expressions of selective sympathy,⁹⁴ can violate egalitarian norms, even when the tangible treatments to which such a motivation or selective sympathy gives rise are equal. However, the application of egalitarian norms to motives and reasons for action creates a difficulty. I have argued that equality is a distinctively flexible norm: normally the decisionmaker may either “level up” or “level down” the benefits or burdens at issue, in order to rectify, or avoid creating, the inequality. But how is such flexibility possible when the tangible treatments themselves might be equal? How can an egalitarian norm be appropriately flexible when the norm takes the form of a prohibition on acting with discriminatory intent or acting based on a discriminatory stereotype?

One possible answer is that any form of tangible treatment that a nondiscriminatory decisionmaker could have produced is appropriately respectful of equality. If a nondiscriminatory employer could have adopted a blanket policy of firing pregnant employees, then the policy is consistent with equality. If the employer could have adopted a different policy, of always examining ability case-by-case, then that policy, too, would be

⁹²Dworkin draws such a distinction, between (superficial) “equal treatment” and (deeper) “equal concern” or “treatment as an equal”:

If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which shall have the remaining dose of a drug. This shows that the right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.

Dworkin, *supra* note 89, at 227.

⁹³See *Palmer v. Thompson*, 403 U.S. 217 (1971), and discussion in Simons, *supra* note 48, at 431-433. These observations explain why Peters’ criticism of Palmer, *supra* note 1, at 1263 n. 84, does not prove his point that racial discrimination is not essentially concerned with equal treatment.

⁹⁴On the notion of selective sympathy and selective indifference, see Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463, (1992) (also citing sources).

consistent with equality. And the range of possible choices reflects the flexibility of equality.

But this answer is inadequate. For one thing, it presumes that possible consistency with egalitarian motives is sufficient; yet we might support a stronger egalitarian principle, requiring that any policy actually produced by a discriminatory motive is invalid unless it would (and not merely could) have been adopted by the employer if the employer had not responded to prejudice.⁹⁵ More importantly, the variety of possible results of showing equal concern and respect does not express the right type of flexibility. Rather, given that the relevant equality norm is a duty to show equal concern and respect, the relevant flexibility is as follows: Either (1) show more concern for the previously disfavored group (thus “leveling up” your concern to the level you showed the favored groups) or (2) show less concern for the previously favored group (thus “leveling down” your concern to the level you showed the disfavored groups).⁹⁶

However, this answer, though analytically correct, is problematic in at least two ways. First, it is difficult to render operational the idea of “leveling up” or “leveling down” an affective or motivational state, such as the state of “concern” for others’ interests. Any attempted legal expression of this idea might therefore need to use certain crude surrogates (such as a legal rule’s explicit use of discriminatory criteria, or a decisionmaker’s “intent” to harm a disfavored group). Second, in principle it might seem troubling that a decisionmaker could satisfy its egalitarian duties by a “race to the bottom,” treating all citizens with equal, but equally offensive, disrespect.

But we should not shrink from this last conclusion. It is indeed what equality permits. At the same time, as a practical matter, a democratically elected government is unlikely to show pervasive disrespect for all of its citizens.⁹⁷ The temptation, or need, to play at least some “favorites” will mitigate any risk of leveling all the way down.⁹⁸

Consider a concrete example. Suppose a legislature enacts a veterans’ preference in employment which, because of the past exclusion of women from the military, inures almost entirely to the benefit of males.⁹⁹ The policy was designed to express thanks to citizens who gave unselfishly to their nation, at great personal sacrifice. But it arguably demonstrates

⁹⁵Even this conception poses significant difficulties. See David Strauss: Discriminatory Intent and The Taming of Brown, 56 U. Chi. L. Rev. 935, = (1989).

⁹⁶Of course, intermediate possibilities are also possible. If one measures “concern” literally in terms of time and attention, then the decisionmaker has a fixed amount of concern to “distribute,” and might thus need to decrease somewhat the “concern” previously showed to his favorites and to increase somewhat the “concern” previously shown to those least favored.

⁹⁷See note 226= *infra* [Justice Jackson’s concurrence].

⁹⁸Moreover, when the question is what remedy a decisionmaker should provide when he has shown unequal respect to different groups, it is plausible to recognize an “impure” equality right, requiring him to level up the disfavored group. See prior section.

⁹⁹See note 46=, *supra*.

less respect for those citizens (predominantly women) who sacrificed by working in the defense industry during wartime. To accomplish equality, government might offer similar preferences to such citizens. Alternatively, it might abolish all such preferences. The latter might, in some sense, show less respect for both groups of citizens (inasmuch as it fails to reward their unusual sacrifices), but it is consistent with equality, and it does not show serious disrespect to anyone.¹⁰⁰ A wide range of government and personal decisions are consistent with the minimal respect that a decisionmaker owes to those affected by her decision.

And that prompts a final point. The idea of disrespect itself can be understood in either a noncomparative or a comparative sense. I have been discussing the noncomparative sense: disrespect towards X is evaluated without reference to how others are treated. But the idea can also take on a comparative meaning: essential to the idea of treating X with disrespect is a failure to treat X as having equal status with other persons in a relevant community.¹⁰¹ On this view, the term “equal” in “a right to equal respect” is otiose.

C. What equality is not

We have considered what equality is. To clarify the concept, and to dispel some possible confusions, let us turn to what equality is not.

1. Accurate implementation of a rule (or “lexical equality”)

Equality principles seem to be implicated when a rule, requiring a particular treatment of a class of persons, is so implemented that some but not all members of the class receive the required treatment. This section will explain why the duty to implement a rule accurately according to its terms does not ordinarily express a genuine egalitarian norm. (I will note some caveats, however, in a later section.¹⁰²)

The example in (1A) was a bit unusual: the equal entitlements of Bonnie and Clyde derive from distinct promises. Example (1B) is even

¹⁰⁰One difficulty with this example is that jobs are a scarce resource: giving a job preference to one, two, or no groups of citizens affects the job prospects of others who are not entitled to the preference. To avoid this difficulty, imagine that the government provides medals or symbolic awards to citizens who have made sacrifices. Then it is easier to see how giving awards to two groups rather than none shows more “respect” for citizens generally. (Even here, to be sure, the resource is not unlimited. Giving awards to all citizens might so debase the award that its value would be entirely lost.)

¹⁰¹See Richard McAdams, *Cooperation and Conflict: the Economics of Group Status Production and Race Discrimination*, 108 Harv. L. Rev. 1003, 1044-1049 (1995)(explaining race discrimination as a process by which a racial group seeks to produce status for itself by lowering another group’s status).

¹⁰²See Section D.1=, *infra*.

more extreme: the noncomparative rules creating Jones' and Smith's separate entitlements have almost nothing to do with one another.

But more commonplace, and more troublesome, is the situation in which a rule, with general criteria of application, is to be implemented. If the rule is unequally implemented, is that inequality a genuine violation of egalitarian norms? If so, do the terms of the rule themselves explain the nature and scope of the violation? Or is some other principle at work?

Consider a variation on (1A):

(3A) I promise that all of my children will receive dessert if they finish their dinner.

In this variation, rather than referring to particular individuals, the entitlement is stated in more general or "universal"¹⁰³ terms.

Suppose both finish their dinner, but I give dessert only to Bonnie. Clyde obviously has a noncomparative claim by virtue of (3A). But does he have a comparative claim, a genuine claim that an equality norm was violated?

Consider another example, from Peters' article.

(3B) In a lottery, two winning tickets are issued, entitling each bearer to a \$500,000 prize. Ms. Lucky, holding one of the winning tickets, goes to collect her winnings and incorrectly receives a check for \$600,000. The next day, Mr. Unlucky, holding the other winning ticket, goes to collect his winnings and receives a check for \$500,000, the correct amount.¹⁰⁴

Here, the rules entitle both Lucky and Unlucky to \$500,000, but Lucky has received more. Does Unlucky have an equality claim to receive what Lucky has received?

More generally, the question concerns rules or principles of the following form:

(3) All T's shall receive B.

And the question arises: suppose some T's receive B, while other T's do not?¹⁰⁵ Does this unequal distribution of treatments to which all members of T are entitled constitute a genuine violation of equality norms?

The question has two facets. If the distribution is incorrect in giving some a lesser benefit than they deserve, then those who incorrectly fail to obtain their entitlements are likely to complain of being unequally

¹⁰³The relevant "universe" can be qualified or limited, however. It need not include all persons. See Simons, *supra* note 48, at 454-455 n. 153.

¹⁰⁴Peters, *supra* note 1, at 1246-1247.

¹⁰⁵More precisely, we must suppose that at least one person with trait T receives B while at least one person with trait T does not.

disfavored relative to those who are treated correctly. (Thus, in (3A), Clyde will complain that he was incorrectly deprived of a dessert that similarly entitled Bonnie actually received.) Let us call this a claim of incorrect deprivation. If the distribution is incorrect in giving some a greater benefit than they deserve, then others who receive the correct treatment might complain of being unequally disfavored relative to those who are treated incorrectly and with undue largesse. (Thus, in (3B), Mr. Unlucky will complain that similarly entitled Ms. Lucky incorrectly received a lottery windfall while Unlucky only received the face amount of his ticket.) This is a claim of incorrect beneficence.¹⁰⁶

Typically, the unequal implementation of general criteria in rules does not violate genuine egalitarian norms because ordinarily, rules requiring specified forms of treatment to members of a class are noncomparative in inspiration. The reason for the rule or principle normally is to provide a form of treatment B to any person with trait T, considered individually and separately from other persons. In example (3A), each child is entitled to dessert if she finishes dinner, without regard to how other children are treated. If both finish dinner and only one obtains dessert, the basic complaint of the other is noncomparative, not comparative. In (3B), anyone who presents a winning lottery ticket is entitled to \$500,000.¹⁰⁷ Although Lucky obtained more than she deserves, Unlucky probably has no complaint. Unlucky probably has no comparative right to equal treatment, and Unlucky is not a victim of noncomparative injustice, for he received what he deserves.¹⁰⁸

Moreover, the correctness of this basic answer is confirmed by an important observation: a comparative right to equal treatment need not embody any rule or generalization at all. Instead, a small number of uniquely identified individuals might hold a comparative right. (Consider a

¹⁰⁶In (3), “B” can refer to a burden instead of a benefit. In that case, the observations in the last parenthetical should be appropriately modified, by characterizing the relevant benefit as relief from a burden. Incorrect deprivation would be a case in which a burden was incorrectly imposed (or was excessive). Incorrect beneficence would be a case in which the burden, incorrectly, was not imposed (or was too light).

Although Peters addresses both types of problems, Peters, *supra* note 1=, at 1212, his main focus is the second problem, incorrect beneficence. Here, he says, “prescriptive” equality purports to provide a reason for treating the claimant wrongly, a reason that the nonegalitarian rule does not itself provide. By contrast, he believes that the nonegalitarian rule itself suffices to explain what is wrong in the first problem, incorrect deprivation. *Id.* at 1226.

¹⁰⁷Following Peters’ original example, I put aside the complication that the amount each person receives might depend on the number of lottery winners. On the question whether a competitive good should, for that reason alone, count as a comparative right, see text at notes = *infra*. =discuss?=
=

¹⁰⁸Peters characterizes the treatment of Lucky as not just incorrect, but “unjust.” Peters, *supra* note 1=, at =. This conclusion is difficult to understand, insofar as Peters does not relate that “injustice” to any person’s suffering a detriment or wrong. (Such an argument would, however, be possible: the distribution of the excess to Lucky makes fewer lottery funds available to other lottery winners or to public projects that the lottery program finances.)

parent's commitment to show the same concern for the welfare of her adopted child as she shows to her natural child.¹⁰⁹) Of course, most comparative equality rights do employ general criteria. (Consider Rawls' difference principle, or the principle that blacks shall not be disadvantaged relative to whites.) But even when the right is held by groups that are defined by general criteria, the point of the right might be to ensure equality despite significant differences between group members, not to ensure equality because group members are descriptively equal in certain respects that the group trait (T) identifies.¹¹⁰ In philosophical terms, normative equality need not supervene upon descriptive equality.¹¹¹

Another example is the progressive extension of the right to vote and other fundamental rights to broader categories of citizens in modern nations. This extension could, to be sure, rely on assertions of descriptive equality--that all citizens are sufficiently equal in their capacity to vote intelligently, or in their interest in those matters governed by the elected officials. But it could also reflect a social commitment to treat virtually all citizens as equal in status, notwithstanding significant actual differences in education, experience, personal interest, and other characteristics that would often be thought relevant. And the basis of that egalitarian social commitment might be the desire to create and define a moral and political community.

Before leaving the question whether unequal implementation of a rule is a genuine violation of equality norms, it is worth noticing the remarkable amount of discussion that the question has provoked.¹¹² Egalitarian norms in law and morality have their greatest social importance in the realms of nondiscrimination rights and distributive justice. Why would distinguished commentators expend so much time and effort on the

¹⁰⁹But does such a case implicitly rest on a general principle, "Show equal concern to all of my own children, whether natural or adopted"? Perhaps, but it need not. It could simply reflect a commitment to treat adopted Andrew and natural Nathan with equal concern, without displaying any similar commitment as to future children. (For example, a parent might admit that she would not be able to show as much concern for additional children as she shows for the first two.)

¹¹⁰By contrast, lexical equality, or equality of entitlements as a consequence of implementing a rule, typically does follow from providing specified treatment to all persons with a specified descriptive trait, for rules often identify a trait that is a necessary and sufficient condition of entitlement (as in (3A) and (3B)).

¹¹¹"To say that considerations of one kind (e.g. the mental) supervene on those of another kind (e.g. the physical) is to say that there are, or can be, no differences in the first kind without there being differences in the second kind." Paul Teller, *Supervenience*, in *A Companion to Metaphysics* 484 (Jaegwon Kim & Ernest Sosa eds. 1995).

¹¹²See, e.g., John E. Coons, *Consistency*, 75 Cal. L. Rev. 59 (1987); Greenawalt, *supra* note 1=; Peters, *supra* note 1=; Westen, *Speaking of Equality*, *supra* note 3=, especially Chs. 9, 10. For some of the extensive philosophical literature, see the sources cited in *id.*, Ch. 9.

prosaic question of the fairness of treatments that are “unequal” as measured by the terms of an ordinary rule?¹¹³

Part of the explanation, I think, is that this question is believed to be closely connected to other important egalitarian issues. In particular, many assume that all equality claims are instances of a perfectly general formal concept to the effect that “likes should be treated alike,” that “the similarly situated should be treated similarly,” or that “equals should be treated equally.” A brief detour into this territory is therefore worthwhile.

Unhappily, this formal concept of equality, “treat likes alike” (or “TLA” for short), is highly misleading, because it is fatally ambiguous. It can have nontrivial meaning, for it can express what I have called a demand-for-reasons equality claim. Thus, if (apart from any promises) one child is permitted dessert and the other is not, the second is likely to ask for an explanation. She can easily place her complaint within the framework of TLA. A precocious child, she will proclaim: “My sibling and I are equals in every relevant respect. Whatever reason you might have had for letting him have dessert applies to me as well. You must therefore treat us equally.”¹¹⁴ Of course, the parent might well have sufficient reason to treat them differently, or this might be a context in which he need not give any reason. But it is coherent, at least, for the disappointed child to complain that her parent failed to treat likes alike in this sense.

