Equality Revisited

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ARTICLE
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In legal, political, and philosophical discourse, and indeed in everyday life, equality often plays the role of a normatively significant prescriptive principle, a principle that provides reasons for action. Professor Peters, however, joins Peter Westen and others who argue that the traditional statement of prescriptive equality — equals are entitled to equal treatment — is normatively empty because it is a tautology. Like Professor Westen, Professor Peters notes that this traditional principle translates into a statement of simple redundancy: people entitled to equal treatment are entitled to equal treatment. Unlike Professor Westen, however, Professor Peters discerns a nontautological principle of equality, which claims that one person's treatment in a particular way is a reason in itself for treating another, identically situated person in that way. Nevertheless, Professor Peters argues that this principle, although nontautological, has no more normative content than the traditional expression; either it provides no independent reasons for action, or it is self-contradictory and incoherent. This Article examines the nontautological principle of equality, analyzes its supposed application in a variety of circumstances, and assesses some consequences of the conclusion that prescriptive equality has no normative content for Equal Protection Clause jurisprudence and John Rawls's "egalitarian" political philosophy.

Equality is at once the most appealing and the most threatening of ideas. Its appeal is the comfort of commonality, the promise of impartiality, the hope of genuine meritocracy. Its threat is the same. Actually, its threat is too much of the same. Its threat is that commonality will usurp individuality, that impartiality will eclipse meritocracy, that treating people the same will mean treating some people wrongly.

This Article is yet another about "equality." (I place the word between quotation marks both because it means different things to different people and because, as this Article makes clear, I do not believe that "equality" really exists as it often is said to exist — as a prescriptive norm.) The Article is the most recent entry in the "equality is empty" debate begun, in the law reviews at least, by Peter Westen fifteen years ago. Like Professor Westen and others, I believe the work of prescriptive "equality" is almost always performed entirely by some nonegalitarian norm. Unlike Professor Westen, though, I do not believe equality's typical emptiness stems from its inevitable tautology. Prescriptive equality need not be tautological, and indeed, in the fullest sense in which it often is advocated, it is not.

* Bigelow Teaching Fellow and Lecturer in Law, The University of Chicago Law School. I thank Dick Craswell, Kent Greenawalt, James Hopenfeld, and Lloyd Weinreb for their helpful comments on earlier versions of this Article and the issues discussed herein.

The fullest, nontautological claim of the egalitarian comes down to this: sometimes a person should be treated wrongly simply because another, identically situated person has been treated wrongly.2 “Wrong” treatment need not mean detrimental treatment, and indeed most egalitarian claims advocate treating people better than they otherwise are entitled to be treated. The child demands to stay up late because her brother, incorrectly, was allowed to stay up late the night before; the ticketed driver protests to the judge that the car in front of him was not stopped even though it, too, was speeding. In these kinds of arguments, prescriptive equality claims real, substantive bite; it is not a tautology because it purports to tell us something we would not otherwise know about how to treat someone.

But even nontautological equality unavoidably butts up against emptiness — inescapably becomes merely an aspect of some wholly nonegalitarian norm — or, where it cannot be said certainly to be empty, collapses into incoherence. This Article aims to demonstrate the truth of these propositions by examining prescriptive equality in a variety of archetypal conditions in which it might be thought to operate prescriptively. The goal will be to expose prescriptive equality as an illusion in each case, a shadow cast by principles that in fact have nothing to do with equality. My project is primarily descriptive, not normative, and my methodology is a combination of logic and intuition — an attempt to use reason to explain emotion. To ensure that my conclusions will have some claim to generality, this Article deals with types of cases rather than specific ones and makes frequent use of hypothetical examples.

This Article thus owes much to the work of Peter Westen, whose methodology has been similar. But although it unabashedly is a descendant of Professor Westen’s work, this Article is in many ways quite distinct from that work. Westen starts with the premise that prescriptive equality cannot be conceived of nontautologically, and proceeds from there to the conclusion that equality can add nothing to our understanding of how to treat people. Westen, however, runs into trouble when confronted with a conception of prescriptive equality that avoids tautology. Rather than question his premise in such cases, Westen imports, sub rosa, egalitarian principles into his rules for how people should be treated. In so doing, Westen severely weakens his conclusions about prescriptive equality’s emptiness, making his argument in some contexts merely a semantic one.

This Article attempts to avoid Professor Westen’s dilemma by starting with the premise that prescriptive equality need not be a tautology. It describes a conception of equality that has substantive logical content — a conception that, I believe, is held in some form by most who ascribe prescriptive force to equality. Then, it tries to show

2 For a full description of the claims of nontautological prescriptive equality, see pp. 1222–27.
that even this fuller definition of prescriptive equality suffers from emptiness in all but one type of case in which it might be applied. Although in that one exceptional kind of case prescriptive equality might not be empty, it is normatively incoherent nonetheless.

In one sense, the ambitions of this piece are considerably more modest than those of Professor Westen's work. Westen, especially in his book Speaking of Equality, has thoroughly examined the idea of equality in law and morals in a way that far exceeds the scope of this Article. Professor Westen has been particularly concerned with the rhetorical force of the language of equality in American politics and law, a phenomenon that to some degree troubles him. His work is tremendously important for understanding the place and limits of equality in our thought and discourse. In contrast, this Article's focus is much more limited. I seek only to demonstrate that prescriptive equality has no substantive moral force of its own; I make no attempt to analyze its rhetorical operation, to consider its historical importance, or to evaluate it thoroughly in any particular legal or political context.

In another sense, however, this Article is more ambitious than Professor Westen's enterprise, and indeed than the undertakings of most modern writers about equality. It is intended as more than an expose of prescriptive equality's logical emptiness or a critique of its worthiness as a rhetorical device. Rather, it suggests that despite what we may at first think, we really just do not care about equality as a normative goal. We care instead about other forces at work, sometimes silently, behind the facade of equality or inequality. This Article's descriptive claims, then, although far narrower than Professor Westen's, purport to cut somewhat deeper.

This project is likely to be misconstrued, just as Professor Westen's grander one has been. I am not against equality. Equality, in its descriptive sense, is a necessary product of nonegalitarian justice, and I am all for nonegalitarian justice. If we treat people rightly, we always in some sense treat them equally. Of course I support treating people rightly. But part of my claim is that if we treat people equally, we do not necessarily treat them rightly.

Along these lines, I do not dispute that the absence of equality of treatment often signals the absence of justice in treatment, and thus I have no quarrel with those for whom alarm bells ring when apparently similarly situated people are treated differently. I merely contend, with Professor Westen and others, that our inquiry must not stop when such a difference has been identified — and, if the difference proves unwarranted, that the problem might not be solved merely by eliminating it. I contend, that is, that inequality is often a symptom but never the disease.

3 See Westen, Speaking of Equality, supra note 1, at 257–88; see also Westen, Empty Idea, supra note 1, at 577–96 (arguing that the confusion that equality creates outweighs its rhetorical benefits).
A few additional caveats are in order. First, the principle that I critique in this Article, which I call prescriptive equality, is but one of many different moral concepts that might be, and have been, advanced under the rubric "equality." There are legion, perhaps infinite, kinds of arguments that might be called "egalitarian" about which this Article has little or nothing to say. As such, the Article is susceptible to charges, brought by advocates of some other conception of "equality," that I have beaten a straw man, that I have failed to debunk equality in its truest sense, or that I have missed the point entirely. In response to such potential objections, I can only state that I believe, and try to argue persuasively below, that the nontautological principle of prescriptive equality I articulate and assess here is at the core of the most interesting and troublesome kinds of egalitarian arguments, and indeed animates the "idea of equality" with which Professor Westen has been concerned. If this Article succeeds in challenging the validity of the particular conception of prescriptive equality that it describes, it will have accomplished its purpose.

Second, this Article is an effort to carve a new path through very well-trodden territory — always a difficult task, and one that should inspire a healthy dose of humility in those who attempt it. I thus have no illusions that the analysis this Article offers is comprehensive, unassailable, or entirely original. I hope only that it contributes in some positive way to the current thinking about its subject — if only by supplying some new and interesting tools for dissecting the problems and issues that arise when arguments of prescriptive equality are invoked.

The rest of the Article proceeds as follows. In Part I, drawing from Professor Westen's work, I explain why prescriptive equality as traditionally expressed is tautological and unable to support normative arguments. I also show, however, that some who have critiqued Professor Westen's work have identified egalitarian impulses that do not seem tautological, and that Westen's response to the existence of such impulses has been unsatisfactory. Then, in Part II, I build upon my previous work and offer a statement of prescriptive equality that avoids tautology and encompasses the nontautological egalitarian impulses of some of Professor Westen's critics.

In Part III, also building on my previous work, I present a formal definition of nonegalitarian justice that offers alternative explanations of the intuitive effects often attributed to prescriptive equality. In Part IV, I closely examine the three general categories (and several subcategories) of conditions in which nontautological equality might be thought to apply prescriptively. I explain why equality is suspect as a substantive norm in each type of condition — either because it adds

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5 See id. at 2050-55.
nothing to nonegalitarian justice or because it simply is incoherent. Finally, in Part V, I make a few general comments about what the emptiness or incoherence of prescriptive equality might mean for our legal regime of “equal protection” and for so-called “egalitarian” political theories like that advanced by John Rawls.

