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How Empty is the Idea of Equality?

Kent Greenawalt*

I. INTRODUCTION

The nature of equality and the relationship between equality and justice have long been puzzling to social and legal philosophers. One manifestation of these problems of understanding is uncertainty among lawyers and judges about the significance of legal norms formulated in the language of equality, most notably the equal protection clause of the Constitution. In an elaborately reasoned, imaginative, and richly referenced recent article, Peter Westen has urged the arresting conclusion that the idea of equality is empty,¹ empty in the sense that any normative conclusion derived from the idea could be reached more directly by reliance on normative judgments cast in other terms. Because use of this empty idea can create confusion and mistaken judgment, Professor Westen claims that it burdens discourse about social justice and moral and legal rights.²

According to Professor Westen, the basic idea of equality is the notion that “people who are alike should be treated alike”;³ a correlative of that notion is that “people who are unalike should be treated unalike.”⁴ To decide who should be considered alike for any particular purpose, a person or an organization must make a moral judgment about which characteristics are relevant. “To say that people are morally alike is therefore to articulate a moral standard of treatment—a standard or rule specifying certain treatment for certain people—by reference to which they are, and thus are to be treated, alike.”⁵ Given the presence of a standard indicating how various people are to be treated, the idea of equality adds nothing to the determination of proper treatment, and is therefore superfluous.⁶ What counts are the standards one uses to decide which people are alike and what treatment is appropriate; these standards are based on the rights that people have. Equality, therefore, is simply derivative from the rights that people have in a moral, or legal, order.⁷

Use of the language of equality is not, however, simply unnecessary, according to Westen. People are led by that language into confusions, suppos-

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2. See id. at 592–96.
3. Id. at 539.
4. Id. at 539–40. I discuss this principle infra section II B.
5. Id. at 545 (footnote omitted).
6. Id. at 547.
7. Id. at 548–56.
ing, for example, that equality does imply certain substantive rights, or that the propriety of treating persons as equal for one purpose suggests the propriety of treating them as equal more generally.\(^8\) The idea of equality therefore deflects people from, and obscures, the truly crucial judgments about substantive rights, and "should be banished from moral and legal discourse as an explanatory norm."\(^9\)

This essay is a response to Professor Westen's analysis and program. With his definition and arguments in mind, I construct a framework for understanding the idea of equality. I indicate how the general modern conception of that idea is broader than the boundaries he sets, and show how claims of equality figure in moral and legal argument. More particularly, I suggest that the idea of equality embraces two rather distinct sorts of notions, the formal principle of equality, that equals should be treated equally (or that likes should be treated alike), and what I shall call substantive principles of equality, such standards as "siblings should be treated equally" and "racial differences should be considered irrelevant."\(^10\) The formal principle of equality is generally conceded to be self-evident (in some sense), but claims about substantive principles of equality are more controversial, calling forth competing views about relevant criteria. The focus of Professor Westen's article is on the formal principle of equality, and upon its corollary about unequal treatment for unequals. As to the formal principle, I show both that Westen conceives it too restrictively and that he fails to acknowledge the normative import that is to be found even in his own crabbed version. What I have labelled substantive principles of equality, Westen declines to consider principles of equality at all,\(^11\) mainly addressing how these differ from the formal principle. I challenge this definitional move, and also offer some suggestions about how substantive principles of equality set standards for behavior and relate to other norms.

This account of concepts of equality provides the basis for a measured appraisal of Westen's assertion that equality is an empty idea that should be extirpated from normative discussions. Westen illumines very important limitations to the normative force of judgments of equality, and many of his cautions about misjudgments that can follow failures to understand those limitations are well taken and persuasively developed.\(^12\) Nonetheless, the idea of equality is much richer than he acknowledges. Not only is its banishment

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8. Id. at 577-84.
9. Id. at 542.
10. Not every standard that is employed to decide who should count as equal for what purposes is a substantive principle of equality. I explore this point more fully infra notes 53-54 and accompanying text. In brief, if the standard is that the fastest runner should win, the conclusion that in case of a tie there should be co-winners would not require employment of a principle of equality.
11. See Westen, supra note 1, at 541-42; 551-56. Westen talks instead of ""conditional" rights that entitle a rightholder to whatever benefits other persons enjoy," id. at 554, and of "quantitatively identical" treatments, id. at 555. See infra notes 49-50 and accompanying text.
12. See Westen, supra note 1, at 577-92.
from moral and legal argument exceedingly unlikely in fact, but the accomplishment of that objective would probably not produce the enhanced clarification of fundamental questions that Westen seeks. A fuller understanding of the significance of existing concepts of equality, toward which this essay is meant to make a modest contribution, is a more promising avenue toward clarification than is the revolution in conceptual formulation that he proposes.

Though this short essay can be understood without a reading of Westen's article, it remains very much a responsive effort, not exploring many important questions about equality and not bringing directly to bear on the problem the extensive literature on equality and justice. Like Westen, my aim is not to engage in normative analysis of particular problems involving equality; that is, I do not set out to show that one or another assertion about equal treatment is substantively correct. I do draw out ethical assumptions that underlie the use of concepts of equality, showing that those assumptions are coherent, and suggesting that they may be better conveyed by language of equality than by any alternatives that come to mind. Whatever ethical conclusions I reach should be understood in that way, not as principles that I here mean to defend against an attack on their merits. I concentrate primarily on equality as an aspect of moral evaluation, referring briefly, however, to legal standards that illustrate how notions of equality operate in normative discourse.