However, TLA can, and often does, express only the derivative idea that a rule should be applied according to its terms. “Treat likes alike” then means only “Treat likes (those who are supposed to be treated equally according to the terms of a rule), alike (according to the terms of the

¹¹³Peters does acknowledge that the “prescriptive equality” he discusses is only one of many kinds of arguments that might be called egalitarian. Peters, *supra* note 1=, at 1214. Greenawalt makes a similar acknowledgement. Greenawalt, *supra* note 1=, at 1274, 1278 n. 42. See also *id.* at 1274 (suggesting that, relative to “the major issues about equality in Western societies... the subject of Professor Peters’ inquiry is narrow and comparatively insignificant. But it is definitely worth our attention.”).

However, Peters also leaves the unmistakable impression that he is hostile to any genuine comparative equality rights. Thus, he employs the term “nonegalitarian justice” to encompass all justice principles other than “prescriptive equality.” Peters, at 1228. This hardly leaves much room for egalitarian principles other than “prescriptive equality.” Moreover, by treating even racial discrimination and Rawls’ difference principle as instances of “nonegalitarian justice” in the noncomparative sense, see *id.* at 1254-1255, 1259-1262, Peters confirms the impression that he would not endorse any comparative conception of equality other than “prescriptive equality” (which he ultimately rejects). See also *id.* at 1263-1264 n. 84 (simply rejecting the comparative equality component of a state constitutional right to a “thorough and efficient” education, a component that requires some equalization between poor and wealthy districts, and claiming that only the noncomparative component of the right is important).

¹¹⁴For a thoughtful discussion of the complexities of a “presumption of equality” requiring equal treatment unless reasons are shown for unequal treatment, see Westen, *Speaking of Equality*, *supra* note 3=, Ch. 10.

rule).” In short, “follow the rule.” This lexical¹¹⁵ conception of equality is derivative, for the equality that it identifies is merely a byproduct of the duty to implement a rule accurately.¹¹⁶

The ambiguity of TLA is extremely unfortunate, for only the first meaning, “give a reason for differential treatment,” expresses a genuine equality norm. I therefore partially agree with Westen’s early conclusion that “equality” is a misleading and often empty concept, and should be “banished” from our discourse¹¹⁷—that is, I agree that the TLA conception of equality should be discarded.

But is my conclusion too hasty? Many seem to believe that the TLA principle has genuine meaning. Although this principle requires an extraneous standard, perhaps it is a meaningful egalitarian norm once that extraneous content is supplied. On this view, for example, “the equally guilty should receive the same punishment” is an egalitarian principle.¹¹⁸

I disagree. The external standard that TLA embodies is often a noncomparative rule, and the equality that that rule “requires” is then incidental. Thus, the argument that those who are equally guilty should receive the same punishment is not a genuine egalitarian argument if it simply invokes the noncomparative rule that each person should receive

¹¹⁵See Simons, *supra* note 48=, at 393-403; Westen, *A Response*, *supra* note 11=, 83 *Colum. L. Rev.* at 1188-1190. See also David Lyons, *On Formal Justice*, 58 *Cornell L. Rev.* 833, = (1973).

¹¹⁶Greenawalt reaches a similar conclusion. He agrees that the formal principle, “equals should be treated equally,” can be empty, and thinks this is a good reason for ascribing to it the content of “prescriptive equality,” namely, “the idea that giving a form of treatment to one equal is a reason to give the same treatment to another.” Greenawalt, *supra* note 1=, at 1268. I disagree, however, that the appropriate content of TLA is this historical or precedential principle of “prescriptive” equality. See text at notes 111-118= *infra*.

Westen’s detailed analysis of the “formal” principle of equality, Westen, *Speaking of Equality*, *supra* note 3=, Ch. 9, partially supports my analysis of TLA, though I believe he gives insufficient attention to the distinction between comparative and noncomparative principles. See note = *infra*.

Even Joel Feinberg, the originator of that distinction, provides a regrettably ambiguous analysis of “likes should be treated alike.” See Westen, *Speaking of Equality*, *supra* note 3=, at 135 n. 11; Simons, *supra* note 48=, at 401 n. 25.

¹¹⁷Westen, *Empty Idea*, *supra* note 2=, at 542.

¹¹⁸See Barry, *supra* note 7=, at 323. See also Allen Buchanan, *Distributive Justice*, *Encyclopedia of Philosophy* = (P. Edwards ed. 1967).

Westen carefully examines H.L.A. Hart’s articulation of this view in Westen, *Speaking of Equality*, *supra* note 3=, at 225-229. Much of Westen’s analysis is persuasive, but again, he understates the importance of the comparative/noncomparative distinction. Thus, Westen’s conclusion (that the “formal” principle or TLA adds nothing to the “material” principle of justice) is valid when TLA simply reflects the notion of implementing a noncomparative rule. But it is not valid when TLA is a way of expressing an egalitarian, comparative metaprinciple, or when the material principle is itself comparative.

punishment in proportion to his guilt.¹¹⁹ In that case, it is no more egalitarian than the argument that those who are equally entitled under the tax law to a business tax deduction of \$497 should receive the same deduction, or the argument that those who make promises should keep them, or indeed any other argument for consistent implementation of a rule.

Similarly, equality should not be conflated with the notion of “giving a person his due” in the Aristotelian sense. For what is “due” or owing to a person could be honoring either a comparative or a noncomparative right.¹²⁰ The Aristotelian formulation conceals the distinction.

Finally, understanding normative equality as accurate implementation of a rule is a mistake, even when the rule in question is a comparative equality principle. For what warrants characterizing a rule as egalitarian is not consistent implementation as such, but rather the content of the rule. “Don’t discriminate against women” is an equality right because it prohibits a particular form of inequality. If the decisionmaker were to act inconsistently, honoring this nondiscrimination norm as to some women but then breaching it as to others, then it would be the breach, not the inconsistency, that principally offends equality norms.¹²¹

2. Consistent departure from a rule

The Lucky/ Unlucky lottery example (see (3B), above) is an instance of incorrect beneficence. Concern about this form of lexical inequality might seem to favor a conception of equality as requiring consistent departure from a rule: if one person (e.g. Lucky) gets a windfall, then so should others similarly situated (e.g. Unlucky).¹²²

¹¹⁹Of course, the argument sometimes is meant to invoke an egalitarian metaprinciple, such as a requirement of impartiality or freedom from bias in administering criminal punishment.

This egalitarian metaprinciple has played an important role in recent sentencing reform movements. A major impetus behind the recent movements toward fixed sentencing and the abolition of probation and parole is a concern that under indeterminate sentencing, judge A and judge B would impose dramatically different punishments on the same set of facts. More rigid sentencing policies reduce that form of inequality (though they create other problems, including harshness and a crude insensitivity to the facts of individual cases). Because, under the old system, judge A and judge B had discretion, it was often not possible to criticize either judge’s decision as an erroneous application of the rule, “impose punishment in accordance with guilt.”

¹²⁰See Kane, *supra* note =, at =.

¹²¹This is subject to the caveats noted in section D.1= *infra*. The requirement of consistency could itself express an egalitarian norm, but it would be a different norm than the duty not to discriminate against women; for example, it might be a duty to explain to the second woman why she was not protected by the antidiscrimination norm when the first woman was protected.

¹²²Usually, as in his Lucky/ Unlucky example, Peters is concerned about incorrect beneficence, and is therefore arguing for consistent departure from a rule. But occasionally, he is concerned about incorrect deprivation. Concern about the latter form

But it is not plausible to think that equality, as a general matter, requires consistent departure from a rule. For then the metaprinciple would be: if you depart from a rule as to Smith, depart from the rule as to Jones. This is a strange principle. It suggests, in the Lucky/Unlucky example, that the windfall to Lucky justifies any form of incorrect treatment of Unlucky—from a larger windfall, to the same windfall, to giving Unlucky even less than the face amount of the lottery ticket.¹²³

To justify an equality claim based on Lucky's treatment, one must explain why Unlucky should get the same incorrect treatment as Lucky. The equality right most likely to provide such an explanation, I think, is a demand-for-reasons equality claim. Unlucky would assert: "Whatever reasons you had for exempting Lucky from your usual rules must apply to me, too." This, in form at least, is a plausible egalitarian complaint. But it is not equivalent to a requirement that a decisionmaker depart from a rule consistently (unless "consistency" is given this more limited meaning of "treat us the same if your reasons for exempting the other also apply to me"). Of course, although this is a plausible complaint, often a satisfactory answer would be this: the decisionmaker made a regrettable mistake in the case of Lucky, and government is obliged to justify its deliberate decisions but not its mistakes.¹²⁴

3. Limited to historical differences in treatment

After rejecting formal equality as tautological and meaningless, Peters turns to what he calls the "prescriptive" conception of equality, which he believes "is at the core of the most interesting and troublesome kinds of egalitarian arguments."¹²⁵ It would be more accurate, I think, to call this conception "precedential." But whatever the label, this conception

of lexical inequality presumably militates in favor of consistent implementation of a rule.

In *Speaking of Equality*, Westen distinguishes two ways in which we might treat people "equally" pursuant to a relevant rule. The rule can serve directly as a prescriptive standard of comparison, so that "A and B are equal" means that they have equal entitlements under a rule. Or the rule can serve indirectly as a baseline for measuring whether actual treatments are identical or nonidentical in the extent to which they depart from what the rule says they should be. In the second case, "A and B are equal" means either that both have received what they are entitled to under a baseline rule, or that both have been denied what they are entitled to under that rule. Westen, *supra* note 3, at 86-92, 189-190. This second formulation seems to include the argument I am now discussing.

¹²³Indeed, Peters makes a similar *reductio ad absurdum* argument, asserting that (incorrectly) giving Unlucky what Lucky (incorrectly) received treats Unlucky equally to Lucky but unequally to everyone else who has been or ever will be treated correctly. Peters, *supra* note 1, at 1249.

¹²⁴But government might need to justify its choice of systems when one predictably leads to more errors than another. =cite=

¹²⁵Peters, *supra* note 1, at 1214.

of equality is much too narrow to express the many legitimate ways in which equality principles are employed in legal and moral discourse.

According to Peters, the nontautological sense of equality,¹²⁶ which he calls “prescriptive” equality (PE), “is the principle that the bare fact that a person has been treated in a certain way is a reason in itself for treating another, identically situated person in the same way.”¹²⁷ This conception presupposes the historical successive treatments of at least two different individuals. (It also seems to derive from Peters’ interest in the subject of precedential constraint.¹²⁸) Peters’ terminology here is unfortunate, for his “prescriptive” equality describes only a narrow subcategory of the cases in which equality is invoked normatively (and non-tautologically) in legal and moral argument.

Peters’ analysis, including his discussion of the Lucky/ Unlucky example (3B, above), overemphasizes history.¹²⁹ The analysis presupposes that one person (Lucky) actually, previously received beneficial treatment relative to another person (Unlucky). But this is an extremely narrow conception of an equality right, for two reasons. First, equality principles can apply even when a person or class has been burdened and no other person or class has received a lesser burden (or a greater benefit). Second, equality principles can apply without regard to the historical sequence of treatments between advantaged and disadvantaged persons or classes.

With respect to the first point, consider this example. Sam is an employer’s only employee, and the employer discharges him because of his gender or his race. Sam still has a coherent equality claim, because the criterion used would result in invidious unequal treatment if applied more broadly, to all persons potentially subject to it. Such a hypothetical discrimination claim is perfectly sensible, and is indeed one viable type of Title VII claim.¹³⁰

Peters disagrees. Several times, he uses what we might call the “single person reductio” in an attempt to show that the applicable principle does not sound in equality.¹³¹ Thus, discussing Yick Wo, he asserts that

¹²⁶Peters explains that his analysis differs from Westen’s as follows. A special nontautological equality problem exists, according to Peters, when X correctly gets a benefit but Y is incorrectly denied it. This isn’t just a case of Y being wrongly denied a benefit, for someone with no greater entitlement to the benefit has been awarded it. Peters, *supra* note 1=, at 1220. Peters misunderstands Westen here. Westen no longer views all equality arguments as meaningless tautologies. Westen, *Speaking of Equality*, *supra* note 3=, at xx. Moreover, Westen does recognize the subcategory of equality principles that Peters denominates “prescriptive.” See note 24= *supra*.

¹²⁷*Id.* at 1223 (emphasis omitted).

¹²⁸Peters, *Foolish Consistency*, *supra* note 35=, at =. See also Peters, *supra* note 1=, at 1226 n. 32, 1263.

¹²⁹Peters explains in his conclusion: “My argument against prescriptive equality has really been an argument in favor of making every decision on its own merits, of treating people the way justice dictates that they be treated, regardless of how someone else has been treated in the past.” Peters, *supra* note 1=, at 1264.

¹³⁰=cites. See Simons, *supra* note 48=, at 418-420.

¹³¹Peters, *supra* note 1=, at 1220, =.

the wrong doesn't depend upon the comparative treatment of two or more persons; the rule that irrelevant treatment is impermissible has meaning even if only one person in the universe ever has been denied a permit.¹³² But Peters fails to recognize that equality principles can apply even when only one person has been denied a benefit.¹³³ The substantive reason why the treatment is wrong in Yick Wo is the use of an invidious (and not merely "irrelevant") racial trait. And the use of the trait is wrong precisely because it violates egalitarian principles.¹³⁴

Second, Peters also claims that the relative timing of the treatment of Lucky and Unlucky matters to the applicability of an equality right. If Lucky happens to receive her windfall lottery ticket first, Unlucky has a "prescriptive" equality claim; while if Unlucky receives his check first and Lucky's check has not yet been issued, then Unlucky has no such claim. But, Peters objects, this means that random chance dictates the applicability of equality, a result that most would view as unjust.¹³⁵

This argument is confused, and does not show that the sequence of treatments necessarily affects the viability of a "prescriptive" equality claim. If we consider the sequence of treatments after both have occurred, then it does not much matter whether Lucky or Unlucky receives a check first.¹³⁶

¹³²Id. at 1220.

¹³³Discussing Yick Wo, Peters asserts:

The Chinese applicants were treated wrongly not because they were treated differently, or "unequally," from the Caucasian applicants, but rather because they were treated according to an irrelevant criterion (their race, or national origin), regardless of how Caucasians were treated.

Id (emphasis added).

The underlined phrase reveals the fallacy in this argument. If Caucasians, too, were denied laundry permits, then it is quite unlikely that the criterion of race explains why Chinese applicants were denied permits. And, even if it turns out that the Caucasian applicants were denied permits for other reasons, while racial prejudice really was the actual reason for denying permits to Chinese, then the latter still amounts to an equality problem, in this straightforward sense: if the Chinese applicants had been Caucasian, then they would have received permits. (Or if they would not have, racial prejudice still provided the government with an additional reason for burdening the Chinese applicants, a reason that made it more likely that government would burden applicants on a racial basis.)