I. EQUALITY AS TAUTOLOGY: THE ESSENTIAL TRUTH AND THE FATAL FLAW OF PROFESSOR WESTEN’S ARGUMENT

Peter Westen has convincingly shown that the principle of prescriptive equality as it traditionally has been stated is tautological and therefore meaningless as an expression of a normative goal. But Professor Westen’s argument has run into problems when confronted with a conception of prescriptive equality that differs from the tautological proposition it attacks. What Professor Westen apparently has not seen is that defenders of “equality” in its fullest normative sense have something more in mind than the undeniably empty idea of “treating likes alike.” This blind spot has weakened Westen’s critique of prescriptive equality by forcing him to import egalitarian premises into his arguments. I discuss this problem below, with the purpose of setting the stage for my articulation in Part II of a statement of prescriptive equality that escapes tautology.

A. Why “Traditional” Equality Means Nothing

“By ‘equality,’” Professor Westen has written, “I mean the proposition in law and morals that ‘people who are alike should be treated alike’ . . . .”\(^6\) This proposition may be stated in the following, equivalent way: *Identically situated people are entitled to be treated identically.*\(^7\) This proposition purports to be normatively prescriptive: it purports to tell us how people should, morally, be treated under certain conditions. As Professor Westen quite rightly points out, however, the proposition cannot be normatively prescriptive because it is a tautology.

The explanation of why this traditional conception of equality\(^8\) is tautological proceeds as follows.\(^9\) Suppose a person, call her Ms.

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\(^6\) Westen, *Empty Idea*, supra note 1, at 539 (citations omitted).

\(^7\) See Peters, *supra* note 4, at 2057.

\(^8\) See *id.* The pedigree of this traditional conception probably goes back to Aristotle, although he made no claim that traditional equality has substantive moral content. In the *Nicomachean Ethics*, Aristotle conceived of inequality as one kind of injustice; inequality occurred “when either equals have and are awarded unequal shares, or unequals equal shares.” ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 3, at 1006 (W.D. Ross trans., 1941). Aristotle recognized that, as a prescription, this conception of equality was tautological, merely a reflection of the treatment of each person “according to merit.” *Id.*

\(^9\) The discussion here will be distilled quite bluntly from Professor Westen’s work, see WESTEN, *SPEAKING OF EQUALITY*, supra note 1, at 185–229; Westen, *Empty Idea*, supra note 1, at 542–58, but I will present the explanation in my own words in order to state it simply and without cumbersome footnotes every couple of lines. My presentation here also owes much to my
Lucky, is entitled to be treated in a certain way. A good way to illustrate entitlement to a certain treatment is to hypothesize a statute creating such an entitlement, so let us do so. Our hypothetical statute provides that a taxpayer is entitled to a $1000 income tax credit for every dependent under the age of eighteen in his or her care (and that every person who does not meet this criterion is not entitled to such a credit). Ms. Lucky has only one child, who recently turned nineteen years of age. As such, Ms. Lucky falls outside the criterion for a $1000 tax credit. Nevertheless, Ms. Lucky makes an error filling out her tax return and claims entitlement to the credit. The government does not catch the error and deducts $1000 from the amount of income tax that Ms. Lucky owes.

Note that Ms. Lucky has, in our example, been treated wrongly. (Later I refer to this kind of treatment as unjust treatment, but for now let us just think of it as wrong.) Her treatment is wrong because she has been given a benefit, a $1000 tax credit, to which she is not entitled under the applicable treatment rule, that is, the statute. (Let us assume that the statute is the only source of applicable treatment rules here.) The wrong treatment, of course, is to Ms. Lucky's benefit; she is glad of it, although her conscience might get the better of her if she discovers the error. But the fact that the treatment benefits Ms. Lucky does not change the fact that the treatment is wrong, that is, incorrect according to the substantive treatment rule that applies in this particular circumstance.

Now imagine a subsequent taxpayer, Mr. Unlucky, who, like Ms. Lucky, has a single nineteen-year-old child and thus falls outside the criterion specified by the statute for the $1000 dependent child credit. Mr. Unlucky and Ms. Lucky therefore are identically situated with respect to entitlement to the $1000 credit (or lack thereof). Like Ms. Lucky, Mr. Unlucky submits a tax return claiming the credit. Mr. Unlucky has the misfortune of being audited, however, and his credit is disallowed.

What is to be said about the comparative situations of Ms. Lucky and Mr. Unlucky? We know that the two are identically situated with respect to their entitlement to a $1000 dependent child tax credit. We also know that they have not been treated identically: Ms. Lucky has (wrongly) been awarded the credit, while Mr. Unlucky has been denied the credit. Does the traditional statement of prescriptive equality — "Identically situated people are entitled to be treated identically" — tell us anything substantive about how morally to evaluate Mr. Unlucky's treatment?

No, it does not. In fact, it tells us nothing we do not already know from the relevant treatment rule (the tax credit statute). Prescriptive equality, traditionally conceived, is supposed to tell us how to treat narrower discussion of traditional equality in a previous article. See Peters, supra note 4, at 2057-64.
two (or more) people who are "identically situated." But notice how we determine whether two people are "identically situated" for purposes of prescriptive equality: we refer to the relevant substantive rule governing their treatment. In our example, that rule is the statute, which says that anyone with a dependent child of eighteen years of age or less is entitled to a tax credit. According to the statute, the only criterion that is relevant to entitlement to the tax credit is the existence of a dependent minor child. Thus, the statute, in telling us the relevant criterion for each person’s treatment, also tells us the relevant criterion of "identicality" (or "sameness" or "likeness") for purposes of determining whether people are "identically" (or "equally") entitled to that treatment. It tells us that two people are "equal," that is, identically entitled to a $1000 tax credit, if they both have a dependent of less than eighteen years of age. No other criterion — gender, race, shoe size, or favorite baseball team — is relevant to equality of entitlement to that particular treatment. In other words, the definition of "identically situated people" in our traditional statement of prescriptive equality is "people identically entitled to a particular treatment." This turns traditional prescriptive equality into the following statement: "People identically entitled to a particular treatment are entitled to be treated identically." Stated slightly differently but equivalently, the statement becomes the following: "People identically entitled to a particular treatment are identically entitled to that treatment." Traditional equality is a tautology.

Applied to our hypothetical, this means that the traditional statement of prescriptive equality does not tell us anything substantive about how to treat Ms. Lucky or Mr. Unlucky. We already know that Ms. Lucky has been treated wrongly, although to her benefit. The applicable substantive treatment rule, the tax credit statute, tells us this. Traditional prescriptive equality adds nothing. But does prescriptive equality not tell us something about Mr. Unlucky’s treatment? Does it not tell us that he too has been treated wrongly (or, put another way, that he is entitled to be treated in the same way as Ms. Lucky)?

Again, the answer is no. The simple reason for this is that a tautology cannot have independent normative substance. As we have seen, traditional prescriptive equality tells us only that a person entitled to be treated a certain way is entitled to be treated that way. Either this is meaningless — because we do not know what the "certain way" is in which the person is entitled to be treated — or it is utterly superfluous, because once we do know in what "certain way" the person is entitled to be treated, we also automatically know everything we need to know about how that person should be treated.

All of this is not to say that tautologies cannot produce morally significant effects by virtue, for instance, of their symbolic or rhetorical
The cliché "today is the first day of the rest of your life" technically is a tautology, but it can be powerful (even morally powerful) nonetheless as a way of emphasizing the need to forget past troubles, to seize the initiative, to take control of one's life. But that platitude, or any other tautology, has moral significance only through its psychological side effects. Rather than having any substantive prescriptive content, it simply captures an independent substantive principle in a rhetorically pleasing way. A tautology really can have no meaning of its own, and traditional equality is a tautology.

There is another way of seeing that traditional prescriptive equality fails to tell us anything about how to treat Mr. Unlucky. Remember that equality parses out to "people identically entitled to a certain treatment are identically entitled to that treatment." In our hypothetical, the treatment at issue is either the grant or the denial of a $1000 income tax credit; we know that Ms. Lucky and Mr. Unlucky are identically entitled to that treatment, whichever it is, because each has a single dependent of the same age, nineteen years. We also know that Ms. Lucky has not been given the treatment to which she is entitled, denial of the credit. Instead she has been given an incorrect treatment, a treatment to which she has no entitlement. Traditional prescriptive equality tells us that Mr. Unlucky, identically situated to Ms. Lucky, has an identical entitlement to that incorrect treatment. But because Ms. Lucky's entitlement to the treatment she received, a $1000 tax credit, is nonexistent, Mr. Unlucky's (identical) entitlement to that same treatment is likewise nonexistent. Traditional equality cannot give us a reason, then, to grant the tax credit to Mr. Unlucky just as it was mistakenly granted to Ms. Lucky.

