

Michigan Law Review

Volume 81 | Issue 3

1983

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Recommended Citation

Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983).
Available at: <https://repository.law.umich.edu/mlr/vol81/iss3/3>

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IN DEFENSE OF EQUALITY: A REPLY TO PROFESSOR WESTEN

*Erwin Chemerinsky**

No value is more thoroughly entrenched in Western culture than is the notion of equality.¹ Even in an American society that sanctioned slavery and permitted women no rights, there were prominent declarations that "all men are created equal."² Now, however, Professor Westen, in a recent article,³ contends that hundreds of years of homage to the ideal of equality is much ado about nothing. Professor Westen argues that equality is a jurisprudential concept that is not only unnecessary, but also misleading.⁴ Ultimately, he concludes that equality "is an idea that should be banished from moral and legal discourse as an explanatory norm."⁵

A close examination of Professor Westen's article, however, reveals that he never proves this conclusion. Professor Westen's central thesis is that the principle of equality standing alone cannot be determinative because it is necessary to develop standards to decide which inequalities are acceptable and which are intolerable.⁶ This

* Assistant Professor of Law, DePaul University. B.S. (1975), Northwestern University; J.D. (1978), Harvard University. —Ed. I wish to express my deep appreciation to my colleague, Stephen Siegel, both for initially suggesting that I write this reply and for his constant willingness to discuss these ideas. I also wish to thank Elliot Abramson, Louis Kaplow, Jeffrey Shaman, and Marcy Strauss for their helpful comments on earlier drafts of this Article.

1. See, e.g., R. HARRIS, *THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT* 4 (1960) ("Equality is at least coeval with if not prior to liberty in the history of Western political thought, and among the Greek and Roman Stoics and the Christian Fathers it was a far more important concept.").

2. The Declaration of Independence proclaims: "We hold these Truths to be self-evident, that all men are created equal." For a careful analysis of the meaning of these terms, see G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 181-228 (1978). In *Gray v. Sanders*, 372 U.S. 368, 381 (1963), the Court spoke of "the conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address."

3. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) [hereinafter cited as "Equality."]. Professor Westen's thesis has already provoked significant debate. See Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Westen, *On "Confusing Ideas": A Reply*, 91 YALE L.J. 1153 (1982). Professor Burton's critique is quite different from the arguments advanced here, as he attempts to demonstrate that the idea of rights is as empty as Professor Westen claims equality to be. As is made clear in this Article, I believe that both equality and rights have important roles to play in normative discourse.

4. *Equality*, *supra* note 3, 577-96. See text accompanying notes 69-99 *infra*.

5. *Id.* at 542.

6. In fact, it long has been recognized that external standards, not derivable from the concept of equality, are necessary to decide which inequalities are permissible and which are

argument, however, only establishes that the concept of equality is *insufficient* to resolve moral and legal controversies. To infer, as Professor Westen does, that because equality is *insufficient* it is also unnecessary is to commit a basic logical fallacy. There is a fundamental difference between necessary and sufficient conditions.⁷

Furthermore, Professor Westen overlooks the need for the concept of equality in society. Equality is *morally* necessary because it compels us to care about how people are treated in relation to one another. Equality is *analytically* necessary because it creates a presumption that people should be treated alike and puts the burden of proof on those who wish to discriminate. Finally, the principle of equality is *rhetorically* necessary because it is a powerful symbol that helps to persuade people to safeguard rights that otherwise would go unprotected.

Part I of this essay analyzes Professor Westen's arguments that the concept of equality is unnecessary. My contention is that Professor Westen never demonstrates that equality is meaningless; his arguments only prove the obvious, that equality by itself is insufficient. Part II argues that equality is a necessary principle: It is the only concept that tells us that different treatment of people does matter. Part III addresses Professor Westen's suggestion that equality is misleading and points out that none of his criticisms of the idea of equality are in any way inherent to that concept. Finally, Part IV demonstrates that even Professor Westen does not do away with equality. He merely hides the concept under a different label.

I. PROFESSOR WESTEN'S FAILURE TO PROVE THAT EQUALITY IS UNNECESSARY

Professor Westen presents four arguments as to why equality is an unnecessary concept. Two of his arguments attack the internal logic of the principle of equality, and two are arguments that equality is an empty idea devoid of meaning. Upon reflection, all of Professor Westen's analysis collapses to the simple point that society must make value choices to decide what inequalities it will and will not accept.

intolerable. See, e.g., *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1164 (1969) ("It becomes necessary, then, in order to apply the formal equality principle, to determine in what respects men are similar and to decide which of these are relevant to the kind of treatment they should receive."). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 991 (1978) ("Equality makes non-circular commands and imposes non-empty constraints only to the degree that we are willing to posit substantive ideals to guide collective choice."); J. WILSON, *EQUALITY* 118-19 (1966); Honore, *Social Justice*, 8 MCGILL L.J. 77, 83 (1962).

7. W. SALMON, *LOGIC* 44-45 (2d ed. 1973).

A. Professor Westen's Attack on the Logic of Equality

Professor Westen begins by arguing that the concept of equality has independent meaning only if it is a command for "either uniformly granting or uniformly denying . . . treatment to all members of a class."⁸ He argues, however, that such an interpretation is "patently absurd" because it is illogical for a concept to allow both an action and its converse.⁹ He uses the example of Rhodes Scholars receiving fellowships to Magdalen College. He states that if equality would require *either* giving fellowships to all Rhodes Scholars or *not* giving them fellowships, the concept would not be devoid of meaning, but would be absurd.¹⁰ Professor Westen concludes that it "is morally contradictory to say that people who are alike entitled to certain treatment should therefore either receive the treatment to which they are alike entitled or not receive it."¹¹

It is contradictory, however, only if one begins by assuming that equality is a value that doesn't matter. If equality of treatment does matter, then the result, be it scholarships for all or scholarships for none, is irrelevant so long as there is equality. If equality is more important than a particular entitlement, it is perfectly consistent to prefer the equal distribution *or* denial of the entitlement to its unequal distribution. Consider, for example, a government program that provides widows, but not widowers, Social Security survivor benefits.¹² Professor Westen would say that an attack based on the inequality of this program would lead to the illogical result that either everyone or no one would get benefits. But the result is not at all illogical if what we care about is equality in the treatment of men and women. If equality is of primary importance, then who does or does not receive benefits is of secondary concern.

Professor Westen is correct that a devotion to equality *by itself* would lead to absurd and tragic results.¹³ As he points out, it would

8. *Equality*, *supra* note 3, at 545.

9. *Id.* at 546.

10. *Id.* at 545-46.

11. *Id.* at 546 n.28.

12. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

13. The absurdity of a single-minded devotion to equality was brilliantly described in a short story by Kurt Vonnegut, entitled *Harrison Bergeron* in *WELCOME TO THE MONKEY HOUSE* 7-13 (1970). Vonnegut describes a society where "everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was stronger or quicker than anybody else." Those who were more graceful were required to wear sandbags. Those who were more intelligent were given earphones that emitted sounds to scramble their thoughts. *Id.* at 7.

This, however, does not establish that equality is a dangerous concept. Rather, it simply says that equality is not enough by itself, that concepts such as liberty also are essential.

be equal to take persons and either let them be free or make them slaves, as long as all were treated the same.¹⁴ But this only proves that equality by itself is not enough to determine social policy; that it also is essential to have concepts such as liberty.¹⁵ Equality doesn't tell us whether we should or should not give scholarships or survivor benefits or freedom. Equality, however, does tell us that, absent a significant countervailing value, we must either provide or deny the benefits *equally*.

The second step in Professor Westen's attack on the logic of the principle of equality is a claim that the concept is "circular."¹⁶ Equality, as defined by Aristotle, is a requirement that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood."¹⁷ Professor Westen says that if we focus on the statement "like people should be treated alike," we must ask who are "like people."¹⁸ Unfortunately, Professor Westen says, "when we ask who 'like people' are, we are told they are 'people who should be treated alike.'"¹⁹ From this observation, Professor Westen concludes that "equality is entirely circular."²⁰

A careful examination reveals, however, that Professor Westen has in no way shown equality to be circular. True, the answer to the question, "who are 'like' people," is "those who should be treated alike." But equality is circular only if the answer to the question, "who should be treated alike," is "like people." Then, and only then, would you have a circular argument. If, however, one asks "who should be treated alike," one is not, according to Professor Westen, told "like people." Instead, one is referred to a set of values which society uses to decide which people we want to treat the same and which differently.²¹ That does not prove that equality is circular; it only shows that equality depends on other concepts to decide

14. *Equality*, *supra* note 3, at 545 n.27 (quoting Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 312 (1974)).

15. H.L.A. Hart, for example, argues that the principle of treating like cases alike is *both* an essential element of justice *and* dependent on other principles for its meaning and its limits. See H.L.A. HART, *THE CONCEPT OF LAW* 153-63 (1961); *id.* at 155 ("[T]hough 'Treat like cases alike and different cases differently' is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinative guide to conduct.").

16. Westen, *supra* note 3, at 547 (citations omitted).

17. 3 ARISTOTLE, *ETHICA NICOMACHEA* 1131a-31b (W. Ross trans. 1925), *quoted in* Westen, *supra* note 3, at 543.

18. Westen, *supra* note 3, at 547.

19. *Id.* at 547.

20. *Id.* at 547.

21. *Id.* at 548-50, 559-77.

which differences to strike down and which to uphold. Again, this simply demonstrates that equality *alone* is not *sufficient*, but does not in any way indicate that it is unnecessary.

B. *Professor Westen's Claim That Equality Is an Empty Idea,
Devoid of Meaning*

Professor Westen develops two arguments as to why equality lacks substantive content and hence is unnecessary. First, he argues that equality in the administration of rules is superfluous.²² Many philosophers have concluded that "once a rule has been formulated . . . equality comes into play as a 'central' and 'necessary' element of justice, ensuring that the rule is applied consistently and 'impartially' to all cases that are alike under the rule."²³ Professor Westen, however, argues:

Such statements erroneously imply that equality imposes some substantive requirement of consistency apart from the substance of the rule itself. It is true that rules should be applied equally, consistently, and impartially, if by "equally," "consistently," and "impartially," one means the tautological proposition that the rule should be applied in all cases to which the terms of the rule dictate that it be applied. But it is wrong to think that, once a rule is applied in accord with its own terms, equality has something to say about the scope of the rule — something that is not already inherent in the substantive terms of the rule itself. To say that a rule should be applied "equally" "consistently" or "uniformly" means simply that the rule should be applied to the cases to which it applies.²⁴

This argument, however, assumes that formalism is possible; that it is practical to apply rules mechanically to decide all of the situations where the rules are supposed to apply.²⁵ If laws permitted no discretion in application or enforcement, Professor Westen is correct that the concept of equality would be unnecessary because society could just apply the law "to the cases to which it applies." But legal scholars have long discarded a belief in formalism because "[e]ven the most detailed command must leave to the individual executing the command some discretion. Hence every law-applying act is only

22. *Id.* at 550-51.

23. *Id.* at 550-51 (quoting W. FRANKENA, *Some Beliefs about Justice*, in PERSPECTIVES ON MORALITY 93, 94 (1976); H.L.A. HART, THE CONCEPT OF LAW 155 (1961); M. SINGER, GENERALIZATION IN ETHICS 49 (1961)).

24. *Equality*, *supra* note 3, at 551 (footnotes omitted).

25. "Legal reasoning is formalistic when the mere invocation of rules and the deduction of conclusions from them is believed sufficient for every authoritative legal choice." R. UNGER, LAW IN MODERN SOCIETY 194 (1976).

partly determined by law and partly undetermined."²⁶ Once there is discretion in applying laws, we can no longer simply say the law applies to the cases to which it applies. It is imperative to develop a concept of equality to insure consistent, nondiscriminatory application of the laws.

Consider, for example, the statute involved in *Yick Wo v. Hopkins*.²⁷ A San Francisco ordinance prohibited operating a laundry in a nonbrick building unless a permit was obtained from the Board of Supervisors. The Board gave permits to virtually every Caucasian applicant (79 out of 80), but denied permits to every Chinese applicant (over 200). Consider how the case would be decided under Professor Westen's analysis. The San Francisco law only would need to apply to all of the laundries in nonbrick buildings. Of course, it does; it is applied to give Caucasians permits and deny them to Chinese applicants. Unless there is a requirement of equality in the application of the law, there would be no basis for challenging the law

26. H. KELMAN, *THE PURE THEORY OF LAW* 349 (1970). See H.L.A. HART, *supra* note 15, at 125:

It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, the provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for "mechanical" jurisprudence.

Legal realism, of course, goes even further than orthodox positivism in denying the possibility of legal formalism.