II. THE FORMAL PRINCIPLE OF EQUALITY

Westen powerfully reminds us of a point often made, rarely challenged directly, but often forgotten: namely, that in the absence of substantive criteria indicating which people are equal for particular purposes and what constitutes equal treatment, the formal principle of equality provides no guidance for how people should be treated.13 He moves from this accurate perception to three mistaken conclusions: that the formal principle is without moral force;14 that the principle that unequals should be treated unequally is logically indisputable;15 that these two principles have no bearing on whether a "presumption of equality" should be indulged.16 These conclusions follow either from overly narrow, counterintuitive constructions of the basic concepts or from analysis that is flawed.

These mistakes evidence a more general failure by Westen to appreciate how the formal principle of equality can operate in ethical choice. The applicability of the principle provides an additional moral reason for complying with an established standard of how people are to be treated. In many situations the principle also affects the substantive conclusions that can prop-

14. See id. at 542, 547, 550–51.
15. See id. at 557–58, 572–73 & nn.124 & 125.
16. See id. at 571–73.
erly be reached, bearing on whether differences in ultimate treatment are warranted and, if so, on the methods for determining how choices among individuals are to be made. Somewhat less directly, the principle also affects how justifications of unequal treatment should proceed and what should be done in instances of uncertainty over whether people are relevantly alike or unalike.

A. The Moral Force of the Formal Principle of Equality

Professor Westen addresses situations in which a firm determination has been reached concerning the treatment that should be afforded to different sorts of people, 17 e.g., educators have decided that people who score over seventy in an objective examination should pass. Westen is clearly correct that on such occasions the formal principle of equality ordinarily 18 gives no new insight into what constitutes proper treatment, since it has already been determined that people should be dealt with in accord with the established criteria. 19 Even then, however, the principle expresses a moral judgment about compliance with the criteria. On other occasions the formal principle provides genuine direction for those establishing standards for treatment because, contrary to what Westen apparently believes, the principle often comes into play before standards of treatment have been settled.

Once the content of the formal principle of equality is clarified, these two points can be easily understood. In the formula "equals should be treated equally," "equals" are persons who differ in no relevant respect in regard to the sort of treatment they should receive. Application of the formal principle thus requires identification of the characteristics that are relevant to whether people should be getting equal treatment. A judgment must also be made about what constitutes equal treatment, not an easy task since the same benefits ($100 a week for medical care) or burdens (a $1000 fine) can have vastly different impacts on the lives of various people. 20 Often there will be a strong interrelationship between one's characterization of treatment as equal or unequal and one's summary of the relevant qualities that make people equal or unequal. Suppose, for example, a decision is made that all those who commit a particular crime should receive fines that impinge equally on their

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17. See, e.g., id. at 543-48.
18. I use this qualifying word because the principle may bear on proper treatment when there have already been substantial deviations from the accepted standard. See infra text accompanying note 26.
19. One may, of course, challenge the substantive criteria as wrong, but the formal principle of equality gives no guidance on that question.
20. Westen recognizes the possibility of uncertainty or disagreement over whether treatments are equal, but the only difficulty he discusses in this respect is that of identifying what the established standard of treatment is. Westen, supra note 1, at 558. He asserts that "treatments can be alike only in reference to some moral rule." Id. at 547. Westen does not advert to the fact that those who must decide upon criteria of treatment must consider what dispositions are equal as well as which people should receive equal dispositions. He disregards the possibility that someone can conclude that treatments are equal without judging whether such treatment is morally appropriate and even without perceiving the moral reasons that might lead to such treatment.
lives. Such a standard leads to a higher monetary imposition against a rich criminal than against a poor one. One can say that the two criminals deserve and receive equally severe sentences—thus, equals are being treated equally. But one can also say that the fines are unequal in amount and that the two criminals are relevantly unequal because one is richer—on this view, unequals are (appropriately) being treated unequally. Both characterizations are correct, since the fines are equal in one respect and unequal in another.

People having to decide how to treat others frequently begin with some doubt over exactly what treatment is appropriate for whom. Confidence that two or more persons do not differ in any relevant respect sometimes precedes assurance about what should be done to them, or for them. To take a crystal clear, if artificial, example, suppose that two identical twins, with identical family circumstances, jointly commit burglary with apparently equal responsibility. The judge quickly concludes that no distinguishing feature warrants different sentences for the two, while still agonizing over the comparative merits of probation or a term in jail. Of course, the judge’s conclusion that no distinguishing features between the two exists does demand substantive judgments about characteristics relevant to sentence, but the conclusion need not coincide with final settlement upon the proper standard of treatment.

In this setting, the force of the formal principle in constraining acceptable determinations about sentence is evident. Suppose the judge believes that giving one twin probation and the other imprisonment would make a useful experiment of the respective value of those forms of sentence. Recognizing that each twin would strongly prefer to be placed on probation, however, the judge holds back, sensing that treating two “equals” so unequally would be unfair, even if an independent reason for doing so supports differential treatment.

A variation on this example forcefully illustrates the same point. The twins are separately tried. The first judge places the first twin on probation.

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21. Under a rule of law that the firstborn inherit real property, a crucial distinction would exist between identical twins.

22. If the judge thought only that the resentment created in the unfortunate twin would render his punishment less likely to meet reformatory goals, he would be moved not by a genuine sense of unfairness but by a utilitarian concern that a perception of unfairness by the subject could render a sentence less useful. The connection between resentment and ideas of unfairness is explored further, though inconclusively, infra text accompanying note 25.