Traditionally conceived, therefore, the supposedly prescriptive principle of equality is tautological and thus normatively vacuous. All of this Professor Westen has demonstrated beyond doubt. But Professor Westen has had difficulty dealing with examples posed by those who maintain that the principle of equality has normative force. In some circumstances, the fact that prescriptive equality is a tautology does not seem to convince us that there is not some independent egalitarian impulse operating somehow to require a certain result.

B. Where Professor Westen's Attack on Equality Goes Wrong

Most of those who have attacked Professor Westen's conclusions about prescriptive equality have simply missed the point, and therefore have missed the mark as well. Let me briefly review the typical attack and show how it fails.\(^{11}\)

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\(^{10}\) See Peters, supra note 4, at 2060 n.116.

\(^{11}\) For another instance in which I review a typical attack, see id. at 2060–62.
Erwin Chemerinsky's critique of Westen, although perhaps the most developed of them, is rather typical. Professor Chemerinsky poses a number of cases, some hypothetical, some real, intended to demonstrate that the concept of equality retains prescriptive content. The same analysis applies to each such case, so I discuss only one of them here. Chemerinsky points to Yick Wo v. Hopkins, in which the San Francisco Board of Supervisors applied a facially neutral ordinance to deny permits to operate laundries to every one of over 200 Chinese applicants while granting permits to 79 of 80 Caucasian applicants. "Unless there is a requirement of equality in the application of the [ordinance]," Professor Chemerinsky asserts, "there would be no basis for challenging the law," and "[a]n obvious injustice would go unremedied." "Equality," writes Chemerinsky, "requires that the government apply its laws evenhandedly. This concept is not part of any law, but rather is derived from the notion of equality." Equality must then have some substantive content.

It is, of course, not a good answer to Professor Chemerinsky to point out that Yick Wo was decided pursuant to the Equal Protection Clause of the Fourteenth Amendment, not pursuant to some abstract "notion of equality" that is "not part of any law." The question remains: what accounts for the Equal Protection Clause? If not for a substantive principle of prescriptive equality, why do we think the result of Yick Wo demanded by the Clause is the right one?

The answer to that question, and to Professor Chemerinsky's challenge, requires us to look at the substantive treatment rule we believe should apply to the Chinese applicants in Yick Wo. That treatment rule is something like this: Applicants for laundry permits (or any other government privilege) should be assessed only on the basis of relevant qualifications for the privilege, not on the basis of irrelevant criteria like race or national origin. This rule is not contained in the permit ordinance that was unequally applied by the San Francisco Board of Supervisors, which purported to give the Board unfettered discretion to grant or deny permits. It is contained instead in our own conscience, in our own notion of morality, and it is reflected in, and given legal force by, the Equal Protection Clause of the Fourteenth Amendment.

But as we can see, this treatment rule is not a rule of prescriptive equality. It is not a rule of equality because it has meaning wholly apart from the comparative treatment of two or more people; it has

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13 118 U.S. 356 (1886).
15 Id. at 580.
16 Id. at 581.
17 Id.
18 See Yick Wo, 118 U.S. at 357–58.
meaning, and force, even if only one person in the universe ever has been denied or granted a laundry permit. It tells us simply that irrelevant criteria — race, national origin, and probably many others — cannot be considered in determining whether to grant or deny a permit to an applicant. What has happened, or will happen, to other applicants is utterly irrelevant to whether the rule is being violated with respect to a given individual.

It is this rule, or principle — no denial or grant of privileges on the basis of irrelevant criteria — that was violated by the San Francisco Board of Supervisors in Yick Wo. It was violated each and every time the Board refused a permit to an applicant merely because (or partially because) he was Chinese, and it was violated each and every time the Board granted a permit to an applicant merely because (or partially because) he was not Chinese. Being Chinese, or not being Chinese, is irrelevant to whether a person is deserving of and qualified for a laundry permit. This is the principle that makes the decision in Yick Wo the morally correct one, and that animates the Equal Protection Clause itself.

Note that prescriptive equality, as with our tax credit hypothetical, plays no role in telling us that the Chinese applicants in Yick Wo have been treated wrongly. The substantive treatment rule — no denial or grant of permits on the basis of irrelevant criteria — tells us everything we need to know. The Chinese applicants were treated wrongly not because they were treated differently, or "unequally," from the Caucasian applicants, but rather because they were treated according to an irrelevant criterion (their race, or national origin), regardless of how Caucasians were treated.

So far, so good, then, for Professor Westen's debunking of equality. But Professor Westen's analysis runs into trouble in a certain kind (or perhaps a certain degree) of case — a case in which we are likely to be offended by a person's treatment in some way that does not appear to be entirely traceable to the violation of a substantive, nonegalitarian treatment rule applicable to that person. This is likely to happen when someone is incorrectly denied a benefit that has been correctly awarded to another, identically entitled person. In such a case, there seems to be more at stake than merely the fact that someone has been wrongly denied a benefit to which she is entitled. There is also the fact that someone else with no greater entitlement to the benefit has been awarded it.

An example is a case posed by Kent Greenawalt in a response to Professor Westen.\textsuperscript{19} Professor Greenawalt imagines a school exam in which any student scoring 70 or above is entitled to a passing grade. One student, $B$, receives a score of 71 and is incorrectly given a failing grade. A second student, $C$, also receives a score of 71 but is correctly

given a passing grade. Has the "wrong" done to B not been "magnified," Greenawalt asks, by the fact that C has been awarded the benefit B has been denied?\textsuperscript{20} Does the comparison between the treatments of B and C not yield "a separate aspect of the wrong that is done to B," that is, an aspect separate from the simple violation of the substantive treatment rule applicable to B?\textsuperscript{21} And, if so, must we not look to a substantive principle of prescriptive equality to account for this separate aspect of the wrong?

Professor Westen's resolution of this conundrum is unsatisfactory. Westen agrees that B has suffered some kind of wrong that is separate from the mere violation of a substantive treatment rule.\textsuperscript{22} But this "separate aspect of the wrong," Westen argues, cannot be traced back to a distinct, substantive norm of equality. Instead, Westen attributes the separate wrong to the existence of another nonegalitarian treatment rule — to the fact that whoever distributed the examination grades inequitably to B and C, in addition to violating the grading rule with respect to B, also violated "a comparative policy" that "prevent[s] one student from acquiring an unfair competitive advantage over another."\textsuperscript{23} The "separate aspect of the wrong" done to student B stems from the fact that B, besides merely receiving an unwarranted failing grade on her exam, has been put at "an unfair competitive [dis]advantage" with respect to C. According to Professor Westen, this comparative policy has nothing to do with prescriptive equality; it is simply an additional nonegalitarian treatment rule.

This somewhat strained answer fails, however, for two reasons. First, the answer is inadequate to account for the "separate aspect of the wrong" that might be detected in every case in which one person has been denied a benefit given to another, identically situated person. Not all such cases will involve "comparative policies against unfair competitive advantage" or similar concerns. For instance, if one starving person, X, justly is given food while another starving person, Y, unjustly is denied food, can we really say that some "comparative policy" prohibiting X from receiving "an unfair competitive advantage" over Y has been violated? Professor Westen's analysis does not explain the "separate aspect of the wrong" we might identify in such circumstances.

More importantly, though, Professor Westen's answer falls victim to bootstrapping: it is circular for the same reason that simply pointing to the Equal Protection Clause as a "nonegalitarian" way to explain the result of Yick Wo would be circular. Yes, a "comparative policy" against unfair competitive advantages might plausibly explain our

\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} See Westen, Speaking of Equality, supra note 1, at 199-204; Peter Westen, To Lure the Tarantula from Its Hole: A Response, 83 Colum. L. Rev. 1186, 1197 n.31 (1983).
\textsuperscript{23} Westen, Speaking of Equality, supra note 1, at 201.
sense that student B somehow has been injured over and above the fact that she has incorrectly been failed. But how do we explain the existence of such a comparative policy? A policy against "unfair competitive advantages" is simply a policy about how benefits should be distributed. The benefits at issue in the exam hypothetical are academic achievement and the further goods academic achievement can bring: employment, a substantial salary, a sense of intellectual fulfillment, and the like. 24 A policy against unfair competitive advantages seems to say that these benefits should be distributed equally — that people with identical entitlements to them should receive identical amounts of them. It says that no one should receive more of those benefits, or a better chance at those benefits, than any other identically situated person. Viewed this way, "unfair competitive advantage" really means "a greater chance to receive certain benefits than the chance that other, identically situated people will receive," and a policy against unfair competitive advantages is nothing more than a policy requiring equality of treatment.

If Professor Westen's "comparative policy" against "unfair competitive advantage" is really just a policy requiring equal treatment, then Professor Westen has not defused the prescriptive potential of equality by pointing to such a policy. He has only shifted the stage at which equality can be said to operate prescriptively. By Westen's solution, instead of operating as an abstract principle that requires consistency of treatment, prescriptive equality operates in the form of a specific policy forbidding unfair competitive advantage. But Professor Westen's solution has done nothing to convince us that equality does not play some kind of prescriptive role. He has made a semantic point, not a substantive one.

