Michigan Law Review

Volume 81 | Issue 3

1983

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Recommended Citation

Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983).

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THE MEANING OF EQUALITY IN LAW, SCIENCE, MATH, AND MORALS: A REPLY†

*Peter Westen**

My argument about equality can be simply stated. Equality, I argue, has two qualities that together disqualify it as an explanatory norm in law and morals. It is both empty and confusing: “empty” in that it derives its entire meaning from normative standards that logically precede it; “confusing” in that it obscures the content of the normative standards that logically precede it.

Professors Erwin Chemerinsky and Anthony D’Amato challenge these assertions. They both deny that equality is empty, by arguing that equality is an independent value with normative content of its own. Professor Chemerinsky further denies that equality is confusing, by arguing that equality is rhetorically superior to alternative normative concepts.

I am grateful to Professors Chemerinsky and D’Amato for taking my argument seriously, and for taking the time and thought to respond. I am afraid, however, that their arguments fail to persuade me. Indeed, if anything, their arguments further demonstrate how empty and truly confusing equality is.

Their arguments, nevertheless, have clarified my thinking in one respect. They have caused me to see more clearly than I did before that my principal assertions about equality — that equality is empty, and that equality is confusing — are true in quite different ways. That equality is empty is an analytical truth. It is true in the same way (and for the same reason) that it is true that 2 plus 2 equals 4. It is a subject on which reasonable people cannot differ. That equality is confusing, on the other hand, is a truth of a different kind. It cannot be proved in the same way that 2 plus 2 can be proved to equal 4. It is something about which people may reasonably differ. Yet it is true, I believe, in the same way that most assertions in law and

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I would like to thank my friends and colleagues, John Chamberlin, Tom Green, Kenneth Karst, and Terry Sandalow, for generously reading an earlier draft of this article, and my research assistant, Robert Stoddard, for his indefatigable efforts.

morals are true — because the arguments in its favor are more persuasive, more reasonable, than the arguments against it.¹

I shall set forth my thesis in Part I, using the Declaration of Independence (“all men are created equal”) to illustrate that the emptiness of equality inheres in its very meaning, and that the confusions of equality result from neglecting its meaning. In Part II, I respond to Professors Chemerinsky’s and D’Amato’s reasons for believing that equality has independent normative content of its own. In Part III, I respond to Professor Chemerinsky’s separate reasons for believing that equality is rhetorically useful.

I. THE MEANING OF EQUALITY

The emptiness and confusions of equality can be illustrated in countless ways. Consider the Declaration of Independence. “We hold these truths to be self evident,” it declares, “that all men are created equal.” Few issues in American history have been subjected to more debate than the truth and meaning of the latter declaration.² The most famous and, perhaps, most momentous debate on the subject took place between Senator Stephen Douglas and candidate Abraham Lincoln in the Illinois senatorial campaign of 1858. The Lincoln-Douglas debates focused in large part on whether blacks and whites are equal within the meaning of the Declaration of Independence. Stephen Douglas argued that blacks and whites are not equal in law or fact, and are not declared to be equal in the Declaration:

I hold that a negro is not and never ought to be a citizen of the United States. I hold that this Government was made on the white basis by white men, for the benefit of white men and their posterity forever, and should be administered by white men and none others. . . . I am aware that all the Abolition lecturers that you find traveling about through the country, are in the habit of reading the Declaration of Independence to prove that all men were created equal Mr. Lincoln is very much in the habit of . . . reading that part of the Declaration of Independence to prove that the negro was endowed by the Almighty with the inalienable right of equality with white men.

1. For the difference between truth in mathematics and truth in law — between logical truths, on the one hand, and rhetorical or dialectical or polemical truths, on the other hand — see C. PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 120-74 (1980); C. PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES* 1-61, 117-33 (1979). Cf. Burke, *Politics as Rhetoric*, 93 *ETHICS* 45, 46-47 (1982) (contrasting “authoritarian” political systems in which there is only one morally correct answer and in which the answer can be known with certainty with a “rhetorical” system grounded on the principles of “persuasion”).

2. For a recent contribution to the debate, see G. WILLS, *INVENTING AMERICA* 210-28 (1978).

Now, I say to you, my fellow-citizens, that in my opinion, the signers of the Declaration had no reference to the negro whatever, when they declared all men to be created equal. They desired to express by that phrase white men, men of European birth and European descent, and had no reference either to the negro, the savage Indians, the Fejee, the Malay, or any other inferior and degraded race, when they spoke of the equality of men.³

Abraham Lincoln argued that while blacks and whites are unequal to one another in "color," they are equal to one another in their essential rights and are declared to be so in the Declaration of Independence:

I adhere to the Declaration of Independence. If Judge Douglas and his friends are not willing to stand by it, let them come up and amend it. Let them make it read that all men are created equal except negroes. Let us have it decided, whether the Declaration of Independence, in this blessed year of 1858, shall thus be amended.

. . . .

My declarations upon this subject of negro slavery may be misrepresented, but cannot be misunderstood. I have said that I do not understand the Declaration to mean that all men were created equal in all respects. They are not our equal in color; but I suppose it does mean to declare that all men are equal in some respects; they are equal in their right to "life, liberty, and the pursuit of happiness".⁴

The two speakers, Lincoln and Douglas, thought they disagreed about whether blacks and whites are created equal. They were mistaken. They did not clearly understand what equality means; and not understanding it, they allowed equality to create disagreements that did not exist and to mask disagreements that did exist. They thought they disagreed about whether blacks and whites are equal, but in fact they disagreed about the standard by which to measure the equality or inequality of blacks and whites in one particular respect — their capacity for enslavement.

To understand the Lincoln-Douglas confusion about equality, one must understand what equality means. What is the core meaning of equality? What is the common logic that links equality in mathematics with equality in law and morals? What does the statement "2 plus 2 equals 4" have in common with the principle "[n]o

3. Speech of Stephen A. Douglas at Jonesboro, Sept. 15, 1858, in *POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN A. DOUGLAS* 116 (1860) [hereinafter cited as *THE LINCOLN-DOUGLAS DEBATES*].

4. Speech of Abraham Lincoln at Springfield, July 17, 1858, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 3, at 63. "It is doubtful," it has been said, "that any forensic duel . . . ever held the power of decision over the future of a great people as these debates did." H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 19 (1959).

State shall . . . deny to any person within its jurisdiction the equal protection of the laws”?

A. *The Definition of Equality*

Equality, at first glance, appears to mean something different in math and science than in law and morals. We use it in math and science to state things as they *are*; we use it in law and morals to state things as they *should* be. The former is a set of descriptive statements, the latter a set of prescriptive statements. In reality, however, there is no difference at all between the two sets of statements — no difference, that is, as far as equality is concerned. The concept of equality is one and the same in all its usages. To demonstrate this, we begin with the meaning of equality in descriptive statements and then move to its meaning in prescriptive statements.

1. *Descriptive Equality*

What do we mean when we say that two atomic particles are “equal” or “unequal,” or that the speeds of two objects are equal or unequal to one another, or that $2 + 2$ is equal to 4 and unequal to 3? What are the constituent elements of “equality” and “inequality” in such descriptive statements?

To begin with, descriptive statements of equality and inequality cannot be made about solitary things. No single thing, standing alone, can be either equal or unequal. To say a thing is equal or unequal is to say it is equal or unequal *to* something — that is, to something *else*. Statements of descriptive equality and inequality thus presuppose plurality.⁵

Plurality alone, however, does not suffice to explain equality and inequality. Conjunctive and disjunctive terms also presuppose a plurality of objects, but the objects do not necessarily stand to one another in relationships of equality or inequality. The conjunctive term “and” presupposes two objects, but the objects so joined have no necessary relationship to one another beyond their conjunction. In contrast, to say that two objects are equal or unequal does more than conjoin them. It *compares* them. It describes the two objects by reference to one another. Thus, statements of equality and inequality — like statements that one thing is larger than another, or

5. “In the case of identity there is only one object corresponding to the name whereas in the case of equality we are dealing with two objects.” Menne, *Identity, Equality, Similarity: A Logico-Philosophical Investigation*, 4 *RATIO* 50, 57 (1962); *id.* at 51 (Statements of equality and inequality “presuppos[e] two objects.”).

smaller, or similar, or dissimilar — are “comparative” in nature.⁶

All comparative statements, including statements of equality and inequality, presuppose external standards of measurement. One cannot declare one woman to be more beautiful than another without first possessing a standard of what counts as “beautiful.”⁷ The same is also true of equality and inequality. One cannot declare two things to be equal or unequal without first comparing them, and one cannot compare them without first possessing a standard by which they can be jointly measured. A rainbow and a Wordsworth ode, it is said, are “neither equal nor unequal,” because “we have no [common] measure or standard for comparing them.”⁸

Equality and inequality differ, however, from other comparative concepts. Their distinctive meanings are implicit in the ordinary way we talk.⁹ Consider the way we talk about money. A ten-dollar

6. See J. FEINBERG, *Noncomparative Justice*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 265, 265-68, 278 (1980).

7. Thomas Jefferson, for example, believed that Caucasians are more beautiful than Negroes, but his belief was necessarily based on the positing of particular standards of physical beauty:

The first difference [between whites and blacks] which strikes us is that of colour. . . . And is this difference of no importance? Is it not the foundation of a greater or less share of beauty in the two races? Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immoveable veil of black which covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of whites, declared by their preference of them

T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 138 (W. Peden ed. 1972).

8. E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 38-39 (1980) (emphasis in original). See also *id.* at 38:

You wouldn't be understood if you said that a rose and a hyacinth were unequal, not unless it was understood what standard of comparison you had in mind. There might be such measure — depth of color, for instance, or size, or even fragrance. But the judgment of inequality and a measure go together, the former requires the latter.

. . . [A] judgment of inequality presumes that there is *some* measure, otherwise the judgment would not make sense.

. . . As a dog and a cat are not unequal, they are not equal either. And a rose and a hyacinth are neither equal nor unequal. Neither “equality” nor “inequality” need apply, because in these instances a measure is lacking.

9. See Bedau, *Egalitarianism and the Idea of Equality*, in *NOMOS IX: EQUALITY* 3, 5-7 (J. Chapman & J. Pennock eds. 1967); Menne, *supra* note 5 at 51.

I do not mean to suggest that words derive their meaning entirely from antecedent definitions, or that people learn to communicate through words by first mastering dictionary meanings. The process is often precisely the opposite: Words derive their meanings, their definitions, from the way they are used. As a consequence, words in ordinary language can rarely be cabined within determinate definitions. Consider the term “identical,” for example. We speak of “identical twins,” yet we obviously do not mean that the twins are identical in every descriptive respect. We mean, rather, that though the twins are not entirely identical — though they are not the same person — they are identical in controlling respects, *i.e.*, genetically. We mean, in other words, that the twins are genetically “equal.” Yet we can use “identical” in connection with “twins” without thereby confusing people into thinking that we are referring to two persons who are identical in every respect (in the way, for example, that the President of the United States and Ronald Reagan are identical in every respect), because the word “twin” *presupposes* two persons who are logically and inevitably different in some re-

bill and a twenty-dollar bill are "similar," but they are not "equal" to one another; David's one-dollar bill and Mary's one-dollar bill are "equal," but they are not the "same" one-dollar bill. The distinctive meanings of equality and inequality also appear in mathematics. The sum of $2 + 2$ is "equal" to 4, not "similar" to 4; the sum of $2 + 2$ is "unequal" to 3, not "dissimilar" to 3. The numbers 31 and 13 are "similar" to one another, but they are not "equal" to one another. The symbols $2 + 2$ and the symbol 4 are "equal" to one another, but they are not the "same" symbol.

What, then, distinguishes equality from "similarity," and inequality from "dissimilarity"? The answer, it seems, is that equality and inequality seem to connote a *greater* sameness and a greater difference, respectively, than do "similarity" and "dissimilarity." A ten-dollar bill and a twenty-dollar bill are similar, but they are not also equal, because they are not sufficiently *the same* as one another to qualify as equal. They are the same in some important respects, but not in others: the same in shape and size and weight and color, but not in the important respect of monetary value. By the same token, an arabic numeral three ("3") and a roman numeral three ("III") are quite dissimilar in their particular configurations, but they are not also unequal, because they are not sufficiently different from one another to qualify as "unequal." A roman numeral three is different in some important respects, but not in others: different in the angularity of its shape, the straightness of its lines, and the disconnectedness of its parts, but not in the important respect of numerical value.

To some observers this suggests that saying things are equal or unequal means that they are the same or different, respectively, in

spects. The same is also true of the terms "same" and "similar" as they appear in the axioms, "people who are the same should be treated the same," and "people who are similarly situated should be treated similarly." To say two people are the "same" in the context of the axiom does not mean that they are identical in *every* respect; it means, rather, that they are the same in the *controlling* respect — the very same thing that we ordinarily mean by "equal." By the same token, to say people are "similarly situated" does not mean that they are identically situated in *less* than all controlling respects; it means, rather, that they are identically situated in *all* controlling respects — again, the very thing that we ordinarily mean by "equal." Yet we use the terms "same" and "similar" in the two axioms interchangeably with the term "equal" (as in "equals should be treated equally"), because in the context of the axioms, there is little danger of confusing people regarding the senses in which we are using the terms.

Nevertheless, though the three terms can be used interchangeably without confusion in some contexts, they cannot be used interchangeably without confusion in all contexts, because they have discrete meanings that would be lost or confused in the latter contexts. Thus, there is a decided difference between saying David and Mary have an "equal" vote, and saying they have the "same" vote — a difference that inheres in the discrete meanings and uses of "equal" and "same." We know the difference in meaning, because we know how to use and not to use the two terms in contexts in which interchanging them would cause confusion.

every possible respect.¹⁰ But that cannot be so. For just as "similar" differs from "equal" in its lack of *sufficient* identity, so, too, "equal" differs from "same" in its lack of *complete* identity; and just as "dissimilar" differs from "unequal" in its lack of sufficient *nonidentity*, "unequal" differs from "different" in its lack of complete nonidentity. Thus, David's one-dollar bill and Mary's one-dollar bill are equal, but they are not the same one-dollar bill, because David's one-dollar bill is not identical to Mary's in every possible respect. No two things in the world can ever be identical in every respect, because things that are identical in every possible respect are no longer two things, but one and the same thing.¹¹ David's one-dollar bill cannot be the same as Mary's in every respect because it contains different molecules and occupies different space. Conversely, nickels and dimes are unequal in value, but they are not different from one another in every possible respect, because they possess essential features in common. No two things in the world are completely different in every respect because they would then no longer be things of the world. All material things are identical in containing matter and occupying space; all tangible and intangible things that can be conceived by the mind are identical in being conceivable by the mind.

With regard to the sufficiency of their identity and nonidentity, therefore, equal falls somewhere between "similar," on the one hand, and "same," on the other hand; and unequal falls somewhere between "dissimilar," on the one hand, and "different," on the other hand. To say two things are equal means that they are identical in more important respects than things that are merely similar.¹² Yet to say two things are equal also means that they are less completely identical than things that are one and the same thing.¹³ (The same

10. Plato seems to have taken this position in arguing that no two material things can ever be "absolute[ly]" equal because there will always be some sense in which they are unequal. See PLATO, *Phaedo* 74b-c, in 1 THE DIALOGUES OF PLATO 401-02 (B. Jowett trans. 1874). Cf. E. WOLGAST, *supra* note 8, at 40 (suggesting that to say two persons are "equal" means they are interchangeable in all respects).

11. Leibnitz demonstrated the truth of this statement in what has come to be known as his Principle of the Identity of Indiscernibles. See W. RABINOWICZ, UNIVERSALIZABILITY 24-25, 113-14 (1979).

12. Thus two dresses are called "similar" when they have the same colour and shape but are made up of different kinds of material and they may also differ in the buttons and added embellishments. Two cars may be called "similar" if they have the same body but different colours and engines of different power. This kind of similarity is called by Ziehen "frustal similarity" (from the Latin "frustum" which means piece or fragment). Menne, *supra* note 5, at 60.

13. We are confronted here with two names, but in the case of identity there is only one object corresponding to the name whereas in the case of equality we are dealing with two objects. Menne, *supra* note 5, at 57.

Dare we generalize from the facts so far by saying that "equal" means "same," as though the two words were synonymous? Clearly not; the requisite condition of substitutivity for

relationships obtain between "dissimilar" and "unequal," and "unequal" and "different".¹⁴ What, then, is this in-between relationship of "equality" that we invoke so easily in ordinary discourse?

The answer may be clear by now. To say two things are descriptively equal does not mean they are identical in *some* significant respects (like things that are similar); and it does not mean they are identical in *all* respects (like something that is one and the same thing). It means that they are identical in *all significant* descriptive respects. By the same token, to say two or more things are descriptively unequal means they are *not* identical in all significant descriptive respects. To reduce the two concepts to their constituent parts, to speak of descriptive "equals" is to say that (i) two or more things, (ii) have been compared to one another by reference to a particular descriptive standard of measurement, (iii) and have been found to be identical by reference to that particular standard. To speak of descriptive "unequals" is to say that (i) two or more things, (ii) have been compared to one another by reference to a particular descriptive standard of measurement, (iii) and have been found to be non-identical by that particular standard.

To illustrate, consider the previous examples. When we say that a ten-dollar bill and a twenty-dollar bill are descriptively similar, we mean that by given descriptive standards of color, shape, size, weight and value, the ten-dollar bill is identical to the twenty-dollar bill in some respects, but not in others. When we say David's one-dollar bill and Mary's one-dollar bill are equal, we do not mean the two bills are identical in every possible descriptive respect, because no two things are identical in every possible respect. We mean, rather, that they are identical in all the descriptive respects we deem relevant,

synonym-pairs fails for this pair. If I gave Mark and Paul equal servings, I did not give them the same serving; what I did was to serve them the same amount, servings of the same size. If I gave you the same answer I gave him, I didn't give you an answer equal to the one I gave him; I gave you the very answer I gave him.

Bedau, *supra* note 9, at 7 (emphasis in original). See also *id.* at 8 ("Equality, thus, not only does not imply identity, it implies non-identity.") (footnote omitted); *id.* at 12 ("We have also seen that things equal to each other are never the same as each other, *i.e.*, the very same thing."); notes 10-11 *supra*.

14. Things that are "unequal" are nonidentical in more important ways than things that are merely dissimilar, and they are nonidentical in less complete ways than things that are truly different.