Interestingly, the most serious challenge to the inherency of judicial discretion and the impossibility of formalism incorporates equality as a central element in the judicial process. See R. DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81 (1978); Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978). Dworkin argues that almost all difficult cases can be correctly resolved without resort to judicial discretion, by evaluating the alternative outcomes according to two measures. The first of these is the "dimension of fit," *i.e.*, the degree to which a possible result conforms to precedents, allowing for the possibility of mistakes in prior decisions. The second measure is the "dimension of political morality," according to which the judge selects from the outcomes compatible with the dimension of fit. Since Dworkin predicates the importance of precedent not on the advisory force of accumulated wisdom, but on the importance of treating past and present litigants equally, and believes "equal concern and respect" to be the central elements of the dimension of political morality, his challenge to judicial discretion itself depends on the validity of equality as an explanatory norm.

27. 118 U.S. 356 (1886).

since it has been applied to all cases under the law. An obvious injustice would go unremedied.

Nor can the example of *Yick Wo* be dismissed as atypical because discretion is written into the statute. Discretion is inevitable in enforcing any law. For example, though most states have statutes prohibiting many forms of sexual activity between consenting adults, few states enforce these laws. No one really objects to the fact that these rules are not applied to the cases to which they apply. If, however, the state enforced these laws only against blacks, then we would object precisely because of the inequality.²⁸ In other words, the concept of equality does add something to the enforcement of rules. Equality requires that the government apply its laws even-handedly. This concept is not part of any law, but rather is derived from the notion of equality.

Professor Westen might reply to this by contending that even if all of the above analysis is true, the concept of equality, by itself, cannot decide when unequal enforcements are to be tolerated and when they are impermissible. There is even a need for a principle, other than equality, to determine that discrimination on the basis of race is wrong. This argument, however, again only establishes that equality alone is not sufficient, that there is a need to develop standards to decide which inequalities are unacceptable.

In fact, all of Professor Westen's arguments considered thus far collapse into his final contention: to decide when "likes should be treated alike" requires some standard, apart from equality. Professor Westen contends that once that standard exists "our substantive work is complete, and the additional and self-evident step of stating our conclusion in terms of 'equals' or 'unequals' is entirely superfluous."²⁹ To decide any issue involving a claim of equality requires the use of some standard to decide whether different treatment of individuals violates the command that "likes should be treated alike." This principle or standard, Professor Westen argues, is suffi-

28. The doctrine of selective prosecution illustrates the importance of equality notwithstanding the need for other values in applying it. Current doctrine tolerates enormous prosecutorial discretion in selecting the individuals to be prosecuted, but deems selection based on a patently invalid classification such as race or religion a violation of due process. See, e.g., *United States v. Niemiec*, 611 F.2d 1207, 1209 (7th Cir. 1980) ("A selective prosecution defense involves the equal protection component of the Fifth Amendment's due process clause [F]undamental to such a defense is 'proof that the decision to prosecute was based on impermissible considerations such as race, religion, or the desire to penalize the exercise of constitutional rights.'") (citation omitted); *United States v. Bland*, 472 F.2d 1329, 1336 (D.C. Cir. 1972) (same). Thus, prosecutorial discretion allows the government to treat codefendant members of a conspiracy differently, so long as the basis for the difference is morally relevant and not an irrelevant factor such as race or religion.

29. *Equality*, *supra* note 3, at 560.

cient to decide the case, rendering the concept of equality unnecessary.

There is no dispute that substantive standards to define when people are "alike" and when "unlike" are necessary. Nor is there dispute that there are some matters that can be decided solely on the basis of these standards, without any reference to equality.³⁰ I am certainly not claiming either that equality is sufficient or that the concept is always necessary. My point is simply that Professor Westen only proves that equality is insufficient and *sometimes* unnecessary, and illogically concludes from this that equality is always empty and meaningless.

Most inequalities cannot be challenged solely by reference to an underlying standard or principle. In fact, in the vast majority of instances the standard used to decide if there is an inequality would not operate at all without a concern for equality. The standard lets us decide that the difference in treatment is unjustified, but it is only equality that makes us care about the different treatment in the first place. Numerous examples, involving both privileges and rights,³¹ illustrate this point.

First consider the problem of selective prosecution previously discussed. An individual prosecuted for violating a statute seldom invoked, who would not be prosecuted but for his race, suffers an injustice only equality explains. Such an individual is, in every relevant particular, like those who escape prosecution; but he or she is treated differently, with extremely damaging consequences. Can we base the judgment that such a prosecution is unjust on some anterior individual right, such as that against "invidious comparison"? The prosecution in this case does not brand the defendant with any stigma the legislature did not validly intend as punishment for the crime committed.

In fact, would the prosecution be less unjust if a black state's attorney brings charges under a rarely used statute against a white

30. Professor Westen properly points out that restrictions of free speech violate the first amendment and can be decided under that constitutional provision without any mention of the Equal Protection Clause. *Id.* at 560-63 (discussing *Carey v. Brown*, 447 U.S. 455 (1980)). *But see* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). It is a logical error, however, to conclude that equality is never necessary merely because first amendment cases can be decided without it.

31. Admittedly, the distinction between privileges and rights is a tenuous one that is easily discredited. *See, e.g.*, Schwartz, *Administrative Law Cases During 1972*, 25 AD. L. REV. 97, 101 (1973) (speaking of the "simplistic and now discredited 'right-privilege' distinction.>"). I use it here simply to point out that equality is necessary both in areas where a constitutional right exists (*e.g.*, voting) and in areas where there is no right involved, but rather just a privilege granted to members of society (*e.g.*, drinking, driving a car, etc.).

defendant because of the latter's race? Certainly not; from the defendant's perspective, a fact beyond his or her control and wholly irrelevant to his or her culpability leads to imprisonment, even though white individuals at large are not stigmatized by the prosecution. Selective prosecution in this instance is unjust solely because it offends equality by treating like violators of the same law differently.

Second, consider the issue involved in *Craig v. Boren*:³² whether a state may prohibit sale of beer to men under age 21 and to women under the age of 18.³³ Absent a concern for equal treatment, this law certainly would be sustained. The law meets a rational basis test. It is rationally related to achieving the legitimate state purpose of traffic safety because there is ample evidence that males between the ages of 18 and 21 "were more inclined to drive and drink beer than were their female counterparts."³⁴ There is no underlying "right to drink" which could decide this case. Only a perception of the inequality in treatment of men and women compels us to ask if the difference is justified by more than a rational basis. In *Craig v. Boren* it is the concept of equality that creates the requirement that differences in the law based on gender must be justified by an important interest.

Consider an example involving a constitutional right. Assume Illinois enacts a law providing that in electing the governor every resident of Chicago can vote once, but everyone else in the state can vote twice. Why would we care about this except for the inequality? Under the hypothetical law the *right* to vote is not infringed because everyone is allowed to vote. In fact, even a total elimination of the right to vote likely would be constitutional. Illinois probably could totally eliminate elections for governor and have the legislature appoint the governor.³⁵ If even totally eliminating the right to vote would be permissible, and in the hypothetical all people do vote, why is there any basis for objection? The answer is easy: because the grant of two votes to some citizens, while allowing others to vote only once, is unequal. There is no way to attack malapportionment

32. 429 U.S. 190 (1976).