23. Professor Westen rightly suggests the absurdity of treating a class of people equally by giving them all the opposite of what they deserve, Westen, supra note 1, at 545-46, but this observation sidesteps the possible operation of the formal principle to help resolve a proper standard of treatment. Although Westen's position on this issue may not be entirely clear, the fairest reading of the relevant passages is that he neither fails to see nor denies that a prior judgment that people should be treated in the same way can affect the choice of standards of treatment. What he does deny is that the formal principle of equality has anything to say on the subject, claiming instead that such considerations are matters of comparative rights about which the language of equality is inapt. See, e.g., id. at 545, 548, 553. See also infra text accompanying notes 49-50. This severe constriction of both the language of equality and the significance accorded the formal principle strikes me as plainly unwarranted; and I find in the Article no systematic defense of his extremely narrow conceptions.
The second judge believes that imprisonment is the better disposition, but is pulled toward probation by the feeling that treating the second twin more harshly would be unfair. A sense that equals should be treated equally may finally lead the judge to impose a sentence different from that which he would otherwise have picked.

In other situations, the principle that equals should be treated equally can affect substantive decisions because the treatment that would be appropriate for a small number of people would not be appropriate for all those who should be accorded equal treatment. A school that ordinarily punishes cheating by suspension may hesitate to invoke that penalty upon discovery by a teacher that an entire class has cooperated in cheating on a particular exam, even if the authorities assume no difference in the level of guilt of group cheaters and individual cheaters. A state wishing to confer a benefit upon its citizens may reconsider upon realizing that under the privileges and immunities clause of article IV the benefit is of the kind that must also be extended to nonresidents if it is given at all.

If a particular benefit (or burden) cannot be shared equally among all those who warrant equal treatment, the benefit may not be conferred at all, or the method for choice of who shall receive it may need to respect the judgment of relevant equality of the people to whom it might be given. Imagine an adoption agency unable to place identical ten-year-old twins in the same home. The best available home is significantly better than the two next best, and roughly equal, homes, and would be recognized as such by the twins. If the twins are to be aware of each other's placement and especially if they are to maintain continuing contact, the agency faces a troublesome decision whether to place either twin in the most desirable home. Their equality might be respected by use of a lottery or other random technique to choose who would get the best home (much as a lottery to select persons for a military draft symbolizes the equal status of those among whom the choice must be made); but even that technique might not overcome the worry that it would be unfair to place the twins in unequal environments. Parental experience with the demands of children to be afforded privileges given to siblings demonstrates how deeply engrained in the human psyche is the feeling that one should not get worse treatment than someone else deemed equal. How precisely the resentment felt by people who think their equals are getting better treatment relates to the ethical sense underlying the formal principle of equal-

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24. An interesting feature of this example is that treating the entire class more leniently than a single offender in the class would have been treated may create an inequality between the members of this class and individual cheaters in other classes.

25. I am assuming in the text that a process of selection is more feasible than spreading the burden among all those equally situated. If the two methods are roughly equal in feasibility, spreading the burden evenly (one year of military service for all those eligible) would be more fair, and a preferable implementation of the principle that equals should be treated equally, than imposing a burden twice as heavy on half of those eligible by a random process in which all have equal chances (two years of military service for the half of those eligible, that half being picked by lottery).
ity is beyond the scope of this essay, but the principle may well reflect, in part, the perceived impropriety of generating such resentment.

Once we acknowledge the directive moral force that the principle of treating equals equally is perceived to have in these settings, we can see the kind of moral force it has when the criteria for treatment are previously settled. If established criteria require that $B$, with a grade of seventy-one, be passed, then $B$ has suffered a wrong if he is failed; but the wrong may be magnified if $C$, also with a grade of seventy-one, is passed. Here, the formal principle does not bear on how $B$ should be treated (only redundantly indicating what treatment is called for by established criteria); but it does focus attention on a separate aspect of the wrong that is done to $B$ if the criteria are not followed. Occasionally, the formal principle can bear on appropriate treatment despite the presence of established criteria. When overly generous deviations from criteria have been made (six students in a row with scores of sixty-nine have been passed by soft-hearted teachers), the formal principle may underlie a claim for the same treatment by one who asserts that he is similar (he also has gotten a sixty-nine) to those who have benefited. As in the instance of sentencing by the second judge, the claim of fairness here stands in opposition to the general principle that each person should get the treatment intrinsically most appropriate for him or her.

Contrary to what Professor Westen supposes, the formal principle of equality is not a necessary logical truth. Not only is unequal treatment of equals an empirical possibility, substantial reasons, such as the indivisibility of benefits or the need to experiment, can sometimes support that practice. Nevertheless, when treatment is being decided for equal humans sensitive to possible inequalities, the moral power of the formal principle exerts a significant pull against unequal benefits or burdens.

B. Unequals and Unequal Treatment

The principle that unequals should be treated unequally does not deny that unequals can empirically be treated equally or even that reasons for

26. It might be claimed that the deviations show that the "real" standard for treatment is different from the stated standard for treatment and that the formal principle tells us only that the real standard should be applied. At least when the deviations are unauthorized (the teachers were not originally permitted to deviate) and when they result from "weakness of will" rather than reflective judgment, the difference between the settled standard and actual practice is crucial. The notion that people should get the treatment deemed most appropriate by those with power to decide points in favor here of failing the person who has just gotten a 69; the equality principle points in the opposite direction.

27. His supposition in this respect is the direct result of his narrow conception of the formal principle. See supra notes 5 & 23.