To be sure, no two things can ever be nonidentical in every possible respect, any more than any two things can ever be identical in every possible respect. It follows, therefore, that when someone says that two things are "different," he cannot mean that they are nonidentical in every respect — any more than he can mean by saying two things are the "same" that they are identical in every respect. Rather, in saying two things are different, he means that they are nonidentical in all *apparent* respects, just as in saying two things are the "same" he means that they are identical in all *apparent* respects.

whether the relevant respect be value alone, or a combination of value, shape, size, weight, and color.¹⁵ By the same token, when we say that 13 and 31 are unequal, we do not mean that they are non-identical in every possible descriptive respect. We mean, rather, that they are nonidentical in the particular descriptive respect that is deemed relevant by the conventions of mathematics — that is, in respect to their numerical value.

These meanings of descriptive equality and inequality entail several important consequences. First, since all material things in the world are descriptively identical to one another in one or more respects, it follows that they are all descriptively "equal" to one another in one or more respects. Since all material things are also descriptively nonidentical in one or more respects, it also follows that all things are also descriptively "unequal" in one or more respects. The combination of the two means that things that are descriptively equal in a certain respect are, necessarily, descriptively unequal in some other respect.¹⁶

Furthermore, it follows from the meanings of descriptive equality and inequality that, descriptively, the notion of "absolute"¹⁷ equality is either redundant or contradictory — depending upon what is meant by "absolute." If by absolute equality one means that two or more things are completely and perfectly identical in the relevant descriptive respect, the term "absolute" is redundant, because *every*

15. Bedau, *supra* note 9, at 7.

16. Bedau, *supra* note 9, at 8; Menne, *supra* note 5, at 53-54 ("[I]f two individuals *x* and *y* have the identical property *F* but are themselves not identical, then they must differ at least in a property *G*.").

17. And shall we . . . affirm that there is a such a thing as equality, not of wood with wood, or of stone with stone, but that, over and above this, there is equality in the abstract? Shall we affirm this?

Affirm, yes, and swear to it, replied Simmias, with all the confidence in life.

. . . .

And whence did we obtain this knowledge? Did we not see equalities of material things, such as pieces of wood and stone, and gather from them the idea of an equality which is different from them? — you will admit that? Or look at the matter again in this way: Do not the same pieces of wood or stone appear at one time equal, and at another time unequal?

That is certain.

But are real equals ever unequal? Or is the idea of equality ever inequality?

That surely was never yet known, Socrates.

. . . .

But what would you say of equal portions of wood and stone, or other material equals? And what is the impression produced by them? Are they equals in the same sense as absolute equality? Or do they fall short of this in a measure?

Yes, he said, in a very great measure too.

. . . .

Then we must have known absolute equality previously to the time when we first saw the material equals, and reflected that all these apparent equals aim at this absolute equality, but fall short of it?

PLATO, *supra* note 10, 74-75, at 401-02.

relationship of descriptive equality is absolute in that sense. To say two or more things are descriptively equal in a certain respect *means* that they are completely and perfectly identical by reference to that particular descriptive standard.¹⁸ To say David's and Mary's one-dollar bills are descriptively equal in value means that in respect of their monetary value they are completely and perfectly identical. On the other hand, if by absolute equality one means that two or more things are descriptively identical in *every* possible descriptive respect, the term "absolute" is contradictory, because no two things are descriptively equal in that sense. To talk of descriptive equality is to talk of a relationship of comparison between two or more things; and to talk of two or more things is to talk of things that can never be identical in every possible descriptive respect.

Finally, it follows from the meanings of descriptive equality and inequality that statements of descriptive equality and inequality are inherently derivative. One cannot know whether two or more things are descriptively equal or unequal without first going through the steps of (i) identifying a descriptive standard for measuring them, (ii) invoking the descriptive standard to measure each of them, and (iii) comparing the results. Yet once one has performed the foregoing steps, one has nothing more to learn about the two things in terms of their equality or inequality. If the two things are discovered to be identical by the chosen standard, it follows that they are "equal." If they are discovered to be nonidentical by that standard, it follows that they are "unequal." Their equality or inequality is nothing but a derivative and conclusory statement of what it means to have compared them to one another by reference to a given descriptive standard.¹⁹

To illustrate the three foregoing conclusions, consider the rela-

18. See Bedau, *supra* note 13, at 7 ("Things that are equal in a certain respect will normally be quite dissimilar to each other in other respects; but whereas in the respect in which they are equal they are not merely similar but *the same*." (emphasis added); McCloskey, *Egalitarianism, Equality, and Justice*, 44 AUSTRALASIAN J. PHIL. 50, 54-55 (1966) (emphasis added):

It is true that we can say that two men have equal yet different abilities — *e.g.*, that one has a creative mind, the other a keen, critical intellect, or that two women are equally beautiful although having different styles of beauty, the one a cold, remote, formal beauty, the other a warm, vibrant, vital beauty. But in each case we should, if pressed, seek to justify our claim about the equality of ability, or of beauty, in terms of some *ultimate identity* of some sort. Otherwise, if we could not point to some such identity, we should withdraw the word "equally" and say that both are very able or very beautiful but in different ways.

19. See Brown, *Nonegalitarian Justice*, 56 AUSTRALASIAN J. PHIL. 48, 52 (1970) (all moral statements of equality are "derivative" and "consequential" in nature); Flathman, *Equality and Generalization, a Formal Analysis*, in NOMOS IX: EQUALITY 38, 51 (J. Chapman & J. Pennock, eds. 1967) (emphasis in original) ("Equality is a significant normative criterion only in a *derivative* sense").

tionship between two sticks of wood, one of which is 5 inches long, the other of which is 5½ inches long. Like all things in the world, the two sticks are descriptively equal in some respects, and descriptively unequal in other respects: equal in respect of whether or not they contain water molecules, unequal in respect of how many water molecules they contain. As with all things in the world, one cannot know whether they are descriptively equal or unequal without first positing a descriptive standard of measurement. Measured by the standard of whole inches, they are perfectly equal: they are "absolutely" identical in both being at least 5 inches long and yet less than 6 inches long. Measured by the standard of quarter inches, they are unequal: they are "absolutely" unequal in that one is 5 inches long and the other is 5½ inches long. To say they are descriptively equal or unequal merely restates, derivatively, their identity or nonidentity by reference to a given descriptive statement.

2. *Prescriptive Equality*

The meanings of descriptive equality and inequality should now be clear. What, then, is the relationship between descriptive equality and prescriptive equality? How does one move from a descriptive determination that two or more persons or things *are* equal (or unequal) to a prescriptive conclusion that they *ought to be treated* as equal (or unequal)?

The answer, of course, is that purely descriptive premises do not themselves generate prescriptive conclusions. One cannot derive an "ought" from an "is," and one cannot infer that people are prescriptively equal or unequal from a finding that they are descriptively equal or unequal.²⁰ Indeed, based on the previous discussion of descriptive equality and inequality, it is contradictory to suppose otherwise. All people are descriptively equal in some respects and descriptively unequal in other respects. If one could infer normative equality and inequality from empirical equality and inequality, one would have to conclude that all people are, at one and the same time, both morally equal and morally unequal to one another.

Prescriptive statements of equality and inequality nevertheless share an important feature in common with descriptive statements of equality and inequality. They both speak in the language of "equality" and "inequality" and, hence, both share in the common properties of that language. To say persons are morally or legally "equal" — like all statements of equality — presupposes the existence of at

20. See D. Hawkins, *The Science and Ethics of Equality* 11-12 (1977).

least *two* persons. It also presupposes a *comparison* of the two persons to one another and, hence, a *standard* of comparison. To say two people are morally or legally equal means that they are morally or legally identical to one another by some particular standard of comparison, just as saying they are legally or morally *unequal* means they are morally or legally *nonidentical* by some such standard.

The real difference between descriptive equality and prescriptive equality is not in the nature of the comparisons they connote, but in the standards by which the comparisons are made. Descriptive equality is premised on descriptive standards; prescriptive equality is premised on prescriptive standards. To say two things are descriptively equal means they are identical by reference to a given empirical standard that measures (or "describes") the way things are. To say two people are prescriptively equal means they are identical by reference to a given normative standard that measures (or "prescribes") the way people should be treated. The identities and nonidentities that prescriptive standards entail are a product of their structure. Prescriptive standards are statements or sentences of the form: "Persons who possess characteristics $C_1, C_2, C_3, \dots, C_{10}$, shall render to persons possessing traits $T_1, T_2, T_3, \dots, T_{10}$, treatment with features $F_1, F_2, F_3, \dots, F_{10}$, or suffer penalties with elements $E_1, E_2, E_3, \dots, E_{10}$, for failing to do so." As such, prescriptive standards contain two essential elements: First, they contain descriptive standards for identifying persons with characteristics $C_1, C_2, C_3, \dots, C_{10}$, persons with traits $T_1, T_2, T_3, \dots, T_{10}$, and treatments with features $F_1, F_2, F_3, \dots, F_{10}$. Second, they link or "connect" the foregoing descriptions, declaring persons with the relevant characteristics to be obliged to render to persons with the relevant traits whatever treatments possess the relevant features. The combination is a normative "rule" or "right" by which certain persons owe a certain kind of treatment to certain other persons. Insofar as the rule defines persons to be identical in the treatment they owe or are owed, the rule renders them prescriptively equal; insofar as the rule defines people to be nonidentical in the treatment they owe or are owed, the rule renders them prescriptively unequal.

Assume, for example, that a state requires ordinary motorists to yield the right of way to motorists on the right. The prescription may be stated in the following form: "Any motorist, except ambulance, police or fire department drivers with sirens sounding, who approaches an unmarked intersection shall yield the right of way to motorists approaching from the right." Like all prescriptive standards, the rule classifies persons in accord with the treatments they

owe and are owed and, hence, defines the extent to which such persons are identical or nonidentical, equal or unequal. The rule defines all drivers to be identical and, hence, equal in that it formally subjects *all* motorists to the rule: "Any motorist, except ambulance, police or fire department drivers with sirens sounding, who approaches an unmarked intersection shall yield the right of way to motorists approaching from the right." The rule also provides internal equalities and inequalities: internal equalities among all ambulance, police and fire department drivers approaching unmarked intersections from the left with sirens sounding, among all other motorists approaching intersections from the left, among all motorists approaching intersections from the right, and so forth; internal *inequalities* between the class of ambulance drivers *with* sirens sounding and the class of ambulance drivers *without* sirens sounding, between the class of ordinary motorists approaching unmarked intersections from the left and the class of motorists approaching unmarked intersections from the right, between the class of motorists approaching *unmarked* intersections and the class of motorists approaching *marked* intersections, between the class of motorists and nonmotorists, and so forth.

Again, as with descriptive equality, the meaning of prescriptive equality entails several important consequences. First, since prescriptive standards necessarily incorporate descriptive standards for identifying persons (*i.e.*, persons with traits $T_1, T_2, T_3, \dots T_{10}$, who possess claims against persons with characteristics $C_1, C_2, C_3, \dots C_{10}$, for treatment with features $F_1, F_2, F_3, \dots F_{10}$), and since no two persons are identical — or equal — by every possible descriptive standard, it follows that no two persons are identical or equal by every possible prescriptive standard. Similarly, since prescriptive standards necessarily incorporate descriptive standards for identifying persons, and since all people are always identical by some possible descriptive standard, it follows that all people are always alike by some possible prescriptive standard. The two conclusions, combined, mean that persons who are prescriptively equal in one respect are necessarily prescriptively unequal in other respects, and vice versa.²¹

Furthermore, since prescriptive standards necessarily classify all

21. Thus, people who are prescriptively equal by the prescriptive rule "to each according to his need" may be prescriptively unequal by the prescriptive rule "to each according to his merit." See Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1164 (1969) ("Simply to say that it is right to treat people equally rather than unequally is meaningless . . . , since to treat two people equally in one respect will always be to treat them unequally in others.").

people on the basis of the treatments they owe and are owed, it follows that prescriptive standards do not treat people as *either* equals or unequals, but as equals *and* unequals. Consider the prescriptive standard or rule "to each according to his needs." The rule defines all persons as prescriptively equal, by declaring all persons to be identical in being subject to the rule "to each according to his needs." The rule further defines all persons as internally equal, by declaring all persons to be identical in being entitled to distributions according to need. Yet the rule also defines people as internally unequal, by distinguishing among people on the basis of their individual needs. The rule treats the very same people as equals in some respects and as unequals in other respects, depending upon the way one characterizes the standards of the rule.

Finally, since prescriptive equality is the relationship of identity that obtains among persons as a consequence of a given prescriptive rule, it follows that prescriptive equality is derivative in the same sense and for the same reasons as descriptive equality. One cannot declare two or more persons to be morally or legally equal without first possessing a moral or legal standard — or rule — for governing the way people in their situation should be treated. Yet once one possesses such a rule, one knows everything there is to know about how the people are morally or legally to be treated. If the people are morally or legally identical by reference to the rule, it follows that they are prescriptively equal and, hence, should be treated equally in accord with the rule. If they are morally or legally nonidentical by reference to the rule, it follows that they are prescriptively unequal by reference to the rule and, hence, should be treated unequally in accord with the rule.²² To call them prescriptively equal or unequal,

22. It is a truism that people who are morally or legally "equal" should therefore be "treated equally," and that people who are morally or legally "unequal" should therefore be "treated unequally." Why? Because it follows logically from a determination that two persons are "equal" by reference to a given normative rule that they are to be "treated" as "equals" in accord with the rule. As Felix Oppenheim puts it, to say "equals should be treated equally" (and "unequals should be treated unequally") is nothing but a tautological way of talking about the meaning of rules. F. OPPENHEIM, *POLITICAL CONCEPTS: A RECONSTRUCTION* 119-20 (1981). ("It is logically impossible for any rule of distribution to treat either equals unequally or unequals equally, in the sense of allotting the same benefit or burden (in the same amount) to persons who differ [with respect to] the characteristics *singled out by the rule*, or different shares to persons whom the rule places in the same category").

Professor Chemerinsky denies that the axiom of Equality (*E*) — *i.e.*, the axiom that "likes should be treated alike" — is tautological in the foregoing sense. See Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, text accompanying note 20. He bases his denial on two distinct arguments. First, he denies that *E* is "circular." *E* would be circular, he says, if two conditions were satisfied: (1) if the term (*t*) "likes" were synonymous with the phrase (*p*) "[those who] should be treated alike;" and (2) if *p* in turn were synonymous with *t*. Unfortunately, he says, while condition (1) is true, condition (2) is false. Condition (1) is true, because *t* does mean *p*: The answer to the question "Who are 'like'

however, adds nothing to what one has already determined to be the content of the moral or legal rule by which they should be treated. The terms "equal" and "unequal" in law and morals are nothing but

people?" is indeed "those who should be treated alike." But condition (2) is false, he says because *p* does not mean *t*: The answer to the question "Who are 'those who should be treated alike?'" is not "'like' people."

Professor Chemerinsky is right about everything except the last step. He is right to stipulate that "likes" by reference to a rule are those persons for whom the rule prescribes like treatment. By that stipulation, however, it follows that those persons a rule requires to be treated alike are also "likes" by reference to the rule. Why? Because the rule is stipulated to be the sole and exclusive measure by which "likes" and "like" treatment can be ascertained.

Second, Professor Chemerinsky challenges a tautological interpretation of *E* by offering an alternative interpretation — an interpretation that allegedly renders *E* morally plausible without rendering it circular. *E*, he says, should be understood as a prescription for *second-best* choices. The *first-best* choice, of course, is to see that people who are defined to be "alike" by prevailing rules should be "treated alike" in accord with such rules. However, if for some reason one cannot give such persons the treatment to which they are alike entitled under the rules, the second-best response is to give them *some other* like treatment — that is, to treat them alike in *some other* way, rather than to distinguish between them. Chemerinsky, *supra*, text accompanying notes 10-12. Thus, if the rules entitle all Rhodes Scholars to receive scholarships to Magdalen College, the first-best response is to give them all scholarships to Magdalen College. However, if one cannot give them all the treatment to which they are alike entitled, the second-best response is to treat them alike by reference to some other rule, *e.g.*, to deny them all scholarships or give them all scholarships to University College, or to give them all half scholarships. It is *E*, Chemerinsky says, that tells us that the latter responses are all better than the response of giving scholarships to some Rhodes Scholars while denying them to others.

The foregoing argument has several flaws. For one thing, *E* says nothing on its face about being a rule of preference. It does not instruct an actor *first* to give a class of people the treatment to which they are entitled and *then* (if the former is impossible) to give them some other like treatment. It states, rather, that people who are "alike" are invariably entitled to one thing — to be "treated alike." Furthermore, even if *E* is interpreted to be a "second-best" preference for always treating classes as classes, it nevertheless fails, because it is false. It is simply false to say that treating members of a class as a class is always preferable to distinguishing among them. It is not preferable, for example, to boil all Rhodes Scholars in oil than to give scholarships to some of them and not to others. Nor is it obviously preferable to deny scholarships to all of them than to give scholarships to all but the least deserving of them.

This is not to say that it is *never* a better course of second-best conduct to treat members of a class by a rule of common treatment than to discriminate among them. Obviously it is sometimes better. The point is, rather, that whether or not it is better depends not on any general axiom of equality, but on the moral significance of the particular treatment to which the class members are all entitled, the particular rule of common treatment they received instead, and the particular discrimination that is being avoided. In some cases, the moral injury inflicted by discriminating in a certain way is greater than the injury done by denying all members of the class the treatment to which they are entitled; thus, the moral injury inflicted by discriminating among Rhodes Scholars on the basis of race or religion may be greater than the injury inflicted by denying all of them scholarships. In other cases, the injury inflicted by discriminating among members of a class is less than the injury done by denying them all that to which they are entitled; thus, the injury inflicted by discriminating among diabetics on the basis of age or marital status or number of dependents may be less than the injury inflicted by denying them all life-saving insulin. *If* it is better to deny all members of a class their due than to discriminate against them, it is not because denial is *always* better or *usually* better than discrimination. It is because as between the two moral rules at issue, the rule against injuring a person on the basis of the particular discrimination at hand (say, injuring a person by stigmatizing him as inferior on grounds of race) has higher moral priority than the rule against injuring a person by denying the particular entitlement at issue (say, denying him a scholarship to Magdalen College).

“rhetorical” devices for talking about legal and moral rules.²³

Consider, for example, whether or not people are morally or legally “equal before the law.” To answer the question, one must first agree upon the prescriptive standard by which “equal” and “unequal” are to be measured. The same holds for any question of equality. One cannot decide whether two sticks of wood are descriptively equal or unequal in length without first agreeing upon a standard for measuring length, because sticks that are equal by one measure of length may be unequal by another. Sticks that are equal as measured in whole inches may be unequal as measured in quarter inches; sticks that are equal as measured in millimeters may be unequal as measured in microns or angstroms.²⁴ What prescriptive standard, then, does one implicitly have in mind in asking whether people are equal or unequal “before the law”? Three possible standards of measure come to mind. By virtue of the first standard, no people as a whole are equal anywhere in the world; by the second standard, all people as a whole are equal everywhere in the world; by the third standard, people as a whole are equal in some societies and unequal in others.²⁵

23. [A]n explicit rule of constitutional equality, such as the equal protection clause of the fourteenth amendment, does not *add* anything distinct from and independent of the other rights (to liberty, security, due process, etc.) already enumerated in or implied by other provisions of the constitution. Since these other constitutional rights apply to all citizens, their form already entails their equal application. The explicit principle of constitutional equality serves only a *rhetorical purpose* reminding us of the nature of other constitutional principles.

R. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY* 223 (1980) (emphasis added). See also Raz, *Principles of Equality*, 87 MIND 321, 334 (1978) (“Arguments and claims invoking ‘equality’ . . . are rhetorical.”); Weale, *An Anti-egalitarian Fallacy*, 52 Phil. 352, 354 (1977) (emphasis added):

If statements of the form “All X ’s are equal with respect of $F_1, F_2, F_3, \dots, F_n$ ” are interpreted as statements about shared properties, they can be expressed in the logically equivalent form of the usual universal quantification: “For anything, if it is X then it is also $F_1, F_2, F_3, \dots, F_n$.” There is an obvious question here: if this is so, why not express the claim simply as one about shared properties, instead of bringing in the *rhetorical flourish* of referring to equality?

24. See Evans, *Equality, Ambiguity, and Public Choice*, 14 CREIGHTON L. REV. 1385, 1393 (1981) (“Whether or not persons or things are equal depends in part on the scales used to compare them. Two distances may be the same when measured in miles, but different when measured with a micrometer.”).

25. I do not mean to suggest by this that these three are the only possible standards defining the extent to which persons are “equal before the law.” J.R. Lucas, for one, has suggested four others: (1) The law shall regulate all people in accordance with “antecedently promulgated” rules; (2) The courts shall decide all disputes concerning people “after hearing arguments on both sides”; (3) The law shall regulate all people “fairly and impartially, without fear or favor”; (4) The courts shall ensure that both sides to disputes are “evenly matched” in their access to counsel. J. LUCAS, *THE PRINCIPLES OF POLITICS* 246, 253, 255 (1966).

The foregoing standards are very different from one another. Standard (1) is either trivial or untenable, depending upon what “antecedently promulgated” means: if Standard (1) means that no person can be regulated except in accord with known rules that leave no question as to his rights and duties, no legal system does or can satisfy the Standard, because no

Standard I: "The law shall regulate people without classifying them on the basis of traits or activities that distinguish them from one another." By suggesting people are equal before the law, one may be comparing people — and therein finding them to be identical to one another — by reference to the prescriptive rule that the law ought not to classify people on the basis of their traits or activities. It is obvious, however, that no people in any legal system are equal before the law in that sense. Every legal system regulates people by classifying them in accord with what it defines to be their relevant traits and activities.²⁶ It follows, therefore, that people who are classified differently from one another for given purposes are necessarily "unequal before the law" by Standard I.²⁷

Standard II: "The law shall regulate people without distinguishing among them except in accord with the traits and activities by which the law deems it appropriate to classify them." As we have seen, to say all people are "equal before the law" cannot possibly mean that they are all indistinguishable before the law, because every legal system regulates people by distinguishing between them in accord with the traits and activities it deems relevant. If people are truly equal before the law, therefore, it must be by reference to some standard of comparison other than Standard I. One possibility

legal system is capable of making explicit in advance everyone's rights and duties; if Standard (1) means that no one may be regulated except in accord with rulings *derived from* or *traceable to* known rules, every legal system in the western world satisfies the Standard (1).

Standards (2) and (4) govern courts rather than legislatures and are well-known features of what lawyers in this country would view as the fundamentals of procedural due process.

Standard (3) — the requirement that the law treat people "impartially without fear or favor" — is entirely derivative in nature. It presupposes still further external standards defining the persons to whom partiality may and may not be shown and, given such standards, merely restates the obligation to follow such standards. See text accompanying notes 68-78 *infra*.

26. See *Toll v. Moreno*, 102 S. Ct. 2977, 2997 (1982) (Rehnquist, J., dissenting) ("All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment."); *accord*, *Clements v. Fashing*, 102 S. Ct. 2836, 2845 (1982) ("*classification is the essence of all legislation*") (emphasis added).

27. Consider a hypothetical murder statute: "All persons of sound mind who knowingly commit homicide without justification or excuse shall be guilty of murder." The statute classifies people on the basis of the particular trait of "soundness of mind" and the particular activity of "committing homicide." People who are classified together for purposes of murder under the statute are interchangeable with one another for purposes of murder, just as people who are classified differently under the statute are noninterchangeable for purposes of murder. All persons of unsound mind are interchangeable with one another in respect of their nonculpability under the statute, just as they are noninterchangeable with all persons of sound mind. It follows from the statute, therefore, that while all persons of unsound mind are "equal before the law" under Standard I, persons of unsound mind and persons of sound mind are not all "equal before the law" under Standard I. See generally Oppenheim, *The Concepts of Equality*, 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 102, 103 (1968) ("Every conceivable rule treats equals (in some specified respect) equally and unequals unequally.").

is by a standard that explicitly *permits* people to be classified. Thus, by declaring people "equal before the law," one may mean to be comparing people to one another — and therein finding them to be identical — by reference to the prescriptive rule that the law ought not to distinguish between people except in accord with the traits and activities it deems relevant. By that standard, however, every legal system necessarily treats people as "equal before the law," because, tautologically, every legal system considers people as indistinguishable except insofar as it considers them distinguishable.²⁸ Consider the legal status of black freedmen in America before the Civil War. In most antebellum states free persons "of color" were by law treated like whites for some purposes, and like slaves for other purposes: like whites, they were generally entitled to marry, contract, own personal property, sue and be sued; like slaves, they were generally prohibited from voting, from serving as jurors, and from holding public office.²⁹ The law treated them as legally indistinguishable from whites except where it deemed them to be legally distinguishable. By reference to Standard II, therefore, all antebellum persons — whites, free persons of color, and slaves — were legally identical and, hence, "equal before the law."

Standard III: "The law shall regulate people without classifying them in such a way as to render them either unanswerable to others or unprotected from others." As a measure of whether people are equal before the law, Standard I is interesting but untenable, while Standard II is tenable but uninteresting. There is, however, another possibility. By "equal before the law," one may mean to be comparing people — and therein finding them identical — by reference to the prescriptive rule that no one should be "above" the law (in the sense of being unanswerable to the law for his activities) or "outside" the law (in the sense of being unprotected by the law in his activities).³⁰ By that standard, some legal systems treat people as equals, others do not. Consider what appears to have been the situation in thirteenth-century England. The King of England was defined by law as being above the law in the sense of being legally unanswerable to others for his conduct,³¹ just as certain "outlaws" of the time

28. See note 26 *supra*.

29. See generally I. BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 3-132 (1974); L. LITWAK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 3-112 (1961).

30. See J. LUCAS, *supra* note 25, at 253 ("nobody is so lowly as not to have recourse to the courts, nobody is so mighty as not to have to answer to the courts: anybody can invoke the courts' aid, everybody must render them obedience").

31. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458 (1793) ("But in the case of the *King*,

were defined by law as being outside the protection of the law.³² Using Standard III as a standard of comparison, one would say that the King and outlaws were legally nonidentical to other citizens — and, hence, legally “unequal” to them — because while other citizens were answerable in and protected by the courts, the King and outlaws were not. Using the same prescriptive standard as comparison today, one would probably say that in America all persons are legally identical to one another by reference to Standard III and, hence, are “equal” before the law.³³

In sum, just as one cannot know whether two sticks of wood are descriptively equal in length without first agreeing upon a descriptive standard of comparison, one cannot know whether people are prescriptively “equal before the law” before first agreeing upon a prescriptive standard of comparison. Yet once one possesses such a prescriptive standard, one knows everything to be known about how people should be treated in that respect. All further statements of equality and inequality merely restate the logical relationships of identity and nonidentity that exist among people by reference to the standard. By Standard I, for example, no people anywhere are equal before the law or anywhere entitled to be treated equally; by Standard II people everywhere are equal before the law and everywhere entitled to be treated equally; by Standard III, people in the thir-

the sovereignty . . . [w]hile it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and consequently, on feudal principles, no right of jurisdiction.”); *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d) (“It is a principle of the English constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. . . . By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject.”); J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 27 (2d ed. 1921) (The King of England is “commonly” said to be a person “who has rights though no duties.”).

32. See 4 W. BLACKSTONE, *COMMENTARIES* *319-20:

[A]nciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by anyone that should meet him, because, having renounced all law, he was to be dealt with as in a state of nature, when everyone that should find him might slay him.

See also *Drew v. Drew*, 37 Me. 389, 391 (1854):

The word *outlaw* has a distinct technical signification, and when used in that sense refers to persons, and not to things. Thus, an outlaw is one who is put out of the law; that is, deprived of its benefits and protection. In earlier times he was called a *friendlesman*; one who could not, by law, have a friend. An outlaw was said *caput genere lupinum*, by which it was meant, that anyone might knock him on the head as a wolf, in case he would not surrender himself peaceably when taken.

Interestingly, Thomas Jefferson tried unsuccessfully in 1779 to revive the obsolescent institution of “outlawry” by urging the Virginia legislature to adopt legislation that would have declared any “white woman” who failed to leave the state within one year of having a child “by a negro or mulatto” to be “out of the protection of the laws.” 2 *PAPERS OF THOMAS JEFFERSON* 471 (J. Boyd ed. 1950).

33. But see *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2711 (1982) (White, J., dissenting) (suggesting that vesting absolute immunity in the office of the President places the President above the law).

teenth century were unequal before the law, while people in the United States today are equal before the law. To talk of their equality or inequality, however, merely expresses what we already know about the three Standards: that the prescriptive rule against distinguishing people on the basis of their traits and activities does not apply anywhere to people whom the law deems distinguishable; that the rule against distinguishing people whom the law deems indistinguishable applies everywhere to all people; and that the rule against treating people as above or outside the law did not apply to all people in thirteenth-century England, but does apply to all people in the United States today.

B. *The Meaning of "All Men Are Created Equal"*

Lincoln and Douglas misperceived the derivative meaning of equality in moral and legal discourse and, misperceiving it, allowed it to confuse their debate. They professed to disagree about whether blacks and whites were "created equal." Yet in reality their disagreement was not about equality or inequality at all. They agreed that blacks and whites were prescriptively equal in some respects, and unequal in other respects. Their real disagreement was not about equality, but about the content of the prescriptive standard that ought to determine the equality or inequality of blacks and whites in one particular respect — their capacity for enslavement.

Lincoln and Douglas overlooked that assertions of equality and inequality in law and morals have no meaning apart from the content of the prescriptive rules they necessarily incorporate by reference. Blacks and whites cannot be declared descriptively or prescriptively equal without reference to some descriptive or prescriptive standard for measuring their identity or nonidentity. Yet once such a standard obtains, relationships of equality or inequality ensue automatically. To declare blacks and whites equal or unequal is merely a way of talking about relationships that obtain among them as a "logical consequence"³⁴ of measuring them by given de-

34. See C. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 38 (J. Petrie trans. 1963).

This is not to say that the process of *formulating* prescriptive rules — or the process of *applying* them in contested cases — is wholly a process of logic. Obviously it is not. Logic alone cannot dictate standards of right and wrong, or dictate how such standards apply in contested cases. Moral judgment is needed in both cases, both to formulate moral rules in broad terms and to particularize their meanings in contested cases. The point is, rather, that *once* one has made such moral judgments, certain relationships follow analytically as a consequence. Once one has formulated moral rules and particularized their meaning in cases at hand, it logically follows that persons are either morally identical by reference to such rules, or morally nonidentical by reference to such rules. If they are morally identical, they are morally "equal" by the relevant measure; if they are morally nonidentical, they are morally "unequal."

scriptive or prescriptive standards.

Had they understood the logic of equality, Lincoln and Douglas would have realized that they did not — and logically could not — disagree as to whether blacks and whites are equal. Blacks and whites are undeniably equal to one another, just as they are undeniably unequal. Like all persons and things, blacks and whites are undeniably equal to one another by some descriptive standards, and unequal by others: descriptively unequal by descriptive standards of skin pigmentation; descriptively equal by the descriptive standard of *possessing* human skin. By the same token, blacks and whites are undeniably equal by some prescriptive standards, and unequal by others: prescriptively equal by the rule “no person shall be denied a job on account of his race;” prescriptively unequal by the rule “no black person shall be denied a job because of his race.”

As to the justness or rightness of particular prescriptive rules, Lincoln and Douglas largely agreed with one another. They agreed, for example, that blacks and whites were — and rightly were — prescriptively equal with respect to the contemporary rule that prohibited persons of either race from marrying persons of the other race. That is to say, they agreed on the justness of the prescriptive rule — “no person of either the Negro or Caucasian race shall marry a person of the other race.”³⁵ Measured by the ban on miscegenation, blacks and whites were identical and, thus, equal: whites were prohibited from marrying blacks for the same reason and to the same extent as blacks were prohibited from marrying whites.³⁶ Presuma-

Why? Because that is precisely what “equal” and “unequal” mean. See Westen, On “Confusing Ideas”: Reply, 91 YALE L.J. 1153, 1164 n.41 (1982).

35. See Speech of Stephen A. Douglas at Chicago, July 9, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 12 (“I am opposed to Negro equality. I repeat that . . . I am in favor of preserving not only the purity of the blood, but the purity of the government from any mixture or amalgamation with inferior races.”); Speech of Abraham Lincoln at Charleston, Sept. 18, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 136 (“I will say then that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races — that I am not nor ever have been in favor of . . . qualifying [Negroes] . . . to intermarry with white people . . .”); *id.* at 136 (“I will also add . . . that I have never had the least apprehension that I or my friends would marry negroes if there was no law to keep them from it; but as Judge Douglas and his friends seem to be in great apprehension that they might, if there were no law to keep them from it, I give him the most solemn pledge that I will to the very last stand by the law of this State, which forbids the marrying of white people with negroes.”). For more on Lincoln’s racial views, see L. COX, LINCOLN AND BLACK FREEDOM: A STUDY IN PRESIDENTIAL LEADERSHIP (1981); B. QUARLES, LINCOLN AND THE NEGRO (1962); Frederickson, *A Man But Not a Brother: Abraham Lincoln and Racial Equality*, 41 J.S. HIST. 39 (1975); Fehrenbacher, *Only His Stepchildren: Lincoln and the Negro*, 20 CIV. WAR HIST. 293 (1974).

36. Measured by the prohibition on interracial marriage, a black wishing to marry a white is legally identical to a white wishing to marry a black, just as a black wishing to marry a black is legally identical to a white wishing to marry a white. That is why the Supreme Court, passing on the constitutionality of a state statute that punished interracial fornication more

bly, Lincoln and Douglas would have also agreed with the many other prescriptive rules of the day, north and south, by which blacks and whites were rendered identical and thus equal: that no person, black or white, slave or free, was allowed to kill another person with malice aforethought; that every person, black and white, slave and free, had a right not to be killed with malice aforethought; that no person of any race was allowed to incite an insurrection or revolt of slaves; and so forth.³⁷ These prescriptive standards drew no distinc-

seriously than intraracial fornication, was able to say that the statute treated blacks and whites equally: "Whatever discrimination is made in the punishment prescribed in the two sections [of the Alabama code] is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same." *Pace v. Alabama*, 106 U.S. 583, 585 (1883). That, too, is why the state of Virginia was able to argue that its antimiscegenation statute treated blacks and whites equally. *See Loving v. Virginia*, 388 U.S. 1, 7-8 (1967) ("[T]he state argues that the meaning of the Equal Protection Clause . . . is only that the state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree.").

This is not to say that an antimiscegenation statute is "equal" within the meaning of the Equal Protection Clause. It depends on whether the legal classifications the antimiscegenation statute creates are consistent with the legal classifications the Equal Protection Clause creates. If an antimiscegenation statute defines as identical and nonidentical, respectively, people whom the Equal Protection Clause *allows* to be so defined, then the antimiscegenation statute is constitutional — just as race-based antifornication statutes were held to be constitutional in *Pace*. If, on the other hand, an antimiscegenation statute defines as identical and nonidentical, respectively, people whom the Equal Protection Clause *prohibits* from being so defined, the statute is unconstitutional — just as the Virginia antimiscegenation statute was held to be unconstitutional in *Loving*. To decide the question, one must identify the constitutional standard prescribed by the Equal Protection Clause. Assume, for example, that the Equal Protection Clause is taken to prohibit the state from selectively imposing disqualifications on disfavored racial groups that lack fair representation in the political branches of government. *See, e.g.*, J. ELY, *DEMOCRACY AND DISTRUST* 77-87, 145-61 (1980). By the latter standard, antimiscegenation statutes may *not* violate the Equal Protection Clause, because they impose the very same disqualification on majority whites as they impose on minority blacks. Now assume, on the other hand, that the Equal Protection Clause is taken to prohibit the state from stigmatizing disfavored racial groups, *see, e.g.*, *Regents of the University of California v. Bakke*, 438 U.S. 265, 357 (1978) (opinion of Brennan, White, Marshall, & Blackmun, JJ.), or from denying persons opportunities based on their race, *see, e.g.*, *Univ. of Cal. Regents v. Bakke*, 438 U.S. at 287-99 (opinion of Powell, J.). By the latter standards, antimiscegenation statutes do violate the Equal Protection Clause. They selectively stigmatize blacks, because they rest on the premise that as between the two races, blacks are an *inferior* race unfit to intermarry with whites. *See Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (colonial antimiscegenation laws "show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery . . . and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race."). They also deny persons opportunities based on race, because they prevent *A* from marrying *B* merely because of *A's* race.

37. *See, e.g.*, GA. CODE § 4953 (1861) ("Any person who shall maliciously kill or maim a slave, shall suffer such punishment as would be inflicted in case the like offense had been committed on a free white person."); GA. CODE § 4217 (same); 2 J. HURD, *THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES* 91, 157-58, 191, 199 (1862) (statutes of various states providing the same penalties for slaves committing murder); K. STAMPP, *THE PARTICULAR INSTITUTION* 227 (1956) ("The southern codes did not prescribe lighter penalties for slaves

tion between blacks and whites. For purposes of the prescriptions, blacks and whites were prescriptively equal.