As my discussion below makes clear, I believe that a comparative policy of the type relied upon by Professor Westen in the grading hypothetical is not in fact attributable to equality as a substantive prescriptive norm. But my point here is that Professor Westen fails to demonstrate that it is not. This failure reflects a certain blind spot in Professor Westen's otherwise compelling and thorough analysis of prescriptive equality: Professor Westen never really recognizes or tackles the principle of prescriptive equality in the fullest, truest sense in which its proponents understand it, a sense that is not tautological at all. The next Part is an attempt to identify that nontautological conception of prescriptive equality.

II. NONTAUTOLOGICAL PRESCRIPTIVE EQUALITY

Proponents of equality as a substantive norm seem to understand the prescriptive principle of equality in a sense that is not tautological, 24 Arguably, some of these benefits are what I call below "competitive" goods, see infra pp. 1232-45, but this is not important right now.
although they rarely actually articulate the principle in a nontautological way.25 What I have called "traditional" prescriptive equality states that "identically situated people are entitled to be treated identically." As we have seen, this is a truism that cannot contain normative value. But as with Professor Greenawalt's exam grading example, egalitarians often urge a role for prescriptive equality that does not seem merely redundant in light of the substantive treatment rule that applies in a given circumstance, but rather seems to bear its own normative force independent of the applicable treatment rule.

What are egalitarians really saying when they make such claims? They cannot be arguing that prescriptive equality, traditionally conceived, really is not tautological at all (although at least one of them has tried to make that case);26 such an argument would run headfirst into a priori logical truths. As Professor Westen has said, the fact that traditional prescriptive equality is tautological and therefore substantively 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."27

What egalitarians actually mean when they claim a substantive role for prescriptive equality is not that equality, traditionally conceived, escapes tautology, but rather that prescriptive equality means something other than what its traditional expression allows. Egalitarians believe that prescriptive equality in its fullest sense means just this: Identically situated people are entitled to be treated identically merely because they are identically situated. Put another way, true prescriptive equality is the principle that the bare fact that a person has been treated in a certain way is a reason in itself for treating another, identically situated person in the same way.28

25 See, e.g., Chemerinsky, supra note 12, at 585–91 (arguing that equality is morally, analytically, and rhetorically "necessary," but failing to articulate a nontautological definition of it); Anthony D'Amato, Is Equality a Totally Empty Idea?, 81 Mich. L. Rev. 600, 600–01 (1983) (posing a hypothetical case that D'Amato believes demonstrates equality's prescriptive force, but failing to define equality nontautologically); Greenawalt, supra note 19, at 1169–83 (arguing that the "formal principle of equality" has "moral force" and articulating several "substantive principles of equality," but failing to define equality nontautologically). However, several writers have indeed articulated statements of prescriptive equality that avoid tautology. See infra note 31.

26 See Chemerinsky, supra note 12, at 578–79. In another article, I explained why Chemerinsky's attempt fails. See Peters, supra note 4, at 2060 n.173.


28 Elsewhere, in a somewhat more cautious mood, I have called this principle "the equality heuristic." Peters, supra note 4, at 2062 (emphasis omitted). I will dispense here with the experimental language and simply take this principle for what it is: the full principle of prescriptive equality as it is understood by egalitarians, the only formulation of a prescriptive equality principle that is not tautological and, therefore, can claim to have substantive normative import.

It is important to avoid one potential source of confusion at the outset. I have stated the principle of nontautological prescriptive equality here in two alternative ways, each of which assumes a different temporal perspective. My first statement of the principle — "Identically situated people are entitled to be treated identically merely because they are identically situated" —
As I have said elsewhere, this true principle of prescriptive equality “rescues equality from tautology” because it supplies a substantive, comparative treatment rule to apply apart from any noncomparative treatment rule that applies in a given case. That is, the true principle of prescriptive equality supplies an independent normative reason for treating someone in a certain way: the fact that another, identically situated person has been treated in that way. The true principle of prescriptive equality, if valid, thus hinges the moral propriety of a person’s treatment solely upon the treatment of someone else in a way that a nonegalitarian substantive treatment rule cannot do. In so doing, “it tells us something we do not already know from the treatment context.”

assumes a completely ex ante perspective, temporally prior to the treatment of anyone who might be subject to the principle. It claims that a person deciding how to treat two identically situated people, X and Y, must consider their identicality of situation as an independent reason to treat them the same way.

It is also possible to apply nontautological prescriptive equality from an intermediate perspective, temporally following the treatment of X but temporally prior to the treatment of Y. From this perspective, the principle becomes the following: “A person is entitled to be treated the same way an identically situated person already has been treated merely because the second person is situated identically to how the first person was situated before she was treated.” This statement is simply a modification of the ex ante version of the principle to account for the intermediate temporal perspective. Stated this way, the principle implies its corollary, which is my second statement of the principle in the text: “the bare fact that a person has been treated in a certain way is a reason in itself for treating another, identically situated person in the same way.”

There is yet a third temporal perspective from which nontautological prescriptive equality can be given effect: the completely ex post perspective, temporally subsequent to the treatments of both X and Y. From this perspective, nontautological prescriptive equality simply condemns any inequality in the treatments of the two people; it states that the treatment of one person differently from another, identically situated person is wrong merely because they were identically situated before their respective treatments. This statement of the principle, too, is merely an alternative version of its ex ante statement.

At various points throughout the remainder of this Article, I assess the principle of nontautological prescriptive equality in each of its three temporal forms. Because the principle is substantively equivalent in each form, I do not believe that anything in my argument hinges on the particular form I happen to be assessing at any given time.

29 Peters, supra note 4, at 2063.

30 Id. In a Response to this Article published in this issue, Kent Greenawalt notes that he has “always thought” that the traditional statement of prescriptive equality “incorporates” this nontautological principle. Kent Greenawalt, “Prescriptive Equality”: Two Steps Forward, 110 HARV. L. REV. 1265, 1268 (1997). Professor Greenawalt is getting at something important here: the idea that the normative language in the traditional statement of equality (“are entitled to” or, in Professor Greenawalt’s formulation, “should be”) might be read to imply a reason for entitlement other than that already provided by the applicable treatment rule. Id. (internal quotation marks omitted). That reason, of course, is the one explicitly provided by the nontautological principle of prescriptive equality as I state it here: the bare fact that an identically situated person has received or will receive a certain treatment. Because I think the normative language in the traditional statement of equality does not itself imply a distinct reason for entitlement, I view “nontautological” equality as a separate principle from the traditional statement. Whether one agrees with me or with Professor Greenawalt on this point, however, will not affect one’s assessment of the arguments and conclusions in this Article. (In any case, Professor Greenawalt’s description of his own interpretation of the traditional principle supports my view that true
Let us see how nontautological prescriptive equality works in practice. (I assume here, for purposes of demonstration, that it does “work” in practice; later I argue that it really does not. But this is how egalitarians believe it works.) Recall our hypothetical case involving Ms. Lucky, Mr. Unlucky, and the dependent child tax credit. In that hypothetical, tautological equality told us nothing we did not already know from the applicable treatment rule, that is, the tax credit statute; it made absolutely no difference to the way Ms. Lucky and Mr. Unlucky were morally entitled to be treated. Nontautological prescriptive equality, however, does make a difference, assuming it is valid. Nontautological prescriptive equality tells us that the bare fact of Ms. Lucky’s treatment, the award of a tax credit, is itself a normative reason to grant the same treatment to the identically situated Mr. Unlucky — even though that treatment is “wrong” according to the applicable treatment rule.

Nontautological prescriptive equality also accounts for the “separate aspect of the wrong” done to student B in the exam grading example discussed above. We know that the applicable treatment rule (or set of rules) — the grading criteria at our fictional school — has been violated by the conferment of a failing grade on student B, who should have passed. The violation of this substantive treatment rule thus has resulted in a particular wrong being done to B. And now our principle of nontautological prescriptive equality provides a source for the additional wrong we might feel B has suffered: it tells us that B has been wronged not only by the violation of the substantive treatment rule applicable to him, but also by the fact that another, identically situated student, C, has been passed while B has been failed. Nontautological prescriptive equality supplies an independent, comparative reason for condemning the treatment of B. Cast in Professor Westen’s terms, nontautological prescriptive equality explains why we might want to have a “comparative policy” against “unfair competitive advantage” in the first place.

It is this full, nontautological principle of prescriptive equality, then — “Identically situated people are entitled to be treated identically merely because they are identically situated” — that animates the strongest defenses of prescriptive equality. Before we move on, it egalitarians have conceived of prescriptive equality in the nontautological sense I describe here, not in the tautological sense that Professor Westen has scrutinized.)

31 I certainly do not mean to suggest that I am the first to articulate the true principle of prescriptive equality. Two others who have are Professor Westen himself, who does not seem to recognize how this statement of the principle avoids tautology, see Westen, Speaking of Equality, supra note 1, at 74, and Joseph Raz, who describes this statement of the principle as “[t]he important kind of egalitarian principle[,]” but who does not attempt to show, as I do below, that even this nontautological equality principle has no independent normative content, Joseph Raz, The Morality of Freedom 225 (1986). For my description of the egalitarian principles offered by Westen and Raz on these occasions, see Peters, cited above in note 4, at 2062 n.127.
is important to get a sense of both the prescriptive scope and the prescriptive strength of this principle.