28. Typically, when persons decide how to treat indistinguishable nonhuman animals, no moral counter emerges against reasons that favor sharply variant treatment. The same may even be true with humans who cannot yet perceive, and will continue to be unaware of, unequal treatment—perhaps the adoption agency can comfortably place new-born identical twins in unequal homes if contact between the twins is to be severed.

29. However difficult it may be to say what is equal treatment, that determination need not depend on a judgment about what treatment is morally appropriate. Suppose that 20-year
doing so may exist, but it asserts that such treatment is unjust. Whether justifications can be offered for equal treatment of unequals depends on how the concept of unequals is construed. If unequals are persons who, after all considerations are taken into account, should get unequal treatment, then, of course, the very formulation does logically preclude any chance of justified equal treatment. But the term "unequals" is ordinarily understood in some narrower sense, relating to the treatment one deserves to receive or would receive if the purposes behind a program of benefits and burdens could be perfectly carried out. When "unequals" are so conceived, equal treatment of them is sometimes, even often, warranted.

During World War II Lord Halifax learned that a leak from the Foreign Office had been traced to a particular typing pool but could be traced no further. He told the members of the pool, "I am going to do something very unjust, but necessary in the interests of national security. There has been a leak from this pool. I do not know which of you it is. And therefore I am going to sack you all." In this instance of equal treatment of persons who are relevantly unequal, the problem is identifying the person with the characteristic that would warrant unfavorable treatment. In other circumstances, categorizations established for administrative convenience may require the same treatment of persons whose difference in relevant characteristics is clearly perceivable at the time. A grading system with few tiers requires teachers to give the same grade to papers they consider to be of very different quality; a statutory compensation scheme with fixed schedules for particular harms may grant the same award for an injured foot to a professional athlete and to a sedentary writer. Finally, a decisionmaker might be aware that sentences with identical conditions are imposed on a burglar and a murderer, with the same expected impacts on their lives. One could describe the two as receiving equal treatment, without believing that the burglar should be getting a sentence as severe as that given the murderer and without believing that anyone else thinks they should be getting equally severe sentences. (If a statute simply gave judges broad authority to give any term of imprisonment they thought right, a lenient judge might give a 20-year sentence to the murderer and a harsh judge such a sentence to the burglar, though all judges (and legislators) agree that murderers should get more severe sentences than burglars.) Westen seems to deny the possibility suggested here. See supra note 16.

30. That apparently is Westen's view. See Westen, supra note 1, at 572-73.
31. One may also talk of "unequals" as those having significantly different characteristics bearing on proper treatment, even when those differences in characteristics do not produce any differences in deserved treatment. If multiple factors are relevant, two persons very unlike in individual characteristics (A's paper is sloppy but shows a powerful intellectual grasp of the subject; B's paper evidences diligent learning at a more pedestrian level) may properly be treated in the same way (a grade of B+). That various combinations of relevant factors can lead to persons appropriately being treated the same way is uncontroversial. Whether this alone is enough to lead us to speak of unequals being treated equally is more doubtful, and for our purposes not very important.
33. Of course, one might say that each member of the pool is equally a suspect; but, as Lord Halifax was aware, that is not sufficient to eliminate the sense of unfairness of firing them all, perhaps in part because of the general assumption that people should not be treated as wrongdoers unless their wrongdoing is proven.
unequal treatment is not only what two people deserve but also what will best serve all immediate objectives, but may believe that equal treatment will promote an important experimental objective.

Just as the principle that equals should be treated equally exerts an ethical pull against the reasons for giving unequal treatment to equals, its corollary, the principle that unequals should be treated unequally, exerts some ethical pull against the reasons for giving equal treatment to unequals. This is not necessarily to say that the respective principles are commonly perceived to have the same degree of force. Virtually any administrable program demands rough categorizations that predictably will lead to equal treatment of persons understood to be relevantly unequal in relation to desert or the purposes of the program. Moreover, at least in modern western culture, people usually feel a more acute resentment when those they deem equal are treated better than they are (e.g., given a higher salary) than when those they feel are relevantly less deserving are treated equally (e.g., given the same salary). Perhaps for both these reasons, the equal treatment of unequals often strikes us as less unjust than the unequal treatment of equals.

C. The Presumption of Equality

Can we draw from the principle that equals should be treated equally any conclusion about what should be done when uncertainty exists whether two persons (or entities) are relevantly equal or unequal? Westen suggests that a presumption in favor of equality is warranted only if persons are more often equal in relevant characteristics than they are unequal. This claim disregards or misperceives the circumstances for choice when one is wholly uncertain about possible relevant differences.

We may think of a presumption of this sort as having two possible effects. One would be that in the absence of reasons to treat persons unequally, they should be treated equally. A second would be that when reasons exist both for and against equal treatment, equal treatment should be given unless the reasons for unequal treatment are stronger. Westen's position is basically sound in respect to the second possibility. If reasons appear for giving A more benefits than B and other equally powerful reasons appear for giving them the same benefits, a preference for equal treatment could only be based on some more general assumption about relevant characteristics or upon a normative judgment that failures to give deserved equal treatment are graver wrongs than failures to give deserved unequal treatment.