At the same time, Lincoln and Douglas also agreed that blacks and whites were — and rightly were — prescriptively unequal by other contemporary rules. They agreed, for example, that whites and blacks were rightly unequal with respect to the prescriptive standard governing eligibility to vote. That is, they agreed on the justness of the prescriptive rule — “no Negro shall be eligible to vote.”³⁸ Measured by that particular standard, blacks and whites were not prescriptively identical and, thus, not equal. Lincoln and Douglas also agreed on the justness of other common prescriptions of the day by which blacks and whites were rendered nonidentical and thus unequal: that no person was allowed to serve as a juror, or to hold public office, or enjoy the status of “citizen,” unless he was white.³⁹

who murdered other slaves than for slaves who murdered whites.”); GA. CODE § 4214 (1861) (any white person who attempts to excite “an insurrection or revolt of slaves,” shall be punished with death”); GA. CODE § 4704-06 (1861) (any slave or free person of color who attempts to induce “slaves” to join in “an insurrection” shall be punished with death).

Lincoln presumably agreed with such statutes because he made a point of emphasizing that he believed blacks were as much entitled to “life, liberty, and the pursuit of happiness” as “the white man.” Speech of Abraham Lincoln at Ottawa, Aug. 21, 1858, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 3, at 75. Douglas, too, presumably believed in the statutes, because he repeatedly emphasized that though he did not consider whites and blacks equal, he believed that we “ought to extend to the negro every right, every privilege, every immunity which he is capable of enjoying, consistent with the good of society.” Speech of Stephen A. Douglas at Jonesboro, Sept. 15, 1858, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 3, at 117.

38. See Speech of Stephen A. Douglas at Jonesboro, Sept. 15, 1858, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 3, at 117 (“I, for one, am utterly opposed to Negro suffrage anywhere and under any circumstances”); Speech of Abraham Lincoln at Charleston, Sept. 18, 1858, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 3, at 136 (“I will say then that I am not, nor ever have been, in favor of bringing about in any way social and political equality of the white and black races — that I am not nor ever have been in favor of making voters . . . of Negroes”); *id.* at 156 (“I am not in favor of negro citizenship. . . . Now my opinion is that the different states have the power to make a negro a citizen under the Constitution of the United States if they choose. The Dred Scott decision decides that they have not that power. If the State of Illinois had that power I should be opposed to the exercise of it. That is all I have to say about it.”).

39. See Speech of Stephen A. Douglas at Chicago, July 9, 1858, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 3, at 12 (“Illinois has . . . decided that the Negro shall not be a slave, and we have at the same time decided that he shall not . . . serve on juries, or enjoy political privileges. I am content with that system of policy which we have adopted for ourselves.”); Speech of Stephen A. Douglas at Jonesboro, Sept. 15, 1858, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 3, at 116 (“I hold that a Negro is not and never ought to be a citizen of the United States. . . . I do not believe that the Almighty made the negro capable of self-government.”); *id.* at 117 (criticizing Maine for allowing Negroes to vote and hold public office); Speech of Abraham Lincoln at Charleston, Sept. 18, 1858, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 3, at 136; *id.* at 156 (“I am not in favor of Negro citizenship”).

This is not to say that blacks in antebellum America were nowhere allowed to vote, hold office, or enjoy the other privileges of citizenship. Some states did extend to blacks the privileges of voting, sitting as jurors, and holding public office. The overwhelming majority of states, however, both north and south, denied blacks such privileges. See I. BERLIN, *supra* note 29, at 90-91, 129, 131; L. LITWACK, *supra* note 29, at 58, 60, 75, 93-94.

Lincoln’s views regarding blacks, it must be admitted, are not entirely unambiguous. At

By those standards, blacks and whites were legally unequal and, hence, to be treated unequally in accord with them.

Unfortunately, Lincoln and Douglas defined the issue between them in such a way as to confuse their real debate in two distinct respects. First, by assuming that whites and blacks must be *either* prescriptively equal *or* prescriptively unequal, they failed to recognize how fully they agreed on the justness of prescriptive standards that together rendered whites and blacks equal in some respects and unequal in others. Second, and more seriously, by framing their issue in terms of equality, they failed to recognize that their real dispute was not about the equality or inequality of blacks and whites, but about the content of the prescriptive rule that ought to govern the equality or inequality of blacks and whites in a particular respect — in respect of slavery. Lincoln believed that the just rule as envisaged by the Declaration of Independence was “No person, white or black, should be held in a condition of slavery.”⁴⁰ By Lincoln’s pre-

times he suggested that he regarded blacks as forever unfit to be social and political equals to whites. See Lincoln’s speeches, *supra*. At times he suggested that while American society was not ready to treat blacks as socially and politically equal to whites, equality as an abstract principle mandated at least resistance to extension of slavery into the territories. See Speech of Abraham Lincoln at Quincy, Oct. 13, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 213; Speech of Abraham Lincoln at Alton, Oct. 15, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 225-27. At times he suggested that blacks and whites could never live as social and political equals in America and, hence, that blacks must either be colonized elsewhere outside the territory of the United States, or maintained here as an inferior caste. Speech of Abraham Lincoln, at Ottawa, Aug. 21, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 74-75; Speech of Abraham Lincoln at Charleston, Sept. 18, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 136; Speech of Abraham Lincoln at Galesburg, October 7, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 179. Lincoln’s apparent equivocation has led scholars to disagree about his real position regarding blacks. Compare Frederickson, *supra* note 35 (arguing that Lincoln did not really believe blacks were equal to whites but merely that blacks were human and, hence, unfit for slavery), with L. Cox, *supra* note 35, at 36 (arguing that Lincoln believed blacks and whites were inherently equal, despite the fact that the country in 1860 was not yet ready to accept it). Lincoln’s apparent equivocation led Douglas to argue that Lincoln’s views lacked integrity — that Lincoln argued for social and political equality to Abolitionist audiences in northern Illinois, and argued against such equality to more conservative audiences in southern Illinois. See Speech of Stephen A. Douglas at Charleston, Sept. 18, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 154-55. But see H. JAFFA, *supra* note 4, at 365-68.

40. See Speech of Abraham Lincoln at Chicago, July 10, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 18; Speech of Abraham Lincoln at Ottawa, Aug. 21, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 74-75; Speech of Abraham Lincoln at Charleston, Sept. 18, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 136; Speech of Abraham Lincoln at Alton, Oct. 15, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 225-27. At the same time, it should be pointed out that while Lincoln expressed a personal repugnance toward slavery and held the view that the Declaration of Independence envisaged slavery’s ultimate extinction, Lincoln emphasized that he did not wish to do anything to interfere with the institution of slavery in the states where it already existed, see Speech of Abraham Lincoln at Ottawa, Aug. 21, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 74-75, and that his principal objective was to prevent the spread of slavery into the new territories. See Speech of Abraham Lincoln at Alton, Oct. 15, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 227-35.

scriptive standard, blacks and whites were undeniably equal and, hence, entitled to be treated accordingly. Douglas believed in contrast that the just rule was "No person, white or black, shall be held in a condition of slavery, unless the white people of a state provide otherwise regarding blacks residing within the state."⁴¹ By Douglas's prescriptive standard, whites and blacks were undeniably unequal and, hence, entitled to be treated accordingly. The two men disagreed not about whether blacks and whites were prescriptively equal, but about the prescriptive standard by which their equality or inequality should be measured.

If asked, of course, Lincoln might have said that while he believed the rule against slavery should apply to blacks and whites alike, he did so because of a *prior* belief that blacks and whites were equal in that respect. Yet, logically, that cannot have been the case — any more than Douglas could logically have arrived at *his* prescriptive rule by virtue of a prior belief that blacks and whites were *unequal*. For to say blacks and whites are prescriptively equal presupposes an anterior prescriptive standard by which blacks and whites are rendered identical. Equality and inequality for Lincoln and Douglas were not the *sources* of their respective views of slavery, but the *products* of their views of slavery. By neglecting the logic of equality, they allowed the language of equality to mask their respective views of slavery, not to illuminate them.

So what do we say about the issue that divided Lincoln and Douglas? Are blacks and whites prescriptively equal or not? The answer is obvious: they are equal in respect of some prescriptive rules, and unequal in respect of others. The real question, therefore, is not "equal or unequal," but "equal in what respect."⁴² Where people agree that blacks and whites should be regarded as prescriptively equal, equality ceases to interest them, because they necessarily agree on the prescriptive rules by which blacks and whites should be treated. Where people disagree that blacks and whites should be regarded as prescriptively equal, equality ceases to help them, because (like Lincoln and Douglas) they necessarily disagree on the prescriptive rules by which blacks and whites should be treated — and, hence, on the prescriptive standard by which equality and inequality are ascertained.

41. See Speech of Stephen A. Douglas at Springfield, June 17, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 11-13; Speech of Stephen A. Douglas at Bloomington, July 16, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 37-39; Speech of Stephen A. Douglas at Galesburg, October 7, 1858, in THE LINCOLN-DOUGLAS DEBATES, *supra* note 3, at 76-77.

42. See J. LUCAS, *supra* note 25, at 244-45.

II. THE EMPTINESS OF EQUALITY

Professors Chemerinsky and D'Amato deny that equality is morally and legally empty. They deny, that is, that statements of prescriptive equality derive their entire normative meaning from anterior prescriptive standards governing the way people should be treated. They argue instead that equality is an independent norm with moral and legal force of its own, a norm that exists apart from whatever prescriptive rules may otherwise prevail. Together they argue that while prescriptive standards may be necessary for normative discourse, such standards cannot always be sufficient, because equality performs three essential functions that cannot be served in any other way: (A) equality focuses attention on areas of potential injustice, by identifying prescriptive rules that treat people unequally; (B) it provides moral and legal guidance as to how to respond to such rules, by creating a rebuttable presumption against rules that treat people unequally; (C) it imposes moral and legal limits on the kinds of justifications that can be advanced to rebut the presumption against unequal treatment, by prohibiting the presumption from being rebutted in the name of arbitrariness, inconsistency, or partiality.

I think Professors Chemerinsky and D'Amato are mistaken. Indeed, like Lincoln and Douglas before them, they make the mistake of talking about equality without attending to what equality *means*. Professors Chemerinsky and D'Amato seem to believe they can talk about the equality or inequality of persons without making reference to anterior standards of comparison. They do not succeed. They succeed instead in doing something far more common: they talk about prescriptive equality and inequality — as everyone must — by implicit reference to anterior prescriptive standards of comparison; but by neglecting the logic of equality, they conceal from themselves and their audience the substantive content of the prescriptive standards they implicitly incorporate by reference. They purport to be assessing one set of prescriptive rules by reference to a norm of prescriptive equality, while in reality they are assessing one set of prescriptive rules by an anterior set of prescriptive rules.

A. *Equality as a Standard for Identifying Areas of Potential Injustice*

Professor Chemerinsky believes that the concept of equality performs the vital function of alerting us to areas of potential injustice by focusing our attention on rules that treat people unequally.

Moral and legal rules, he says, can be divided into two distinct categories: rules that treat people equally; and rules that treat people unequally. Neither category is necessarily just or unjust. The justice or injustice of all rules — whether they treat people equally or unequally — ultimately depends upon whether the treatments they provide can be justified by external moral or legal standards. Nevertheless, he says, as between the two categories, rules treating people unequally are suspect in ways that rules treating people equally are not.⁴³ The importance of the concept of equality, he says, is that it “focus[es]”⁴⁴ our attention on a category of potentially unjust rules that would otherwise go “unnoticed.”⁴⁵

A good example, Professor Chemerinsky says, is the rule in *Craig v. Boren*⁴⁶ that prohibited beer from being sold to men under the age of 21 and to women under the the age of 18. The statute was premised on evidence that men under the age of 21 were more likely to drive automobiles under the influence of beer. The statute was designed to minimize drunk driving on the part of a statistically significant group of dangerous drivers by regulating their purchase of beer. The statute did not violate anyone’s independent constitutional rights, he says, because men under the age of 21 have no constitutional right either to drink beer or to drive automobiles. Nor did the statute violate constitutional standards of minimum rationality. Absent a concept of equality, therefore, the statute might well have passed unchallenged. The “only” thing that “compel[led] us to ask” if the statutory scheme was truly justified was the “perception of the inequality in treatment of men and women.”⁴⁷ It was our concept of equality that caused us to “focus”⁴⁸ on an injustice that might otherwise have gone “unremedied.”⁴⁹

Professor Chemerinsky’s argument, I am afraid, is premised on a fallacy. He proceeds from the premise that moral and legal rules can be placed in distinct categories, depending upon whether they treat people equally or unequally. He is mistaken. Prescriptive rules do not treat people *either* equally *or* unequally. They treat people *both* equally *and* unequally.⁵⁰ Every prescriptive rule treats people as

43. See Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. — (1983), text accompanying notes 27-28.

44. Chemerinsky, *supra* note 43, text accompanying notes 52-53.

45. Chemerinsky, *supra* note 33, text accompanying notes 55-59.

46. 429 U.S. 190 (1976).

47. Chemerinsky, *supra* note 43, text accompanying notes 34-35.

48. Chemerinsky, *supra* note 43, text accompanying notes 52-53.

49. Chemerinsky, *supra* note 43, text accompanying notes 55-56.

50. See Oppenheim, *supra* note 27, at 102-03 (“Every conceivable rule treats equals (in

equals in some respects and as unequals in other respects, because every prescriptive rule can be stated in terms by which people are, variously, identical and nonidentical. Consider the rule in *Craig v. Boren*:

It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell . . . to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight.

"A 'minor,' . . . is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years."⁵¹

Like any statute, the *Craig* statute can be stated as a prescription by which all people are identical and, hence, equal. It can be stated as follows:

It shall be unlawful for *any person* to sell any beverage containing more than one-half of one percent of alcohol measured by volume and not more than three and two-tenths (3.2) percent of alcohol measured by weight, *if* the person so selling holds a license to sell and dispense beer, *and if* the person to whom he so sells is a female under the age of eighteen (18) years or a male under the age of twenty-one (21) years.

By that statement of the statute, all people are prescriptively identical in two respects. They are all told that *if* they hold a license to sell beer, they may not lawfully sell beer to persons who are under age as defined in the statute. In addition, all people are also prescriptively identical under the statute as objects of the prohibition. They are all told that *if* they are men and if they are under 21 they are not persons to whom beer may be lawfully sold by persons holding beer licenses.⁵² All people are prescriptively equal under the *Craig* statute in the same sense in which it is often and truthfully said that "all persons are equal before the law."⁵³ They are all identical as "per-

some specified respect) equally and unequals unequally"); *id.* at 103 ("any rule which allots 'equal shares to equals' implicitly not only allots 'unequal shares to unequals' but also allots them 'in proportion to their inequality'").

51. *Craig v. Boren*, 429 U.S. at 191 n.1 (quoting Okla. Stat. tit. 37, §§ 241, 245 (1958 & Supp. 1976)).

52. There is a sense in which men are certainly equal; for there is a sense in which moral rules apply to all men alike. All men must keep their promises, for example. But this just means that all men must keep their promises *if* they have made any, just as all men, whether fathers or not, should care for their children *if* they have any, and all men, whether murderers or not, should be hanged *if* they have committed murder, and all men, whether serfs or slaves or not, have the same duty to their overlord or owner *if* they have one. Hence the assertion that men have this kind of equality. . . is of very little value, for it is compatible with their actual rights and duties being very different.

J. HARRISON, *HUME'S THEORY OF JUSTICE* 193 (1981).

53. Again, we may be all equal before the law, in the sense that the law applies to everybody, but in this sense our being equal before the law is compatible with the law's assigning to different people very different rights and duties. In this sense, a law which hangs coloured men for raping white women, but does not hang white men for raping

sons" to whom and *about* whom the law speaks.

At the same time, however, the *Craig* statute also distinguishes among people by their traits and activities and, hence, treats them as nonidentical and unequal. It treats people who hold licenses to sell beer differently from people who hold licenses to sell wine; people who sell beverages of less than one-half of one percent alcohol differently from people who sell beverages containing more than one half of one percent alcohol; people who sell to persons over 21 differently from people who sell to persons under 21; people who sell to women under the age of 21 differently from people who sell to men under the age of 21; and so forth. The same thing would also be true if all the foregoing features of the statute were eliminated. Assume, for example, that the statute were amended to apply to all persons who sell alcohol of any variety to anyone of any gender or age. The statute would still be premised on prescriptive standards by which some people are nonidentical and, hence, unequal to others. It would still treat persons who sell alcohol differently from those who do not; people who sell alcohol once differently from those who sell it repeatedly. People are inevitably unequal under the *Craig* statute in the same way, and for the same reason, that people are inevitably unequal under statutes that classify people on the basis of traits or activities.

It follows, therefore, that since all rules treat people unequally in some respects, equality cannot perform the targeting function that Professor Chemerinsky ascribes to it. Equality cannot distinguish rules that do *not* require special scrutiny (because they treat people equally) from rules that do require special scrutiny (because they treat people unequally). The most it can do is distinguish the respects in which such rules treat people equally from the respects in which such rules also treat people unequally. Accordingly, if one

coloured women applies equally to all men; that they are *all* hanged *if* they are coloured, treats all men alike in just the same way as does the rule that they are hanged *if* they are murderers. Again, if there is a God, it seems reasonable to suppose that there is a sense in which all men are equal in his eyes, but, since it is improbable that he looks upon all men the same, it may just mean that he looks upon all men the same unless there are reasons for looking upon them differently. And, of course, God may look upon all men the same in that he will look upon *any* man who is a saint differently from the way he looks on *any* man who is a sinner . . .

J. HARRISON, *supra* note 52, at 194.

All principles are (sets of) statements of general reasons. As such they apply equally to all those who meet their condition of application. Generality implies equality of application to a class. Adding "equally" to the statement of the conditions or consequences of a principle does not necessarily turn it into one which has more to do with equality.

. . . [A]ll principles of entitlement generate equality (in some respect) as an incidental by-product since all who have equal qualification under them have an equal entitlement. Raz, *supra* note 23, at 325-26, 333. See text accompanying notes 28-29, *supra*.

truly believes that rules that treat people equally do *not* deserve special scrutiny and that rules that treat people unequally *do*, he faces two choices: he can conclude that because all rules necessarily treat people equally in at least one respect, *no* rule requires special scrutiny; or he can conclude that because all rules necessarily treat people unequally in at least one respect, *all* rules require special scrutiny. But there is one thing he cannot do. He cannot find in the definitions of equality and inequality any principle for distinguishing rules that require scrutiny from rules that do not.

Why would an observer as perceptive as Professor Chemerinsky conclude otherwise? Why would he be induced to believe that equality and inequality could serve as a litmus test for identifying suspect rules? The answer, I believe, is that he confuses general concepts of equality with the particular relationship of prescriptive equality that ensues from the particular prescriptive standard he happens to have in mind. By neglecting the derivative relationship that exists between statements of prescriptive equality and underlying prescriptive standards, he mistakes the particular prescriptive standard he implicitly has in mind for the consequential relationship of equality that derives from it. He thinks he finds normative value in equality itself, while in reality he rediscovers in a particular relationship of equality the normative value prescribed by the particular standard that logically underlies it.