33. To be precise, *Craig v. Boren* involved the state's power to limit sale of 3.2% beer. This is a detail not pertinent to the discussion here.

34. *Craig v. Boren*, 429 U.S. at 201. While this evidence is certainly open to attack, it is probably more than enough to meet a rational basis test.

35. In theory, such a law might violate article IV, section 4 of the Constitution: "The United States shall guarantee to every State in this Union a Republican form of Government." This constitutional provision, however, is virtually a "dead letter." See, e.g., *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). See also Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

of legislatures except by using the concept of equality and the belief that all who are governed by an official must have an equal voice in his or her election.³⁶ Again, equality is not sufficient. There must be external standards to inform us that voting is important and to decide what is equal.³⁷ Equality, however, is necessary — so much so that the definition of the right to vote is wrapped in the concept of equality.³⁸

Consider a final example illustrating that Professor Westen is incorrect when he suggests that the existence of rights and standards makes the concept of equality unnecessary. What if a state were to provide \$1000 for the education of every student with an I.Q. over 120, but only provided \$100 for the education of students with lower I.Q.s? Again, we care about this difference because we perceive an inequality. Professor Westen argues that whether such a law is constitutional can be answered entirely “by direct reference to the underlying substantive right.”³⁹ The Supreme Court, however, has rejected the contention that there is a right to an education.⁴⁰ By Professor Westen’s analysis does this mean that there would be no basis for a challenge to unequal distribution of funds? In fact, assume that the Court had recognized a right to an education. If the state provides \$100 for some students, but \$1000 for others, the government has discharged its duty to provide all students with an education. Again, by Professor Westen’s reasoning the law would have to be upheld because it is sustained by the “underlying right.” It is only the concept of equality that tells us that there is something wrong with the state’s funding scheme. True, we still need to develop a definition of “equal” education, something that is not an

36. It is worth noting that Chief Justice Earl Warren described the reapportionment cases as the most important decisions during his tenure on the Court. See *The Warren Court: An Editorial Preface*, 67 MICH. L. REV. 219, 220 (1968).

37. Professor Westen is correct that what is equal in the area of voting will vary depending on the context. *Equality*, *supra* note 3, at 563-64. This does not mean that the concept of equality is irrelevant, but rather only that other criteria are needed to decide what is the correct meaning of equality in any setting.

38. Consider for example the definition of the right to vote in terms of “one person-one vote.” See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Professor Westen states that the dissent in *Reynolds* could have argued that equality in voting could be achieved by counting each voter’s share equally with all others in the district rather than the state. *Equality*, *supra* note 3, at 595. Yet, this only proves that although equality is necessary to decide reapportionment cases, there is disagreement over the meaning of equality. Again, equality is insufficient because there is a need for standards to decide what is equal. But equality is necessary to tell us that the difference matters in the first place.

39. *Equality*, *supra* note 3, at 563.

40. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying that it is implicitly so protected.”).

easy task.⁴¹ But the fact that equality is insufficient does not in any way bear on its necessity.

In sum, Professor Westen is correct that equality by itself cannot determine cases. But that does not mean that equality is meaningless. In no way does Professor Westen's article demonstrate that equality is unnecessary. Part II of this reply will discuss why the concept of equality is useful and even essential.

II. EQUALITY IS A NECESSARY CONCEPT

Although Professor Westen argues that equality is an unnecessary concept, he fails to provide any criteria that can be used to judge when a concept is useful or necessary. There are three basic, and interrelated, functions a concept might serve. First, a concept is *morally* necessary if it compels us to care about something that we believe we should care about. Second, a concept is *analytically* necessary if it creates argumentative burdens that otherwise would not exist. Finally, a concept is *rhetorically* necessary if it helps us to persuade others to accept a result that we believe is justified. Equality is a principle that is morally, analytically, and rhetorically necessary.

A. Moral Necessity

Equality is the only concept that tells us that different treatment of people does matter. It is the concept that forces us to consider how society treats people in relationship to one another. Equality is descriptive in the sense that it is used to label the relative likeness or unalikehood in the status and treatment of people.⁴² For example, if

41. See J. COONS W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

42. Professor Westen argues that equality is meaningless as a description because all things are in some ways equal and in some ways unequal. See Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply*, 81 MICH. L. REV. 604, 607 (1983). Professor Westen is quite correct that people or things are never equal per se. This, however, does not mean that the concept of equality is meaningless. Rather, it simply means that equality must be discussed relative to a standard. For example, while we cannot speak generally of people being equal, we can speak of their being of equal height or of equal intelligence or of possessing equal worth as human beings. Professor Westen assumes that the existence of the underlying standard is sufficient, making the concept of equality superfluous. But the standard of height, or intelligence, or worth only provides a measure; the concept of equality informs us how two or more people compare according to that measure. That equality must be discussed relative to an underlying standard simply means that equality by itself is insufficient, not that it is unnecessary.

Similarly, Professor Westen argues that equality is meaningless as a prescriptive norm because all people should be sometimes treated equally and sometimes treated unequally. *Id.* at 639. Again, this does not mean that equality is a useless concept. Rather, it suggests that we need to speak of equality in specific contexts. In light of the importance of education, we can speak of a need to provide equal educational opportunity. Because voting is of central importance in a democracy, we create a rule of one person, one vote. In these and numerous other

we see differences in income or opportunity or rights we term these differences inequalities. Equality is also prescriptive in that it is an idea that commands us to act to reduce or eliminate inequalities. A caste system is unequal; a principle of equality dictates that it be eliminated. Thus, to the extent that as a society we rightly believe that we should care about certain differences among people and want to eliminate some of those disparities, equality is a morally necessary concept.

The premise that we should care about different treatment of people is so obvious as to require little elaboration.⁴³ In part, we believe that we should care about differences in treatment because we believe that "organized society [should] treat[] each individual as a person, one who is worthy of respect."⁴⁴ The philosopher John Rawls points out that our society should be built on an "ethic of mutual respect and self-esteem."⁴⁵ The only way that you or I can be assured that we always will be treated with respect is to insist that everyone be treated with equal dignity.⁴⁶

Moreover, we care about inequalities because we believe that every individual is entitled to the same opportunities as every other person.⁴⁷ As Ronald Pennock writes:

The objective of equality is not merely the recognition of a certain dignity of the human being as such, but it is also to provide him with the opportunity — equal to that guaranteed to others — for protecting and advancing his interests and developing his powers and personality.⁴⁸

Again, we care about equal opportunity for everyone because it is

contexts, equality provides a crucial prescriptive norm that no other concept supplies. In fact, because of the pervasive discrimination which has existed throughout human history, we should create a general presumption in favor of equality, that people should not be treated differently without a compelling reason. See text accompanying notes 53-65 *infra*.