The alleged prescriptive scope of nontautological equality extends primarily to cases in which one person, \( X \), already has been treated wrongly according to some nonegalitarian treatment rule, and the question of how to treat another, identically situated person, \( Y \), arises. In such a case, prescriptive equality claims to provide a reason to treat \( Y \) similarly wrongly, a reason the nonegalitarian treatment rule does not give us.\(^{32}\) As we have just seen, that reason is the fact that \( X \) already has been treated wrongly. Prescriptive equality, however, does not claim to carry much force in a case in which \( X \) already has been treated correctly according to the nonegalitarian treatment rule. In such a case, the treatment rule itself already tells us to treat \( Y \) similarly correctly. The most prescriptive equality can do in such a case is give us a redundant reason for this conclusion. Nontautological prescriptive equality, then, can claim little real prescriptive strength in cases of prior correct treatment.\(^{33}\)

As I explain below, see infra pp. 1226–27, one makes a claim of nontautological prescriptive equality every time one advocates treating a person in a way that would otherwise be wrong merely because an identically situated person has already been treated wrongly. These kinds of claims are made frequently, in a variety of contexts, see infra note 32, although they rarely are parsed and systematically defended, see supra note 25. I have those who make such claims in mind when I refer to "egalitarians" or "advocates of equality."

\(^{32}\) There are many real world examples of such cases and of egalitarian claims being made in them. One of the most salient occurs in adjudication, in which the practice of following even wrongly decided precedents often is justified by reference to equality. See Peters, supra note 4, at 2055–56 nn.98–103 (listing examples of egalitarian justifications of stare decisis). In this situation, the egalitarian claims that a case must be decided (and thus the litigants must be treated) in a way that otherwise would be incorrect merely because a prior case has been decided that way. A similar claim is made by those who read the Equal Protection Clause to "command[] that governmental benefits and immunities shall be available to all, if granted to any." J. Skelly Wright, Judicial Review and the Equal Protection Clause, 15 HARV. C.R.-C.L. L. REV. 1, 18 (1980). Such an interpretation of the Clause would require that "benefits" or "immunities" wrongly be given to a person merely because they have wrongly been given to another, identically situated person (or, apparently, to any other person). On a more mundane level, this kind of egalitarian claim is made, for instance, whenever a child pleads to stay up late merely because her brother was wrongly allowed to stay up late the night before.

\(^{33}\) It is true that prescriptive equality might support modifying a correct treatment already given to a person in order to make that person's treatment consistent with an incorrect treatment subsequently given to an identically situated person. Of course, such ex post modification will not always be possible, as when the treatment has taken the form of expendable resources that the recipient has already consumed. But even when ex post modification is possible, the case presented is simply a variation on the case in which a person already has been treated wrongly and prescriptive equality supports treating an identically situated person similarly wrongly. As an example, refer back to the tax credit hypothetical discussed above. See supra pp. 1215–18. It would not make a difference whether, on the one hand, Ms. Lucky has been wrongly awarded the tax credit, and the decision that must be made is whether also to award the credit to Mr. Unlucky; or, on the other hand, Mr. Unlucky has correctly been denied the credit and Ms. Lucky's credit subsequently has been incorrectly allowed. In either case, the question is whether to treat Mr. Unlucky wrongly in order to bring his treatment into line with that given Ms. Lucky. It is only that in the former case, prescriptive equality counsels prospectively allowing Mr. Unlucky...
Moreover, even in cases of prior incorrect treatment, the alleged prescriptive strength of equality need not be absolute. That is, prescriptive equality need not provide a dispositive reason for a certain treatment. The egalitarian may believe that although the incorrect treatment of $X$ is a reason favoring incorrect treatment of $Y$, other reasons exist that disfavor such treatment — reasons that outweigh the reason provided by equality. The egalitarian, for example, may believe that even though equality gives us a reason to award Mr. Unlucky the same tax credit that Ms. Lucky has incorrectly been awarded, on balance the tax credit nonetheless should not be given to Mr. Unlucky. The egalitarian may believe that the reasons for limiting the availability of the tax credit in the first place — the need for tax revenues, the potentially perverse incentives created by an overly generous dependent tax credit, and so on — outweigh prescriptive equality in this instance.

In other words, in order for one to be a prescriptive egalitarian, one need only assert that the bare fact of the treatment of an identically situated person is among the criteria that should apply in deciding how to treat someone. One need not believe that prescriptive equality is always, or ever, a trump card. But if one’s version of egalitarianism has any force at all, one will believe that, in at least some cases, prescriptive equality carries sufficient weight to require that a person be treated wrongly merely because an identically situated person already has been treated wrongly.34

That, then, is the true principle of prescriptive equality. By debunking “traditional” equality as an empty tautology, Professor Westen has made a significant contribution to our understanding of why prescriptive equality has no place in our moral pantheon. But Professor Westen has not considered prescriptive equality in this fuller, nontautological sense. I do just that in the remainder of this Article. First, though, I need to sketch a heuristic definition of nonegalitarian justice that I then use to explain why even nontautological prescriptive equality ultimately has no normative force.

34 Two implications of such a belief should be noted here. First, the egalitarian probably would not consider the treatment of this second person to be “wrong,” all things considered. She would hold instead that the force of prescriptive equality makes that treatment “right.” Second, because the egalitarian believes that a reason for treatment applies to the second person that did not apply to the first person — namely, the fact of the first person’s treatment — she is, in a sense, denying that the second person is “identically situated” to the first person. This is not self-contradiction, however. Recall that the egalitarian, in assessing identicality of situation, adopts an ex ante perspective, judging identicality as of a point in time immediately prior to the first person’s treatment. See supra note 28. This is true even if she is actually making her assessment from an intermediate perspective (after the treatment of one person but before the treatment of the other) or from an ex post perspective (after the treatments of both people). See id. As such, the fact that the first person already has been treated does not affect the egalitarian calculus of identicality of situation.
III. THE NONEGALITARIAN JUSTICE HEURISTIC

My goal in this Article is to demonstrate that prescriptive equality, even in its nontautological sense, has no independent normative force. I plan to demonstrate this through a combination of logic and intuition — by logically examining intuitive moral reactions we might have to certain circumstances and explaining how they are attributable to other moral principles than “equality.” If I succeed, I will have shown that every moral prescription we might think mandated by prescriptive equality in fact arises from other, nonegalitarian norms. But this methodology requires that I offer an alternative mechanism for assessing our moral reactions that does not incorporate any notions of prescriptive equality.

My alternative mechanism is a heuristic construct intended to encompass every potential normative belief other than those attributable to nontautological prescriptive equality. I call this heuristic construct nonegalitarian justice (or sometimes just justice). For purposes of the remainder of this Article, nonegalitarian justice will mean the following: treatment of a person in accordance with the net effect of all the relevant criteria and only the relevant criteria, provided that considerations of nontautological equality cannot be relevant criteria. Stated as a prescriptive principle, nonegalitarian justice dictates that people be treated in accordance with the net effect of all the relevant (nonegalitarian) criteria and only the relevant (nonegalitarian) criteria.35

A few clarifications about this definition of nonegalitarian justice are necessary before moving on to the meat of the Article. First, it is important to keep in mind my purpose in “defining” nonegalitarian justice as I have done here. I do not need, and do not intend, to offer a substantive definition of what justice actually is, a definition that would supply all the information necessary to determine whether the treatment of a person in any particular circumstance is ultimately “just” or “unjust.” I intend nonegalitarian justice here to serve only as a foil for prescriptive equality. My goal, again, is to show that treatments of people that we might consider “wrong” (the failing grade given to a student who should have passed, or the denial of a laundry permit to a Chinese applicant in nineteenth-century San Francisco) are wrong — if they are wrong at all — not because of the prescriptive norm of equality, but because of some other prescriptive norm or set of prescriptive norms. “Nonegalitarian justice,” then, will serve simply as a placeholder for the entire set of potential prescriptive norms other than equality. If the reader thinks a certain treatment of a person is wrong, it will be up to the reader to insert the substantive moral principles explaining why it is wrong; my task here will be only to show,

35 I have used this definition of nonegalitarian justice before, in another context, with only slight modifications not relevant here. See Peters, supra note 4, at 2050–55.
using my heuristic definition of nonegalitarian justice as a tool, that prescriptive equality is not among the reasons why it is wrong. 36

My definition of nonegalitarian justice, then, is in a sense entirely formal; it has no substantive content of its own. This does not mean that the definition is toothless, however. Unlike traditional equality, it is not a tautology. As we shall see, this definition can act prescriptively by identifying the kinds of cases in which a person is treated unjustly. By this definition, unjust treatment always occurs when a person is not treated in accordance with the net effect of all the relevant criteria — for instance, when an irrelevant criterion is used to determine that person's treatment. But this definition does not identify what criteria actually are relevant to any particular treatment. This is the sense in which the definition is merely formal; as long as its procedural requirements for treatment are met, the concept of nonegalitarian justice allows for an infinite variety of substantive moral conceptions of what criteria are "relevant" to a person's treatment in any given case.