To illustrate the confusion, consider the discussion of *Craig v. Boren*. Professor Chemerinsky is right that, constitutionally, the *Craig* statute was presumptively invalid. He is also right that the statute explicitly distinguished between men and women and thereby treated them unequally. He is wrong, however, in thinking the statute was presumptively invalid because it treated people unequally. *Every* statute treats people unequally in some respects. The statute was presumptively invalid not because it treated people unequally, but because it treated unequally people who by constitutional standards are presumptively equal. The *Craig* statute violated a fourteenth amendment right of men which is analogous to, say, the fourth amendment right of persons to be free from unreasonable searches and seizures. The fourth amendment prohibits the government from subjecting any person to seizure unless the government has shown "[r]easonable" grounds for doing so.⁵⁴ The fourteenth

54. U.S. CONST. amend. IV. The fourth amendment has also been construed as a requirement that in most cases the determination of reasonableness be made by a neutral magistrate prior to the search. See generally Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982) (arguing that the exceptions to the so-called "warrant requirement" be reconceptualized and reformulated).

amendment has been construed to prohibit the government from denying any person opportunities or benefits on the basis of sex unless the government has sound reasons for doing so.⁵⁵ By the latter prescriptive standard, men and women are prescriptively identical in their right to challenge legislation that denies them opportunities or benefits on the basis of sex. It is the latter prescriptive standard, therefore, that renders men and women prescriptively equal and, hence, entitles them to be treated equally in that respect. It is the latter standard, too, that rendered the *Craig* statute presumptively invalid. The statute was presumptively invalid, and the statute treated men and women unequally. But the statute was not presumptively invalid *because* it treated men and women unequally. It was presumptively invalid because it violated the presumptive right of men not to be denied benefits or opportunities on the basis of sex — and thereby treated unequally in a particular respect persons whom the Constitution requires to be treated equally in that particular respect.⁵⁶

55. See *Mississippi Univ. for Women v. Hogan*, 102 S. Ct. 3331, 3336-37 (1982).

56. Professor Chemerinsky repeats the *Craig* fallacy in his hypothetical case on Social Security. See Chemerinsky, *supra* note 43, text accompanying notes 10-12. He posits a hypothetical Social Security statute that grants survivor benefits to widows but not to widowers, and then suggests that one can challenge the statute in the name of "equality" without reference to anterior entitlements. Again, he mistakes legal standards and entitlements for the derivative relationships of legal equality and inequality that they entail. If the Social Security statute were the highest law in the land, it could not be legally challenged in the name of equality because the legal identities and nonidentities the statute entailed — that is, its legal equalities and inequalities — would be legally supreme. If, on the other hand, the Social Security statute *can* be legally challenged in the name of equality, it is because and only because some higher legal standard exists by which men and women are rendered identical and thus equal. The higher legal standard Professor Chemerinsky has in mind, of course, is a fourteenth amendment norm, — *i.e.*, that no state shall deny any person benefits on the basis of sex. See, *e.g.*, *Mississippi Univ. for Women v. Hogan*, 50 U.S.L.W. 5068 (U.S., June 29, 1982). By that legal standard, men and women are rendered legally identical for purposes of Social Security benefits and, hence, legally equal. The statute in that event can be challenged in the name of equality — but only by virtue of an anterior fourteenth amendment standard from which such equality logically flows. The "equality" Professor Chemerinsky invokes is nothing but the relationship of identity that obtains between men and women as a consequence of the anterior fourteenth amendment standard he leaves unstated.

Professor Chemerinsky is also wrong to suggest that prescriptive equality is *prescriptively indifferent* as to whether relevant benefits are granted to all members of the relevant class or denied to them. Prescriptive equality is the relationship of identity that obtains among persons of a class by virtue of an anterior rule for the treatment of persons. To identify the treatment to which members of the class are entitled, one must consult the rule. If the rule prescribes that all members of the class are to be granted a certain benefit, then to deny them all that benefit is *not* to treat them as "equals" by reference to the rule. If, on the other hand, the rule prescribes that all members of the class be denied benefits, then to grant them all benefits is not to treat them as equals by reference to the rule. To illustrate, consider Professor Chemerinsky's hypothetical Social Security statute in the context of the fourteenth amendment. The legislature's first preference — a preference expressed in the statute — is to grant benefits to widows and not to widowers. The fourteenth amendment, in turn, prohibits the legislature from giving effect to its first preference, because the fourteenth amendment prohibits the legislature from granting or denying benefits on the basis of sex. It follows, therefore, that the total

B. *Equality as a Norm of Preferred Conduct*

Equality not only alerts us to areas of potential moral and legal concern, Professor Chemerinsky says, it also tells us how to proceed once the areas are identified. It tells us, he says, that while equal treatment is presumptively good, unequal treatment is presumptively bad. It is a norm or "ideal" that "commands us to act to reduce or eliminate inequalities."⁵⁷ To be sure, he says, it is not an unconditional requirement that all inequalities be eliminated, for some inequalities may indeed be justified by external normative standards. Rather, it reminds us that our real "concern"⁵⁸ is not with equality but with inequality; that while equal treatment itself does not matter, unequal treatment "does matter";⁵⁹ that while equal treatment itself requires no justification, unequal treatment always requires justification;⁶⁰ that as between equal treatment and unequal treatment, there is a "presumption"⁶¹ in favor of equal treatment; that unlike those who wish to treat people equally, there is a "burden of proof on those who wish to discriminate."⁶²

To illustrate, he hypothesizes a statute that creates two classes of students for the purpose of financial assistance: students with I.Q.s in excess of 120 who thereby become eligible for \$1,000 in educational assistance; and students with I.Q.s of 120 or less who are eligible for only \$100 in educational assistance. The statute distinguishes between the two classes of students and, in doing so, creates prescriptive inequalities. It defines two classes of students as prescriptively unequal to one another for purposes of educational assistance, and, accordingly, it provides them with prescriptively unequal treatment. To that extent, he says, there is "something wrong"⁶³ with the statute that would not be present if the statute provided either the *same*

set of prescriptive rights a widower has under the statute-plus-the-fourteenth-amendment is a function of the presiding court's legal assessment as to what the legislature would have intended if it had known that it had to proceed on a sexually neutral basis. *See* Califano v. Westcott, 443 U.S. 76, 89-93 (1979). If the court makes a legal judgment that the legislature intended in that event to grant benefits to widows and widowers alike, then denying them all benefits is not permissible under the law and, hence, is not treating them as "equals" as defined by the law. If, on the other hand, the court makes a legal judgment that the legislature intended in that event to deny the benefits to widows and widowers alike, then granting them all benefits is not permissible under the law and, hence, is not treating them as "equals" as defined by the law.

57. Chemerinsky, *supra* note 43, text accompanying notes 41-43.

58. Chemerinsky, *supra* note 43, text accompanying notes 57-59.

59. Chemerinsky, *supra* note 43, text accompanying notes 41-43.

60. Chemerinsky, *supra* note 43, text accompanying notes 57-63.

61. Chemerinsky, *supra* note 43, text accompanying notes 53-54.

62. Chemerinsky, *supra* note 43, text accompanying notes 53-54.

63. Chemerinsky, *supra* note 43, text accompanying notes 40-41.

amount of educational assistance for every student or *no* educational assistance for any student. What, then, is “wrong” with the hypothetical statute that would be right in a statute that treated students equally? The answer, it seems, is obvious — *the hypothetical statute treats students unequally*. The inequality prescribed by the statute is itself a “wrong” that we should “care about”⁶⁴ and “want to eliminate.”⁶⁵

The foregoing argument is premised on two distinct fallacies. First, in talking about a “presumption” in favor of treating people equally and about the “wrong[ness]” of treating people unequally, the argument assumes that it is *possible* to treat people equally without treating them unequally. But that is not so. Every prescriptive rule that classifies people on the basis of traits and activities necessarily treats them unequally. Consider Professor Chemerinsky’s hypothetical education-funding statute. The statute distinguishes between students on the basis of I.Q. and, thus, treats them unequally in that respect. If the distinction were removed and all students were awarded \$1,000 in educational assistance, the statute would still discriminate between students and nonstudents. If that discrimination were removed and all residents awarded \$1,000, the statute would then discriminate between residents and nonresidents. If the residence discrimination were removed and \$1,000 awarded to everyone who applied, the statute would discriminate between those who applied and those who did not apply. If that discrimination in turn were removed and \$1,000 awarded to anyone who could be located, the statute would then discriminate between those who could be located and those who could not. If even that discrimination were removed, the statute would still discriminate between those who receive \$1,000 under the statute and those who receive other benefits under other state statutes, for no statute can treat people equally with respect to *both* statutory and total entitlements. In short, the statute cannot be framed so as to treat people equally without also treating them unequally.

It follows, therefore, that the so-called “presumption” of equality is unworkable by its own terms. It tells us to distinguish between rules that treat people equally and rules that treat people unequally, yet no such distinction exists. It tells us that there is something “wrong” with rules that treat people unequally, yet no rule can be found that does otherwise. It tells us that unequal treatment requires

64. Chemerinsky, *supra* note 43, text accompanying notes 38-39.

65. Chemerinsky, *supra* note 43, text accompanying notes 41-43.

justification and equal treatment does not, yet both properties are present in every rule. The answer, of course, may be that every rule requires justification.⁶⁶ Or that no rule requires justification. But this much is certain: equality and inequality themselves cannot distinguish rules that require justification from rules that do not.⁶⁷

Second, and more serious still, the argument *for* equality and *against* inequality erroneously assumes that relationships of equality and inequality can be separated, prescriptively, from the prescriptive standards they presuppose. It assumes, that is, that the relationships of identity and nonidentity — of equality and inequality — that obtain by reference to given prescriptive rules possess moral value or disvalue in themselves apart from the rules from which they derive. Yet that cannot be true, because relationships of prescriptive equality and inequality have no content apart from the prescriptive standards that underlie them. Equality and inequality add nothing in the way of goodness or badness to the prescriptive standards that underlie them, because equality and inequality do nothing but spell out the logical relationships of identity and nonidentity that the standards themselves establish. If a prescriptive standard is morally and

66. To say every rule (or any rule) requires justification again presupposes standards by which one can distinguish justified rules from unjustified rules. See generally Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). Once one possesses such standards, however, those standards themselves — standards of substantive due process, as it were — provide the substance by which equalities and inequalities are determined. One can go on and call them standards of substantive “equality,” but the reference to equality is entirely derivative. It is simply a way of talking about, or referring to, one’s various standards for justifying rules.

The same is also true of the general proposition that all rules are invalid until shown to be valid. To say every rule requires justification is itself to posit a rule of substantive due process of the following kind — “no rule shall be deemed valid in respect of its several classifications until the classifications have each been justified.” A rule of the latter kind may be desirable or not, but regardless of its desirability, the rule has no significant relationship to the concept of equality. One can call the latter rule a rule of “equality,” but all one means is that classifications shall be deemed invalid until they are shown to be valid. Since the latter notion of equality derives entirely from one’s anterior rule of substantive due process, one might as well pierce the superfluous language of equality and talk directly about the underlying standard of substantive due process itself.

67. For a further discussion of this point, see Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 569-77 (1982).

This is not to deny the possibility or existence of a *particular* presumption of equality in a *particular* area of governance. Obviously, if a society believes that explicit discriminations between men and women are *usually* unjust or *especially* unjust, it can sensibly create a rebuttable presumption against such discriminations. Similarly, if a society believes that its white majority’s explicit discriminations against its black minorities are usually unjust or especially unjust, the society can create a rebuttable presumption against explicit majority discriminations of that kind. It is perfectly possible to create *presumptions* of equality of particular kinds, because it is perfectly possible to legislate *equalities* of particular kinds. The point is, rather, that it is not theoretically possible to create a *general* presumption of “equality” of all kinds, because it is not theoretically possible to legislate equality of all kinds; and it is not possible to create a presumption against majority discrimination against minorities of all kinds, because it is not theoretically possible to legislate without creating minorities.

legally just, the relationships of equality and inequality that ensue from it will be just; if a prescriptive standard is unjust, the equalities and inequalities that ensue from it will be unjust.

This point can be illustrated by reference to descriptive equality. It makes no sense, as we have seen, to talk about the relative height of two persons without reference to descriptive standards for measuring height. Basketball players who are identical (and hence equal) as measured in feet or in inches may be nonidentical (and hence unequal) as measured in microns or angstroms. Their equality or inequality has no meaning apart from the consequences of subjecting them to a given standard of comparison. By the same token, the utility of the equality or inequality that results from a given standard has no meaning apart from the utility of the standard itself. If it is useful to measure objects in microns, it is useful to know that the objects are equal or unequal in microns, and useless to know that they are equal in inches. If it is useful to measure basketball players in inches, it is useless to know they are unequal in microns.

Much the same is true of prescriptive equality and inequality. It makes no sense to talk about prescriptive equality or inequality without reference to a prescriptive standard of measure. People who are identical (and hence equal) by reference to rules governing ages of eligibility to drive automobiles may be nonidentical (and hence unequal) by reference to rules governing ages of eligibility to vote; people who are equal by reference to rules governing eligibility to vote may be unequal by rules governing eligibility to serve in the Senate or hold the office of President. The prescriptive equalities or inequalities that obtain among them have no meaning apart from the consequences of subjecting them to given prescriptive standards of comparison. By the same token, the justness of the equalities and inequalities that result from given prescriptive standards has no meaning apart from the justness of the standards themselves. If it is just to prohibit people from driving until they are 16 years old, from voting until they are 18, and from serving in the Senate until they are 30 years old, it follows that it is just to treat 18 and 35 year olds equally with respect to driving and voting, and unequally with respect to serving in the Senate. If, on the other hand, it is unjust to allow 18-year-olds to drive or to prohibit 18-year-olds from serving in the Senate, it follows that it is *unjust* to treat 18- and 35-year-olds equally for purposes of driving and unequally for purposes of serving in the Senate.

In short, to say people are prescriptively equal or unequal is to

state the derivative consequence of comparing their respective treatments under a given prescriptive rule of treatment. To say the rule is just *means* that the rule justly treats equally and unequally the people whom the rule defines as being equal and unequal. To say the rule is unjust means that it unjustly treats equally and unequally the people whom the rule defines as equal and unequal. Thus, if it is just to give special educational support to students with high I.Q.s, then the equalities and inequalities that result from applying Professor Chemerinsky's hypothetical rule are themselves just. If it is unjust to give special assistance to students with high I.Q.s, then the equalities and inequalities that result from applying the rule are themselves unjust.

Why, then, does Professor Chemerinsky believe that relationships of equality are in themselves good and relationships of inequality in themselves bad? Because, again, he confuses general relationships of equality and inequality with the particular relationship of equality that ensues from the particular prescriptive standard he has in mind. He believes, as most of us do, in the justness of the prescriptive standard — "no persons shall be stigmatized nor unreasonably denied opportunities or benefits on the basis of race, sex, creed, or national origin." (He apparently also believes in the rule, "No person shall be denied educational opportunity on the basis of I.Q."). It logically follows, therefore, that he also believes in the justice of the relationships of equality among people that ensue from measuring them by the foregoing standard, and in the *in*justice of the inequalities among people that result from measuring them by rules that violate that standard. Unfortunately, being unaccustomed to piercing statements of equality and inequality for the prescriptive standards they logically presuppose, he mistakes the standards he finds just and unjust with the equalities and inequalities that derive from them. He believes that he likes equality and dislikes inequality, while in reality he likes particular prescriptive standards and the particular equalities they logically entail, and he dislikes other particular standards and the particular inequalities they logically entail. He does not really believe equality is just and inequality unjust. He believes particular equalities are just and particular inequalities are unjust, and he does so because of his beliefs in the justice and injustice of the particular prescriptive standards that underlie them.

C. Equality as a Moral and Legal Requirement of Consistency and Nonarbitrariness

Equality, it is said, does more than alert us to rules that are po-

tentially unjust, and more than charge us with the burden of justifying those rules. It also tells us that certain justifications are simply unacceptable. It tells us, Professor Chemerinsky says, that prescriptive rules shall be framed and applied consistently and impartially. It also tells us, Professor D'Amato says, that prescriptive rules shall be nonarbitrary in nature.

I agree that consistency, impartiality, and nonarbitrariness are morally and legally desirable. I would deny, however, that those desired qualities derive from anterior notions of equality. If anything, the derivation is precisely the opposite: our notions of equality derive from anterior prescriptive standards that themselves define what we mean by "consistency," "impartiality," and "nonarbitrariness."

1. *The Requirements of Consistency and Impartiality*

Equality, Professor Chemerinsky says, does something that rules by themselves cannot do: it tells us how rules should be administered. It tells us that rules should be administered in a "consistent,"⁶⁸ "even-hand[ed]"⁶⁹ and "non-discriminatory"⁷⁰ manner. This is so, he says, because no rule can completely determine or specify the standards for its administration. Every rule must "inevitab[ly]" accord some "discretion"⁷¹ to those charged with its administration. Yet something tells us — something not contained in the rule itself — that the rule should be administered consistently and impartially. That something is the "concept of equality."⁷²

An example, he says, is the early equal protection case, *Yick Wo v. Hopkins*.⁷³ The City of San Francisco in *Yick Wo* enacted an ordinance to prevent fire hazards by regulating the operation of laundries in nonbrick buildings. The ordinance made it an offense for any person to operate a laundry in a nonbrick building unless the Board of Supervisors in its discretion first granted him a permit. The Board of Supervisors exercised its discretion by granting permits to virtually every Caucasian applicant while denying permits to every Chinese applicant. The U.S. Supreme Court held that although the ordinance was valid on its face, it had been applied and administered "with an evil eye an[d] unequal hand," thereby creating illegal "discrimination between persons in similar circumstances" in viola-

68. Chemerinsky, *supra* note 43, text accompanying notes 26-27.

69. Chemerinsky, *supra* note 43, text accompanying notes 27-29.

70. Chemerinsky, *supra* note 43, text accompanying notes 26-27.

71. Chemerinsky, *supra* note 43, text accompanying notes 27-29.

72. *Id.*

73. 118 U.S. 356 (1886).

tion of the fourteenth amendment requirement that justice be "equal."⁷⁴ It is no accident, Professor Chemerinsky says, that *Yick Wo* was decided in the name of equality, because the case involved an evil that no other principle reaches. The evil in the case did not lie in the terms of the ordinance and, hence, could not be addressed by reference to the ordinance. The evil lay in the inconsistent and partial way the ordinance was administered and, hence, could only be addressed in terms of the inequality of its administration. In his words: "[T]he 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."⁷⁵

Professor Chemerinsky is right to expect consistency and impartiality in the administration of laws. He is wrong, however, to think they have their source in equality. Consistency and impartiality find their complete source in the content of the rules being administered. They are simply a spelling out of what the rules themselves mean. To say rules should be applied "consistently" and "impartially" means that they should be applied in accord with their terms. Consistency and impartiality are not *supplements* to be added to rules; they are the *result* of giving rules the effect they have already been determined to possess.