34. Westen, supra note 1, at 574.
35. This is true even though his discussion is directed at the first possibility, id. at 571-75, and it is far from clear that he even considers the second.
36. Westen talks about "a judgment that people are alike in more morally significant respects than they are unalike," id. at 574; but an actual decision might well narrow the class of relevant instances in some manner—e.g., are people usually alike in respect to some particular sort of benefit or burden?
37. See id.
Westen's position is not sound with respect to cases in which no specific reasons for unequal treatment can be adduced. Imagine that a judge is unsure whether two offenders jointly responsible for a criminal result deserve the same or different sentences. He thinks they probably deserve different penalties because of likely different levels of culpability, but he neither perceives any relevant difference in characteristics nor has any intuition as to which offender warrants a heavier penalty. How can he possibly suppose he should give one a more severe sentence than the other when he has no idea which offender warrants the harsher penalty? The judge minimizes the magnitude of his probable error by giving each the penalty that fulfills his best estimate of what is most appropriate, and that will be the same penalty for both. In the absence of apparent reasons for unequal treatment, the principle that equals should be treated equally does lead to a presumption in favor of equality. Even when persons are plainly unequal (say one, and only one, of two children of the same maturity has broken a window, but the parents come up with no basis for suspecting one more than the other), equal treatment may be the only appropriate step when no discoverable ground exists for treating one more harshly than the other.

The presumption of equality as thus elaborated cannot alone help resolve what should be done when the choice is between treatments that are equal in different respects, since the formal principle of equality cannot itself provide guidance on which sorts of equality are more important than others. More particularly, the presumption alone does not guide those who must decide between intervention that will render the circumstances of "equals" more equal or nonintervention that will leave those circumstances to be determined by "natural," or other outside, forces. Consistent nonintervention is, after all, one form of equal treatment. Even if the presumption is unhelpful for choices between kinds of equal treatment, that does not, as Westen supposes,
render it "totally indeterminate." It comes into play when some form of treatment must be dispensed to a group of persons (a teacher is grading papers or a judge is sentencing offenders) and the factors that render treatment significantly equal or significantly unequal are clear (what matters for a grade is the grade itself, not the color ink one uses to write it).

In its minimal form the presumption of equality casts a burden on the proponent of unequal treatment to explain why such treatment is warranted, and it requires equal treatment if no reason (or only patently unacceptable reasons) are forthcoming. If one supposes that unjustified unequal treatment is a graver wrong than unjustified equal treatment, then the presumption of equality can also have force when reasons for equal and unequal treatment seem about evenly balanced. Though the required supposition about the comparative magnitude of the two kinds of wrongs is not derivable from the formal principles, it does have a certain plausibility, as I have indicated at the close of the last section.

The rational-basis test used to assess ordinary classifications that are claimed to violate the equal protection clause of the Constitution can be understood as a form of the minimal version of the presumption of equality. The defenders of a legislative or administrative rule must present some legally acceptable reason why those who are worse off under the rule should be dealt with differently from those who are better off. For the rule to survive, the state needs not only a legitimate reason for treating the claimants the way that 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. The potential stringency of this genuinely comparative test depends on a number of related factors: how freely the courts label purposes as impermissible, how strictly they review whether asserted permissible reasons in fact produced the classification and are genuinely served by it, how tightly they require that the permissible reasons for the classifications be tied to the major purposes of the rule involved. I do not wish here to show that rational-basis review under the

43. See Westen, supra note 1, at 574-75. He also speaks of the presumption as "essentially meaningless." Id. at 571.

44. Legally unacceptable reasons would include those based on constitutionally forbidden ends (e.g., suppression of religious views) and on other ends that bear no relationship to the public welfare (e.g., that individual legislators will be made wealthy by the bribes of those favored).

45. If the rule confers a benefit, the challenge will come from someone not covered by it; if it imposes a burden, the challenger will be someone on whom its burden is imposed.

46. Westen, thus, oversimplifies matters when he says that "[w]hatever merit rationality review has must ultimately derive not from notions of equality but from notions of substantive due process." Id. at 577. One may believe that, properly conceived, substantive due process does include all valid claims of improper classification: on this view, Westen's conclusion that all rationality review derives from substantive due process could be defended; but the reason would be that substantive due process incorporates equality notions.

47. In its traditional formulation, the test requires that the ground of difference be related to "the object of the legislation." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). That position has been criticized. Obviously, if the defendants can rely on any subsidiary purpose
equal protection clause should be given more, or less, potency than it now possesses, only to elucidate the similarity of that review to the presumption of equality in moral evaluation.

In summary, respecting the formal principles, the classic formulas about treatment of equals and unequals are neither so trivial nor so devoid of moral significance as Professor Westen supposes; they both exercise directive influence over social choices and state powerful ethical reasons for consistent compliance with standards that have been set.

III. SUBSTANTIVE PRINCIPLES OF EQUALITY

A. The Nature of Substantive Norms of Equality

In order to decide what persons are relevantly equal or unequal, substantive judgments have to be made about what characteristics count. When a judgment is made that those, and only those, who get a grade of over seventy should pass, the standard is set in terms of what appears likely to be the most appropriate treatment for each person within the designated classes. No substantive judgment about equality need inform development of the standard. In other circumstances, however, the particular determination about appropriate treatment is approached with presuppositions that some sorts of variances among individuals or groups are not warranted. For example, parents are trying to decide whether to afford musical instruction to each of two nonidentical twins. Recognizing that one child would probably benefit much more than the other, the parents, nonetheless, decide at the outset (in order to forestall resentment) that either both will be offered the opportunity or neither will. In such a setting, the final conclusion that includes equal treatment is not simply a derivation from independent resolution about the treatment most appropriate for each individual; rather the conclusion rests in part on a substantive norm of equality.