43. There is a rich volume of literature defending equality as a moral imperative. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971); NOMOS IX: *EQUALITY* (R. Pennock & J. Chapman eds. 1967); R. TAWNEY, *EQUALITY* (1931).

44. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977).

45. J. RAWLS, *supra* note 43, at 256 (1971). See also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 179-83 (1977) (speaking of the right to "equal concern and respect").

46. Thus, inequality is worth caring about because it denies self-respect. J. RAWLS, *supra* note 43, at 534; Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 49 (1969).

47. William Faulkner wrote: "There is no such thing as equality per se, but only equality to: equal right and opportunity to make the best one can of one's life within one's capacity and capability, without fear of injustice, or oppression or violence." *ESSAYS, SPEECHES AND PUBLIC LETTERS BY WILLIAM FAULKNER* 105 (J. Meriwether ed. 1965).

48. Pennock, *Democracy and Leadership* in *DEMOCRACY TODAY* 126-27 (W. Chambers & R. Salisbury eds. 1962). The original belief in equality at the time the Constitution was written was this notion of equal opportunity. See C. ROSSITER, *SEEDTIME OF THE REPUBLIC* (1953).

the only way we can be assured that we will always have the opportunity to advance ourselves. Furthermore, from a utilitarian perspective, inequalities prevent people from developing their potentials and hence deprive society of innumerable benefits.⁴⁹

Finally, we care about different treatment of people because we believe that in a society based on the consent of the governed equal treatment is essential. Rousseau wrote:

[T]he social compact establishes among the citizens such an equality that they all pledge themselves under the same conditions and ought to enjoy the same rights. . . . [T]he sovereign never has a right to burden one subject more than another, because then the matter becomes particular and his power is no longer competent.⁵⁰

We care about equality because in a democracy we believe that it is wrong for the majority to impose "on minorities by the way of laws that provide different rules for the one than for the other."⁵¹ As Justice Jackson stated more than a quarter of a century ago:

[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. Courts can take no better measure to assure that laws will be just than to require that the laws be equal in operation.⁵²

All of this establishes that we should care, collectively and individually, about differences in treatment of people. An analysis based just on rights does not force us to focus on such differences or try to eliminate them. Only the concept of equality compels us to care about the way we treat people in reference to each other.

B. *Analytical Necessity*

A concept is analytically necessary if it creates an argumentative burden that would not otherwise exist. That is, a concept is analytically useful if it determines who has the benefit of a presumption in a

49. John Dewey writes: "Social welfare is promoted because the cumulative, but undesignated and unplanned, effect of the convergence of a multitude of individual efforts is to increase the commodities and services put at the disposal of men collectively, of society." J. DEWEY, *LIBERALISM AND SOCIAL ACTION* 8 (1933).

50. J. ROUSSEAU, *THE SOCIAL CONTRACT* Book II, Ch. IV (Paris 1762), reprinted in F. COKER, *READINGS IN POLITICAL PHILOSOPHY* 646-47 (rev. ed. 1938).

51. Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 674 (1970).

52. *Railway Express Agency v. New York*, 336 U.S. 106, 111-13 (1949) (Jackson, J., concurring).

dispute and who must bear the burden of proof.⁵³ The concept of equality does just this by creating a presumption that people should be treated alike, and puts the burden of proof on those who wish to impose differences in treatment.⁵⁴ As Professors Coons, Clune and Sugarman observe:

There is that enduring something which causes us to ask the state to make its case for distinguishing two humans, if it is to treat them differently; the state may make the case in a thousand ways and it may be assisted in this by presumptions galore, but make it it must.⁵⁵

The concept of equality is analytically necessary because it forces the government to justify inequalities that might otherwise go unnoticed or unremedied.

Professor Westen develops two arguments as to why he believes the presumption of equality is useless. First, he argues that the presumption of equality cannot be "derived logically from the idea of equality."⁵⁶ That is, the idea of equality commands us to treat "likes" alike and to treat "unalikes" unlike. Therefore, Professor Westen concludes that "a presumption in favor of treating people alike is as unjustified as a presumption in favor of treating them *unlike*; each presumption creates an unjustified risk that it will deny people the treatment to which they are actually entitled."⁵⁷

As a matter of formal logic, Professor Westen is correct that there is no reason to presume equality rather than inequality. However, if one leaves the realm of formal logic and considers actual experience, there is no doubt that our concern should be with the possibility of unjustified discrimination, not the chance of unjustified equal treatment. History unequivocally demonstrates that what we most have to fear is government treating differently people who deserve like treatment. In a society with a legacy of racism and sexism, it is idle fancy to worry that at times we might err by not discriminating enough. Professor Westen is right that the presumption of equality cannot be derived via formal logic from the idea of equality. That, however, does not deny that the concept of equality is necessary because without it there obviously could not be a presumption of equality, a presumption easily justified on the basis of experience.

This empirical argument, however, has its own internal logic.

53. See Whately, *Presumption and Burden of Proof*, in READINGS IN ARGUMENTATION 26-29 (J. Anderson & P. Dovre eds. 1968).

54. See, e.g., B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 15-17, 53-58 (1980). Evans, *Equality, Ambiguity and Public Choice*, 14 CREIGHTON L. REV. 1385, 1386-87 (1981).

55. J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 41, at 302.

56. *Equality*, *supra* note 3, at 571.

57. *Id.* at 573 (emphasis in original) (footnote omitted).

Professor Westen contends that if political decisionmakers vigilantly protected the substantive rights of everyone in society, then a presumption of like treatment would serve little purpose and, in fact, would be undesirable because of the risk of treating unlike cases alike. But politically powerful groups controlling government do not *randomly* infringe rights. Rather, political dominance tends to cause systematic mistreatment of and discrimination against the powerless. In democracies, and especially in America, the politically powerless usually are members of various minorities. A presumption of like rather than unlike treatment, as Justice Jackson so tellingly observed,⁵⁸ requires the dominant group to live by its own rules. No other principle so systematically and comprehensively restrains the abuse of political power.