Take *Yick Wo*, for example. The city of San Francisco in *Yick Wo* could have dealt with the granting of permits in one of three ways: (i) by denying the Board of Supervisors any discretion at all to issue permits to operate laundries in nonbrick buildings; (ii) by granting the Board of Supervisors some discretion to issue permits while simultaneously *prohibiting* the Board from exercising its discretion on the basis of race; and (iii) by granting the Board discretion to issue permits *without* prohibiting the Board from exercising its discretion on the basis of race. Each of the foregoing rules entails its own standards of consistency and impartiality, but the standards derive from the rules themselves, not from independent notions of equality.

An ordinance containing no discretion. The San Francisco ordinance could have been framed as an outright ban, thus denying the Board any discretion to issue permits to anyone to operate a laundry in a nonbrick building. If that were the case, the Board would be contradicting the ordinance if it issued permits to anyone, Caucasian

74. 118 U.S. at 373-74.

75. Chemerinsky, *supra* note 43, text accompanying notes 27-29.

or Chinese. The Board would be contradicting the ordinance because the Board would be saying that it had authority to grant *someone* a permit, while the ordinance says the Board has authority to grant *no one* a permit. The two statements of law contradict one another — and thus are “inconsistent” with one another — because they cannot logically be squared with one another.

It follows, therefore, that under an outright ban on issuing permits, only one course of conduct by the Board would be “consistent” with the ordinance — to deny permits to everyone. Then and only then, would the Board be acting consistently with the ordinance because then and only then, would its action be implicitly premised on a statement of law that squared with the ordinance. The scope of what is consistent and inconsistent with the ordinance thus turns entirely on the scope of the ordinance.

An ordinance containing discretion limited to nonracial consideration. Alternatively, the San Francisco ordinance could have been framed as a grant of limited discretion, discretion confined to the granting and denying of permits on nonracial grounds. In that event, the Board would be subject to two legal standards and, hence, to two standards of consistency and impartiality. Within the area of its discretion to grant and deny permits, the Board would be subject to a standard of plenary rulemaking authority. For that is what “discretion” means. It means an area within which the discretion-holder has authority to adopt, or not to adopt, whatever rule he deems fit.⁷⁶ It is an area in which his action cannot legally contradict any other norm because, by definition, it is an area in which no constraining norms exist. Within the area of its discretion, therefore, the Board would be logically incapable of doing anything that would be legally inconsistent with the ordinance.

With respect to the *limitation* on its discretion, however, the situation is precisely the opposite. The limitation prescribes what the board must do (*i.e.*, exercise its discretion on a nonracial basis) and not do (*i.e.*, exercise its discretion on a racial basis). If the Board acted on a nonracial basis, its action would square with the limitation and thus be legally “consistent” with it. If the Board acted on a racial basis, its action would contradict the limitation and thus be legally “inconsistent” with it. Again the scope of consistency and inconsistency coincides with the scope of the rules being administered.

76. See Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).

The same analysis applies to "impartiality." If the Board complied with the ordinance by granting and denying permits on a non-racial basis, it would be acting "impartially" within the meaning of the ordinance because it would *not* be acting *partially* toward persons whom the ordinance prohibits the Board from treating with partiality. If, on the other hand, the Board granted permits only to Chinese, it would be acting "partially" because it would be showing partiality toward persons whom the ordinance prohibits the Board from treating with partiality. Like the requirement of "consistency," the requirement that rules be applied "impartially" logically collapses into the simpler requirement that rules be applied in accord with their terms.⁷⁷

An ordinance containing discretion encompassing racial consideration. Finally, the San Francisco ordinance might have been framed as the courts in *Yick Wo* construed it to be framed — as an ordinance granting absolute discretion to the Board to grant or deny permits on any basis including a racial basis.⁷⁸ In that event, no action by the Board in granting or denying permits could be legally inconsistent under the ordinance, because the ordinance would contain nothing for the action to be inconsistent *with*. The Board could legally grant permits to Caucasians *qua* Caucasians. Or it could legally deny permits to Chinese *qua* Chinese. Or it could grant permits exclusively to Caucasians for the first 364 days of the year and exclusively to Chinese on the 365th day of the year. No such actions or combination of actions could be legally inconsistent under the ordinance because none of them contradicts anything the ordinance requires the Board to do.

This does not mean that discretionary acts may not be inconsistent by *non*legal standards. Of course they may. They may be inconsistent by *descriptive* standards of all sorts. Thus, if a board of supervisors grants permits exclusively to Caucasians for 364 days a

77. In certain cases, indeed, the resemblances and differences between human beings which are relevant for the criticism of legal arrangements as just or unjust are quite obvious. This is preeminently the case when we are concerned not with the justice or injustice of the *law* but of its *application* in particular cases. For here the relevant resemblances and differences between individuals to which the person who administers the law must attend, are determined by the law itself. To say that the law against murder is justly applied is to say that it is impartially applied to all those and only those who are alike in having done what the law forbids. . . .

The connexion between this aspect of justice and the very notion of proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule.

H.L.A. HART, *THE CONCEPT OF LAW* 156-57 (1961).

78. See 118 U.S. at 366-68.

year and then exclusively to Chinese on the 365th day, one can say that the standard describing the last day's action (*i.e.*, the descriptive standard of granting permits solely to Chinese) differs from and thus is "inconsistent" with the standard describing the previous year's action (*i.e.*, the descriptive standard of granting permits solely to Caucasians). The point is, however, that the descriptive inconsistency is prescriptively irrelevant unless it can be shown that the board has a prescriptive obligation to adhere to one descriptive standard or the other. If the board has discretion to grant and deny permits on a racial basis, its action on the 365th day, though descriptively inconsistent, is not legally inconsistent, because it does not conflict with anything the Board is legally obliged to do. The issue is rather like a girl who insists on dating a fair-haired boy after dating five dark-haired boys in a row. Her dating the fair-haired boy may be descriptively inconsistent with her prior behavior (and it may show "partiality" to fair-haired boys), but it is not *morally* inconsistent or partial, because she has no moral obligation to date dark-haired boys. Similarly, unless the Board's practice of granting permits only to Caucasians operates to create an informal "whites-only" rule from which it may not depart, the board's decision to grant a Chinese a permit on the 365th day cannot legally be regarded as inconsistent or partial.⁷⁹

What, then, does this mean for *Yick Wo*? How does it bear on the argument that the Court decided *Yick Wo* on principles of "consistency" and "impartiality" having their source in equality? It means, I believe, that if the Court decided *Yick Wo* correctly, it was not because the Board's preference for Caucasians violated abstract

79. Although it is said to be a principle of federal administrative law that the federal courts will require federal administrative agencies to comply with their own rules, *see* W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 395-98 (7th ed. 1979), it has never been thought to be a principle of federal constitutional law that the federal courts will require states to abide by state law. *See* *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875) (the states are final in stating the content of their own law). *But cf.* *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (reversing a state court judgment for failure on the state court's behalf to give a criminal defendant the benefit of what the U.S. Supreme Court perceived to be the real content of state law). It is no accident that there is so little federal constitutional precedent for the proposition that federal courts have an obligation to compel state courts to abide by state law, because every alleged *failure* of a state court to comply with its own law can, conceptually, be described with equal validity as a redefinition by the state court of what its own law really *is*. Thus, consider a board that grants permits solely to Caucasians for 364 days a year and then solely to Chinese on the 365th day of the year. The practice can be described in two ways. One can say that the state's "real" rule is to grant permits solely to Caucasians, and that its decision to grant permits to Chinese on the 365th day is an unexplained and unprincipled "exception" to the rule. Alternatively, and with equal plausibility, one can say that the state rule is precisely what the board did — that is, to grant Caucasians permits for 364 days a year and Chinese permits on the 365th day. Unless the federal court possesses some standard by which it can presume to "know" the board's real rule better than the board itself, it has no principled basis on which to say that the board's practice violates the board's own rule.

notions of consistency, impartiality, or equality, but because the Board's preference violated a particular substantive standard the Board was legally obliged to follow. The Board's action did not violate the ordinance itself, because the ordinance itself did not preclude the Board from granting permits on a racial basis. The Board's action did violate the fourteenth amendment, however, because the fourteenth amendment *does* prohibit state agencies from granting or denying benefits on racially stigmatic grounds. Once the fourteenth amendment standard is ascertained, the Board's action can be characterized in several ways. One can say that the Board violated Yick Wo's fourteenth amendment right not to be denied a benefit on racially stigmatic grounds. Or one can say that the Board's action was "inconsistent" with its legal obligations under the fourteenth amendment; or that the Board treated "partially" people whom the fourteenth amendment required it to treat "impartially"; or that the Board treated as nonidentical (and hence unequal) in a certain respect people whom the fourteenth amendment prescribes to be identical (and hence equal) in that respect. The latter statements of "inconsistency," "partiality," and "equality" are doubtless true. But they do not add anything to what the first statement already contains. They are nothing but derivative restatements of what the fourteenth amendment has already been ascertained to mean.⁸⁰

80. The U.S. Supreme Court has held per Justice Stevens that the Equal Protection Clause codifies a "fundamental principle" to the effect that "the State must govern impartially." *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) (per Stevens, J.). See also *Rogers v. Lodge*, 50 U.S.L.W. 5041, 5049 (U.S. July 1, 1982) (Stevens, J., dissenting) ("the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment"); *Clements v. Fashing*, 50 U.S.L.W. 4869, 4874 n.5 (U.S. June 25, 1982) (Stevens, J., concurring) ("the Equal Protection Clause has independent significance in protecting the federal interest in requiring States to govern impartially"); *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 677-78 (1981) (Stevens, J., dissenting).

Justice Stevens is either right or wrong, depending on what he means by "impartiality." If Justice Stevens means that the Equal Protection Clause prohibits the state from showing partiality toward those specific persons toward whom the Equal Protection Clause specifically prohibits the state from showing partiality (*e.g.*, toward whites on the premise of their being a superior and favored race), he is obviously — and tautologically — right. Like every normative rule, the Equal Protection Clause defines what must and must not be done to various people and, hence, defines the various people toward whom partiality in that respect must and must not be shown. In that sense, however, the Equal Protection Clause has no more to say about partiality and impartiality than any other rule. It says something about specific kinds of impartiality to specific classes of people, but it says nothing about impartiality *itself*. If, on the other hand, Justice Stevens means that the Equal Protection Clause prohibits the state from showing partiality toward *anyone* by *any* standard (*e.g.*, toward persons in desperate financial need), he is obviously wrong. Every normative rule classifies people and, hence, defines classes of people toward whom partiality is owed. It is incoherent to say that the state may not show partiality toward anyone by any standard, just as it is incoherent to say that the state must not treat people unequally by any moral standard. To treat two people equally (or impartially) in one respect will always be to treat them unequally (or impartially) in other respects. See Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1164 (1969). In short, insofar as it means anything at all, the statement that the Equal Protection Clause prohibits the

2. *The Requirement of Nonarbitrariness.*

Professor D'Amato, too, believes that equality is an independent norm with moral and legal content all its own. Equality comes into play, he says, in areas in which prescriptive rules have no further function to perform. Prescriptive rules can declare it to be wrong to impose certain burdens on any groups of people (say, the burdens of cruel and unusual punishment), and wrong to impose any burdens on certain groups of people (say, groups believed to be racially inferior), and wrong to impose any burden on any group of people for certain reasons (say, for no legitimate ends). But within the parameters of what prescriptive rules consider lawful, rules have nothing further to say about how people are classified. They have nothing to say, for example, about the lawfulness of arbitrarily discriminating among persons who are otherwise similarly situated. It is equality alone, he says, that tells us it is unlawful to distinguish among people on arbitrary or random grounds.

To illustrate, Professor D'Amato asks us to imagine a state that endeavors to reduce gasoline consumption by restricting opportunities of drivers to purchase gasoline. Instead of spreading the restriction evenly among all drivers by means of rationing, however, the state arbitrarily selects a random group of drivers for a particularly onerous restriction: it permits drivers with odd-numbered license plates to purchase gasoline every day of the week, but restricts drivers with even-numbered license plates to purchasing gas solely on Saturdays. There is something offensive about such a statute, Professor D'Amato says, but its offensiveness has nothing to do with prevailing prescriptive rules. The statute does not abridge anyone's fundamental rights, because the right to purchase gasoline is not fundamental. The statute does not impose special burdens on any suspect class, because even-numbered drivers are not a suspect class. The statute does not violate standards of rationality, because the re-

state from treating people partially collapses logically into the simpler statement that the Equal Protection Clause prohibits the state from denying persons the treatment to which the Equal Protection Clause entitles them. *Cf.* Gillespie, *On Treating Like Cases Differently*, 25 PHIL. Q. 151, 157 (1975) (the statement that the state must treat people "consistently" collapses logically into the simpler statement that the state must give people the treatment to which they are entitled).

It might be argued, of course, that while the Equal Protection Clause has specific content, its specific content is to require the states to apply their laws faithfully to the persons to whom their laws apply — and that *that* is what "impartiality" under the Equal Protection Clause means. The trouble with the latter principle is not that it is wrong as a matter of constitutional law, but that it is impotent. For any state, when challenged, can always say that what it has done *is* its law. See note 79 *supra*. Consequently, unless the federal courts possess some standard by which they can know the content of state law better than the states do themselves, the Equal Protection Clause will end up ratifying whatever the states choose to do.

striction is rationally related to the legitimate end of reducing gasoline consumption. Rather, the evil of the statute is that it arbitrarily and randomly treats dissimilarly people who are similarly situated. The evil of the statute is not that it violates people's rights, but that it treats them unequally.

Professor D'Amato's argument fails, I believe, as a simple matter of logic. He endeavors to disjoin two things that by definition cannot be separated. He seeks to disjoin a particular statement of prescriptive equality from the particular prescriptive standard it logically presupposes. He cannot do so. Either he is right that odd- and even-numbered drivers are prescriptively equal under the Constitution, in which case the gasoline-conservation statute necessarily violates some constitutional right of even-numbered drivers that is logically anterior to assertions of their equality. Or he is right that the statute does *not* violate any such constitutional right of even-numbered drivers, in which case odd- and even-numbered drivers are not prescriptively equal under the Constitution. But as a matter of logic, he cannot be right that the statute treats unequally people who are prescriptively equal under the Constitution and, yet, violates no prescriptive right anterior to the determination of equality.

The fallacy in Professor D'Amato's argument can be revealed in alternative ways: Starting with his assumption that the gasoline-conservation statute treats unequally people who are prescriptively equal under the Constitution, one can show that the statute must also violate constitutional rights that obtain independently of equality; alternatively, starting with his assumption that the statute does not violate independent constitutional rights, one can show that the statute cannot treat unequally people who are prescriptively equal under the Constitution. Let us proceed on the former premise — that the statute treats unequally people for whom the Constitution requires equal treatment. To say odd-numbered drivers are constitutionally equal to even-numbered drivers for purposes of purchasing gasoline presupposes a constitutional standard of comparison, a standard by which the two groups of drivers are rendered identical for purposes of purchasing gasoline. What can the standard be in this case? It cannot be a *descriptive* standard, such as a standard that describes people by reference to whether or not they drive automobiles, because as Professor D'Amato himself recognizes, one cannot move from the descriptive premise that all drivers are descriptively identical in being drivers to the prescriptive conclusion that all drivers are

prescriptively identical in their right to purchase gasoline.⁸¹ To say drivers are prescriptively equal in some respect presupposes a *prescriptive* standard by which they are identical.

What, then, is the prescriptive standard or rule that Professor D'Amato's assertion of equality presupposes? It cannot be that all drivers have a constitutional right to purchase gasoline, because, as Professor D'Amato says, they clearly do not. Nor can it be that even-numbered drivers are a constitutionally suspect class against whom the state may not discriminate, because, as he says, the state may discriminate between even- and odd-numbered drivers for purposes of coordinating gasoline purchases.⁸² Nor can it be that the state may not impose burdens on persons for illegitimate ends, because though such a rule may exist, the gasoline conservation statute does not violate it. None of the foregoing standards explains Professor D'Amato's assertion that the odd- and even-numbered drivers are prescriptively identical for purposes of gasoline conservation. Yet some such prescriptive standard must exist because his assertion of prescriptive equality presupposes it.

To ascertain the standard, it may help to inquire why the gasoline-conservation statute seems unjust to Professor D'Amato. Why does Professor D'Amato consider it wrong to impose an onerous burden on a class of randomly selected drivers? The answer, I suspect, is that he believes the statute imposes an onerous burden on a narrow class of drivers under circumstances in which the state could fully achieve its ends by imposing a *less* onerous burden on that or a different class of drivers. Instead of imposing the Saturdays-only restriction on the class of even-numbered drivers for the entire year, the state could impose the Saturdays-only restriction on the class of all drivers — alternating the restriction as between even- and odd-numbered drivers on a month-by-month basis. An alternating scheme serves the state's ends just as well, because it imposes the very same quantitative restriction on the very same number of drivers every month, *i.e.*, a Saturdays-only restriction on one half of all drivers every month. Yet by spreading the burden of the Saturdays-only restriction among the wider class of all drivers, the scheme lessens the overall burden.⁸³

81. See D'Amato, *Comment: Is Equality a Totally Empty Idea*, 81 MICH. L. REV. 600 (1983) (suggesting that state legislators, albeit drivers themselves, may well be justified in creating a prescriptive standard by which they are excepted from the rationing scheme).

82. See D'Amato, *supra* note 81 at 600.

83. The spreading of the burden may lessen the burden in the same way that spreading the burdens of tort losses lessens their magnitude. A \$50,000 personal injury from an industrial accident can be distributed in different ways: by imposing the entire loss on the injured em-

This suggests that Professor D'Amato implicitly adheres to something like the following rule of substantive due process: "The state shall not pursue its ends by imposing a great burden on one class of persons where it could fully achieve its ends by imposing a considerably lesser burden on that or another class of persons."⁸⁴ The foregoing rule explains why Professor D'Amato believes that odd- and

employee; by spreading the loss among all employees (say, at \$1/per employee); or by spreading the loss among all purchasers of the employer's product (say, at \$0.10/purchaser). If one measures the burden of the distribution solely by the total number of dollars directly lost by the total number of persons, the several distributions are equally burdensome. If, however, one measures the burden of the distribution by its overall impact, the latter distributions are less burdensome, because employees and purchasers as a whole are better able to absorb loss. The same is true of distributing the Saturdays-only restriction. If one measures the "burden" of the restriction solely by the total number of persons subjected to Saturdays-only purchases per year, it makes no difference whether one imposes the restriction solely on even-numbered drivers or whether one spreads the restriction among all drivers. If, however, one measures the burden of the restriction by its overall impact, the latter formula may lessen the overall magnitude of the burden by spreading it among a class that is better able to absorb it.