Substantive norms of equality are of various sorts and their relationships to other norms and values are highly complex. In the example concerning musical instruction, the parents believe that the benefit should be conferred on both children or upon neither child, so that the children should be treated equally in terms of the benefit. The parental decision in favor of equal treatment is focused upon a particular concrete choice and upon particular individuals, with the characteristics that determine equality having already been set for the individuals. Other norms of equality differ in one or more of these respects. Many norms of equality do not indicate precisely which persons will be treated equally but that the satisfaction of certain criteria will lead to treatment in a designated way or to equal treatment. If legislators decide, for example, that sentencing discretion is unfair and that all those who commit any specific crime should receive the same sentence, a norm of equality would inform their deliberations over what sentencing structure to

the makers of a rule might have had for favoring one group rather than another, very few classifications will be without some legitimate reason.
establish, a norm cast in terms of presently unidentified individuals who will commit crimes in the future. This norm differs from the one affecting the parents of the two children in that it is directed to large groups of individuals and makes future behavior the key to one's treatment, but the two norms are similar in their statement of positive conditions for equal treatment and their attention to one problem of choice.

Other norms are formulated in terms of exclusion of factors from consideration, declaring that those factors are to be regarded as irrelevant. Parents of a boy and girl might decide, for example, that gender will not affect their treatment of the two children. A law may forbid consideration of race, ethnic origin, or religion in hiring. Because those norms leave open the possible use of an otherwise unlimited number of criteria for choice, they do not determine that any two individuals or any specifiable groups of individuals will actually receive the same benefits and burdens. Most ethical and legal norms against discrimination are so formulated.\footnote{48} Often they are put at a high level of generality; constitutional norms, for example, forbid certain types of discrimination by the government across the entire range of its activities.

Much more might be said about varieties of substantive norms of equality, but the preceding is sufficient to suggest their important place in deliberations over how people are to be treated. Two rather different challenges might be raised to this brief account. One would be to deny that what I have discussed are properly considered norms of equality at all; the second would be to deny the significance of these norms. The first of these challenges is taken up immediately below, the second in the following Section.

B. Norms of Equality and Comparative Norms Generally

Westen explicitly argues that what I call substantive norms of equality are not norms of equality. Using as an illustration the requirement of the privileges and immunities clause of article IV that states give equal treatment to citizens of sister states, he talks of "conditional rights" that require "quantitatively identical treatment."\footnote{49} These rights, he says, are merely a subset of all comparative rights; the fact that they demand quantitatively identical treatment "is a contingency . . . with no moral significance for purposes of equality."\footnote{50}

As far as the terminological question is concerned, Westen's position is, putting it mildly—odd; except insofar as that position is merely the logical working through of his determination to define the formal principle of equality in an exceedingly narrow way and to foreclose use of the language of

\footnote{48. Occasionally, equal treatment for different groups is taken to involve allocation of benefits proportionately among groups. In a liberal democracy this sort of equal treatment is likely to be supported only as a corrective device for past discrimination based on group membership, or as a device to prevent such discrimination in the future.}

\footnote{49. See Westen, supra note 1, at 554-55.}

\footnote{50. Id. at 555.}
equality for any other claims. Westen is indisputably correct that some comparative norms are not cast in the language of equality, e.g., privates will receive one-half the pay given to lieutenants. He is also correct in suggesting that norms requiring the same treatment can be viewed as a subset of the broader category of comparative norms. But he flies in the face of any ordinary understanding of the term "equality" in denying that norms that require people to be treated the same way are norms of equality. If it is a claim of equality that people similarly subject to an established standard should be treated the same way (Westen's version of the formal principle of equality), surely claims that people should be treated the same way with regard to one or many benefits or burdens because they share relevant characteristics, and claims that people should not be denied the same treatment on the basis of irrelevant differences (such as race or gender), are also claims of equality. A drastic alteration in the usual sense of what "equality" covers would be needed to accomplish the sharp distinction Westen proposes between rights to equality and rights to quantitatively identical treatment. I reserve for the conclusion comment on the possible benefits of such radical surgery on the concept of equality.

Although Westen helps clarify the similarities between substantive norms of equality (in my terminology) and other comparative norms, he seriously underestimates the significance of the former. A sense that some people deserve better or worse treatment than others is fairly common, but rarely is that sense reducible to a quantitative formulation; simple equality has an intuitive appeal as a proper proportion that does not often exist for other explicit proportions. Thus, substantive norms of equality enjoy prominence among the norms that precisely define one person's or group's benefits in relation to another's. Another reason why norms of equality occupy a special place among comparative norms is that all norms that preclude reliance on characteristics deemed to be irrelevant are norms of equality; they demand that equal treatment be given to persons who are alike in other respects and differ only in regard to the irrelevant characteristics. Since we live in an era when many previously accepted bases for differentiating among people are now thought improper, and when public action to prevent private choices on those bases is deemed acceptable, the significance of these preclusive norms has greatly increased.

C. The Significance of Substantive Norms of Equality

Much more troublesome than the terminological quarrel is the problem of how substantive norms of equality relate to other comparative and to

51. As earlier discussion indicates, see supra notes 19–21 and accompanying text, I believe this is too narrow a construction of even the formal principle, which applies whenever a firm determination is made that people should be treated similarly in respect to a particular kind of treatment, whether or not the precise treatment has yet been settled.