It is also important (very important, as it turns out) to note the reason-based, nonteleological nature of this definition of nonegalitarian justice. By this definition, nonegalitarian justice turns not merely on outcomes but also on reasons for outcomes. A treatment is just if and only if it is in fact the result of the application of all, and only, the relevant criteria. Thus, a treatment of someone might be "correct" or "right" in the sense that its outcome is correct — the person has been treated in the way dictated by the net effect of all the relevant criteria — but still be unjust because the reasons actually relied upon in conferring the treatment were morally irrelevant ones. An example I have used before is the Nazi decision to spare most non-Jews from concentration camps. 37 The outcome of that decision was morally correct, because of course those non-Jews did not deserve to be interned and potentially exterminated in horrific prison camps. But the reasons for the decision — the criteria considered in making it — were morally wrong: non-Jews were spared only because of the irrelevant fact of their ethnicity, that is, the fact that they were not Jewish. Accordingly, their treatment by the Nazis was unjust, even though it was, in

36 This is not to say that I will not occasionally suggest substantive moral reasons, other than equality, why a given treatment might be wrong. When I do so, however, I will not be endorsing those particular substantive reasons (although usually they will not be very controversial). Nor will the success of my arguments rely on whether the reader agrees with those reasons. I will simply be claiming that if a person believes a certain treatment to be wrong, then that person's belief in the treatment's wrong can be traced to a belief in some moral norm other than prescriptive equality. The possibility that a person might not believe the particular treatment I am discussing is morally wrong, of course, will not threaten my arguments against equality; if a treatment is not wrong at all, it certainly is not wrong because it is unequal.

37 See Peters, supra note 4, at 2053.
a sense, correct. (Of course, the treatment of Jews condemned to the camps can be said to have been more unjust than the treatment of non-Jews spared from the camps, since both the outcome of and the reasons for the internment of Jews were morally wrong.)

Finally, it is necessary to say a few words about the components of this definition of nonegalitarian justice. The word "treatment" in the definition can refer to the infliction of a burden on a person (for example, conferment of a failing grade), to the bestowal of a benefit upon a person (for example, the award of an income tax credit), or to the act of refraining from additionally burdening or benefiting a person, that is, to the enforcement of the status quo with respect to that person. "Person" includes collective entities (corporations, associations, government agencies, and the like) as well as individuals. The phrase "in accordance with the net effect of all the relevant criteria," as I have noted already, means that a treatment, to be just, must be, first, the treatment dictated by both a correct consideration of every relevant criterion (but no irrelevant ones) and a proper weighing of each relevant criterion with respect to every other relevant criterion; and, second, in fact the product of such a process of correct consideration and proper weighing.

38 This is a case of what I define later in this Article as "conditions of distinction": a single decisionmaker has made the ex ante decision to differentiate between two people or groups based upon an irrelevant criterion. In such cases, both people or groups affected by the decision to differentiate have been treated unjustly, because both people or groups have been treated according to the same irrelevant criterion. But this does not mean that the treatment of someone according to an irrelevant criterion always makes the otherwise correct treatment of identically situated people unjust. It does not mean, for instance, that mistakenly awarding a tax credit to Ms. Lucky necessarily turns the otherwise correct denial of the credit to Mr. Unlucky into an injustice. Mr. Unlucky's correct treatment would not be unjust in the same sense that the Nazis' treatment of non-Jews was unjust unless a single decisionmaker (say, the tax auditor) has decided to differentiate between Mr. Unlucky and Ms. Lucky based on an irrelevant criterion — the fact, for example, that Mr. Unlucky is African-American and Ms. Lucky is Caucasian. Only when a single decisionmaker incorrectly differentiates between the treatments of two identically situated people or groups has an injustice in this sense been perpetrated. I explain this concept of conditions of distinction further in section IV.C below.

I should mention that Mr. Unlucky's otherwise correct treatment might indeed be unjust if the award of a tax credit is what I call below a "condition of competition." If it is, Ms. Lucky's unjust treatment will directly impact Mr. Unlucky's treatment, making his treatment unjust (although for a somewhat different set of reasons than those rendering the Nazis' treatment of non-Jews unjust). I explain how in section IV.A below.

39 Under any fairly complex substantive theory of justice — that is, almost any substantive theory of justice we might imagine — it will often, perhaps always, be impossible for a real human actor accurately to identify, consider, and weigh every relevant criterion in deciding how to treat a person. Such a complex theory of justice will, therefore, have to account for this fact of human fallibility by stipulating that a treatment in the real world is completely just as long as all the relevant criteria, and only the relevant criteria, are taken into account to as great a degree as is humanly possible (or something along these lines). A substantive theory of justice that fails to include such a stipulation will require the impossible, which no valid conception of justice may do. See infra pp. 1234–39. In defining nonegalitarian justice in a previous article, I failed to recognize this point. See Peters, supra note 4, at 2053–54.
IV. WHY NONTAUTOLOGICAL PRESCRIPTIVE EQUALITY FAILS

There are three general types of cases in which nontautological prescriptive equality might be said to operate independently to prescribe certain results. In each type of case, one of two phenomena emerges: either the work we suspect is being done by equality really is being performed by a principle of nonegalitarian justice, as I have defined it above; or prescriptive equality, when it seems to have some claim to operate independently, necessarily results in contradiction and incoherence. In no type of case, that is, can prescriptive equality claim to be a valid moral norm that serves some independent function. Either prescriptive equality is nonsensical, or it is, as Professor Westen has argued all along, substantively empty.

The first type of condition in which prescriptive equality might be said to operate as a substantive norm consists of what I call, paraphrasing Larry Alexander, conditions of competition.\textsuperscript{40} Conditions of competition exist when applying a certain amount of a treatment to a person necessarily affects the amount of that treatment available to other identically situated people. There are three subsets of conditions of competition: conditions of scarcity, in which there is not enough of a certain kind of treatment to satisfy in full the claims of everyone who is entitled to that kind of treatment; conditions of exact sufficiency, in which there is precisely enough of a certain kind of treatment to satisfy in full the claims of everyone entitled to that kind of treatment; and conditions of finite surplus, in which there is more than enough of a certain kind of treatment to go around, but the application of a large enough amount of excess treatment to one person will result in a deficiency of that treatment with respect to others.

The second general type of condition consists of conditions of infinite supply. In conditions of infinite supply, there is an unlimited amount of a certain type of treatment, such that everyone's entitlement to that treatment can be satisfied in full regardless of whether or how much excess treatment is applied to anyone.

The third general type of condition in which equality might be thought to operate prescriptively consists of conditions of distinction. Conditions of distinction are conditions in which one person (or class of people) is treated in a certain way based wholly or partially on an ex ante decision to distinguish between that person (or class) and another person (or class), who (or which) is treated in a different way. Conditions of distinction will in fact also be either conditions of competition or conditions of infinite supply, but their special characteristics make them worthy of separate discussion.

Let us look at each of these types of conditions in turn. In each case, we have no reason to believe that equality operates as an in-

\textsuperscript{40} See Larry Alexander, \textit{Constrained by Precedent}, 63 S. CAL. L. REV. 1, 12 (1989) (describing these as conditions in which "the good at issue is competitive").
dependent prescriptive norm. Instead, in each case, some substantive conception of nonegalitarian justice does all the work.

A. Conditions of Competition

In conditions of competition, more than one person is equally entitled by some rule(s) or principle(s) of nonegalitarian justice to a given treatment, and the amount of the treatment that can be given one such person is affected by the amount of the treatment that is given to another. Some commentators have argued that prescriptive equality, although meaningless in most other circumstances, operates in conditions of competition to require (or to provide an independent reason for) an evenhanded allocation of treatments.41

There are three varieties of conditions of competition: conditions of scarcity, conditions of exact sufficiency, and conditions of finite surplus. Similar analyses apply to each; and in each type of condition, prescriptive equality is entirely empty because nonegalitarian justice tells us everything we need to know.

1. Conditions of Scarcity. — Conditions of scarcity are hypothetical conditions in which it is not possible to satisfy in full every legitimate claim to a particular treatment. (My reason for referring to them as "hypothetical" conditions becomes clear below.) There are two different sorts of conditions of scarcity. The first involves scarcity of divisible treatments — conditions in which there is not enough of a given treatment to satisfy in full every legitimate claim to it, but in which a less than ideal amount of the treatment can meaningfully be applied to any claimant. The second involves scarcity of indivisible treatments — conditions in which there is not enough of a given treatment to satisfy in full every legitimate claim to it, and in which it is not possible meaningfully to apply the treatment to any claimant in less than an ideal amount.

(a) Scarcity of Divisible Treatments. — Suppose that each of two people, Smith and Jones, is ill and is entitled by nonegalitarian justice to receive 100 units of a certain medicine. Suppose, however, that only 150 units of the medicine exist. The full claims of both Smith and Jones to receipt of the medicine cannot be satisfied: if Smith’s claim to the medicine is satisfied in full, only 50 units will be left for Jones, and vice versa. But imagine that any amount of the medicine will benefit each of Smith and Jones to some degree; although each is legitimately entitled to a full 100 units, less than 100 units of medicine (75 units, 50 units, or even 1 unit) nonetheless will do each person some good. These are conditions of scarcity of divisible treatments.