Second, Professor Westen argues that the presumption of equality is useless because "it is totally indeterminate." That is, Professor Westen contends that the presumption of equality cannot "distinguish 'like' from 'unlike' treatments."⁵⁹ He argues that "the presumption itself contains no standards for distinguishing 'good' from 'bad' reasons for treating people unlike, and so it cannot tell an actor when the presumption is rebutted."⁶⁰

Again, Professor Westen confuses necessary and sufficient conditions. The presumption of equality, like the concept of equality itself, is not sufficient. Other standards are necessary to decide when the presumption has been met. This, however, does not mean that the presumption is empty. It is analytically essential in that it forces the government to justify differences in treatment. It is irrelevant that other standards must be developed to decide what differences are legitimate and which are impermissible. Without a presumption of equality the government never would have to justify the differences at all.

Consider, for example, the requirement that all differences in treatment must be justified by at least a rational reason.⁶¹ Absent a presumption of equality there would be no reason to require rationality. In a democracy it is likely that majoritarian politics will lead to many irrational laws.⁶² Certainly, we don't demand rationality

58. See note 52 *supra* and accompanying text.

59. *Equality*, *supra* note 3, at 575 (footnotes omitted).

60. *Id.* at 575.

61. The classic formulation of the rational basis test is that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

62. See Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 212 (1976) ("[a] policy

and have courts review legislation solely because intellectually we want our society to be a rational one. Rather, there is a requirement for minimum rationality because some are disadvantaged by any law.⁶³ The disadvantage should not be tolerated unless there is a rational reason for it. Contrary to Professor Westen's assertion, the presumption of equality is the basis for the rationality requirement.⁶⁴

Granting Professor Westen's arguments about the presumption of like treatment, then, does not undermine its usefulness. Indeed, the difficulty of identifying what reasons justify difference in treatment among like people virtually compels such a presumption, for human experience strongly suggests that the danger of erroneous discrimination incomparably exceeds the danger of erroneous uniformity. A presumption of equality provides an analytical counterweight to the prejudices of dominant groups, thereby serving a critical political function no other concept can perform as well.

C. *Rhetorical Necessity*

A concept is rhetorically useful if it helps us to persuade people to accept a result that we believe is justified. Even if equality does not add anything morally or analytically, it is still a necessary concept if it causes people to protect rights that they otherwise would ignore. Equality is a symbol that has tremendous emotive force. Even Professor Westen admits that equality is a powerful and per-

often results from the accommodation of competing and mutually inconsistent values, or because it simply intends to favor one interest at the expense of another, or because it represents only a judgment of the justice or equities on the immediate issue without intending to accomplish any further aim."); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27 ("Many public policies are . . . explained as the outcome of a pure power struggle — clothed in a rhetoric of public interest that is a mere figleaf . . .").

63. See, e.g., Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949):

The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that of inequality." In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by doctrine of reasonable classification.

(footnote omitted). See also Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068-69 (1979):

But what, if anything, does the rationality requirement have to do with equal protection? . . . The typical claim that a classification fails the rationality requirement can be understood as a demand for an answer . . . to the question, "Why *me* but no one else?" A satisfactory answer must point to a relevant objective difference between the included class and others to which government may attach significance.

(emphasis in original) (footnotes omitted).

64. The rational basis test applies the fourteenth amendment's requirement of the "equal protection of the laws."

suasive rhetorical concept. He observes that "arguments in the form of equality invariably place all opposing arguments on the 'defensive.'"⁶⁵ Society feels "constrained by the very word — to deny equality is almost to blaspheme."⁶⁶

For example, the emotional power of the ideal of equality has been instrumental in causing society to reduce racial injustices. Professor Westen believes that racial discrimination should be viewed as an infringement on the right not to be stigmatized.⁶⁷ Are people more likely to rally behind the concept of racial equality or the right not to be stigmatized?

As argued earlier, part of what makes equality such a compelling ideal is that it guarantees *everyone* an important measure of political security.⁶⁸ Thus everyone can rally to the principle of equality in a way that they will not rally to the protection of more particular principles and rights. Even if cold analysis in terms of rights would lead to the same conclusion, those who suffer the violation of their rights could not appeal so effectively to the broad mainstream of political power by relying on that analysis. Equality is a rhetorically necessary concept precisely because it will lead people to safeguard rights that otherwise would go unprotected.

Professor Westen probably would reply to this by contending that even if this were true, the concept of equality is misleading and the confusion it causes outweighs any benefits it provides. Part III examines Professor Westen's claims concerning the "confusions of equality."

III. IS EQUALITY INHERENTLY CONFUSING?

Professor Westen develops four reasons why he believes that "equality confuses far more than it clarifies."⁶⁹ In analyzing Professor Westen's reasons, the key question is whether he identifies problems *inherent* to the concept of equality. Any concept can be misused. There can be no denying that, at times, the Court has used equality in a misleading way.⁷⁰ The issue is whether such inadequa-

65. *Equality*, *supra* note 3, at 593 (footnote omitted) (note especially the sources cited at 593 n.192).

66. *Id.* at 593 n.192 (quoting W. RYAN, *EQUALITY* 3 (1981)).

67. *Id.* at 567-69.

68. See notes 44-49 *supra* and accompanying text.

69. *Equality*, *supra* note 3, at 579 (footnote omitted).

70. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974), where the Court held that a state insurance plan that excluded coverage for disability that accompanies normal pregnancy and childbirth does not invidiously discriminate against women. The Court held that pregnancy is not a "sex-based classification" because "[t]he program divides potential recipi-

cies are inherent to equality analysis, or whether it is possible to apply the principle of equality without confusion. I conclude that not only are Professor Westen's criticisms not inherent, but also that his "rights analysis" would be susceptible to the same criticisms and confusion. Consider each of Professor Westen's four reasons why equality is misleading.

A. *The Fallacy of the Independent Norm*

Professor Westen argues that

[t]he principle of equality is taken by some people to be an independent norm — a norm comparable to rights and liberties of speech, conscience, and religion. Such a perception conceals the need to look outside equality for substantive rights to give the principle content.⁷¹

If Professor Westen's point is that the Court should explicitly justify what makes a classification suspect or an interest fundamental,⁷² I completely agree. But there is nothing inherent in the concept of equality that prevents the Court from explaining the substantive basis for its conclusion that there is an unjustified inequality. In fact, the myriad of commentators, including Professor Westen, who have argued that equality analysis requires use of other values,⁷³ should help insure that the Court will explain the rationale for its equal protection decisions.

Furthermore, in most instances the Court has explained the substantive rights relied upon to give the principle of equality content. For example, in cases involving the right to vote,⁷⁴ the right to travel,⁷⁵ and the right of access to the courts,⁷⁶ the Court carefully explained why those interests should be regarded as fundamental. Likewise, in considering classifications based on such criteria as age,⁷⁷ alienage,⁷⁸ and gender,⁷⁹ the Court at least explained why it chose the level of scrutiny that it did. Certainly, we can differ with

ents into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."