¹³⁴To some extent, Greenawalt agrees with Peters' "one person reductio" argument. In an attempt to show that the precedential conception of equality has independent meaning, Greenawalt states: "[I]t may be a worse wrong if a white is given a benefit and a black is denied the benefit because of race, than if the black is the only person concerned and he is denied the benefit because of race." Greenawalt, *supra* note 1=, at 1278 n. 42. Perhaps. But the wrong isn't much worse, if it is worse at all. In any event, a conception of equality that ignores the wrong in the latter case is sorely deficient. (Although Peters does not believe that the latter type of wrong presents an equality issue, Greenawalt correctly disagrees.)

¹³⁵Peters, *supra* note 1=, at 1252-1253.

¹³⁶As Peters concedes, if "prescriptive" equality demands that Unlucky also obtain a windfall, this can be done by giving him the windfall initially (if his treatment was

If, instead, we consider the sequence of treatments after only one has received a check, then again, no viable “prescriptive” equality claim yet exists in either case: for we do not know whether Unlucky will receive what Lucky has received, or vice versa. (And as Greenawalt points out, in this second situation we might be able to predict how the other will be treated; if so, we can evaluate the equality claim now, regardless of sequence.¹³⁷)

Consider a more realistic example. Employer A, with several job openings, first hires a white employee. He then receives an application from an equally qualified black, but does not hire her. Employer B first receives an application from a black prospective employee, and declines to hire her. He then hires an equally qualified white. Although there are evidentiary differences between these two examples, nondiscrimination law properly condemns each employer.

Why would Peters take this peculiarly historical perspective? Perhaps because his argument is best addressed, not to egalitarian norms generally, but to egalitarian rationales for the legal doctrine of precedent. In emphasizing the actual history of treatment, and in insisting that two unequal actual treatments must have occurred, Peters seems to be extending the argument of an earlier article, in which he sought to show that if a past precedent is unjust, a supposed right to equal treatment does not justify following that precedent today.¹³⁸ That specific argument about precedent might indeed be correct. Even if it is, however, it does not undermine egalitarian arguments in other contexts. In the context of precedent, competing principles (including the importance of allowing the law to evolve) might override the right to equal treatment. But it hardly follows that the equality right is conceptually incoherent or normatively indefensible.¹³⁹ For example, suppose a judge sentences equally

second) or by retrospectively giving him an additional check (if his treatment was first and he initially received the correct amount). *Id.* at 1226-1227 n. 33.

One small difference is the administrative cost of issuing a second check. If the solution to inequality is to level “Lucky” down to the correct level, a more serious difference exists. For it is often infeasible or wrong to deprive Lucky of a windfall she has already received spent, but this is not the case if her treatment is second and we intervene promptly. (Similar problems arise if the issue is incorrect deprivation rather than incorrect beneficence.)

¹³⁷Greenawalt, *supra* note 1=, at 1272, 1282. Greenawalt notes that this is more likely to occur when we have two different decisionmakers (e.g., judge A predicts that judge B will make a mistake); and usually, it is easier to see past mistakes than to predict future ones; but still, in principle, “prescriptive” equality is not tied to the time sequence. *Id.* at 1282.

¹³⁸Peters, *Foolish Consistency*, *supra* note 35=.

¹³⁹Greenawalt agrees with Peters that prescriptive equality does not support the doctrine of precedent, but he agrees for two special reasons. First, the people involved in the two cases are often not significantly related to one another, and Greenawalt believes that a significant relationship is a precondition to applying prescriptive equality. (For my criticism of this requirement, see note 221= *infra*.) Second, in civil cases, if one litigant in the first case received better treatment than deserved, then the other litigant received worse treatment than he deserved; so following the precedent in the name of equality

responsible defendants J and K at different times. Equality can have some force in this context, even if, in the end, other legal or moral considerations militate in favor of different treatment.¹⁴⁰

Moreover, strictly speaking, precedent does not exemplify the value of interpersonal equality at all. Rather, precedent concerns intertemporal equality, a form of equality that can apply to successive treatments even of a single person over time. Yet interpersonal equality is the far more important egalitarian concern in morality and law.

Thus, suppose an administrator is deciding whether L should receive a building permit for a certain type of construction. Two years later, L again requests a permit for the same type of construction. Does “equality” count as a reason for the administrator to decide both cases in the same way? In a sense, yes, but only in the sense that intertemporal equality is desirable—e.g., to provide consistent application of principles over time. And insofar as it is also desirable that principles evolve or change over time, the intertemporal equality principle loses force.

Of course, in the context of precedent, concerns about interpersonal and intertemporal equality typically merge. If M is denied a permit this year while L received one last year based on similar facts, M can raise both concerns. But it is helpful to separate them analytically. The worry about interpersonal equality is, for example, that the administrator is biased

will give one of the litigants in the later case worse treatment than he deserves. Greenawalt, *supra* note 1=, at 1289. Although Greenawalt believes that prescriptive equality has force when it results in giving people better treatment than they deserve, he is agnostic about whether it has force when it results in giving people worse treatment.

¹⁴⁰See Section D.4= *infra*.

Alexander makes a further argument purporting to show that the doctrine of precedent does not express a defensible egalitarian norm. In the context of precedent, Alexander asserts that “the comparative justice [or equality] claim is actually stronger for following a decision that is seriously wrong than for following a decision that is only minimally wrong,” insofar as the winner in the present cases will be much better off than her equally deserving but losing counterpart in the earlier case. Alexander, *Constrained by Precedent*, *supra* note 36=, at 11. Although the noncomparative justice reasons for following the earlier case are correspondingly weaker, the result is still that we have the same overall balance of reasons for following seriously wrong past decisions as for following minimally wrong past decisions. But, Alexander notes, we do not in fact believe that it is as important to follow seriously wrong past decisions. Thus, he concludes, we must not believe that intertemporal equality is a weighty value. *Id.*

Alexander’s argument relies on a false premise. It is not necessarily true that the equality claim for following a seriously wrong precedent is especially strong. Equality principles can be sensitive to differentials in wellbeing, but they need not be. For example, they can depend more on the permissibility of criteria of distinction (as in prohibitions of racial and gender discrimination). In the context of precedent, the equality norm might be this: Although a court has considerable discretion concerning which principle of law to adopt in a case of first impression, equality demands that the court have a substantial reason for not following a precedent. This norm is based on equality insofar as it requires an explanation for differences in treatment of those who claim to be similarly situated. Of course, such a norm might often be less weighty than the need to correct a past mistake. And that competing need is weightier the more serious the past mistake. But the equality norm requiring explanation can have a weight that is insensitive to the seriousness of the past mistake.

against M, or is showing favoritism toward L. The worry about intertemporal equality (even if the problem were only successive treatments of L) is, for example, that the administrator is acting thoughtlessly or without any meaningful standards at all. In general, we are more concerned about interpersonal than about intertemporal inequalities. (If L receives a permit in January, and M is denied a permit on similar facts in February, we are normally more troubled than if L receives a permit in January and L is denied one in February.)

To be sure, Peters' conception of precedential equality sometimes expresses a meaningful egalitarian claim, insofar as we might recognize a right to a minimal explanation for any differential in treatment (historical or otherwise). But precedential equality is both too broad and much too narrow to explain when the concept of equality is usefully employed in legal and moral argument. It is too broad: Peters errs in thinking that precedential equality is a universal, and significant, principle.¹⁴¹ Not every case of incorrect beneficence under a rule deserves multiplication. And conversely, precedential equality is far too narrow, for it does not encompass nondiscrimination rights, distributive justice principles, egalitarian constraints on the exercise of discretion, and many other important contexts in which equality principles are properly invoked.

A final example of the inadequacy of precedential equality is Peters' rather tortured analysis of Rawls' difference principle. Peters wants to refute the objection that his approach requires the rejection of "so-called egalitarian theories of justice such as Rawls's."¹⁴² According to Peters, Rawls' difference principle is largely safe from the criticism that it expresses "prescriptive" equality, for the following reasons. First, if an unequal distribution of a social primary good (such as wealth) to Y but not X will benefit the least advantaged, Rawls permits the inequality. Peters agrees that this need not express "prescriptive" equality, but only for a very narrow reason: "the fact that X but not Y will invest the wealth in a socially beneficial way means that X and Y are not identically entitled to the wealth," so "prescriptive" equality simply does not apply.¹⁴³ Second, if unequal distribution will not benefit the least advantaged, then Rawls would require equal distribution between X and Y; but again, Peters finds a narrow reason for concluding that the result need not express "prescriptive" equality: "we now have no valid reason of nonegalitarian justice (at least, none that Rawls would recognize) to give Y more wealth than X."¹⁴⁴

But these rationalizations simply overlook the egalitarian point of Rawls' theory. As a matter of justice, Rawls believes, we should create

¹⁴¹See Peters, *supra* note 1=, at 1250, n. 58 ("The prescriptive egalitarian holds that unequal treatment of identically situated people, measured according to any legitimate standard of identity, is always to some degree wrong.").

¹⁴²*Id.* at 1259.

¹⁴³*Id.* at 1260.

¹⁴⁴*Id.*

unequal entitlements to wealth and income if (but only if) the inequalities would benefit the worst off. Peters calls this a principle of “nonegalitarian justice” and points out that if the principle is applied according to its terms, we need not rely on the dubious “prescriptive equality” conception. But Peters’ definitional moves cannot conceal the egalitarian content of the principle.¹⁴⁵

In the end,¹⁴⁶ Peters cautiously concludes that Rawls’ theory “is perfectly consistent with nonegalitarian justice in many, probably most, situations in which it might be applied.”¹⁴⁷ But he suggests that we must closely examine “any legal, political, or moral theory that makes the proper treatment of some people contingent upon the treatment given to others,” since such a theory might be “grounded in a fiction.”¹⁴⁸ Of course, Rawls’ Theory of Justice is such a theory. It is remarkable that Peters can offer only this contingent, uncertain judgment about whether the most important political theory of this century passes the simple test of intelligibility.

4. Only a prohibition on using irrelevant criteria

Do equality rights merely prohibit the use of irrelevant criteria? And if so, are they really about equality at all?

Peters treats the most obvious instances of a right to equal treatment (such as the prohibition on race or gender discrimination, or Rawls’ difference principle) as exemplifying one type of nonegalitarian right—namely, a right not to be disadvantaged based on an “irrelevant” criterion.¹⁴⁹ Indeed, his very statement of NEJ is in terms of “relevant” criteria.¹⁵⁰ But the relevance of relevance is much less than Peters believes.

¹⁴⁵It is plausible to question whether what Rawls is concerned about is the inequality of distribution of primary social goods among different social and economic classes, or instead the need to give priority to the needs of those who are worst off. In an important sense, the latter interpretation is not egalitarian. See Parfit, =; Temkin, *supra* note 38? =; =. But this is not Peters’ point.

¹⁴⁶In another argument, Peters conjures a scenario in which the difference principle might incorporate “prescriptive” equality, and in which the principle should therefore, he believes, be rejected. He supposes essentially the Lucky/ Unlucky lottery ticket fact pattern, and conjectures that the difference principle might support multiplying Lucky’s windfall and providing it to Unlucky, as well. Peters, *supra* note 1=, at 1261. But, as Peters might realize, *id.* at 1261 n. 80, Rawls never intended the difference principle to apply to distributions that depart from what his theory requires. Rather, he is concerned to explain what people deserve in the first instance, as a result of implementing the basic principles that would be chosen in the original position. See Rawls, *supra* note 51=, at = [on desert v. entitlement].

¹⁴⁷*Id.* at 1262.

¹⁴⁸*Id.*

¹⁴⁹Peters, *supra* note 1=, at 1220, 1230 n. 38, 1254-55; 1259-1262. See also Westen, *Speaking of Equality*, *supra* note 3=, at 120-121.

¹⁵⁰See text at notes 29= *supra*.

Irrelevance of a trait or reason is neither a necessary nor a sufficient condition for qualifying as an equality norm.

The prohibition of the use of a racial criterion in cases such as Yick Wo reflects a comparative right. To treat such a prohibition as simply requiring that extraneous factors be ignored is to trivialize the reasons why racial discrimination is illegal. Racial discrimination expresses a profound disrespect for the status of a minority group; the use of an arbitrary or irrelevant criterion, without more, has no such meaning or effect.¹⁵¹ Among other things, Peters' view does not permit us to explain why discrimination against blacks might plausibly be seen as more troublesome than preferential treatment of blacks.¹⁵²

As another example, consider gender classifications. Gender is often at least minimally "rational" or relevant to permissible ends of government. For example, a gender-based criterion might loosely correlate with whether a youth will drink and drive,¹⁵³ or whether a wage-earner has a dependent spouse.¹⁵⁴ But, under the equal protection clause, the government needs an especially strong reason before it may explicitly differentiate women and men. Relying on stereotypes, even stereotypes that are substantially accurate, can perpetuate traditional gender roles.¹⁵⁵

Even racial classifications are sometimes relevant to legitimate government ends; their invalidity does not depend on their being irrelevant. For example, in the context of peremptory challenges, race might well be a relevant characteristic: black jurors as a group are more likely than white jurors to question the credibility of the prosecution's case. But the Supreme Court has reasonably concluded that the use of race even in this context threatens to perpetuate highly inaccurate stereotypes and racist views.¹⁵⁶

Still, one might worry that nondiscrimination rights do not really express equality insofar as they are negative rights, merely prohibiting people from employing certain traits or considering certain types of reasons

¹⁵¹See, e.g., Paul Brest, ==; John Hart Ely, Democracy's Distrust = (=).

¹⁵²Peters does offer an explanation, suggesting that opponents of affirmative action think race is always irrelevant, while proponents argue that a preference is "based on a relevant criterion ... : the fact that the African-American business owner, due to historical and sociological conditions, faces artificial obstacles to obtaining government contracts that the Caucasian owner does not face." Peters, supra note 1=, at 1256 n. 66 (emphasis original). But it is unhelpful to describe this debate as a battle over which nonegalitarian criterion of relevance to use. Rather, each criterion expresses a different egalitarian norm: the opponents argue that a relative preference unfairly distributes benefits unequally based on race; the proponents argue that a relative preference fairly distributes benefits in order to promote equal opportunity or diversity or to redress historical inequality.

¹⁵³Craig v. Boren, 429 U.S. 190 (1976).

¹⁵⁴See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

¹⁵⁵See, e.g., *United States v. Virginia*, 116 S.Ct. 2264, = (1996).

¹⁵⁶*Batson v. Kentucky*, 476 U.S. 79, = (1986). See also *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994)(applying *Batson* to prohibit gender-based peremptory challenges).

in their distributional decisions. Perhaps such rights do not so much require equality as forbid acting for certain reasons. Perhaps they focus, not on the nature or scope of the resulting inequality, but instead on the harm (such as stigma) that any use of the impermissible trait produces.¹⁵⁷ On this view, nondiscrimination rights are not centrally concerned with equality at all.