Advocates of prescriptive equality argue that equality operates under such conditions to require an equal distribution of the relevant

41 See, e.g., RAZ, supra note 31, at 222–25; Alexander, supra note 40, at 11.
treatment among the claimants – to require, in our hypothetical, that Smith and Jones each receive 75 units of medicine. A nonegalitarian conception of justice, they contend, need not demand this result, because such a conception might still be satisfied by an unequal distribution of the medicine.

To see how this argument works, imagine that the amount of nonegalitarian justice achieved with respect to each of Smith and Jones is directly proportional to the amount of medicine each person actually receives, up to the full amount to which each person is entitled. Suppose, for example, that distribution of the full 100 units of medicine to a person who deserves it — Smith or Jones, in our hypothetical — is worth 100 points on the scale of justice. Imagine that a point on that scale is subtracted for each unit of medicine below 100 units that Smith or Jones receives, so that the receipt by either Smith or Jones of 75 units of medicine is worth 75 points. In such a case, distributing 75 units of medicine to each of Smith and Jones results in a total score on the justice scale of 150 points. But distributing the medicine unequally among the parties — say 100 units to Smith and only 50 units to Jones — results in the same total score on the justice scale: 150 points. Thus, the argument goes, nonegalitarian justice is indifferent between different distributions among deserving claimants, as long as the entire amount of available treatment is distributed.43

Advocates of equality would argue that in conditions of scarcity of divisible treatments, when nonegalitarian justice supposedly is indifferent to the exact distribution, prescriptive equality (and equality alone) operates to demand equitable distribution. We would, the egalitarian position insists, prefer an equal allocation of medicine between Smith and Jones to an unequal allocation that favors one or the other. Because nonegalitarian justice is indifferent, however, egalitarians claim that this preference can be explained only by the force of prescriptive equality as an independent norm.

42 See, e.g., Raz, supra note 31, at 222–25; Alexander, supra note 40, at 11.

43 Nonegalitarian justice might demand that none of the medicine go to waste in conditions of scarcity. If so, it would not countenance a distribution of 125 units to Smith and 25 units to Jones; because Smith can use no more than 100 units, the extra 25 units he would receive in such an allocation would be wasted. But as long as neither Smith nor Jones receives a larger share than she or he can use (100 units), nonegalitarian justice, egalitarians argue, is indifferent to how the medicine is distributed. Of course, it is possible for a scarce treatment to be divisible in a way that is disproportionately sensitive to allocation of less than a full amount of that treatment. For instance, suppose the value of the medicine to its recipient decreases exponentially for each 25 units below 100 that person receives, such that 75 units of medicine are only half as beneficial as 100 units, 50 units are only a fourth as beneficial as 100 units, and so on. In such a case, nonegalitarian justice would be concerned with the proportions in which the medicine is allocated; an allocation of 100 units to Smith and 50 units to Jones would achieve more total justice than an allocation of 75 units to each of Smith and Jones. To an advocate of equality, such a case merely serves as a more extreme example of why nonegalitarian justice by itself does not demand equitable distribution. Indeed, Professor Greenawalt poses a similar case in his Response, see Greenawalt, supra note 30, at 1276–77; I respond to it in note 46 below.
But this egalitarian argument misses a crucial point about conditions of scarcity of divisible treatments: such conditions cannot exist, at least not as the egalitarian position requires us to define them. Conditions of scarcity of divisible treatments, we have posited, are conditions in which each of two (or more) people is legitimately entitled to a certain amount of a given treatment, but it is impossible to satisfy all such legitimate claims in full. Under such conditions, then, the demands of justice cannot fully be met. To posit such conditions is to say that justice demands the impossible; and to say that justice demands the impossible is to contradict oneself. Justice (indeed, any version or aspect of human morality) must, virtually by definition, be constrained by the possible.\(^{44}\) It is meaningless to say that justice demands that your noisy upstairs neighbor be exiled to Venus, that you be paid your salary in kryptonite, or that John Lennon return from the dead and give a concert with the Beatles.\(^{45}\) Justice cannot require the occurrence of something that cannot occur. It cannot ask the impossible.

If justice cannot demand the impossible, then it cannot simultaneously be true that justice demands that each of Smith and Jones receive 100 units of medicine, and that only 150 units of medicine exist. If it is impossible to give each of Smith and Jones 100 units of the medicine, justice cannot require that result. Therefore, if we know for certain that only 150 units of the medicine exist, then we also know for certain that only one of the following hypotheses is true:

\[ H_1: \text{Smith is not entitled to a full } 100 \text{ units of the medicine, but Jones is.} \]
\[ H_2: \text{Jones is not entitled to a full } 100 \text{ units of the medicine, but Smith is.} \]
\[ H_3: \text{Neither Smith nor Jones is entitled to a full } 100 \text{ units of the medicine.} \]

\(^{44}\) This claim is not as sweeping as it may seem. One’s conception of morality might place rigorous demands on people by, for instance, requiring them to forego self-interest in favor of other goods. A claim that morality is in this sense “stringent,” to borrow Samuel Scheffler’s term, see Samuel Scheffler, Human Morality 25–28 (1992), is not the same as a claim that morality is impossible; it is at most a claim that the demands of morality often are psychologically or emotionally difficult for people to meet. My real claim here is that morality cannot demand the physically impossible. Justice might make the emotionally taxing demand that a doctor deny scarce medicine to her husband and give it to someone who is more entitled to it, but it cannot make the physically impossible demand that the doctor give a full amount of the scarce medicine to both people.

Morality also might demand efforts to make possible what currently is impossible, and I do not claim otherwise here. For example, if it is now physically impossible to feed all the world’s people, morality might demand vigorous efforts to create the technology, distribution mechanisms, political conditions, etc. that would make it possible to do so. But again, if it is currently impossible to feed everyone, morality cannot demand that we do so, now.

\(^{45}\) Modern recording technology, however, has made this particular miracle virtually possible. See Susan Bickelhaupt, Names & Faces, BOSTON GLOBE, Mar. 16, 1995, at 54 (reporting that the three living Beatles recorded an unfinished John Lennon song, Free as a Bird, produced by combining existing Lennon vocal tracks with new recorded performances); see also Jerry McKenna, Hot 100 Singles Spotlight, BILLBOARD, Jan. 6, 1996, at 91 (reporting that Free as a Bird reached the top 10 on the Billboard singles chart).
But we also know, by definition, that Smith and Jones are identically situated with respect to their entitlements to receive medicine. We know, therefore, that neither $H_1$ nor $H_2$ above can be true. By definition, neither Smith nor Jones can be entitled to a different amount of medicine than the other. We know, then, that $H_3$ must be true: neither Smith nor Jones is entitled by justice to a full 100 units of the medicine.

Still, it seems that nonegalitarian justice allows us numerous options. We could give Smith 99 units of the medicine and Jones 51 units, or vice versa; we could give Smith and Jones 75 units of the medicine each; or we could allocate the medicine according to any other proportion in the range between the two extreme choices.

Or could we? Remember that Smith and Jones are, by definition, identically situated with respect to their entitlements to the medicine. Any result that apportions more medicine to one than to the other therefore necessarily violates nonegalitarian justice, because it necessarily treats Smith or Jones according to some criterion that is not relevant (or according to an incorrect weighing of the criteria that are relevant). This must be true, we know, because no relevant criterion for treatment applies to one that does not apply to the other (and because all the relevant criteria apply to each with equal force). If Smith is being treated differently from Jones, it must be because an irrelevant criterion for treatment, or an incorrect weighing of criteria for treatment, is being applied.

We cannot, then, give more medicine to Smith than to Jones, or more to Jones than to Smith, and still remain consistent with the dictates of nonegalitarian justice. This reduces our options considerably; in fact, it reduces them to precisely one: we must give Smith and Jones exactly the same amount of medicine. We must, that is, give half the medicine (75 units) to Smith and half the medicine (75 units) to Jones. This is the only solution that does not offend nonegalitarian justice.

It is important to recognize the fact that unequal distribution of the medicine would amount to unjust treatment of both Smith and Jones, not only of the person who gets less medicine. Suppose, for instance, that Smith is given 100 units of medicine on the mistaken belief (that is, the irrelevant criterion) that there is enough medicine to satisfy every otherwise legitimate claim to it. Smith has been treated unjustly (though beneficially) in this circumstance because an irrelevant criterion has been applied to her treatment, in the same way that our old friend Ms. Lucky has been treated unjustly (though beneficially) in being awarded an incorrect income tax credit. Moreover, one result of Smith’s treatment is that Jones will receive only 50 units of medicine (since that is all that is left). Jones’s treatment, that is, has been caused in part by Smith’s treatment; therefore, the same mistake that caused Smith’s unjust treatment — the application of an irrelevant criterion — also caused Jones’s treatment. Thus, both Smith and
Jones have been treated according to the same irrelevant criterion. Both have been treated unjustly.