71. *Equality*, *supra* note 3, at 580.

72. *Cf.* Karst, *supra* note 44, at 2 ("Neither the Court nor the commentators had much to say, in those latter days of the Warren era about what it was that made a classification suspect or an interest fundamental.").

73. *See* note 6 *supra*.

74. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

75. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

76. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

77. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

78. *See, e.g.*, *Ambach v. Norwalk*, 441 U.S. 68 (1979).

79. *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Frontiero v. Richardson*, 411 U.S.

the Court's reasoning and conclusion, but Professor Westen is wrong in implying that equality analysis inevitably omits consideration of the underlying substantive right.

Professor Westen labels his first criticism the "fallacy of the independent norm." This label is misleading because equality is an independent norm. It is a moral imperative that we care about different treatment of people. Equality, of course, is also a dependent norm in that by itself it is insufficient to decide controversies. This, however, is not a criticism of equality because all concepts, including rights, are both dependent and independent norms. For example, consider the first amendment's protection of freedom of speech. In one sense, this is obviously an independent norm because it is a concept that is morally, analytically, and rhetorically necessary. In another sense, however, analysis of freedom of speech issues also depends on other norms. How do we decide what interests are sufficiently compelling to justify infringing freedom of speech? Nothing in the first amendment helps us decide this; other standards are necessary. How do we decide that political speech is more important than commercial speech⁸⁰ or sexually oriented expression?⁸¹ The first amendment makes no distinction among types of speech. Again, first amendment analysis depends on other standards and value judgments. In fact, why since 1937 has the Court aggressively protected the first amendment's protection of free speech while virtually ignoring the fifth amendment's protections of property?⁸² There is no differentiation of the importance of these rights in the Constitution. Even the decision to protect the first amendment is dependent on other norms. Freedom of speech and equality are both independent norms that depend on other principles for their content.

B. *The Fallacy of Equivalences*

Professor Westen contends that

[a]s a form for analyzing problems, equality is a search for equivalences. Unfortunately, by justifying particular moral and legal conclusions on the ground that one individual is "equal to" another, equality tends to mislead people into assuming that such persons are

677, 685-88 (1973) (plurality opinion) (explaining why strict scrutiny is appropriate for gender classifications).

80. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557 (1980) (use of intermediate scrutiny for commercial speech cases).

81. See *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

82. See, e.g., McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38.

generally equal for moral and legal purposes.⁸³

If Professor Westen's point is that concepts take on a life of their own and often are mistakenly applied to situations where they don't belong, I completely agree. This criticism, though, is applicable to all concepts, not just equality.⁸⁴ Furthermore, this criticism is not inherent in the use of any concept, including equality. In dealing with the principle of equality we must insist that in every case the courts consider whether the individuals should be treated as "likes" or "unalikes." Professor Westen is correct that we must guard against treating people as if they are alike for all purposes.⁸⁵ He is wrong, however, when he implies that the concept of equality invariably will lead us to treat people as if they are always alike.

In fact, Professor Westen's example of affirmative action belies his conclusion that equality misleads us into assuming that people are always the same. Professor Westen contends that much of the criticism of affirmative action is based on the mistaken notion that affirmative action is wrong because it discriminates against whites, just as earlier discrimination was wrong because it discriminated against blacks.⁸⁶ Yet the Court was not misled by this argument; the Court did not accept the idea that discrimination against whites is equal to discrimination against blacks.⁸⁷ Despite the danger which Professor Westen points out, the Court upheld affirmative action programs. In fact, the confusion over affirmative action that Professor Westen identifies likely stems from a rights analysis and not the concept of equality. For many years the Court had proclaimed that race was not a legitimate basis for classification.⁸⁸ This right, that government be color-blind, was inconsistent with affirmative action.

In other words, both rights analysis and equality can be wrongly applied. There is nothing inherent in the principle of equality that makes its misuse inevitable. Careful analysis can prevent the confusion Professor Westen discusses.

83. *Equality*, *supra* note 3, at 581.

84. For example, I would argue that the Court's protection of corporate political speech, *see* *First Natl. Bank v. Bellotti*, 435 U.S. 765 (1978), reflects a concept, freedom of speech, being applied to a context where it is not appropriate.

85. *Equality*, *supra* note 3, at 582-84.

86. *Id.* at 582.

87. *See* *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

88. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967); *Anderson v. Martin*, 375 U.S. 399 (1964).

C. *The Fallacy of Equal Scrutiny*

Professor Westen argues that equal protection analysis is misleading because it involves a rigid, categorical analysis. He contends that "[b]y forcing all constitutional claims into categorical levels of scrutiny equality may distort the variety of standards that are ordinarily thought to govern the resolution of substantive claims."⁸⁹ This argument is not an indictment of the concept of equality, but rather a criticism of the way that the Court has developed equal protection doctrines. Some justices⁹⁰ and many commentators⁹¹ have argued for eliminating the rigid two- or three-tier system for scrutinizing equal protection cases. Even Professor Westen admits that one way "to escape from the fallacy of thinking that all equality cases are subject to procrustean levels of scrutiny . . . is to retain equality as a form of argument while rejecting the notion that equality entails levels of scrutiny peculiar to itself."⁹² Professor Westen admits that careful analysis can prevent people from being misled by the levels of scrutiny:

The underlying right will not necessarily be distorted; existing equal protection doctrine can accommodate different rights within a single level of scrutiny by assigning different weights to the different interests served by the challenged classifications⁹³

In other words, the criticism of the current matrix for analyzing equal protection cases does not expose an inherent flaw of equality analysis.

Furthermore, the use of rigid levels of scrutiny is not unique to equal protection analysis. For example, in the area of freedom of speech the Court recently has held that commercial speech cases should be subjected to intermediate scrutiny.⁹⁴ Categories of scrutiny can be used in rights analysis, just as in considering equality issues.

D. *The Fallacy of Fungible Remedies*

Finally, Professor Westen argues, equality is confusing because some have wrongly argued that "equality provides a richer and more

89. *Equality*, *supra* note 3, at 586 (footnote omitted).

90. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).

91. See, e.g., Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

92. *Equality*, *supra* note 3, at 586.

93. *Id.* at 586 n.171.