This view is mistaken. Nondiscrimination rights are indeed centrally concerned with equality. The stigmatic harms that race and sex discrimination cause are often an expression of prejudice, hostility, spite, and disrespect. To put the matter in the most literal egalitarian terms, these harms express the discriminator's desire to distribute respect and esteem unequally. To be sure, the inequality in tangible benefits that a discriminatory decision brings about might be less troublesome than the prejudiced attitude the discriminator expresses or the insult the victim feels. If a black employee had the choice whether to suffer an economic loss due to an employer's negligence or indifference, or instead to suffer a significantly smaller economic loss due to an employer's outright racial hostility, the employee might well prefer the former. Still, the inequality, in tangible benefits or in status, does matter.¹⁵⁸

Nevertheless, Peters' discussion of irrelevance does point out a serious ambiguity with those nondiscrimination rights that do prohibit reliance on certain traits because they are irrelevant. When are these rights genuine equality rights? The concept of "irrelevance" is opaque; it can contain very different normative concerns.

Consider two examples:

(A) "Don't discriminate based on race"

(B) "Don't discriminate based on failure to offer a bribe"

(A) is an equality right (even if it is part of a larger view that race is always irrelevant, i.e., that we should have a color-blind society). But (B) apparently is not. Why not?

¹⁵⁷See Peters, *supra* note 1=, at 1256: "The wrong of ... decisions [based on especially odious criteria like race or gender] lies not in the difference in treatments that result from them; it lies in the application of an especially harmful irrelevant criterion to produce that difference."

¹⁵⁸This analysis might help explain why an equality claim against the employer in examples (2D) and (2E), *infra*, can still be viable even if he promotes neither employee, if his reason for promoting neither was based on a sexist desire to avoid promoting Wilma. (He might take this action to avoid detection of his sexist motivation.)

On first glance, forbidding the employer from "leveling down" or "multiplying the wrong" in this way seems inconsistent with my earlier analysis. But it is not. An equality right can be designed to equalize status, not merely (and sometimes not even) to equalize tangible benefits. See Section B.4= [Equality of Respect], *supra*. Denying promotion to both still treats Wilma worse than she would have been treated had she been a man. And it represents a distinct insult to her, possibly undermining her status in the workplace in a way that denying promotion to Mark does not. (Finally, an equality right can be impure, thus requiring leveling up.)

Formally, (A) and (B) are the same. For each prohibits the use of a classification based on a specified criterion. But substantively, they differ.

Violation of (A) will lead to differentiation of benefits and burdens according to race. What is most troubling about such differentiation is not the mere fact that an irrelevant criterion has been employed, but the social significance of racial classifications (including subordination, caste, and unequal status in the community), and the pervasive, severe consequences of such classifications (including social friction, undermining of feelings of self-worth and of a culture of mutual respect, and sometimes violence).

Violation of (B) ordinarily will not have a similar meaning or effect. First, such a violation does not inevitably lead to inequality; it is at least possible for a violation of (B) to cause no inequality, if no one offers a bribe, or if all do. Second, and more important, although it will be unfortunate for society if bribery is rewarded, such a policy need not create socially significant inequalities. (On the other hand, such a result is possible, if the government is corrupt and supported by a wealthy elite, and if the bribery policy is part of a pervasive pattern of misgovernment. In that case, (B) could have an egalitarian justification and content.)

We need a substantive theory identifying which inequalities are salient in our society in order to determine which “nondiscrimination” rights of this sort (i.e., rights not to suffer because of “irrelevant” criteria) are genuinely concerned with equality. (Indeed, it would be clearer to restate (B) as: “Don’t disadvantage me based on...” and to reserve the term “nondiscrimination” for genuine comparative equality rights.)

Notice that (A) involves a trait, while (B) involves conduct. So (A) is more likely to result in entrenched, and therefore more troublesome, equality. But the difference is at best one of degree. A trait can be discriminatory and problematic without being entrenched (e.g. a one-time government decision disadvantaging those with blue eyes). And conversely, discrimination against some forms of conduct or affecting some types of personal interests is especially troublesome, e.g. discrimination against those exercising equal protection fundamental interests such as the right to vote, or those exercising the right to equal access to the criminal and civil legal process.¹⁵⁹

¹⁵⁹=cites. See Simons, *supra* note 48=, at 467-472.

D. How equality operates

Having addressed the more basic criteria distinguishing egalitarian from nonegalitarian principles, I turn to some additional, important features of how egalitarian principles operate in moral and legal analysis.

1. To govern unequal implementation of a rule (sometimes)

Above, I explained why the duty to implement a rule accurately according to its terms expresses only “lexical equality”--a trivial, derivative, tautological sense of equality. However, in at least three circumstances, unequal implementation of a rule can violate a genuine equality norm.

a. The scope of the rule expresses an invisible, historical equality norm

The first circumstance or caveat is this: a genuine equality principle could be part of the history, and could explain the current scope, of a general rule of form (3). Consider (3A), above, in which I promised that all of my children would receive dessert if they finish their dinner, and suppose the following history. I initially created a more complex entitlement under which my son’s entitlement to dessert depended on different conditions than my daughter’s entitlement. (Recall (1A).) Then I decided to reject that more complex entitlement, in part because I no longer find those other conditions important, but in part because I give weight to my children’s desire for equal treatment in this respect. I might agree with them that if a particular factor (finishing dinner) is sufficient reason for one child to receive dessert, then (ordinarily) that factor should also suffice for the other child to receive dessert.

Consider another example:

(3C) An employer once excluded blacks from applying for a particular position. The employer then decides, in response to public pressure or through a change of heart, to accept applications from all races, explicitly announcing, for the new job opening, “All persons, without regard to race, are encouraged to apply.”

Notice that, when equality is part of the explanation of the current scope of a noncomparative rule, the operative rule is still noncomparative. We might say that equality in this setting is an invisible principle, while the noncomparative rule is the visible principle. The difference is important. If a principle is invisible, then it cannot directly operate to constrain decisions. This is both good news and bad news for current recipients. It is good news, insofar as the decisionmaker could ordinarily satisfy the equality principle by denying the relevant benefit to all. Because that principle is

invisible, however, this stingy response is unavailable. For example, in (3C), the embedded equality principle is: “Do not discriminate against blacks with respect to accepting applications for the position.” This principle would be satisfied by abolishing the position, or by employing a different, nonracial restriction on applications (e.g., limiting applications to those with twenty years’ experience). (3C) is therefore good news for the previously excluded group, blacks, because it now grants them a noncomparative right to apply for the position in question.¹⁶⁰ But the impotence of the embedded equality principle is also bad news for current recipients. If the decisionmaker changes his mind, abandons the rule in (3C), and reverts to his racist ways, the invisible nondiscrimination principle has no operative effect.

If we wish to make the equality principle visible, of course, we can do so, by adopting it as an operative principle. Instead of hoping that employers adopt and maintain noncomparative rules that extend benefits to blacks as well as whites, government might forbid racial discrimination by employers. Combining such a nondiscrimination rule with a job opening still results in the noncomparative rule (3A), but that entitlement is now secure against a discriminatory reformulation.¹⁶¹

When does equality operate even as an invisible principle, explaining the current scope of a noncomparative rule? It is difficult to say. On their face, all noncomparative rules employ general criteria. This generality is consistent with an embedded egalitarian norm, i.e., a desire to create equality between subjects with respect to the benefit at issue. But it is also consistent with the nonegalitarian view that the classifying trait is the most relevant and appropriate trait for conferring the benefit at issue.

So we need to look behind the face of the rule, to its purpose and history. At one extreme, suppose a case in which the decisionmaker never expected more than one individual ever to be subject to the rule.¹⁶² In such a case, the rule is entirely noncomparative in inspiration as well as operation. At the other extreme, suppose that the current scope of the rule is in significant part due to efforts to overcome past inequalities. “All adult persons shall have the right to vote” in contemporary society does not merely represent a determination that being an adult person is relevant to

¹⁶⁰Compare Justice Scalia’s argument for limiting affirmative action to remedying specific identified instances of past discrimination, a remedy that no longer requires any reference to race at all. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, = (1989)(Scalia, J., concurring). In effect, he argues for race being considered, not as a comparative group right (blacks should be preferred to whites in certain respects), but as a noncomparative individual right (all persons are entitled to a judicial remedy for an individual rights violation; some blacks are so entitled). Of course, his argument still reflects the logic of comparative rights, insofar as the historical individual rights violations of which blacks complain were themselves violations of the comparative right not to suffer discrimination.

¹⁶¹These examples involve the operation of visible and invisible legal principles. Similar problems can arise within a moral system that has either lexically ordered principles or reasons with widely varying weights.

¹⁶²—E.g., the federal law requiring ex-President Nixon to turn over his tapes? cite=

voting (in the way, for example, that it is relevant to the size of hospital beds). It also, and more importantly, represents a social commitment not to permit slavery, property qualifications, gender discrimination, or other unjustifiable criteria to qualify this fundamental right of equal political participation.¹⁶³

This first caveat applies both to cases of incorrect deprivation and to cases of incorrect beneficence. If one reason for the universality of the rule is to prohibit certain unjustified discriminations, then we have an equality reason to correct either the deprivation or the beneficence. (Under the facially noncomparative principle that all adults are allowed to vote, an equality objection could be asserted not only if some are denied the right to vote, but also if others are allowed to vote twice.)

- b. An egalitarian metaprinciple applies when fully implementing the rule is impossible or undesirable

The second caveat is this. Sometimes it might be necessary, or desirable, not to implement a noncomparative rule fully. For example, a budgetary crisis might prevent all deserving recipients from receiving their full entitlements. And an egalitarian metaprinciple might then apply, imposing upon the decisionmaker a second-order duty to be impartial or

¹⁶³Westen, in an otherwise useful analysis of the Twenty-Sixth Amendment to the U.S. Constitution, fails to identify the invisible equality component within a noncomparative rule and thus misstates the significance of that rule. Westen, *Speaking of Equality*, supra note 3=, at 136-141. Westen points out that the Amendment provides both a federal and a state right to vote to those who are eighteen years or older whenever older citizens have such a right. However, because the federal Constitution elsewhere establishes when older citizens have such a right, the effect of the Amendment is to give eighteen year olds a noncomparative federal right to vote for certain federal officials. But with respect to state elections, Westen asserts, the effect of the Amendment is very different. Since the U.S. Constitution does not create any significant requirements with respect to the state offices that must be elective, the Amendment only creates a contingent right: If a state allows persons older than eighteen to vote in an election, it shall also allow eighteen year olds to do so.

All of this is true enough. But Westen then proceeds to analyze the federal right of eighteen year olds to vote as if it had nothing to do with nondiscrimination. (See *id.* at 140.) Yet that right, albeit noncomparative, has the scope that it does precisely because a comparative nondiscrimination right (contained in the Amendment) was combined with other constitutional voting rights. If the Constitution were amended to provide that members of the U.S. Senate were no longer to be elected, or that Supreme Court Justices were to be elected, then the Amendment would again be triggered and would affect the scope of the ultimate federal right to vote. (In just the same way, of course, if the scope of the state right to vote changes, so does the scope of the Amendment with respect to state voting rights.)

Consider also Raz's discussion of Dworkin's fundamental right of equal concern and respect. Raz, supra note 22=, at 220. Raz interprets Dworkin too narrowly as endorsing only a noncomparative right, when in fact, Dworkin means at least to emphasize the impermissibility of discrimination along this dimension. See Simons, supra note 48=, at 480 n. 229.

nondiscriminatory in her decision whether to honor first-order entitlements.¹⁶⁴ We might, for example, give the benefits administrator considerable discretion in distributing limited funds, but forbid him from considering race, gender, or other impermissible factors in that decision. (At the same time, we might also accept the use of nonegalitarian factors as metaprinciples in this situation--e.g., benefits might first be distributed in full to those who have a strong claim of reliance, or who satisfy some absolute standard of need.)¹⁶⁵

In this situation, it is sometimes difficult to decide whether the decisionmaker's response is egalitarian. Suppose, for example, that the total pool of available funds is unexpectedly 40% less than originally promised. And suppose the decisionmaker therefore distributes to each recipient an allotment that is reduced 40% from the allotment which the recipient originally deserved. Does this distributional decision express a right to equal treatment? Perhaps it does, if the formula was chosen in order to exclude certain forms of preference or inequality. Perhaps it does not, if the point is simply to give each individual a fair allotment, measured by what is feasible.¹⁶⁶

¹⁶⁴Could the notion of "impartiality" be understood in noncomparative terms? I think not. "To act 'impartially,'" Westen suggests, "is to act without favoring one person vis-a-vis others." Westen, *Speaking of Equality*, supra note 3=, at 224 (emphasis original). Surprisingly, in view of this plausible (and comparative) definition, Westen nevertheless disagrees with my view that impartiality is a necessarily comparative principle. He gives the example of a piano teacher contracting separately with two students to give each sixty instructional minutes a week, but skimming on the time of one of the students. *Id.* at 225. Westen correctly notes that the contractual right of each student is noncomparative, and concludes: "Yet we would commonly say ... that by denying one student (and not the others) the sixty-minute lesson to which he is noncomparatively entitled, the teacher is not treating the two students 'impartially.'"

True enough. But the reason we would say this is precisely because the teacher seems to be favoring one student over the other. This conduct violates a higher-level egalitarian principle, that (roughly speaking) one should not differentially honor (first level, noncomparative) entitlements (without good reason, or in circumstances suggesting favoritism).

¹⁶⁵Westen's discussion of unequal implementation of entitlements, in his category of "prescriptions as baselines within descriptive standards of comparison," neglects to consider the possibility of egalitarian metaprinciples for judging such inequalities. See Westen, *Speaking of Equality*, supra note 3=, at 86-92.

¹⁶⁶Peters offers an argument to explain how nonegalitarian principles justify proportional reduction in this type of case. If the original rule says that A and B are each independently entitled to a particular benefit, and if scarcity occurs, then proportional reduction is required, not because of equality, but because the original rule meant that there was no relevant difference between A and B with respect to obtaining the benefit. Peters, supra note 1=, at 1235. This is a clever but unpersuasive argument. The original entitlement rule might have meant no more or less than it said: A and B are each entitled to the full benefit. If the benefit cannot be fully distributed, other principles might come into play. For a helpful discussion of the possible choices (in the context of Peters' example of a drug in short supply), see Greenawalt, supra note 1=, at 1276-1278.