Professor D'Amato responds by arguing that while we may be able to minimize the burden by spreading it among a wider class, we cannot take the step of *defining* the latter class without reference to anterior notions of equality. I would disagree. The truth is precisely the opposite. We cannot know which drivers are "equal" for purposes of spreading the burden until we first define the class to be regulated; and we cannot define the class to be regulated until we first discover the optimum group within which we achieve our desired ends at the lowest overall cost. We may ultimately discover that the optimum class includes all drivers — in which case we can say that all drivers are equal. Or we may ultimately discover that the optimum class includes all drivers except legislators, policemen, and doctors — in which case we can say that all drivers are equal except legislators, policemen and doctors. In both cases, however, it is the content of our normative rule that establishes the relevant equalities and inequalities, not vice versa.

84. The foregoing constitutional rule finds some support in the recent equal protection case, *Logan v. Zimmerman Brush Co.*, 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982). *Zimmerman* involved the constitutionality of a state statute that conditioned causes of action for discrimination against the handicapped on the willingness of the Illinois Fair Employment Practices Commission to conduct a hearing within 120 days of the filing of a complaint of discrimination. The plaintiff, Logan, whose cause of action was barred by the failure of the commission to convene a hearing within 120 days of his filing of the action, argued that the statute deprived him of equal protection by treating him differently from persons whose actions were scheduled for a hearing within the 120-day period. The respondent, *Zimmerman*, argued that the statute did not violate equal protection because it served a rational end — that is, it served to expedite the resolution of certain claims. A plurality of the Court held that though the end of expediting the resolution of claims was legitimate, and though the means employed furthered the latter end, the statute was nevertheless unconstitutional under the Equal Protection Clause because it imposed a great burden on a randomly selected class under circumstances in which the desired end could have been achieved by imposing a considerably lesser burden on a different class. See *Zimmerman*, 50 U.S.L.W. at 4252-53 & n.3 (opinion of Blackmun, J., concurring). See also *Zimmerman*, 50 U.S.L.W. at 4253 (opinion of Powell, J., concurring).

This is not to say that a sharp distinction can ever be drawn, conceptually, between ends and means. To say that the *Zimmerman* statute used illicit means to achieve a legitimate end can be taken to mean that while the statute furthered *some* legitimate ends, it violated still other legitimate ends and, thus, was not rationally related to the aggregate of legitimate ends that the statute reportedly served. The Supreme Court decision in *Zimmerman* can thus be taken to mean that although the *Zimmerman* statute served the state's end of *expediting* the resolution of claims, the statute did not rationally serve the state's companion end of resolving such claims *on the merits*. Stating the holding in that way illustrates the logical necessity in all rationality analysis of *attributing ends* to the state. See note 79 *supra*, and note 85 *infra*.

even-numbered drivers are prescriptively equal. It explains why the drivers, though *non*identical and thus *unequal* under the statute, are nevertheless equal and entitled to be treated equally under the Constitution. The argument goes as follows:

(i) Major premise: The state shall not pursue its ends by imposing a great burden on one class of persons where it can fully achieve its ends by imposing a considerably lesser burden on that or a different class of persons.

(ii) Minor premise: The state, instead of imposing a Saturdays-only restriction on even-numbered drivers for the entire year, could have fully achieved its goals by means of the considerably lesser burden of alternating the restriction between odd- and even-numbered drivers on a month-by-month basis.⁸⁵

(iii) Conclusion: Since the state could have achieved its goal of gasoline conservation by less burdensome means, and since the Constitution requires the state to achieve its ends by such less burdensome means, it follows that the gasoline-conservation statute divided into subclasses (*i.e.*, the subclasses of even- and odd-numbered drivers) persons whom the Constitution requires the state to treat as a single class for purposes of the state's ends (*i.e.*, a class of all drivers).

Prescriptively, the keystone of the argument is step (i), a proposed standard of substantive due process limiting the exercise of state power. As a constitutional limit on the way the state may exercise regulatory power, the standard limits the way states may classify people for regulatory purposes and, hence, the extent to which people may be treated as equals or unequals for regulatory purposes. The standard determines that odd- and even-numbered drivers must be classified together for purposes of the Saturdays-only regulation because classifying them separately would subject even-numbered drivers to an unnecessary "burden" within the meaning of the stan-

85. Every state statute can be plausibly described as the sole means at the state's disposal for achieving the state's goals — simply by taking the actual content of the state statute as the complete embodiment itself of the state's real goals. See Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128 (1972) ("It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it"). Therefore, to say that a state could "fully achieve" its goals by means of some statute other than the statute at hand necessarily presupposes a standard or set of standards for defining the state's "real" goals — whether the standard be the state's own statement of its goals, or a standard defining what the state will be permitted to take as its goals. See Westin, *supra* note 67, at 569 n.117, 577 n.136. With respect to the gasoline-consumption statute, therefore, I am assuming that the state's "real" goal is to conserve the consumption of gasoline at no administrative cost higher than the one entailed by the statute it actually adopted. Given that statement of goals, it follows, I think, that a substitute statute that alternates the rationing between even- and odd-numbered drivers would fully achieve the state's goals as well as the statute at hand.

dard. It is the latter constitutional standard, therefore, that renders odd- and even-numbered drivers constitutionally "equal" for the state's gasoline conservation statute. The constitutional standard does not require that the two classes of drivers be classified together because they are, somehow, already constitutionally "equal" for regulatory purposes; rather, they are constitutionally equal for regulatory purposes because the prevailing constitutional standard requires that they be classified together.

I do not mean to take a position here on whether the state actually *has* a constitutional obligation to replace a greater burden on a certain class with a considerably lesser burden on that or a different class whenever it can achieve its ends as well by both means. Nor do I take a position on whether, if the state has such an obligation, the state would be precluded from adopting a gasoline-conservation statute of the kind Professor D'Amato describes. A state may be able to show, for example, that alternating the Saturdays-only restriction from month to month between the two classes of drivers is too complicated, inefficient, or susceptible to abuse to be justified under the circumstances. The state may be able to show that — as with drafting men into the military service by lot, or auditing income-tax returns at random — the state has no adequate alternative to imposing a year-long burden on a narrow class of randomly selected drivers. In that event, the class of even-numbered drivers would *not* be constitutionally equal to odd-numbered drivers for purposes of the gasoline conservation statute, any more than young men whose names are selected by lot are constitutionally equal to men whose names are passed over by lot for purposes of compulsory military service. The point is, *if* odd- and even-numbered drivers are prescriptively equal under the Constitution, as Professor D'Amato says they are, it must be by virtue of some constitutional rule of the foregoing kind — that is, some rule of substantive due process that itself determines who is equal and who is unequal within the meaning of the Constitution.⁸⁶

86. Others may be able to propose alternative rules of substantive due process that produce essentially the same results. Someone with a view of substantive due process based on "reciprocity," for example, might argue that persons who reap the benefits of a resource should presumptively be obliged to bear the accompanying burdens and, thus, that persons who reap the benefit of purchasing gasoline should presumptively be obliged to bear the burdens of conserving it. Alternatively, someone with "economic" views might argue that due process constitutionalizes the combination of two economic rules: (i) the costs of every enterprise ought to be *internalized* within the enterprise; and (ii) the costs of every enterprise ought to be *spread* as widely as possible among all users of the enterprise. The constitutional consequence of such rules would be to require all drivers, and only drivers, to bear the costs of gasoline conservation. In that event, the descriptive standard of "all motorists" would coincidentally coincide with the governing prescriptive standard.

III. THE CONFUSIONS OF EQUALITY

Professor Chemerinsky denies that equality is confusing. More than that, he argues that equality is “rhetorically useful” in moral and legal discourse because “it helps us to persuade people to accept [results] that we believe [are] justified” and thus “causes people to protect rights that they otherwise would ignore.” I think that Professor Chemerinsky is wrong about the confusions of equality, but wrong in a rather different way than he is wrong about the emptiness of equality. He can be proved wrong about the emptiness of equality in the same way that “ $2 + 2 = 3$ ” can be proved wrong — by showing that his statements about equality contradict the meaning of their constituent terms. A persons who says $2 + 2 = 3$ simply does not know what the terms “2” and “3” *mean*. A person who denies that equality is empty does not know what equality means. The same cannot be said of a person who denies that equality is confusing. That equality is confusing cannot be proved in the same way that “ $2 + 2 = 4$ ” can be proved, because it is not a tautological truth. As with most moral and legal issues, one can do no more than show that the arguments in its favor predominate over the arguments against it. One can do no more than explain how and why the confusion occurs, offer examples of common confusion, and leave it to the reader to assess persuasiveness.

A. *The Nature of the Confusion*

Professor Chemerinsky understands me to be arguing that equality is “inherent[ly]”⁸⁷ confusing — that equality has conceptual properties that “inevitably”⁸⁸ and “invariably”⁸⁹ lead people into confusion. Framing the issue in those terms, he seeks to demonstrate that equality is not inherently confusing.

I am afraid Professor Chemerinsky misunderstands my position. I do not believe — and do not believe I have said — that equality is inherently confusing.⁹⁰ Indeed, given its logic, equality *cannot* be inherently confusing. Equality and inequality are derivative relationships of identity and nonidentity that obtain among persons or things by reference to given standards of measure. They add nothing

87. Chemerinsky, *supra* note 43, text accompanying notes 69-71.

88. Chemerinsky, *supra* note 43, text accompanying notes 79-80.

89. Chemerinsky, *supra* note 43, text accompanying notes 85-86.

90. I thought I had made it clear that there is nothing in the concept of equality that *precludes* a person from reasoning clearly, provided he maintains his diligence. The problem with equality is not that it precludes clear thinking, but that it encourages unclear thinking. See Westen, *supra* note 67, at 581, 586-87, 592.

ing to what one inevitably knows by virtue of having subjected persons or things to given standards of comparison. They are "empty,"⁹¹ "formal,"⁹² "vacuous,"⁹³ "consequential"⁹⁴ relationships with no independent content of their own. As long as a person understands them for what they are — as long as he pierces them for the standards of measure they logically incorporate by reference — he not only *will* not be confused, he logically *cannot* be confused.

That equality does not *inevitably* confuse, however, does not prevent it from *typically* confusing. Equality tends to confuse people often and to confuse them badly. Indeed, that it confuses people is one of the first things commentators observe about equality. Equality, they say, is a "strange and difficult"⁹⁵ idea, a "complex,"⁹⁶ "intricate,"⁹⁷ "elusive,"⁹⁸ and "mysterious"⁹⁹ concept that "distorts" and "obscures"¹⁰⁰ normative discourse, transforming it into a "bottomless pit of complexities."¹⁰¹

To understand why equality is such a "confused word,"¹⁰² it helps to understand how the confusion occurs. The confusions of equality are many, but they can almost all be traced to a common source: statements of equality presuppose underlying standards of comparison; but by expressing their underlying standards elliptically rather than directly, such statements tend to mask and conceal the actual normative standards they incorporate by reference. As a consequence, people fall into confusions of several kinds: *B* may make a statement of equality that *A* rejects, but only because *B* and *A* are implicitly proceeding on the basis of different standards of comparison. *B* may make a statement of equality that *A* accepts, but, again, only because *B* and *A* are implicitly proceeding by reference to dif-

91. J. HARRISON, HUME'S THEORY OF JUSTICE 197 (1981). See also Westen, *supra* note 67, at 578 n.140.

92. J. FEINBERG, SOCIAL PHILOSOPHY 100 (1973); C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 11-29 (1963); Locke, *The Trivializability of Universalizability*, 77 PHIL. REV. 25 (1968).

93. J. REES, EQUALITY 95-96 (1971); Wollheim, *Equality and the Equal Rights*, in JUSTICE AND SOCIAL POLICY 111, 116 (F. Olafson ed. 1961).

94. Browne, *Nonegalitarian Justice*, 56 AUSTRALASIAN J. PHIL. 48, 52 (1978).

95. Adler & Hutchins, *The Idea of Equality*, in THE GREAT IDEAS TODAY 303 (M. Adler & R. Hutchins eds. 1968).

96. Blackstone, *Introduction*, in THE CONCEPT OF EQUALITY v (W. Blackstone ed. 1969).

97. Dallmayr, *Functionalism, Justice and Equality*, 78 ETHICS 1, 10 (1967).

98. Evans, *Equality, Ambiguity and Public Choice*, 14 CREIGHTON L. REV. 1385 (1981).

99. Dworkin, *What is Equality?* 10 PHIL. & PUB. AFF. 185 (1981).

100. Browne, *supra* note 94, at 53.

101. Sowell, *We're Not Really Equal*, NEWSWEEK, Sept. 7, 1981, at 13.

102. *Id.*

ferent standards of comparison. *B* may conclude that persons who are equal by a particular descriptive standard must therefore be treated as equals by a particular prescriptive standard, but only because he overlooks his having substituted one sort of standard for the other. *A* may conclude that persons who are equal by *one* prescriptive standard must therefore be treated as equal by *another* prescriptive standard, but, again, only because he overlooks his having substituted one prescriptive standard for the other. *B* may express in terms of equality a particular prescriptive standard he cherishes and thereby come to believe that it is equality itself he holds dear. *A* may express in terms of inequality the violation of a particular prescriptive standard he cherishes and thereby come to believe that it is inequality itself he reviles.

This tendency of equality to confuse can be illustrated by considering areas in which equality does not confuse. Equality is noticeably *un*confusing in mathematics and science, because people discussing equivalences in math and science are likely to be quite clear about their standards of measure. Take math for example. Equality is "an easily understood concept in mathematics"¹⁰³ because the standard that governs equivalences and nonequivalences in math can scarcely be misunderstood. The standard is prescribed by a convention that everyone who does math understands: integers or symbols on the left side of an equation are "equal" to integers on the right side if they are identical to one another by *number*; integers on the left side are "unequal" to integers on the right side if they are nonidentical by number. The standard of comparison for determining identity and nonidentity — equivalence and nonequivalence — is the standard of number. The same kind of clarity exists in the sciences. People who invoke equivalences and nonequivalences in science are unlikely to be misled regarding the underlying standards of measure. This does not mean that equality and inequality have greater content in technical discourse than elsewhere. They do not. They are just as derivative (and thus as empty) in math and science as elsewhere. It means, rather, that while equality and inequality remain empty in technical discourse, they do not confuse and, because they do not confuse, they do not warrant being banished from technical discourse.

Unfortunately, experience with equality and inequality in law and morals suggests the opposite. People who invoke equivalences and nonequivalences in law and morals tend to mislead (and be mis-

103. *Id.*

led) regarding underlying standards of measure. Take the question of whether separate-but-equal educational facilities are "equal" for fourteenth amendment purposes. The Supreme Court in *Plessy v. Ferguson*¹⁰⁴ held that separate but equal facilities for blacks and whites are equal for constitutional purposes; the Court in *Brown v. Board of Education*¹⁰⁵ held that separate but equal educational facilities for blacks and whites are "inherently unequal."¹⁰⁶ A similar question is being debated today regarding educational facilities for men and women. Some authorities argue that separate but equal colleges for men and women are equal for fourteenth amendment purposes; others argue that they are inherently unequal.¹⁰⁷ It should be obvious, however, that stating the issue as one of equality or inequality asks the wrong question and, consequently, tends to beget the wrong answer. Separate but equal educational facilities are not either equal or unequal, they are both equal and unequal. They are prescriptively equal by some prescriptive standards, and prescriptively unequal by other prescriptive standards: equal by a prescriptive rule that prohibits the state from spending less money to educate blacks than to educate whites (or less money to educate women than to educate men); unequal by a prescriptive rule that prohibits the state from stigmatizing persons or denying them educational opportunities on the basis of race or sex. Thus, the real question today is not whether separate but equal colleges or athletic facilities for men and women are equal for fourteenth amendment purposes, but what standard or rule the fourteenth amendment prescribes — a rule that prohibits the state from spending less on the training of women than on the training of men, a rule that prohibits the state from stigmatizing women on the basis of sex, or a rule that prohibits the state from offering educational and athletic opportunities on the basis of sex? The latter question cannot be avoided, because it provides the prescriptive standard by which constitutional equality and inequality are to be measured. Yet by stating the question derivatively in terms of equality rather than directly in terms of the underlying standard,

104. 163 U.S. 537 (1896).

105. 347 U.S. 483 (1954).

106. 347 U.S. at 495.

107. Compare *Vorchheimer v. School Dist.*, 532 F.2d 880 (3d Cir. 1976) (upholding all-male and all-female high schools of "equal quality and prestige"), *affd. per curiam by an equally divided court*, 430 U.S. 703 (1977), with *Yellow Springs Bd. of Educ. v. Ohio High School Athletic Assn.*, 647 F.2d 651, 666-97 & n.8 (6th Cir. 1981) (Jones, J., concurring and dissenting) (denying female chance to compete on best team creates stigma). Cf. *Mississippi Univ. for Women v. Hogan*, 50 U.S.L.W. 5068, 5069 n.1 (U.S. July 1, 1982) (reserving for a future time the question whether "separate but equal" educational facilities for males and females violate the Constitution).

one "obscures"¹⁰⁸ the underlying choice of standards and thus "distorts"¹⁰⁹ moral and legal discourse.

Equality and inequality are more confusing in law and morals than in math and science, not because equality and inequality mean anything different in one area than in the other, but because the standards by which equivalences and nonequivalences are measured are more elusive in law and morals. The descriptive standards that populate math and science tend to be clear, certain, and settled. The prescriptive standards that populate law and morals tend to be vague, varying, and controversial. The descriptive standards of math and science can be expressed derivatively in terms of equalities and inequalities without much risk of confusion. Unfortunately, experience shows that the prescriptive standards of law and morals cannot be expressed derivatively in terms of equality and inequality without adding to the mysteries that already surround them.