52. One might imagine a norm that permitted some reliance on a characteristic but not too much, e.g., a state law that allowed employers to add no more than ten points to one's perform-
noncomparative norms. I shall not here attempt the deep philosophical analysis that would be needed to probe their structural relationships in a systematic way, but I do wish to establish that, at the level of ordinary moral and legal discourse, many norms of equality are not easily derivative from, or reducible to, noncomparative norms. A norm of equality could be derivative in the sense of adding nothing significant to another norm or in the sense of merely summing up the conclusions of a series of applications of other norms. Suppose there is general agreement that a country's sole aim in picking Olympic runners is to choose those who are fastest in their events, because picking the fastest runners is regarded as best overall for the country and its sports programs, or because the fastest are believed to have a moral right to be chosen. To say that equal treatment should be given to equally fast runners, or that race or hair color should not be taken into account, would add nothing to the norm that speed on the track should be the only criterion of choice. Someone might say more generally that hair color should not be taken into account for social choices, meaning no more than that thus far hair color has not emerged as relevant to any of the purposes underlying those choices. Conceivably a society might even try to simplify decisionmaking by explicitly barring consideration of factors determined to be irrelevant on many earlier occasions, because they consistently bore no relation to the purposes of a wide range of decisions. Then, a genuine norm of equality would exist, but one that was derivative from the positive standards for making particular previous decisions and the aim of administrative convenience.

Often, however, norms of equality are something more than reflections of factors deemed relevant for particular kinds of decisions. They are based on belief that substantial reasons of a general kind exist for eschewing or forbidding criteria of choice whether or not those criteria bear some plausible relation to the particular kind of decision to be made. Any use of race or religion as a classification device may, for example, be thought likely to fortify irrational prejudices and to cause social divisiveness by encouraging people to think along racial or religious lines. Thus it may be thought that such classifications should not be made even if they might bear some plausible

ance on an exam because of one's status as a veteran. Such discrimination-reducing norms would not be norms of equality.

53. I pass over the serious practical (and partly normative) problem of how the fastest runners are to be determined, whether by performance on one occasion or over a series of occasions, or by some other method.

54. Of course, if two equally fast runners were competing for a single remaining place, both could not be given the place. Then the formal principle of equality would be brought to bear to decide upon a method of selection that would recognize the equality of the two runners. (Alternatively, some subsidiary purpose, say to build for the future by choosing the younger runner, might be introduced to resolve ties.)

55. The government for the most part leaves private citizens and enterprises to decide for themselves whether criteria they use for choices bear a plausible relation to the purposes underlying the choices. When the government enters the domain of private choice by barring private discrimination, it singles out and prohibits the use of certain standards.
relation to the purposes underlying the distribution of a particular benefit or burden.

As written or interpreted, a number of constitutional provisions, including the equal protection clause of the fourteenth amendment, the privileges and immunities clause of article IV, and the speech and religion clauses of the first amendment, contain norms of equality. The point is easily illustrated under the equal protection clause by doctrines stating that classifications based on race, national origin, gender, etc. must meet either strict scrutiny or "intermediate review." These standards go beyond generalizations based on the past inaptness of the specified criteria in particular instances and reflect the view that use of those criteria is generally undesirable. The norms are not absolute, but exceptions require relatively powerful justifications.

In both moral and legal discourse the relation between a norm of equality and other norms and values can be complicated. The principle that the government should not distribute benefits or burdens on religious grounds is a substantive norm of equality. The principle that the government should not encourage or discourage any sort of religious faith is (essentially) a noncomparative norm. The norm against distribution based on religious criteria is something more than a restatement of the norm against encouragement; but once it is perceived that by keying benefits or burdens to religious belief or affiliation, the government may indirectly encourage one kind of religion and discourage another, the first norm can be thought to be derivable from the second. In right-to-travel cases, the Supreme Court has said that generally a state may not treat new residents worse than old ones. A critical part of the argument of the new residents has concerned comparative disadvantage; yet if the basis for the norm of equality is itself drawn from the more fundamental norm that liberty to travel should not be penalized or discouraged, the equality norm plays a definitely subordinate role. Professor Westen is correct to criticize the Supreme Court's unnecessary employment of the equal protection clause in cases in which the real work is done by right, such as the right to travel, derived from another part of the Constitution.

On some occasions a norm of equality is not so easily derivable from another specific norm, but may serve some general value, such as social harmony. The argument that religious preferences should not be employed because they cause social divisiveness is of this sort. One might posit a norm that the government should not cause social divisiveness and claim that the norm against religious preferences can be derived from it. But a norm about social divisiveness is very vague and obviously the government must do many

56. I by no means wish to suggest that this is the only basis of the norms against use of religious criteria for government benefits.

57. This is true at least in cases where the new residents have complained that they have been deprived of a benefit that the state legitimately could have denied to all its residents. Admittedly, if a state were obligated to provide a given benefit to its residents, the claim of the new residents who had been deprived of the benefit would not necessarily be rooted in principles of equality.

58. See Westen, supra note 1, at 560–64.
things that do cause some degree of social divisiveness (such as fight wars or refrain from fighting wars). The norm against religious preferences cannot be derived from the more general norm in any easy, straightforward way.

Norms of equality often rest on fundamental value assumptions or norms that are themselves egalitarian, for example, that all people should be accorded equal respect by their government. Moreover, these assumptions hardly seem reducible to any nonegalitarian norms or values. The premise underlying the reapportionment cases, that voters in state elections should have votes equal in weight, may be of this kind. Just as norms of equality can be grounded in nonegalitarian norms, so can the converse occur. A norm that an advanced society should afford its citizens roughly equal opportunity in life can be used to support a noncomparative right to a minimal level of nutritional and medical support. An egalitarian norm that all people's conceptions of the good should count equally in a liberal democracy could be used to derive a nonegalitarian norm that any claim to benefits based on the correctness of the claimant's special conception of the good is without moral force.