Recall Peters' shipwreck example. Each of the eleven survivors has a noncomparative right to a space on a lifeboat to save his life. But it is impossible to satisfy all entitlements; the lifeboat has space for only ten. Moreover, unlike the limited funds example, the benefit here is indivisible; it cannot be proportionately reduced and then distributed to all claimants. One response to this crisis is to effectuate a comparative nonequality right, requiring that children, or the elderly, or the marquee baseball player, be saved first. Another response is to effectuate an equality right: all persons are equally entitled to live, and a lottery or similar method should be employed to recognize their equality *ex ante*.¹⁶⁷ (Notice that a noncomparative right is less likely to operate here, in the context of a competitive good, since the treatment that one person receives necessarily affects the treatment that others receive.¹⁶⁸)

The fact that a lottery results in not saving one person does not mean that a lottery approach is based on nonegalitarian principles. Peters seems to think otherwise. Since all eleven have an equal right to a place in the lifeboat, he argues, equality demands either the impossible (saving all) or the unthinkable (letting all eleven drown). That is, since we must, by hypothesis, let at least one drown, and since the other ten are similarly situated, equality demands that we let them drown, too. Only nonegalitarian principles, Peters concludes, can explain the decision to save some but not all.¹⁶⁹

But the "nonegalitarian" principles that Peters invokes to justify saving some but not all turn out to be comparative: each sailor should have

¹⁶⁷Raz discusses this issue under the heading "Principles of equal distribution in conflict." He discusses the principle:

(5.1) If there are n F's each is entitled to $1/n$ of all the G.

and suggests that a genuinely egalitarian principle underlies (5.1), namely:

(5.2) In scarcity each who has equal entitlement is entitled to an equal share.

Raz, *supra* note 22=, at 222-223.

Raz is correct that the comparative equality principle (5.2) could explain (5.1). But a noncomparative principle (call it (5.3)) could also explain (5.1):

(5.3) Every F is entitled to as much G as possible.

Then, when scarcity occurs, we would violate (5.3) if we gave a larger share of G to some F's than to other F's.

¹⁶⁸This is not necessarily the case, however. Even with a competitive or scarce good, noncomparative rights can operate. A supermarket advertising "free beach balls while quantities last" grants a (defeasible) noncomparative right to each customer to a free beach ball. When quantities run out, that defeasible condition kicks in. Although the actions of other customers affect the condition, this fact does not render the right comparative in any important sense.

The boundary between comparative and noncomparative rights is sometimes difficult to draw. I do not have the space to explore the issue further here.

¹⁶⁹Peters, *supra* note 1=, at 1237-1238.

an equal (10/11) chance for a place in the lifeboat. And just as the impossibility of satisfying all noncomparative entitlements to a place need not drive us towards satisfying none of these entitlements, as Peters concedes,¹⁷⁰ the impossibility of satisfying each sailor's comparative entitlement to a place (if any other sailor gets one) need not drive us towards satisfying none of these comparative entitlements. In both instances, although providing places to all eleven sailors may be the ideal solution (albeit for different reasons), providing equal ex ante opportunities might be second best.

The lifeboat example underscores an important point: To understand equality principles, we must understand their domain.¹⁷¹ Equality can pertain to results, but it can also pertain to opportunities. It can address the tangible treatments created by law (e.g., whether men and women are equal in their entitlement or disentitlement to parental leave), but it can also address the law's effect on a group's status (e.g., whether "equal" denial of parental leave reinforces the subordination of women).¹⁷² When the subject matter is an indivisible benefit, such as the allocation of scarce medical care or life-saving opportunities or the allocation of a single managerial job position, equality of opportunity is likely to be a more important principle than equality of outcome.¹⁷³

This second caveat applies not only to incorrect deprivations, but also to incorrect beneficence. It might be quite predictable, for example, that a government benefits program will occasionally make overpayments. Egalitarian principles can govern the systematic response to such errors. Thus, if accounting system A is likely to result in errors favoring the wealthy, while accounting system B is likely to result in errors distributed more evenly across income classes, one might choose accounting system B,

¹⁷⁰Id. at 1240.

¹⁷¹See Rae, *supra* note 62=.

¹⁷²See Section B.4= *supra*.

¹⁷³An interesting analytical problem arises here. Are equality principles with respect to indivisible benefits subject to the leveling down and multiplication of wrong objections? It might seem not. If the "benefit" is a place on the lifeboat, then one can level up (as many as possible get a seat) or down (no one does). But if the "benefit" is defined as an equal chance for a place, how could one level up or down? Everyone deserves a 10/11 chance, in Peters' example. Or consider a more common example: discrimination in filling the only supervisor position in a job category. If the person hired is no more qualified than the person passed over, it is infeasible to level up, yet it seems absurd to level down. The appropriate analysis is to require an equal opportunity for the job: each candidate deserves equal consideration, apart from race or other impermissible traits. But how can "equal consideration" be a matter of leveling up or down?

The answer is that the decisionmaker might have discretion concerning the nature of the benefit that is offered, discretion that permits "leveling up" or "leveling down" in the relevant sense. In the lifeboat example, the captain might be in position to save either a rickety 10-person boat or a more sturdy 8-person boat; the survivors have a right to an equal chance at the available seats on whatever boat is saved. In the employment example, the employer has discretion to advertise more or less widely, even though this affects the prospects of the two candidates before her. (Or she may redefine the nature or emoluments of the job.)

without, of course, compromising on the effort to develop a more accurate system for preventing errors.

- c. An equality principle requires the decisionmaker to explain why he departed from the rule in some but not all cases

The general point that unequal implementation of a rule presents no distinctive equality problem is subject to a third caveat: this inequality, like any inequality in treatment, might demand explanation. A demand for reasons for inequality is one important type of equality right, as noted above. Thus if, under (3A), both children finish dinner but only one receives dessert, the disappointed child might reasonably ask for a justification. She might complain not only that I have violated her noncomparative rights under (3A), but also that I have treated her differently from her brother for no apparent reason. Or, in a slightly different vein, she might complain that whatever reason I might have for dishonoring her entitlement applies equally to him. With respect to this demand-for-reasons equality right, violating both of their noncomparative rights is “better,” for there would no longer be a differential distribution of dessert to explain.

Of course, all things considered, the equality right might be weak and not dispositive. I might have a stronger reason for denying Bonnie her entitlement than for denying Clyde his, even though I might concede that I have breached her entitlement. (She complained that dinner was “yucky.”) Or I might reformulate rule (3A) on the spot, concluding that I will no longer honor this entitlement if one of my children has misbehaved, or if bedtime has passed. I might even believe that the children should not get too attached to dessert, and that it is a good thing if occasionally I depart from the rule for no reason at all. (Or I might wish to prepare them for the whims of the administrators they will encounter in their adult life.) Still, a demand-for-reasons equality claim can exert some force in the direction of requiring an explanation and requiring consistent application of a reason to all of my children.

This demand for a justification of inequality can be invoked in instances of incorrect beneficence, as well as incorrect deprivation. Recall Peters’ lottery example ((3B), above). Unlucky might well ask why Lucky obtained the windfall. Was it because she is friendly with the lottery commissioner? (And is that an impermissible consideration in a government distributional decision?) Or, worse, was it because she was white and he is black? If so, he is entitled to challenge the decision on egalitarian as well as noncomparative grounds.¹⁷⁴ If, however, the windfall is due to an innocent error, Unlucky might have no valid equality claim.¹⁷⁵

¹⁷⁴Indeed, he might have standing to raise the equality claim, but he is unlikely to have standing to raise the noncomparative right claim, considered by itself.¹⁷⁵Peters

But an objection looms. Perhaps the duty to be consistent in one's reasons for treatment is not an egalitarian duty at all. Requiring consistency of reasons for departing from a rule seems similar to requiring consistent treatment under a rule; and the latter, we have seen, is often not a genuine equality principle.¹⁷⁶ "Consistency" in either context, one might say, simply means following a reason or rule to the natural extent of its "authority." One should never be irrational, whether one is treating one person or many, and whether one is irrationally treating people the same or irrationally treating them differently.

The objection is misplaced. In a demand-for-reasons equality claim, the complaint is premised on differential treatment. Consistency of reasons might be required as a justification of that differential. For example, in a rational basis equal protection case, the plaintiff asserts that he is a member of a class that is similarly situated to another class of persons who receive better treatment, and that government needs a reason for the differential.¹⁷⁷ The government cannot successfully defend its policy by adducing a reason that concededly would entitle both classes to the benefit. In familiar equal protection jargon, such a reason is underinclusive.¹⁷⁸

To be sure, one might also hold the view that a decisionmaker should never act irrationally, in any context, whether comparative or noncomparative. As a logical matter, if all inequalities demand justification, why shouldn't all equalities demand justification? That is, why shouldn't a person be entitled to make a different sort of comparative claim—that he was unfairly lumped together with others, and that the decisionmaker should explain why? (In constitutional jargon, this is a complaint of overbreadth.)¹⁷⁹ Moreover, why shouldn't a person be entitled to demand a reason for any noncomparative treatment?

The short answer is that we might or might not extend the demand for reasons to all of these contexts. If we do extend the demand, however, the type and weight of reasons demanded should be sensitive to distinctions

implicitly argues only for the leveling up form of "prescriptive equality": Unlucky wants to get what Lucky got, not to have Lucky leveled down. But a pure equality right is satisfied by either remedy, and the force of the noncomparative right here might result in the leveling down remedy, if Lucky has already disposed of the windfall proceeds.

¹⁷⁶See, e.g., Raz, *supra* note 22=, at 229 (arguing that equality is used contextually and argumentatively, but not normatively, when we make the "ad hominem" claim: "You seem to acknowledge the force of the reason in one case so why do you deny it in the other?").

¹⁷⁷See Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 U.C.L.A. L. Rev. 447, = (1989).

¹⁷⁸See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)(zoning that excludes a group home for the retarded cannot be justified by supposed interests in avoiding flood dangers, avoiding legal responsibility, preventing overcrowding and the like, because these interests can't explain the beneficial treatment given to other permitted uses).

¹⁷⁹See Simons, *supra* note 175, at =. It is also one sense of the claim that "unequals should be treated unequally" and that "unalikes should be treated unlike." See Simons, *supra* note 48=, at 437-442.

in context (as constitutional doctrine amply illustrates).¹⁸⁰ Egalitarians can coherently endorse the view that inequalities in particular demand justification of a certain type and weight.

The upshot of these three caveats is that sometimes, for these three different reasons, the unequal distribution of entitlements under a noncomparative rule does raise a genuine equality problem.¹⁸¹ But should we go further, and treat these caveats as swallowing the rule? A legal or moral system might go so far as to recognize the following perfectly general “egalitarian rule-correction” principle:

(2C) If a particular noncomparative rule (3) provides that all T’s shall receive B, and if any person within T obtains B, then all persons within T should obtain B.

But this principle, while intelligible, is not very plausible. For there are many circumstances in which a decisionmaker cannot or should not confer all entitlements, as we have seen. On the other hand, if this principle is interpreted only as a principle possessing minimal weight relative to other principles, e.g., as simply demanding a weak justification, then it is more plausible.

2. As a critique of existing rules

Equality principles often operate as critiques of existing moral or legal rules.

The earlier sections discussing the unequal implementation of rules did not address challenges to the rule itself as inconsistent with equality principles. Indeed, the very idea of lexical equality is that equality is just a question of unequal implementation of a rule or principle. But of course challenges to the content of moral or legal rules (such as legislative rules) are among the most prevalent types of equality arguments. To be sure, challenges to the unequal administration of rules, or to discretion exercised under a rule, can raise serious equality problems. But equality is often invoked to challenge legislative rules that classify according to race, gender, mental disability, state of origin, sexual preference, and the like. And egalitarian challenges can be broader and deeper still, questioning basic social policies that result in social stratification and extremes of wealth and poverty, or that fail to alleviate such inequalities.

¹⁸⁰See Greenawalt, *supra* note 2=, 83 Col. L. Rev. at 1177 (“For [a] rule to survive [an equal protection rational basis challenge], the state needs not only a legitimate reason for treating the claimants the way it does—that reason would suffice to meet a straightforward substantive due process attack; the state must also have a legitimate reason for drawing the lines of inclusion and exclusion as it does.”); Simons, *supra* note 175=, at =. =some examples?

¹⁸¹Even when these caveats apply, however, they will often require, not full implementation of a rule, but only selective implementation.

The “demand for reasons” type of equality right is often asserted in challenges to the fairness of legislation. Equal protection doctrine examines “classificatory fit,” i.e., a law’s relationship to its purpose. If the purpose logically justifies burdening a broader class than the classification purports to burden, then the law is underinclusive. If the purpose justifies burdening a narrower class, the law is overinclusive or overbroad. Through these doctrinal requirements, equal protection law attempts to give substance to the ambiguous demand that “likes be treated alike.”¹⁸²

3. In both discretionary and nondiscretionary decisions

Equality principles apply to both discretionary and nondiscretionary decisions. At first blush, they seem more problematic in the latter context, for nondiscretionary decisions trigger a troubling objection—the objection that insisting on equality means insisting on the multiplication of wrongs. Yet there is a cognate objection in the discretionary context—the objection that equality means leveling down. In this part of the article, I explore the discretionary/ nondiscretionary distinction and the strength of these objections.

The problem of unequal distribution under a rule is ordinarily raised in the context of absolute or nondiscretionary entitlements, a context in which a demand for equality seems especially troublesome, because the “multiplication of wrongs” objection to equality seems especially plausible. In example (3A), if the parent wrongly denies one child his dessert, he only multiplies the wrong by denying dessert to the other child.¹⁸³ More generally, for noncomparative rules such as (3), all T’s are absolutely entitled to B. Then it is a clear wrong not to provide B to any person with trait T. But if it is wrong to deny B to one person with trait T, it is surely wrong to deny B to even more persons with trait T. And then it hardly seems justifiable to respond to unequal distribution of B among persons with T with equal denial of B to all persons with T.

At first glance, it appears that equality principles are more plausible when the benefit at issue is discretionary, rather than an absolute entitlement, because we can then avoid the multiplication of wrongs objection. By characterizing a benefit (or relief from a burden) as

¹⁸²However, we can distinguish egalitarian from nonegalitarian concerns about classificatory fit. For example, the egalitarian concern is whether the asserted argument for differential treatment proves too little or too much; the nonegalitarian concern might be whether the asserted purpose is a fraud, or is insufficiently furthered to justify infringement of the plaintiff’s rights or interests. See Simons, *Overinclusion and Underinclusion*, *supra* note 175, at =.

¹⁸³Compare Peters’ lottery example, (3B), which involves incorrect beneficence rather than incorrect deprivation. Here, “multiplication of the wrong” would mean a multiplication of incorrect beneficence, i.e., giving Unlucky a windfall because Lucky received one. (On whether this should count as a “wrong” or “injustice,” see note 111 = *infra*.)

“discretionary,” I mean that at the time of treatment, the decisionmaker has the option either to confer B or not to confer B without violating the recipients’ rights or otherwise wronging the recipients.¹⁸⁴ Of course, discretion often exists within a range. The decisionmaker has discretion if, so long as he acts within that range, he does no wrong.¹⁸⁵ (A judge might have discretion to sentence a burglar to a prison term ranging from three year to ten years, meaning that a sentence within that range violates neither the burglar’s rights nor the judge’s duties.) Insofar as the decisionmaker has discretion whether to confer B, then the “multiplication of wrongs” objection is misplaced, for the simple reason that the original denial of desired treatment is not a wrong in the first place.¹⁸⁶

Consider this example. A university official is greeting alumni at a university function. He might simply voice a friendly greeting to each person, or he might also shake everyone’s hand. Suppose we conclude that either practice is consistent with his duty to show respect to his guests. To

¹⁸⁴For helpful discussions of discretion, see Dworkin, *supra* note 89=, at 31-35, 68-71 (1977); Frederick Schauer, *Playing by the Rules* 222-228 (1991).