B. *The Usefulness of the Confusion*

Professor Chemerinsky's last argument is in many ways the most interesting. Even if equality has no independent normative content of its own, it nonetheless has great symbolic value, he says, by virtue of its singular rhetorical force. The source of its value is its "emotional power" to "persuade people to accept [results] that we believe [are] justified" and, thus, "to safeguard rights that otherwise would go unprotected."¹¹⁰ Regardless of whether equality is analytically empty, its "tremendous emotive force" makes it "rhetorically useful."¹¹¹

I agree (and have said before) that equality possesses singular rhetorical force.¹¹² I also agree (and have also said before) that some empty and derivative concepts are rhetorically useful, particularly ones that work heuristically to focus attention on the considerations we have decided ought to govern the resolution of moral and legal issues.¹¹³ I do not agree, however, that the rhetorical force of equality is useful, because I do not believe that its "emotive force" is beneficent. The rhetorical force of equality comes not from focusing our attention on the considerations that we believe should govern the

108. See note 100 *supra*.

109. See note 100 *supra*.

110. Chemerinsky, *supra* note 43, text accompanying notes 65-69.

111. Chemerinsky, *supra* note 43, text accompanying notes 65-66.

112. See Westen, *supra* note 67, at 593 & nn.191-92.

113. See *id.* at 579, n.147.

resolution of normative disputes, but by concealing, obscuring, and confounding them.

The nature of the rhetoric of equality can be illustrated by the Equal Rights Amendment. The Equal Rights Amendment contains two elements — a substantive element, and a rhetorical element. Substantively, the Equal Rights Amendment prohibits the state from basing a person's legal entitlements on his sex, that is, from classifying a person for legal purposes on the basis of sex.¹¹⁴ Rhetorically, the Equal Rights Amendment expresses its substance in the language of "equality." Together the two elements combine as follows: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

Significantly, while the framers and supporters of the Equal Rights Amendment chose to express themselves through the rhetoric of equality, their invocation of equality is both derivative and superfluous. The key rhetorical term in the amendment — the word "equality" — is entirely derivative: the relationship of identity (or "equality") that would prevail among people by virtue of the amendment follows logically from the standard of measure the amendment explicitly prescribes — that the state shall regulate people without regard to "sex." Moreover, because the amendment makes explicit the prescriptive standard by which the equality of persons is to be measured, the further reference to "equality" becomes entirely superfluous.¹¹⁵ The word "equality" does not add anything to what the Amendment would mean without it: "[R]ights under the law

114. Needless to say, like any moral or legal rule, the Equal Rights Amendment has to be *interpreted* and, in being interpreted, can be held to mean different things. Thus, it can be given what is ordinarily called its "literal" meaning and held to prohibit a state from basing any person's legal entitlements on his sex. Alternatively, it can be held to contain implicit exceptions, such as exceptions for segregated bathroom facilities, etc. The point is that in the absence of a determination that the Amendment contains implicit exceptions, and in the absence of an authoritative determination of what those exceptions consist of, the Equal Rights Amendment purports on its face to prohibit all explicit sexual discrimination by the state. *See* R. LEE, *A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT* 43 (1980).

115. If one wished to state the Equal Rights Amendment in nonredundant words, one could proceed in one of two ways. Following the example of the framers of the Equal Protection Clause, one could simply prohibit the state from denying any person "equality of rights under the law," thus leaving unstated or implicit the normative standard by which equality is measured (*i.e.*, that no person shall be denied rights solely because of his sex). Alternatively, following the example of the nineteenth amendment, one could make explicit the standard by which people are to be treated, by explicitly prohibiting the state from denying any person rights "on account of sex." It is simply redundant, however, to combine the first formulation with the second — as the Equal Rights Amendment does — because each formulation suffices entirely to prohibit discrimination based on sex. The Equal Rights Amendment is redundant in the same way in which the nineteenth amendment would be redundant if instead of prohibiting the state from denying citizens "the right . . . to vote . . . on account of sex" (as it does), it prohibited the state from denying citizens "*equality of rights* . . . to vote . . . on account of sex."

shall not be abridged or denied by the United States or by any State on account of sex."

The reference to equality in the Equal Rights Amendment is redundant. Yet it carries (and is perceived by ERA supporters as carrying) significant rhetorical force.¹¹⁶ What precisely, then, is the source of its persuasive force? How, exactly, does the rhetoric of equality work its persuasion? Does it do so by revealing the content of the underlying prescriptive standard, or by obscuring it? The answer, I believe, is plain: the rhetoric of equality in the Equal Rights Amendment invites agreement not by illuminating the controversial prescriptive standard on which it rests, but by concealing and confounding it. The substance of the Equal Rights Amendment is highly controversial. It prohibits the state from classifying persons on the basis of sex. Thus, if enforced literally, it would prohibit the state from deploying all-male combat forces; from maintaining all-female residence halls or dormitory floors; from supporting all-female athletic teams; from providing all-male and all-female bathrooms; and from prohibiting all-male (or all-female) marriage.¹¹⁷ Yet the rhetoric of equality disarms potential opponents by obscuring the Amendment's underlying standard and allowing them to insert other standards — both descriptive and prescriptive — in its place. Thus, realizing that men and women are descriptively equal by some standard (*e.g.*, by the standard of possessing *X* chromosomes), people may conclude that men and women must therefore

116. The National ERA Outreach Campaign, in its "ERA Action Team Phone Bank Manual," urged "public opinion message worker[s] to emphasize the rhetoric of equality in their 'sample messages' to persons. See ERA Action Team Phone Bank Manual, on file with the *Michigan Law Review*. The National Organization of Women urged ERA Countdown Campaign workers to "[a]sk the press to run the full text of the ERA." See *10 Tips for Maximizing Your Coverage of the ERA Message Brigade*, on file with the *Michigan Law Review* (emphasis in original). See also Letter from ERA Countdown Rallies Committee to Now Activists, of June 8, 1981, enclosing a sample pro-ERA editorial with the full text of the ERA, on file with the *Michigan Law Review*. The ERA Countdown Campaign in its paid advertisements emphasized that the Equal Rights Amendment was about "equality." See Paid Political Advertisement, *The Sunday Oklahoman*, Jan. 10, 1982, §A at 8-9 (urging people to read the actual text of the Equal Rights Amendment and concluding "we have waited long enough for equality"). See also *The Sunday Oklahoman*, Jan. 10, 1982 (*Women's News*) at 1:

"The main reason we need the ERA is that over the Department of Justice (building) is the inscription, 'Equal Justice Under the Law,' and that makes the ERA in the tradition of this country," said Wanda Jo Peltier, head of the Oklahoma Women's Political Caucus.

"We won't have equal justice until we get women in the Constitution."

Interestingly, the word "equal" might carry a negative rhetorical content. See, *e.g.*, *Ann Arbor News*, June 19, 1982, at A7 (quoting former Representative Martha Griffiths for the proposition that "the word 'equal' has been the downfall of the ERA").

117. See R. LEE, A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT 55, 64-66, 78-79 (1980). But see Emerson & Lifton, *Should the E.R.A. Be Ratified?*, 55 CONN. B.J. 227, 233-34 (1981) (arguing that the Equal Rights Amendment will be construed not to affect laws or regulations designed to protect privacy regarding intimate bodily behavior, or dealing with sexual preference).

be prescriptively equal for purposes of ERA; agreeing that men and women are prescriptively equal by some standards (*e.g.*, by the prescriptive standards governing suffrage), people may conclude that men and women must therefore be prescriptively equal for purposes of ERA; realizing that separate but equal athletic teams and restroom facilities are prescriptively equal by some standards (*e.g.*, by the standard that the state spend the same amount of money on the care of women as on the care of men), people may conclude that ERA must therefore incorporate such standards. In each case, the rhetoric of equality persuades people to accept the substance of ERA — not by enlightening them, but by confounding them.

Now it might be argued that the ends justify the means — that the substantive ends of equality rhetoric justify its beguiling means. Professor Chemerinsky seems to suggest as much in arguing that equality “helps us to persuade people to accept [results] that we believe [are] justified.” I would be tempted to agree with him if I shared his confidence that certain “result[s]” are constitutionally “justified,” and that equality will be invoked exclusively on their behalf. Unfortunately, besides lacking Professor Chemerinsky’s confidence about what values are ultimately justified, I have no reason to believe that the rhetoric of equality will advance those values and no others. Every legal rule treats all people equally in some respects and unequally in other respects. Every rule, therefore, can be expressed and defended on the grounds that it treats equals equally. Equality was invoked in the past to justify slavery.¹¹⁸ It has been invoked in our times to justify segregating the education of blacks and whites,¹¹⁹ to deny pregnancy benefits to women,¹²⁰ and to presumptively disqualify women from jury service.¹²¹ Even if ends justify means, and even if one knows which ends are justified, one may as often find oneself arguing against equality as arguing on its behalf.¹²²

118. See ARISTOTLE, THE POLITICS 1252a at 5-30, 1255b at 15 (T. Sinclair trans. 1962). See generally D. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 66-72 (1966); Campbell, *Aristotle and Black Slavery: A Study in Race Prejudice*, 15 *Race* 3 (1974).

119. See Brief for Appellees at 17-30, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 67 (P. Kurland & G. Casper eds. 1975).

120. See *Guduldig v. Aiello*, 417 U.S. 424 (1974).

121. See *Hoyt v. Florida*, 368 U.S. 57 (1961), *overruled*, *Taylor v. Louisiana*, 419 U.S. 522 (1975).

122. Compare *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (Opinion of Powell, J.) (criticizing programs of affirmative action for admission to medical school as “not equal”) (emphasis added), with *Bakke*, 438 U.S. at 363, 368, 373 (opinion of Brennan, White, Marshall, & Blackmun, JJ.) (praising such programs in the name of “equal opportunity”) (emphasis added). Cf. *People ex rel. S.P.B., — Colo.*, 651 P.2d 1213 (Oct. 12, 1982) (considering the argument that by imposing child-support duties on both parents without according the

Alternatively, equality might be defended precisely on the ground that it is a rhetorical device by which courts can accommodate ebbs and flows in values without giving the appearance of fickleness. No written constitution, no matter how farsighted, can at a single point in time embody all the fundamental moral conceptions that a society may come to embrace in the course of its history.¹²³ Every society, therefore, needs some general concepts — like the concept of due process — by which courts can adopt newly arising values and slough off old values without giving the appearance of constitutional fluctuation. The concept of equality performs that function by serving as a rhetorical rubric under which courts can subsume the prevailing prescriptive rules of the day.

The foregoing argument has some force, because societies do benefit from possessing shared concepts not tied to particular passing conceptions.¹²⁴ The trouble with equality, however, is that it does more than accommodate shifting values. It obscures them. That is the essential difference between equality, on the one hand, and due process, on the other. Like the concept of treating equals “equally,” the concept of giving everyone his “due” can encompass an unlimited range of particular normative conceptions. It is a form of argument, a variable, which can assume the coloration of whatever happen to be the prevailing conceptions of the day — whether they be the right of slaveholders to travel with slaves through federal territories,¹²⁵ or the right of businessmen to set the terms and hours of employment,¹²⁶ or the right of pregnant women to make autonomous decisions regarding abortion.¹²⁷ The difference between equality and due process is that equality conceals its conclusory nature, while due process reveals it. Substantive due process does not purport to be anything other than what it is — a conclusory rubric to be invoked as a label for whatever values are deemed fundamental at the moment. Equality, in contrast, performs the same function,

father a right to decide that a fetus be aborted, the Uniform Parentage Act denies fathers equal protection of the laws); Sullivan, *Some Thoughts on the Constitutionality of Good Samaritan Statutes*, 8 AM. J. LAW & MEDICINE 27 (1982) (arguing that good samaritan statutes may violate the principle of equal protection of the laws); Cf. Willhelm, Book Review, 79 MICH. L. REV. 847, 852 (1981) (“The very idea of Equality, of treating Blacks and Whites alike, is racist because it fails to take account of over three hundred years of racist oppression. . . . Thus, the myth of Equality serves as a racist doctrine to justify the continued economic subjugation of Blacks, who remain powerless to define Equality to meet Black needs or to force abandonment of the myth altogether in favor of racial justice.”) (footnotes omitted).

123. See J. ELY, *DEMOCRACY AND DISTRUST* 87-101 (1980).

124. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-37 (1977).

125. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

126. See *Lochner v. New York*, 198 U.S. 45 (1905).

127. See *Roe v. Wade*, 410 U.S. 113 (1973).

but with considerably less candor. It, too, serves as a rubric for whatever happens to be perceived as fundamental values of the day; yet it does so while purporting to be "an independent norm"¹²⁸ in its own right.

Mystification may have a rightful place in the rhetoric of politics. But it can become an instrument of abuse in the hands of officials who supposedly derive their authority from the informed consent of the people, and in the hands of judges who supposedly derive their legitimacy from a commitment to reasoned explanation.¹²⁹

CONCLUSION

"Maybe you are right about equality," it will be said. "Maybe equality is empty and confusing, and maybe it should be banished from moral discourse as an explanatory norm. But it cannot be banished from legal discourse — at least not in this country — because it figures explicitly in our fundamental law. The fourteenth amendment codifies the idea of equality and thereby gives it an unavoidable role in legal discourse."

The foregoing argument is premised on fallacies about what it means to say equality is "empty," and what it means to banish equality "as an explanatory norm." Empty does not mean "meaningless," and banishing an idea as an explanatory norm does not mean banishing the values that underlie it.

Equality is empty in the same way that substantive due process is empty. Both are derivative formulas possessing no independent normative content apart from the anterior rights and rules they incorporate by reference. The formula of substantive justice, "to each his due,"¹³⁰ is derivative in nature. It commands us to give a person his due, but it does not itself define a person's due. It simply incorporates by reference whatever rights or rules for a person are otherwise deemed to exist — whether the right to contract, the right to marry,

128. Chemerinsky, *supra* note 43, text accompanying notes 79-82; *id.* at n. 42.

129. See Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13 (1979):

The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values. It is a dialogue with very special qualities: . . . (c) Judges are compelled to speak back, to respond to the grievance or the claim, and to assume individual responsibility for that response. (d) Judges must also justify their decisions.

See also Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 509 (1982) ("Courts — at least appellate courts — generally believe themselves under an obligation to justify what they hold.").

130. See H. Kelsen, *Aristotle's Doctrine of Justice*, in WHAT IS JUSTICE? 128 (1971) ("Aristotle's definition of distributive justice is but a mathematical formulation of the well-known principle *suum cuique*, to each his own, or to each his due.").

or the right to rear one's children.¹³¹ No particular statement of substantive due process — such as the right to marry — is ever meaningless. Statements of substantive due process possess precisely as much meaning (and as little meaning) as the underlying rights that substantiate them. They possess no additional meaning, however, because substantive due process itself has no meaning apart from the rights and rules it incorporates by reference. Substantive due process itself is empty.

The same holds true of equality. Particular statements of equality are never meaningless. They possess as much meaning as the underlying rights and rules they incorporate by reference — whether the right to travel, the right to appeal a criminal conviction without regard to one's wealth, or the right to have one's vote in state elections weighted in accord with one's share of the population of the state as a whole.¹³² Statements of equality have no additional meaning, however, above and beyond the standards they incorporate by reference, because equality itself has no content apart from those standards. Statements of equality have meaning, but the meaning is entirely derivative. Equality itself, like substantive due process, is empty.¹³³

131. See *Lochner v. New York*, 198 U.S. 45 (1905) (right to contract); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (right to rear one's children).

132. See *Zobel v. Williams*, 102 S. Ct. 2309, 2316 (1982) (Brennan, J., concurring) ("As is clear from our cases, the right to travel achieves its most forceful expression in the context of equal protection analysis."); *Douglas v. California*, 372 U.S. 353 (1963) (right of a criminal defendant to appeal a criminal conviction without regard to wealth); *Reynolds v. Sims*, 377 U.S. 533 (1964) (right to have one's vote in the state elections weighted in accord with one's share of the population of the state as a whole).

133. To state the same thing in other words, equality possesses the quality of a *moral variable*, incorporating by reference whatever specific moral standards one wishes to insert. See Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153, 1156-58 (1982). This capacity of equality to function as a moral variable is easily illustrated. Following the Declaration of Independence, a number of American states — including Massachusetts and Virginia — enacted bills of rights, declaring their peoples "free and equal." See MASS. CONST. pt. I, art. I (1780, amended 1976) ("all men are born free and equal"); VA. CONST. OF 1776 art. I, § 1 ("all men are by nature equally free and independent"). See generally W. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 164-88 (1980). Despite their common invocation of the term "equal," the two states meant to constitutionalize very different moral standards and, hence, very different measures of "equality." Thus, by declaring all men "equal," Massachusetts meant to abolish slavery. It meant to constitutionalize the rule — "no person shall be held in a condition of slavery." See "The Quock Walker Case," in 1 H. COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 110 (9th ed. 1973) (report of an opinion by the Massachusetts Supreme Judicial Court declaring slavery unconstitutional in Massachusetts under the "free and equal" clause of the Massachusetts Constitution). In contrast, by declaring all men "equally free," Virginia meant to do nothing that would interfere with the institution of hereditary slavery. It meant to constitutionalize the rule — "no person shall be denied the freedom to which he is rightfully entitled by birth." See *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806). For further discussion as to what was (and what was not) decided in *Quock Walker*, and as to the contrast between Massachusetts and Virginia, see R. COVER, *JUSTICE ACCUSED* 43-55 (1975).

Equality can be banished as an explanatory norm in the same way that substantive due process can be banished as an explanatory norm: both can be pierced and discarded as superfluous veils for underlying rights and rules. The due process clause of the fourteenth amendment is deemed to be the locus of the right of a woman to terminate an unwanted pregnancy.¹³⁴ One can talk about the entitlement in two ways. One can talk about it *indirectly*, by referring to the right of substantive "due process"; or one can pierce the language of due process and talk directly about the "right to an abortion." The language of due process does not add anything of substance to a direct reference to the rights that underlie it. "Due process" is a rhetorical device — a formal way of talking about entitlements by reference. Due process does not "explain" the right of abortion, and in the context of abortion, it does not exist as an independent norm. We can preserve the right of abortion in its fullness and yet banish due process as an explanatory norm.

The same holds true for equality. The equal protection clause is deemed to be the locus of a variety of entitlements, including the right of a person not to be stigmatized on the basis of race.¹³⁵ One can talk about the latter entitlement in various ways. One can talk about it indirectly, by referring to "equal protection"; or one can pierce the language of equal protection and talk directly about the underlying right to be free from stigmatic classification. The language of equality adds nothing of substance to the right that underlies it. "Equal protection" is a rhetorical device — a formal way of talking about entitlements by reference to the identities they entail. Equal protection does not explain the right to be free from stigmatic classification, and in the context of stigmatic classification, it does not exist as an independent norm. We can preserve the right to be free from racial stigma and yet banish equality as an explanatory norm. We not only can. We should.

134. *Roe v. Wade*, 410 U.S. 113, 152 (1973). See generally Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

135. See *Plyler v. Doe*, 102 S. Ct. 2382, 2393 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste- and invidious class-based legislation.").