Though these comments barely hint at the subtle relationships between different sorts of norms, they are sufficient to suggest the importance of substantive norms of equality and to indicate the absence of any simple one-way street, or process of derivation, between other norms and egalitarian norms.

IV. CONCLUSION: THE LANGUAGE OF EQUALITY

This brief examination has shown some of the complexities of the idea of equality and has demonstrated that though formal and substantive norms of equality are both often subordinate in various ways to other norms, they are neither logically self-evident nor ethically empty. Equal treatment can be unjust, and unequal treatment can be just. Substantive norms of equality can be the basis for excluding some kinds of moral and legal claims, such as the claim based on one's special conception of the good. These norms can also limit the permissible scope or affect the weight of various sorts of claims in favor of unequal treatment. Similarly, substantive norms of equality can preclude use of certain forms of classification altogether, limit the possible

59. This is true unless all egalitarian norms are thought to be supported by the need for social harmony.

60. Westen's discussion of these cases, Westen, supra note 1, at 594-95, is somewhat puzzling. He argues that reliance on principles of equality in the voting rights cases was misleading, since different notions of equality would have yielded different holdings. Toward that end, he suggests that Justice Harlan's position in dissent in Reynolds v. Sims, 377 U.S. 533, 589 (1964), could have been put as supporting equality of votes within each legislative district. Id. at 595. But that characterization would hardly have been an adequate response in terms of equality to the majority's assumption that equality of weight within and among districts was required.

61. Bruce Ackerman proposes such a principle in B. Ackerman, Social Justice in the Liberal State 11 (1980).

62. Westen disagrees: "Claims that treatment can be simultaneously just and unequal, or equal but unjust, are grounded in simple self-contradiction." Westen, supra note 1, at 558.
subject matters for other forms of classifications, and influence the weight of the reasons necessary to justify still other forms of classifications. At least in our society, the formal principle of equality is the basis for a presumption in favor of equality, implicitly demanding some explanation for unequal treatment. It exerts a moral force against using some techniques of distributing benefits and burdens (such as experiments) for which there may be rational reasons; and it limits the permissible methods for choosing among equals when a choice must be made. The formal principle also embodies a moral judgment about one element of the wrong done to someone when an applicable standard for conferring benefits is not followed.

Professor Westen's claim that equality is empty has been shown to be based on his extraordinarily narrow conception of what equality means, a conception that excludes substantive norms of equality altogether and sharply constricts the range of the formal principle of equality as well. His recommendation that the language of equality cease to be used in moral and political discourse does not rest on the assumption that all the claims now cast in that language are really meaningless, but rather that some better vocabulary is available for making and considering them.

Any proposal for improving the conceptual terminology presently in use must face an obvious difficulty. No one is in a position to dictate usage, though the Supreme Court and other institutions do have a powerful influence on legal usage. Even if an alternative vocabulary would be preferable, it is doubtful if part of a select elite should simply abandon the terms presently used by most persons. If some people do abandon the old terms, then similar arguments will be made in vastly different vocabularies, itself a considerable source of potential confusion. In any event, whatever usage one chooses for oneself, one must understand the ideas that others are conveying in the less than ideal alternative vocabulary. As a practical program, one could, thus, hardly recommend instant cessation of use of the language of equality or thought about what that language seeks to communicate. What one could sensibly recommend is the introduction of alternative ways of speaking and an effort over time to shift to those preferable modes.

If Westen's position is correct, such a program would be justified by the confusions generated by the language of equality. This position is difficult to evaluate for two very important reasons. The first is that no major concept of moral and political discourse that is taken from ordinary language is free of considerable confusion. Terms like "privacy," "freedom," and "right" have their own uncertain dimensions and multiplicity of senses. I should be surprised if the idea of equality is either more confused or more complex than these other ideas. What is perhaps more to the point, I am skeptical that one could find a new vocabulary that one could introduce into the stream of general usage that would not quickly develop its own ambiguities and confusions. The second reason why Westen's proposal is hard to evaluate is because it is always difficult to say how far developments in moral and legal evaluation are the product of intellectual confusion. Certainly the historical progression toward greater equality in political rights and social opportunities is not
mainly the result of some misplaced extension of the formal principle of equality, but rather of the sense that previously accepted distinctions are morally unjustified. Perhaps the self-evidence of the formal principle of equality does diffuse a certain glow that reaches substantive claims of equality that are highly debatable. But the principle, after all, does share with these claims a concern for equal treatment that unifies all the aspects of the idea of equality; and whether choice of a new vocabulary could somehow divert attention from that unifying element is highly dubious.

One very important impediment to abandoning equality language in legal discourse is the vast amount of law that has been developed under the equal protection clause (as well as other norms that use the language of equality). Especially if one thinks that the critical decisions have been legally sound and socially beneficial, he will be hesitant to abandon their present moorings or to concede that interpretation of the equal protection clause should not employ the concept of equality. If the concept of equality is to retain its present importance in legal discourse, attempts to develop a different vocabulary for nonlegal discourse would probably not contribute to clarity and would likely fail.

In sum, while one cannot be sure whether a change in vocabulary would produce greater clarification or more appropriate resolution of issues, there are strong bases for skepticism. Especially in light of the difficulties of causing such a change, even were it desirable, a more sensible program for clarification is to promote understanding of the present richness of the ideas of equality that now form a central part of our moral and legal thought.