94. *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557 (1980).

flexible array of remedies than do rights.”⁹⁵ The argument made in favor of equality is that

when a legislative burden violates one person's rights, the only legislative response that can remedy the violation is to remove the burden altogether. In contrast, when a legislative burden denies one person equal treatment vis-à-vis another, the denial can be remedied by any legislative response that results in treating them the same. The principle of equality is presumably indifferent to whether the legislature responds by removing the burden from him or extending it to everyone. Consequently, since equality envisages a wider range of legislative responses and therefore intrudes less into the democratic process, equality is the preferable form of *analysis*.⁹⁶

Professor Westen offers a number of persuasive reasons why equality doesn't actually have this advantage over rights analysis. He argues that the range of remedies is, overall, equally narrow or broad.⁹⁷

Assume that Professor Westen is correct that remedies for denial of equality are not more flexible than are remedies for infringement of rights. This means only that one benefit traditionally attributed to the principle of equality is removed. In no way does it mean that the concept of equality is misleading because there is nothing inherent in that concept which leads us to believe that equality analysis is less intrusive into the democratic process. Nor does attacking this benefit of equality reduce the need for the concept.

At the outset of his article, Professor Westen rejects as illogical a view of equality that requires equal but unspecified treatment of all “equal” people, because it would justify providing a benefit to everyone or providing it to no one.⁹⁸ Recall Professor Westen's claim that it is absurd to say that all Rhodes Scholars should have a fellowship to Magdalen College or that none should get it.⁹⁹ Implicitly, he is arguing that rights analysis would not allow such seemingly contradictory results. In other words, in this view (which I have defended earlier),¹⁰⁰ equality analysis offers a greater range of choices, albeit by Professor Westen's analysis an illogical range, than would rights analysis. As such, equality analysis does offer the legislature more choices in remedying a constitutional violation than would rights analysis, contradicting Professor Westen's claim of the “fallacy of fungible remedies.”

95. *Equality*, *supra* note 3, at 587.

96. *Id.* at 587 (citing *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

97. *Id.* at 587-92.

98. *Id.* at 545-46; see text accompanying notes 8-13 *supra*.

99. *Id.* at 545-46.

100. See text accompanying notes 12-14 *supra*.

IV. PROFESSOR WESTEN'S CRUCIAL ADMISSION: EQUALITY IS NECESSARY

Professor Westen concludes his article by claiming that we "can do without equality altogether."¹⁰¹ The previous three sections have discussed why this is a totally unjustified conclusion. In fact, careful examination of Professor Westen's alternative to the concept of equality reveals that he does not do away with the concept of equality; he merely hides it under a different label.

Professor Westen suggests that the concept of equality can be replaced by focusing on the underlying substantive rights. For example, commentators and courts should focus on the right to justice or the right to due process rather than use the concept of equality.¹⁰² Yet, if one asks what does it mean to provide the right to justice or the right to due process, part of the answer is providing equality. As Professor Westen states:

In short to say that "every person should be given his due" means "persons who are alike should be treated alike" and "persons who are unlike should be treated *unlike*."¹⁰³

Furthermore, Professor Westen admits that the concept of equal protection is inherent in a right to due process:

[T]here is no necessary tension between the constitutional language of substantive "due process" and the constitutional language of "equal protection," because "giving every person his due" means "treating like persons alike." There is no necessary difference between a national constitution that contains an equal protection clause (and omits a due process clause) and a national constitution that contains a due process clause (and omits an equal protection clause). That is why the Supreme Court's substantive due process jurisprudence can mirror its equal protection jurisprudence without doing violence to the text.¹⁰⁴

Professor Westen implies that we should focus on the right to due process rather than the concept of equality. He admits, however, that the right of due process necessarily includes the concept of equality. He does not do away with the idea of equality; he simply conceals it as part of the rights to justice and due process.

If Professor Westen is correct, the accurate analyses of legal and moral issues will arrive at the same result regardless of whether the argument takes the form of equality or of underlying rights. Careful analysis can avoid the fallacies Professor Westen ascribes to equal-

101. *Equality*, *supra* note 3, at 596.

102. These two rights are interchangeable since "'[j]ustice' means 'giving every person his due.'" *Id.* at 556.

103. *Id.* at 557.

104. *Id.* at 559 n.69.

ity, and inaccurate analysis can infect arguments in terms of rights with the same fallacies. Consequently, the risk of error should dictate the form of argument: Is analysis in terms of rights or of equality more likely to lead to the result that either would reach if properly conducted? In other words, given the biases that exist in legal and political decisionmaking, what biases should we build into the form of argument itself? I believe that the dangers of political perversity by dominant groups clearly outweigh the risks of inaccurate analysis, which in any event apply alike to thinking in terms of equality and rights. Equality, by confronting the powerful with the presumption that the rules they impose will apply to themselves as well as to others, and by affording the powerless a potent rhetorical appeal to the powerful, diminishes this greater danger in ways that rights analysis cannot. At least with respect to issues historically subject to the tragic consequences of unjustifiable discrimination, equality offers the superior "explanatory norm."

CONCLUSION

Despite all of my disagreements with Professor Westen, I believe that his article makes a crucial point. Equality cannot be used as a talismanic incantation to decide controversies. It is essential that we not only focus on equality, but also examine the underlying substantive rights. It appears that our society has become frustrated with the idea of equality: Consider the tension over affirmative action and the failure to ratify the Equal Rights Amendment.¹⁰⁵ Therefore, it is especially important that politicians, commentators, and courts do more than speak of equality; they must explain why the inequalities are intolerable. These explanations, by definition, will require discussion of social values and rights which persuade us that we must act to eliminate inequality.

Still, this point of agreement cannot mask my fundamental disagreement with Professor Westen's conclusion and methodology. It has become fashionable for commentators to "trash" legal and philosophical principles.¹⁰⁶ Authors like Professor Westen develop elaborate arguments that a concept is unnecessary because it is not determinative. Such approaches are both misleading and dangerous. The attacks are misleading because they confuse necessary and suffi-

105. See W. RYAN, *EQUALITY* 4 (1981).

106. For example, Professor Westen cites articles arguing that concepts such as freedom and justice are empty and unnecessary. *Equality*, *supra* note 3, at 547 n.31 (citing MacCallum, *Negative and Positive Freedom*, 76 *PHIL. REV.* 312 (1967)); *id.* at 556 n.66 (citing H. Kelsen, *Aristotle's Doctrine of Justice*, in *WHAT IS JUSTICE?* 135-36 (1957)).

cient conditions. No concept by itself is sufficient, but that doesn't prove that the concept is unnecessary. Moreover, attacks on concepts such as equality are dangerous because these ideals are crucial in helping us to form the ideal of a better society. They represent moral imperatives that should not be eliminated. I believe that analysis should focus on how to achieve equality, not how to do without it.