Recall that a benefit is optional if it could initially have been denied; but it becomes vested if, once conferred, it cannot be freely withdrawn. text at notes = *infra*. Optional benefits might or might not be vested. And vested benefits can be strongly or weakly vested. The strength of the entitlement can be measured by its temporal duration (e.g., benefits cannot be retroactively withdrawn, or, more strongly, must be distributed prospectively for some period of time) or by its ability to override other moral or legal considerations.

All legal entitlements might be considered “optional” in the sense that the political system might ultimately change the entitlement (even such entitlements as constitutional rights). But, for purposes of equality analysis, the question is more limited: does the decisionmaker (a judge, or administrator, or legislator, or parent) have the option, at the time of the decision, to redefine or alter the recipient’s entitlement? If not, then the entitlement is mandatory in the relevant sense, even though the entitlement can be altered by some other authority (or by that decisionmaker at some other time).

¹⁸⁵Discretion might also, or instead, be limited by the requirement that the decisionmaker act only for certain reasons. For example, a sentencing judge might be permitted to act only on the basis of retribution, deterrence, cooperation with the police, and other identified factors. But the decision remains discretionary if the judge is permitted to weigh and balance these factors as she likes.

¹⁸⁶See Alexander, *Constrained by Precedent*, *supra* note 36=, at 11-12 (asserting that intertemporal equality has little weight except in two situations: where the good in question is a discretionary benefit and where it is competitive, such that inequality amounts to deprivation).

More precisely, the multiplication of wrongs objection is misplaced insofar as the decisionmaker has discretion to confer B within range R (e.g. a sentence from one to ten years). Suppose one judge has sentenced X to one year and Y to five years. If the judge could have imposed any sentence between one and ten years without committing a wrong, a later judge can remedy the unequal distribution of B within R either by leveling up within R (sentencing both to one year) or by leveling down (sentencing both to five years). The leveling down option depends, of course, on whether X’s entitlement to a one year sentence vests once it is announced.

Peters pays virtually no attention to discretionary decisions. It is therefore not surprising that he emphasizes so heavily the multiplication of wrongs objection to equality.

that extent, his duty is discretionary. However, if he were to shake the hands of whites but not blacks, he would violate a duty not to discriminate on racial grounds. Now suppose the official realizes that he has unjustly discriminated against blacks, and responds by voicing a greeting to all guests and discontinuing the practice of shaking hands. Is he now “multiplying the wrong”? No, because the decision to voice a greeting but not shake hands is not a wrong in the first place.

Consider another example, from the employment context. Compare two scenarios:

(2D) (Discretionary decision):

An employer has substantial discretion over standards for promotion to a job category with higher pay. The employer, in his discretion, weighs length of service, current quality of work, and ability to work with other employees. He promotes Mark but not Wilma.

If it is discovered that the employer’s reason for not promoting Wilma was actually a stereotyped assumption that women are unable to handle management roles, then he violates her equality right. Does this mean that he must promote her? Not necessarily—at least, not by virtue of equality principles alone.¹⁸⁷ Counterfactually, he could have initially adopted a more stringent standard under which neither Mark nor Wilma was promoted, without wronging them. Thus, if he now adopts that more stringent standard, revoking Mark’s promotion, he does not “multiply a wrong.”¹⁸⁸

The fact that discretionary benefits cannot trigger the “multiplication of the wrong” objection does not necessarily provide great solace to egalitarians, however. For discretionary benefits do prompt the “leveling down” objection. As we have just seen, the employer could remedy the inequality after the fact, or could avoid it in the first instance, by exercising discretion in either a stingy or a generous direction.

The “multiplication of the wrong” and “leveling down” objections are closely related. Each reflects a distinctive feature of equality rights—their flexibility. In the case of a nondiscretionary entitlement, equal

¹⁸⁷Federal antidiscrimination laws support “make whole” relief, generally interpreted as requiring promotion in this situation, where feasible. Thus, Title VII does presumptively entitle the victim of discrimination to back pay and retroactive promotion or reinstatement. Charles R. Rickey, *Manual on Employment Discrimination Law and Civil Actions in the Federal Courts* 1-85 (2d ed. 1996), citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975). See §706(g) of Title VII, 42 U.S.C. §2000e-5(g). =other laws=.

However, neither reinstatement of a fired employee nor promotion of an employee who was illegally passed over is required if a reduction in force or legitimate reorganization eliminated the position. See Mack Player, *Employment Discrimination Law* 554 (stu. ed. 1988)(Age Discrimination in Employment Act); =.

¹⁸⁸Once an optional benefit becomes vested, however, revoking it is indeed wrongful. See text at notes 84-85= infra; note 184= infra.

treatment requires either equal conferral of the entitlement or equal denial; and equal denial amounts to multiplying the wrong. In the case of a discretionary benefit, equal treatment requires either equal conferral of the benefit or equal denial; and equal denial amounts to leveling down (though it does not constitute multiplying the wrong).¹⁸⁹

Now imagine a second scenario, in which employees have an absolute entitlement to promotion based on certain objective criteria:

(2E) (Nondiscretionary decision):

Any employee with five years experience and no negative written evaluations will be promoted. Both Mark and Wilma are entitled to promotion under the relevant criteria. Again, the employer promotes Mark but not Wilma.

Suppose that in this case, as in the prior example, the actual reason for the employer's not promoting Wilma is his bias against women. But now, the employer has committed two wrongs; he has denied Wilma a promotion she deserves (a noncomparative wrong); and he has treated her worse than he would have treated her had she been male (a comparative wrong). And now, the "multiplication of wrongs" objection seems, at first glance, more plausible. Is it not absurd that equality would be satisfied by denying promotion to both individuals, in violation of both of their noncomparative absolute entitlements?

This result, I submit, is not absurd but perfectly defensible. Of course it is better if the employer satisfies both entitlements rather than neither. Equality is not the only principle that matters. But it does matter. "Multiplying the wrong" by denying promotion to both Mark and Wilma is better in a very important respect than promoting Mark but not Wilma: it avoids insulting and stigmatizing Wilma. And one can certainly justify a distinct remedy for the equality violation, over and above the remedy for denial of the entitlement.¹⁹⁰

I have been discussing nondiscrimination rights, a type of "negative" equality rights. But positive equality rights, as well as negative, can apply to the distribution of both discretionary and nondiscretionary benefits. For example, suppose a state law requires equal educational spending across school districts (or forbids inequalities of greater than a certain scope). Suppose further that the law does not guarantee a

¹⁸⁹The close relationship of the two objections also makes it unnecessary to clarify the sense of "wrong" that is multiplied. The most plausible meaning, because it is the meaning that justifies the rhetorical bite of the objection, is the denial of a person's rights or entitlements, to his detriment. But Peters also counts as a "wrong" any incorrect treatment, even one to the benefit of the recipient. See note = supra. Alexander, similarly, seems to adopt a broad notion of "wrong": he complains that equality does not plausibly support a doctrine of precedent because we would then be committed to replicating "morally erroneous decisions." Text at note 37= supra.

¹⁹⁰=check Title VII on this.= For further discussion, see Section C.4= supra ("Only a prohibition on using irrelevant criteria").

noncomparative minimum spending level for education. Then the state has provided a positive equality right that governs distribution of a discretionary benefit; if a wealthy district spends X on each student, then the state must equalize funding so that a poor district spends X, too; or it must employ some other formula that results in equal spending.¹⁹¹ Here, even if applying the equality principle results in wealthy districts spending less on their children's education than if no equality principle applied, this is not an instance of the "multiplication of a wrong," because by hypothesis children have no right to a particular level of educational funding.

Now suppose that the state legislature does guarantee a noncomparative minimum spending level of Y per student in every district in the state. However, insufficient funding is available. (As before, a state law requires equalization.) If it is feasible to equalize existing state and local resources at the level of W per student, should a court require this, even if W is less than Y? Yes, insofar as the court wishes to honor the equality right. Notice that this solution does "multiply the wrong" if, but for equalization, some districts would be able to satisfy level Y. Nevertheless, this egalitarian solution might be warranted, depending on the relative strength of the equality right and the noncomparative right.

In the end, the question whether wrongs should be multiplied, or benefits leveled down, depends on context and on the scope and force of the relevant equality right. Of course, if the right is impure, that represents a conclusion (flowing from the relevant factors) that leveling up is required.¹⁹² In the case of strong nondiscrimination rights, such as the right not to suffer invidious racial discrimination, multiplying the wrong or leveling down is indeed defensible, if that is the only feasible option. Indeed, in some cases, it might even be better to level down (or multiply the wrong) than to level up (or eliminate the wrong).¹⁹³ But as to weaker equality rights, multiplying the wrong will more often be unjustifiable. Consider a "demand-for-reasons" equality right, requiring only that the decisionmaker have a rational reason for differential treatment. If this right has little weight, it would be permissible for a government to give a small economic benefit to some businesses but not other businesses which seem to be about as deserving, merely for reasons of administrative convenience

¹⁹¹More realistically, courts interpreting a constitutional or legislative equalization requirement are likely to permit the state to adopt a formula that minimizes inequalities, restricting them to a certain range. =cites=

¹⁹²See Section B.3= for discussion of the "pure/impure" distinction.

¹⁹³See Robert E. Goodin, *Utilitarianism as a Public Philosophy* 246-248 (1995), pointing out that leveling down can be the preferable way to eliminate the inequality when inequality takes the form of unequal satisfaction of nonbasic needs. Achieving a higher level of satisfaction of such relative needs is essentially a status good, and it is better to eliminate such status by leveling down than by leveling up. (Consider housing: beyond assuring a decent minimum, government might choose to restrict the affluent from building more expensive housing rather than promote more expensive housing for the poor. *Id.* at 252-254.)

(so long as the criterion of unequal distribution doesn't violate a stronger equality right, such as a prohibition on racial discrimination).¹⁹⁴

A final point about discretionary decisions is this. Even when a decision is discretionary, the demand-for-reasons type of equality right could militate in favor of consistent treatment. I emphasize "could": in some contexts, the very point of permitting discretion is to immunize the decisionmaker from any inquiry or concern about her reasons for treatment.

On the one hand, consider two cases in which it is plausible to require equal treatment absent a good reason for differential treatment. First, suppose that a daffy uncle, without explanation, gives his young nephew a gift of \$10,000, and his young niece a gift of only \$5. A parent might wish to intervene to correct this irrational inequality and to equalize the gifts, "leveling down" the bank account of the nephew in order to level the niece up. Indeed, if the gifts are in kind rather than in cash, the parent might prefer to waste the more expensive gift rather than allow the inequality.¹⁹⁵

A second case comes from the sentencing context. A judge sentences two defendants, J and K, who jointly participated in a crime and whose participation was identical.¹⁹⁶ Suppose the judge has discretion within a statutory range, and suppose she may consider any one of a number of purposes of punishment, including retribution, deterrence, incapacitation, prospect of rehabilitation, cooperation with the police, and the like. She is permitted to balance these factors as she wishes, and indeed to interpret their meaning as she wishes.¹⁹⁷ Now suppose (perhaps heroically¹⁹⁸) that the judge is confident that the two defendants are

¹⁹⁴See, e.g. *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993); *New Orleans v. Dukes*, 427 U.S. 297 (1976).

¹⁹⁵Greenawalt gives a similar example where waste would not be objectionable. See Greenawalt, *supra* note 1=, at 1277 (parent refuses to buy last remaining toy of a certain type in order to avoid treating children unequally).

¹⁹⁶See Greenawalt, *id.* at 1267, 1271; Westen, *Speaking of Equality*, *supra* note 3=, at 195-199, 211-219.

¹⁹⁷See Coons, *supra* note 110=.

¹⁹⁸Or perhaps not. As Greenawalt points out, "sometimes we are confident that two people count as relatively equal—for example, that they should be punished equally—before we have decided what treatment they should receive." Greenawalt, *supra* note 1=, at 1267 (footnote omitted).

Westen offers an interesting response to this argument and the argument in the text. He claims that the sentencing judge implicitly is employing a rule to decide the treatment of each defendant, and it is that rule, not the concept of equality, that prompts the judge to treat them equally. The rule is to the effect that no criminal sentence shall exceed or fall short of the sentence that most closely corresponds in gravity to the defendant's blameworthiness, or that would most effectively deter, and so forth. Westen, *Speaking of Equality*, *supra* note 3=, at 195-199. See also *id.* at 212-213.

The problem with this response is familiar: the response asserts a noncomparative right, and thus ignores the comparative character of the original argument. Thus, suppose that the judge wishes to dispense a punishment corresponding to blame, and he knows what J and K have done, but he does not know what punishment

identical with respect to all of these factors. Is it justifiable for her to treat them differently?

It is possible, of course, that one of the acceptable purposes of punishment itself argues for differential treatment even though the participation of J and K is otherwise equal. For example, some consequentialists would support arbitrarily sentencing similarly situated defendants differently, on the theory that sentencing A to nine years and B and C to five secures as much deterrence as sentencing all three to seven years does (and at lesser cost to the individuals and to the state).¹⁹⁹ But assume that the judge does not believe this. Must she be consistent in her treatment of J and K?

Perhaps she must. K has an understandable objection if J is treated more leniently for no apparent reason. Although the judge is free to weigh and balance the factors as she wishes, or even to choose the factors she considers relevant and irrelevant, perhaps she must be consistent, applying the same weight in all cases before her. It is justifiable to demand a reasoned explanation for unequal treatment even when the original treatment could have been different.

Now this equality right might be weak. For example, suppose the judge sentenced J a year ago, while K comes before the judge today. If the judge believes she erred in sentencing J as she did, then the judge has some reason to treat K differently. Securing the correct result, and encouraging reflective development of law and policy, are certainly reasons militating in favor of a different resolution in the case of K. By contrast, when a judge simultaneously sentences J and K, these reasons are unlikely to be served.

On the other hand, sometimes the value of discretion is very great, even when the decisions are essentially simultaneous. Indeed, sometimes it is important that an actor not be required to account for his reasons at all. If so, even impermissible reasons cannot be prohibited. This argument supports the traditional view that lawyers have complete and unreviewable

they deserve. He might feel that a punishment ranging from, say, 5 to 10 years in prison would be within the range of deserved punishment. But he might also know that the two defendants are equal in blame, and therefore conclude that it would be wrong to treat them differently. It would be especially troubling if the judge were to treat the two differently, even if neither the judge nor outside observers were confident in answering the noncomparative question of how much punishment each defendant deserves (without regard to the punishment that the other deserves).

Westen is indeed correct that the sentencing decision embodies an implicit rule or set of rules, and that the rules themselves might permit discretion in setting the appropriate punishment. But it is critical that a comparative background rule is in effect (providing, roughly, that a judge exercising discretion in sentencing must treat equally those defendants who are identical with respect to the relevant purposes of punishment). If instead only the noncomparative rule “provide a sentence based on blame within the bounds of your discretion” were in effect, the judge could give J 5 years and K 10 years. The propriety of the first sentence would have no bearing whatsoever on the propriety of the second.

¹⁹⁹See also Westen, *Speaking of Equality*, *supra* note 3=, at 197-198.

discretion in exercising peremptory challenges.²⁰⁰ A less deferential view finds impermissible certain reasons for peremptory challenges, such as racial and sexual stereotypes. This is essentially the current state of the law.²⁰¹ On this view, even if a lawyer chooses to weigh various permissible factors (such as occupation and income) in a particular way in deciding to challenge prospective juror X (for example, rejecting X because he is an affluent computer programmer), the lawyer may weigh those factors in a different way and decide not to challenge prospective juror Y, even if Y is similarly situated to X with respect to all of the factors.²⁰²

4. With varying force

The force that an equality principle exerts depends on the specific egalitarian norm at issue. To say that an equality principle applies is not to say that it carries the day. Other moral reasons might, all things considered, demand a result different from what equality demands, or might at least tip the scales in favor of one egalitarian outcome over another (thereby favoring leveling up over leveling down, or vice versa). Thus, one obviously needs a compelling justification for infringing a right not to suffer racial discrimination, if indeed this can be justified at all, while one needs little if any justification for not providing Mr. Unlucky (in Peters' example) with a benefit equal to the windfall received by Ms. Lucky.

²⁰⁰However, the rationale for this view is probably not that racist motivation is actually acceptable, but instead that the cost of inquiring into its existence would be too great, limiting the parties' discretion in other undesirable ways.

²⁰¹=cites

²⁰²Selective prosecution is another context in which courts defer to prosecutors' need for flexibility and discretion. Chief Judge Richard Posner recently summarized the doctrine as follows:

["Selective prosecution"] has two meanings in law. The first is simply failing to prosecute all known lawbreakers, whether because of ineptitude or (more commonly) because of lack of adequate resources. The resulting pattern of nonenforcement may be random, or an effort may be made to get the most bang for the prosecutorial buck by concentrating on the most newsworthy lawbreaker, but in either case the result is that people who are equally guilty of crimes or other violations receive unequal treatment, with some being punished and others getting off scot-free. That form of selective prosecution, although it involves dramatically unequal legal treatment, has no standing in equal protection law. ... The second form of selective prosecution, and the only one that is actionable under the federal Constitution, is where the decision to prosecute is made either in retaliation for the exercise of a constitutional right, such as the right to free speech or to the free exercise of religion, or because of membership in a vulnerable group.

Esmail v. Macrane, 53 F.3d 176, 178 (7th Cir. 1995). Judge Posner goes on, however, to recognize another category of judicially cognizable selective prosecution—where a citizen is singled out for official harassment because of malice and spite.

In his response to Peters' article, Kent Greenawalt makes some of these points quite powerfully. He emphasizes that equality, like other moral norms, can either reinforce or pull against the balance of other reasons, sometimes making a difference, sometimes not.²⁰³ When egalitarian principles pull against nonegalitarian ones, the former do not (contrary to Peters' view) necessarily become contradictory or incoherent.²⁰⁴ Of course, equal protection doctrine recognizes this variation in force by establishing varying degrees of judicial scrutiny depending on the invidiousness of the classifying trait and the importance of the personal interest that is differentially burdened.²⁰⁵

The force and role of egalitarian reasons also depend on whether equality is understood to be a teleological principle (achieving equality should be the actor's goal) or a deontological principle (the actor's duty is to respect equality; the duty constrains pursuit of other goals).²⁰⁶ In either case, when a genuine right to equal treatment is at stake, equality is itself a goal or duty, and not simply a consequence of other analysis, in normative argument. But there are many ways in which achieving equality (or avoiding inequality) can be a goal, or respecting equality can be a duty.

Thus, equality could be an ultimate or foundational goal, duty, or right. (An example would be Ronald Dworkin's assertion that a fundamental right to equal concern and respect underlies all other important political rights.²⁰⁷) Within a teleological or consequentialist account, equality could be an instrumental goal, serving such purposes as avoiding envy and civil strife, and encouraging citizens to develop self-respect. But teleological equality could also be valued intrinsically, and not simply because its aggregate consequences for human welfare are beneficial. This is the point of Parfit's telling "divided world" hypothetical: inequality between citizens on separate islands could be viewed as an intrinsically bad state of affairs even if the citizens have no awareness of each other (i.e., even if the inequality creates no further bad consequences, such as envy or hostility).²⁰⁸

²⁰³Greenawalt, *supra* note 1=, at 1269-1271, 1273-1283. Greenawalt gives the following example. A professor determines that 89 is the top of the B+ range. By mistake, when S receives an 89, the professor gives her an A-. T also received an 89. Greenawalt suggests that "prescriptive equality" provides a reason to give T an A- as well, even though this contradicts the original grading scheme. *Id.* at 1271. As Greenawalt points out, this is a case of equality "pulling against the balance of other reasons," *id.*, because the grading scheme might be partly designed to measure achievement absolutely, or consistently over time. This is a justifiable instance of multiplying the original wrong, if no one else is similarly situated to S and T, and if the harm of departing slightly from the grading scheme is not serious.

²⁰⁴*Id.* at 1281.

²⁰⁵=cites: discuss strict scrutiny, intermed. scrutiny, rational basis tests.

²⁰⁶See Dennis McKerlie, *Equality*, 106 *Ethics* 274 (1996); Temkin, *supra* note 38?=, at =; Parfit, *supra* note 38=, at =.

²⁰⁷See note 89= *supra*.

²⁰⁸Parfit, *supra* note 38=, at =. =further description of hypo?=-

Equality rights can have a complex argumentative structure. In equal protection doctrine, for example, equality principles help tell us what types of justifications are themselves inconsistent with egalitarian norms,²⁰⁹ what egalitarian goals are mandatory,²¹⁰ what traits are impermissible or suspect bases for discrimination, what interests trigger higher scrutiny when they are unequally burdened, and how much classificatory precision (in the connection of means to end) is required.

Equality rights sometimes operate behind the scenes. Even when an entitlement on its face is noncomparative, it can be the result of the combined effect of other legal or moral principles, one of which is a comparative equality right. As noted earlier, universality of certain apparently noncomparative rights (such as the right to vote) might be egalitarian in inspiration, at least in part. And that egalitarian source might be a visible, operative right, or instead an invisible and inoperative one.²¹¹

Finally, the force of an equality right obviously depends upon its status within the lexical hierarchy of a legal or moral system. In our legal system, constitutional rules trump legislative rules, so a constitutional equality principle trumps a legislative classification. Thus, if a gender classification violates the equal protection clause, the legislature must equalize treatment of men and women, even if it desires neither to expend the additional resources to level up, nor to incur the wrath of men by leveling down. On the other hand, if a gender classification is embedded in a state constitution, and the only equality requirement is at the level of state legislation, then it is unlikely that the classification can be challenged. Of course, a major reason why certain principles are embedded at higher levels in the hierarchy is to assure that they have special force relative to other principles.²¹²

E. Answering the supposed problems with equality

We are now in a position to see why the supposed problems with equality either are nonproblems or are exaggerated. The arguments in this section often refer back to the arguments in the main part of this article.

²⁰⁹“[A] bare ... desire to harm a politically unpopular group” won’t wash. See *Romer v. Evans*, 116 S.Ct. 1620, = (1996), quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). See also Jeremy Waldron, *The Substance of Equality*, 89 Mich. L. Rev. 1350, 1359 (1991)(book review of Westen, *Speaking of Equality*)(arguing that “in advancing social justifications, we are required to accord equal concern to the interests of everyone in society”).

²¹⁰See note 234= *infra*.

²¹¹See Section D1.a [TAN 158-161]= *supra*.

²¹²See Rawls, *supra* note 51=, at 199 (explaining that the lexically prior principles of justice are best embodied at the constitutional level, while the lexically subsequent difference principle is best implemented through legislation).

1. Emptiness

Is equality an empty concept? Yes and no.

Yes, equality is “empty” of content in one sense—it is a general concept, not a concrete conception. In order to invoke egalitarian principles in any particular legal or moral context, one needs to develop a persuasive substantive account explaining which discriminations are wrong, and why;²¹³ what distributive justice ideal is most attractive; how (and when) a decisionmaker must justify his mistakes; and so forth.

But no, equality is not an empty concept. Its comparative form gives it contingency and flexibility, and distinguishes it from all noncomparative views.

What about the formal conception of equality, “treat likes alike”? This conception is indeed empty, insofar as it means “give any and all persons what they are entitled to under a pertinent rule or norm.” But it is not empty if it expresses an egalitarian demand for a principled explanation of differences in treatment.

2. Confusion

Far from causing confusion, equality arguments are clarifying.

The loss of the concept of equality would make it much more difficult to explain how equal protection differs from due process, and how invidious discrimination can differ from affirmative action. It would make it virtually impossible to explain the point of many important theories of distributive justice.²¹⁴

Still, it is true that descriptive and normative equality are often confused; and that sometimes a vague sense of “equality” is defended and approved, leaving unspecified the particular equality principle at issue. For example, even when it is clear that equality between men and women is, in some sense, at issue, it might be unclear whether the operative principle is the duty to avoid making explicit distinctions in treatment, or instead the duty not to make decisions based on gendered stereotypes, or instead the duty not to further subordinate the status of women.²¹⁵

On the other hand, to return to one of Westen’s examples,²¹⁶ it is hardly surprising that Abraham Lincoln relied on equality and Stephen A. Douglas did not. The substantive equality principle that Lincoln relied

²¹³See, e.g., Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 *U. Pa. L. Rev.* 149 (1992); Brest, *Foreword: In Defense of the Antidiscrimination Principle*, = *Harv. L. Rev.* =.

²¹⁴See discussion of Peters’ analysis of Rawls, TAN 140-146= *supra*.

²¹⁵See TAN 228-238= *infra*.

²¹⁶See note 22= *supra*.

upon was a genuine and very important egalitarian norm of antidiscrimination and equal status of all persons. The supposed equality principles upon which (Westen insists) Douglas could have relied are not equality principles at all, but instead noncomparative rights—the right of states to decide about slavery, or the right of each person to receive the benefit of existing (and obviously discriminatory) laws.

3. Gratuitousness

The claim of gratuitousness simply ignores the crucial category of comparative rights. Collapsing egalitarian norms into the formal principle “treat likes alike” (as Westen often suggests) or into “nonegalitarian justice” (as Peters suggests) deprives us of a valuable and distinctive concept.²¹⁷ For example, Peters declares that the term “equal” in the equal protection clause is otiose. But to eliminate this word might suggest that the constitution guarantees some minimum level of protection to each citizen, without regard to how others are treated. It might, in other words, misleadingly suggest that the clause protects noncomparative rather than comparative rights. Yet the distinctive force of the equal protection clause is its “equal protection” of legal benefits and opportunities that are constitutionally optional. (Indeed, it is precisely when the interest or benefit is itself constitutionally guaranteed, and not optional, that the suitability of equal protection analysis is most controversial.²¹⁸)

Moreover, the claim that equality is gratuitous when it simply amounts to prohibiting the use of “irrelevant” criteria is also false. As we have seen, that prohibition often expresses a comparative equality right, not simply a noncomparative right. Once again, ignoring the distinction confuses analysis.

Both Peters and Westen (in his earlier writings) find ways to accommodate egalitarian norms while purporting to reject them as gratuitous. Both authors are curiously stipulative, defining the acceptable form of analysis as “rights” (the early Westen) or “nonegalitarian justice”

²¹⁷Peters concedes that equality can sometimes be a useful concept, but he believes that its value is quite limited:

Sometimes calling attention to inequality of treatment reveals injustice in treatment; recognizing a symptom can help us diagnose the disease. But once the disease has been identified, the important thing is to remedy the injustice, not the resulting inequality.

Peters, *supra* note 1=, at 1257.

I agree that the differential in treatment is not the only concern of all equality rights. But Peters does not recognize that such a differential (whether in tangible treatments or in status) is a necessary and distinctive concern of such rights.

²¹⁸Thus, it is controversial whether equal protection fundamental interest analysis represents a distinct form of analysis or should instead be understood as an aspect of substantive due process. See Simons, *supra* note 48=, at 467-472; =other cites?=.

(Peters), and then in turn defining these as including everything except the narrow concept of formal equality (Westen) or everything except the narrow concept of “prescriptive” equality (Peters). Thus, they still would seem to accept the most important egalitarian norms, such as antidiscrimination rights and distributive justice norms, as genuine instances of “rights” or of “nonegalitarian justice.” But, by submerging these norms in the vast sea of other noncomparative norms, they was away the distinctive qualities of equality norms.

4. The multiplication of wrongs

Equality sometimes does demand the multiplication of wrongs. But that demand is sometimes appropriate.

First, the objection that equality requires the multiplication of wrongs presupposes that the prior (or other) treatment is a “wrong.” Thus, it does not apply to discretionary treatments.²¹⁹

Second, with respect to nondiscretionary treatments, when the “wrong” is a gross injustice on the scale of slavery or genocide, equalization in the direction of multiplying that wrong is indeed unthinkable, as Alexander suggests. The equality claim is just not that strong relative to the imperative of avoiding the wrong. But when the wrong is less serious, or the equality claim more serious, multiplication is sometimes an acceptable option. If I am forgetful and permit one child to stay up a few minutes past her bedtime, I might permit the other child to do the same.²²⁰ Or I might not; but it would not be absurd for me to give some weight to equality here. Moreover, recall this example from above. If an employer promotes Mark but fails to promote Wilma because of sexism, notwithstanding that each is entitled to promotion, then the response of promoting neither might address the equality injury.²²¹ It is still much better, of course, if he promotes both rather than neither; but promoting neither at least is better in one way than promoting only one.

Peters’ approach itself unnecessarily multiplies the problem of the multiplication of wrongs. Recall Peters’ peculiar definition of “prescriptive equality.” This principle is extraordinarily broad: in every case, it assumes, if one person obtains more than she should, then all other persons with similar entitlements should obtain more than they should. Thus, he virtually defines “prescriptive equality” as a requirement to multiply wrongs.²²² But such a universal principle is implausible, and indeed

²¹⁹See text at notes 182-185= *supra*.

²²⁰For a similar example, see Greenawalt, *supra* note 1=, at 1265-1266.

²²¹But note qualification, text at notes 128-132= *supra*.

²²²Peters asserts that the prescriptive force of nontautological equality is greatest when it counsels the multiplication of wrongs, rather than the multiplication of correct treatment; for in the latter case, the nonegalitarian treatment rule already tells us to treat a second recipient correctly after a first recipient has been treated correctly. Peters, *supra* note 1=, at 1226.

absurd.²²³ Insofar as precedential equality is a plausible principle, it surely has a more limited domain. Greenawalt suggests one set of limitations (to situations in which the persons treated differently are significantly related, and the person who receives worse treatment is aware of the better treatment of others²²⁴); but others are also plausible. (Consider equal protection doctrine's rational basis test, always requiring justification, but often permitting a weak or even hypothetical reason to override the interest in equal treatment.)

In this light, equality principles do not demand a strong legal doctrine of precedent. Equality does give some support to following precedent, even if the precedent is today widely considered to be mistaken. But the force of the equality demand could be weak relative to other demands and needs, including the importance of permitting the law to improve.²²⁵

5. Leveling down and waste

Are the leveling down and waste objections really troubling? By definition, these objections do not extend to impure equality rights, those which require leveling up of benefits (or leveling down of burdens).²²⁶ But, given that decisionmakers need flexibility and face limited resources, it will often be infeasible in our political system to recognize impure equality rights. Pure equality rights will remain pervasive, so the objections endure.

Some might find the objections persuasive because they seem to reveal that the demand for equality rests on morally unattractive dispositions or instincts. Envy and spite are unenviable emotions. And one reason why envy is an unattractive character trait is that it often expresses a desire for leveling down, or at least a preference for leveling down over inequality.²²⁷ But I find this view incomplete and unpersuasive. Consider the quality of resentment at being unjustly treated worse. Such a feeling might reflect a simple desire for equal treatment, however it is to be

²²³See text at note 121= supra.

²²⁴Greenawalt, supra note 1=, at 1266, 1272, 1289. Greenawalt's limitations seem too restrictive, however. Unrelated persons could also have a right to demand reasons for differential treatment (as the equal protection rational basis test provides), including mistakenly beneficial treatment received by others. (Suppose the IRS made a small error that benefitted 90% of a defined group of taxpayers; equality provides a reason for extending the benefit to the other 10%.) And the person who is treated worse might be entitled to equal treatment even if she is unaware of her disadvantage. (Suppose the other 10% are unaware of the error.)

²²⁵See text at notes = supra.

²²⁶See Section B.3= supra.

²²⁷See Nozick, supra note 90=, at 239*. See also Rawls, supra note 51=, at 530-541 (discussing envy). For a passionate, conservative critique of egalitarianism as resting on envy, see Robert Bork, ch. 4 (The Passion for Equality), from *Slouching Towards Gomorrah: Modern Liberalism and American Decline* 66-82 (1996).

achieved.²²⁸ A justifiably resentful person can accept leveling down, without preferring it to leveling up. Thus, the acceptability of leveling down does not necessarily reflect or promote problematic dispositions.

Still, the objections to leveling down and waste have *prima facie* force. Surely it is better (all else equal) not to deprive a group of a benefit, not to extend a burden, not to waste resources. The question, in the end, is the comparative force of the objections relative to egalitarian and other norms.

Sometimes leveling down is not especially troubling. If the benefit in question is not of great importance, and the seriousness of the equality violation depends significantly on the invidiousness of the trait (as in cases of racial discrimination), then leveling down is not problematic. (Recall the example of the university official choosing to voice a greeting rather than also shaking hands.)

In other contexts, such as when the benefit is very important, it is far better if the inequality is remedied by leveling up rather than down; indeed, other moral and legal principles might so require.

Notice, too, that when the benefit in question is divisible, the choices are not as stark as a possibly expensive “leveling (all the way) up,” on the one hand, or a very stingy “leveling (all the way) down,” on the other. If a government benefit program impermissibly discriminates against women, the government might use the program’s resources both to level the men part of the way down, and to level the women part of the way up. The result is that the victims of discrimination do obtain some benefit. Of course, when the benefit is indivisible, a wasteful leveling down might be the only feasible way to achieve equality.

Finally, an important political constraint will often, as a practical matter, limit the scope and severity of both the multiplication of wrong and the leveling down objections. Equality rights are often invoked by minorities. If government responds to a violation by multiplying the wrong (in the sense of depriving a larger group of an entitlement) or by leveling down, this will burden, or deny a benefit to, a larger class of persons—possibly a much larger class. This larger class might well employ the political process to ensure that the problem is remedied by government eliminating rather than multiplying the wrong, or by leveling up instead of down.²²⁹

²²⁸See Rawls, *id.* at 533 (distinguishing resentment, which is a moral feeling, from envy, which is not).

²²⁹In the famous words of Justice Jackson:

[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

6. Privileging the status quo

The analysis of this essay helps answer some of the feminist concerns about conventional equality approaches. My suggestions in this and the next subsection are necessarily sketchy, but I hope they show that this essay's analysis of equality can support many feminist critiques and can illuminate debate.

One complaint is that conventional equality analysis privileges the status quo by entitling women only to what men currently are entitled to. But equality analysis need not be so limited. Although equality is a comparative concept, it is also a flexible and generous concept. It need not derive one class's entitlement from what the comparison class currently receives.²³⁰ (Thus, it need not limit women's employment opportunities to those that men currently have.) Rather, equality can be, and historically often has been, a means of social transformation, a means of critiquing current norms.²³¹

Consider two ways in which egalitarian norms can serve to critique the current "male" work standard that scants family responsibilities. First, it is plausible to conclude that that standard itself is a product of generations of sex discrimination. If women had always been permitted and encouraged to enter the work force on the same terms as men, and if men were similarly encouraged to participate in raising children, employers might well have developed different policies about work and family responsibilities. Second, different policies might well be developed today if companies were run by women who have had significant family responsibilities, or if legislatures included a much larger proportion of women (or included more men highly sympathetic to women's concerns).

To be sure, it is usually much easier to formulate a workable legal test of "discrimination" if one limits the inquiry to whether one class's treatment equals another class's current treatment. If instead the test is what the treatment of both classes would have been, but for past discrimination, or but for current racist or sexist motives, stereotypes, and selective sympathy, then the counterfactual inquiry becomes very difficult and sometimes judicially unmanageable.²³² However, the question before us is the meaning of the concept of equality, not the pragmatic question of

Railway Express Agency v. New York, 336 U.S. 106, = (Jackson, J., concurring). =Note N.J. school educational funding dispute: wealthy districts balked at leveling down. See Peters, *supra* note 1=, at =.

²³⁰See text at notes 107-109= *supra* (noting that a right of equal treatment does not even depend on showing that one class is descriptively equal in any respect to another class).

²³¹See Section D.2= *supra*.

²³²However, the Canadian Supreme Court apparently has not been deterred by these difficulties. It has found neutral laws discriminatory in effect, and has held that proof of discrimination does not depend on a comparison to another class's more favorable current treatment. See Kathleen E. Mahoney, *The Constitutional Law of Equality in Canada*, 44 *Maine L. Rev.* 229, 240 (1992). =research further.=

which egalitarian norms should be implemented through the equal protection clause or through legislation. As to the first question, I am confident that the concept of equality is broad enough to encompass most feminist critiques of current social practices.²³³

Moreover, many different egalitarian norms exist. Those interested in improving the status and social conditions of women might be most effective if they were to employ a variety of egalitarian approaches, not any single approach.²³⁴ Thus, an equality norm can consider discriminatory effects as well as discriminatory intent. Equality norms can condemn policies that contribute to the subordination of women, even if the policies have a benign motivation. Veterans' preferences might be genuinely motivated by patriotism and a desire to thank those who have made extraordinary sacrifices for their nation; but the effect of these preferences on women's opportunities could be enough to condemn them.

These examples also help answer the complaint that conventional equality analysis considers equality and inequality at a superficial level. To the contrary, egalitarian norms can address deeper forms of inequality. Certain policies that treat men and women equally in a formal or superficial sense (such as a denial of parental leave to any parent) might nevertheless have a profound impact on the status of women in society, and might therefore be properly subject to greater legal scrutiny.²³⁵ And even if it is not feasible or wise to incorporate a deeper egalitarian norm in such legal doctrines as the equal protection clause, the norm can be effective as a justification of political action.

7. Privileging sameness and devaluing difference

A related complaint is that equality norms overvalue sameness and devalue difference. More specifically, the norm demanding "equal treatment" might be inadequate to justify policies recognizing the distinctiveness and social importance of sex-specific conditions such as pregnancy. At the same time, the alternative of demanding "special" treatment might also be problematic.

But this complaint, like the prior one, assumes too narrow a conception of equality. The concerns motivating a "special treatment" or "difference rather than sameness" approach often can be captured by egalitarian norms. Indeed, Congress reacted to the Court's pregnancy

²³³One possible objection is that equality's distinctive flexibility (normally permitting either leveling up or down) is missing when the egalitarian norm takes the form of a prohibition on acting with discriminatory intent or acting based on discriminatory stereotypes. I respond to that objection in section B.4= supra.

²³⁴See generally Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 *Minn. L. Rev.* 1153 (1993).

²³⁵See Deborah Rhode, *The politics of paradigms: gender difference and gender disadvantage*, from *Beyond Equality and Difference* (G. Bock & S. James eds. 1992), ch. 8; =other cites.

decisions with legislation amending Title VII to require that pregnancy discrimination be treated as a form of gender discrimination.²³⁶

The “formal” equality idea is only one egalitarian norm. A right to equal treatment can indeed depend on being “similarly situated with respect to the (hypothetical or actual) purposes of the law.” But it need not be so restricted. It can ignore the decisionmaker’s purposes, for example, and simply demand equality in some respect.²³⁷

As explained above, egalitarian norms need not rely on extant descriptive equalities. Instead, they can be premised on the desire to create a specified form of (descriptive) equality. For example, consider the controversy over college funding of athletic programs for men and women. A recent decision of the United States Court of Appeals for the First Circuit held that a university cannot avoid Title IX’s equal funding requirement by proving that women are currently less interested than men in participating in college sports.²³⁸ Part of the court’s rationale was that Title IX’s purpose is to create a similar level of interest in women’s sports as in men’s, and to create a similar level of status for those participating, and thus to avoid ratifying a status quo of lesser interest that might itself be a product of discrimination and gender stereotypes.²³⁹

Still, equality analysis cannot express all versions of the complaint that conventional equality norms do not adequately value difference and diversity. Insofar as the celebration of difference and diversity expresses a genuine pluralism, equality norms are largely inapposite.²⁴⁰ For example, suppose separate women’s educational institutions are defended, not on the ground that they recognize women’s distinctive learning styles and thus ultimately promote equal job opportunities, but on the ground that they cultivate distinctive values (such as supportive rather than competitive relationships, or group rather than individual learning). “To the extent difference theory demonstrates the existence of radical, irreducible difference among groups, it undercuts the justification for working toward equality for those groups.”²⁴¹

²³⁶Pregnancy Discrimination Act, 42 U.S.C. §2000e(k)(1982).

²³⁷An example is *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). In *Harper*, the Court invalidated a poll tax and essentially ignored state interests in obtaining revenues or in limiting the vote to those with a stronger interest in voting. Instead, the Court simply concluded that if the state chooses to make an office elective rather than appointive, it may not draw de facto wealth distinctions among voters, even if those distinctions would indeed serve these state interests. See *Simons*, supra note 48=, at 476-477.

²³⁸*Cohen v. Brown University*, 101 F.3d 155, 175-181(1st Cir. 1996).

²³⁹*Id.* at 180-181.

²⁴⁰Even here, however, equality can play a part, if pluralism expresses the notion that different values or ideals are equally valuable. But insofar as pluralism expresses the idea that the different values deserving of respect are incommensurable, equality is inapposite.

²⁴¹*Ward*, supra note 43=, at 98.

F. Conclusion

I began with two questions. First, is equality really a meaningful, coherent, distinctive norm in law and morality? My positive answer, and the reasons for it, should by now be clear. Second, what explains the persistent doubts that many feel about this answer? I have addressed this question, too, both explicitly and implicitly. Let me review some reasons.

First, it is easy to confuse the lexical equality that follows as a consequence of applying a normative principle (e.g., two persons “should be treated equally” in the trivial sense that a general rule entitles each of them to identical treatment), with a comparative equality right that operates as a ground for a normative principle (e.g., equal protection doctrine, or Rawls’ difference principle). Only in the latter case does the “right to equal treatment” express a genuine egalitarian norm.

Second, it is also easy to assume that prohibitions on “irrelevant” criteria have nothing to do with equality. While this is true of some such prohibitions, it is not true of all. Equality sometimes does demand that a relevant reason explain distinctions in treatment (though equality often demands something more or something different).

Third, equality operates in a number of different contexts, with a force that depends very much on the context. For example, sometimes equality has more force when the decision is discretionary rather than nondiscretionary, insofar as discretionary decisions do not trigger the objection that equality multiplies a wrong. Sometimes equality operates as a metaprinciple, dictating how the entitlements under a rule should be distributed when the rule cannot be fully implemented. And sometimes equality operates as a (possibly weak) demand for reasoned explanation of any differential in treatment.

Fourth, it is a commonplace that equality as to one thing normally means inequality as to another. Requiring equal per capita distribution of resources means that those who make greater efforts receive no greater reward, resulting in unequal distribution of resources relative to effort. It is then tempting to conclude that all that really matters is the “thing” that must be equalized. But this conclusion does not follow. Of course it does matter very much what an equality right requires to be equalized.²⁴² But it is also critical whether equalization itself matters. If it does not, if what matters instead is distributing the good or resource to any deserving persons, then the right in question does not concern equality at all.

²⁴²See generally Amartya Sen, *Inequality Reexamined* (=). As Raz argues: “We only have reason to care about inequalities in the distributions of goods and ills, that is of what is of value or disvalue for independent reasons. There is no reason to care about inequalities in the distribution of grains of sand, unless there is some other reason to wish to have or to avoid sand.” Raz, *supra* note 22=, at 235 (emphasis original). This is overstated—e.g., for some nondiscrimination rights, such as the right not to suffer racial discrimination, the subject-matter hardly matters—but it is indeed true of many equality rights, especially positive rights to the equal distribution of an opportunity or resource.

The right to equal treatment is a curious principle. It is a peculiarly weak principle, insofar as its requirements are contingent and flexible, and therefore do not, by themselves, dictate any specific treatment at all. Indeed, these features have caused some observers to doubt that it has any meaning. But equality is also an unusually potent principle, for it is a principle of enormously wide application, a principle that constrains even discretionary decisions, and a principle that sometimes requires leveling down of benefits or even the multiplication of wrongs.

The contingency and flexibility of equality rights prompt a final question. Is the need for equality rights a concession to human fallibility? If we were not prone to bias and prejudice and undue impartiality, or to envy and jealousy, would purely noncomparative rules and principles suffice? I think not. Some equality rights, especially nondiscrimination rights, do indeed respond to human imperfection. Others, however, especially equality rights embodied within distributive justice theories, are part of a positive social vision, a vision that is not premised on a perceived need to transcend human frailty. For example, in one such vision, government should alleviate inevitable inequalities in natural talents in order to assure more equal social opportunities. At the same time, in this vision we might see certain forms of partiality (for example, towards one's family or community) as socially desirable, not regrettable.²⁴³

We can safely cast the skeptical doubts aside. Equality indeed has a logic of its own. In both law and morality, the right to equal treatment is significant and distinctive. And its sometimes complexity should not mask its conceptual value and transformative power.

²⁴³See generally Thomas Nagel, *Equality and Partiality* (1991).