Advocates of prescriptive equality, then, must confront the validity of two related conclusions. First, the necessity of distributing the medicine equally between Smith and Jones can be explained entirely by reference to nonegalitarian norms of justice; prescriptive equality need play no role. The bare fact that Smith has been given 75 units of medicine has played absolutely no part in our decision to give 75 units of medicine to Jones, and vice versa. The happenstance that both Smith and Jones are entitled to receive the same amount of medicine is due simply to the (fortuitous) fact that the same set of nonegalitarian criteria of justice applies, with the same weight, to both Smith and Jones. Smith has been treated only according to the relevant criteria applicable to her treatment, and Jones has been treated only according to the relevant criteria applicable to his. Equal distribution is merely a reflection of the fact that each person has independently been treated justly.

This point is not threatened in the slightest by the fact that each of Smith and Jones, had the other not existed, would have received a different treatment (that is, a full 100 units of medicine) from that which he or she actually received due to the presence of the other. The fact that the justice of a person’s treatment changes depending upon whether others are entitled to the same treatment does not mean that some norm of equality is operating. That fact, rather, merely reflects the truism that justice is confined to the possible — that no one justly can be entitled to something if that entitlement would deprive another of something to which she justly is entitled. To say that I am not entitled to swing my fist if, in so doing, I would bring it into contact with your jaw is not to state a principle of equality. It is to state a principle of nonegalitarian justice, pure and simple.

A second, related point the egalitarian must confront is that if Smith is given more medicine than Jones, we do not require a substantive notion of equality to determine that Jones has somehow been treated wrongly. Nonegalitarian justice does all this work for us as well. Unequal distribution of the medicine necessarily involves the unjust treatment of both Smith and Jones, because the treatments of both have been directly caused by the application of an irrelevant criterion (or an incorrect weighing of the relevant criteria). The wrong of Jones’s treatment, then, can be explained entirely in terms of nonegalitarian justice. Inequality, again, is a symptom; injustice is the disease.

Conditions of scarcity of divisible treatments, therefore, do not and cannot exist. No norm of nonegalitarian justice is capable of producing scarcity, because justice by definition cannot require treatments that are impossible. “Scarcity” in this context means only that the treatments demanded by justice would change if more resources were available; it means that ideal quantities of the relevant treatment are
not present. Under such conditions, equitable distributions are produced; but they are not produced by prescriptive equality, because the treatment given to one person never serves by itself as a reason for giving the same treatment to another. They are, rather, byproducts of nonegalitarian justice, of the correct application in each case of all (and only) the relevant nonegalitarian criteria with respect to a given treatment.

(b) Scarcity of Indivisible Treatments. — Conditions of scarcity of indivisible treatments are conditions in which there is not enough of a given treatment to satisfy in full every legitimate claim to that treatment, and a person entitled by nonegalitarian justice to the scarce treatment cannot meaningfully be given less than the full amount of the treatment to which she is entitled. Suppose, for example, that there are eleven survivors of a shipwreck but room for only ten people in the sole available lifeboat. If all eleven survivors attempt to climb into the lifeboat, the overloaded boat will sink and all will drown. Only by allowing one person to drown will any be saved. Suppose further that the same relevant criteria for rescue apply (with the same force) to each of the eleven people; none of the survivors has a greater claim of justice than any other to be allowed a place in the lifeboat.

Our lifeboat hypothetical exemplifies conditions of scarcity of indivisible treatments. The treatments are scarce because there are not enough of them to go around: there are eleven equally meritorious claims for a place in the lifeboat but only ten places available. The treatments are indivisible because they are not susceptible of application in less than the full amount to which each person is entitled: it would be meaningless to allow a person less than one place in the lifeboat. It is all or nothing.

What, if anything, can the principle of prescriptive equality tell us that nonegalitarian justice cannot about the proper course of action in such a situation? There are only two things it conceivably could tell us that justice cannot — both of which we know cannot be true.

First, prescriptive equality could tell us that because ten people will be saved by being given a place in the lifeboat, the eleventh person — identically situated in all relevant respects to each of the first ten — must be given a place in the lifeboat as well, merely by virtue of the fact that the first ten people will be saved. We know that this cannot be true because it is impossible: all eleven people cannot be saved. Either one is left to drown, or all drown. Equality, like justice, certainly cannot demand the impossible.

Second, prescriptive equality could tell us that the other ten people — each of whom is identically situated in all relevant respects to the person being left to drown — must be left to drown as well, merely because of the fact that the eleventh person will be left to drown. But we know that this, too, cannot be true — not because it is impossible (it is not), but because it so clearly offends most people’s notions of
morality that it is unthinkable. No one adhering to any reasonable moral code would allow ten people to drown merely to prevent those people from being treated more advantageously than an eleventh person.

Therefore, of the two courses of action that equality might be thought to prescribe, one is impossible and the other is morally unthinkable. Prescriptive equality thus appears enfeebled to the point of irrelevance in conditions of scarcity of indivisible treatments. But this tentative conclusion does not mean that equality does not operate at all as a distinct substantive norm in such conditions. After all, in affirming that we would never allow ten to drown merely because we have allowed one to drown, we may be saying simply that the (extremely weak) dictates of prescriptive equality in such a case are outweighed by the (extremely strong) countervailing dictates of nonegalitarian justice. Perhaps our conclusion would be different if there were hundreds of drowning sailors but only one ten-person lifeboat, or two drowning sailors but only a single one-person flotation vest. Or, more likely, perhaps our conclusion would be different if the treatment at issue were tickets to the World Series instead of places in a lifeboat. Prescriptive equality might hold its own against considerations of nonegalitarian justice when its triumph would mean not that ten people will drown who otherwise would not, but that ten people will watch a baseball game on television who otherwise would see it in person.46

46 Professor Greenawalt uses several hypotheticals to make the point that prescriptive equality need not produce absurd results in conditions of scarcity. See Greenawalt, supra note 30, at 1276–78. One such hypothetical, in which unequal distribution of a certain medicine to two patients provides a greater chance of saving both lives than does equal distribution of the medicine, seems a somewhat poor example. For me, at least, it is difficult to see how exposing both patients to a greater risk of death in the name of equality is significantly less absurd than leaving eleven sailors to drown rather than saving only ten. But Professor Greenawalt’s point is that, as in the case of the World Series tickets, there may be situations in which obeying equality does not seem so unthinkable. In such situations, Professor Greenawalt asserts, the “normative pull” toward prescriptive equality “is neither confused nor obviously misguided.” Id. at 1277.

It is revealing, however, to note the kinds of situations in which Professor Greenawalt, throughout his essay, identifies a “normative pull” toward equal treatment: they are cases “in which the people are in some relationship with each other,” id. at 1283, cases, for example, in which the individuals concerned “are close friends, members of the same family, companions on a trip, or perhaps even patients of the same doctor,” id. at 1276. Granting for the sake of argument that a “normative pull” can exist in such cases, what might explain that “pull”? One reasonable answer is that the “pull” has significant components that are psychological or emotional rather than “normative.” A mother choosing which of her two sons will receive a greater dose of medicine (and thus have a greater chance of survival) might understandably recoil from the act of choosing itself, but she might nonetheless understand that unequal distribution of the medicine is the morally correct choice. Common experience suggests that it is not unusual for people to shrink from making moral choices that have unpleasant emotional consequences. The presence of such emotional consequences, however, does not mean that there is some normative principle of equality underlying the reluctance to choose.

Another reasonable (and perhaps complementary) answer is that much of the “normative pull” toward equal treatment in these special circumstances arises from particularly salient considera-
But we know that even this cannot be so — prescriptive equality cannot produce an independent reason for treatment even in these watered-down conditions of scarcity of indivisible treatments — and we know this for a familiar reason. That reason, once again, is that *justice is constrained by the possible*. Scarcity of indivisible treatments (like scarcity of divisible treatments) cannot exist, because justice cannot demand that eleven people be given space in a lifeboat that will hold only ten. Justice can conceivably demand only that as many people be saved as it is possible to save — no more, and no less.\(^{47}\)

However, we now are faced with a dilemma that was not present in our examination of so-called scarce divisible treatments. We know that each person entitled to a scarce indivisible treatment cannot be entitled by justice to the full amount of such a treatment, because giving each person the full amount of such a treatment is impossible. But unlike the case of scarce divisible treatments, we cannot allocate some lesser amount of a scarce indivisible treatment to each person who deserves it; we cannot give each of our shipwrecked sailors ten-elevenths of a place in the lifeboat. We have only two options: let one person drown, or let everyone drown.\(^{48}\)

We seem, then, to be faced with a paradox. Nonegalitarian justice cannot demand that all eleven sailors be saved, because that is impossible. And since we have granted that each sailor is situated identically to every other sailor, we know that nonegalitarian justice cannot demand that *any* sailor be given a full place on the lifeboat; each sailor must be entitled to no more than ten-elevenths of a place in the boat. But it is impossible to give a person “ten-elevenths of a place” in a lifeboat: places in lifeboats are all-or-nothing propositions. Because it is impossible, then, to give each sailor a full place in the boat, and

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\(^{47}\) See RONALD DWORKIN, LAW’S EMPIRE 181 (1986) ("Suppose we can rescue only some prisoners of tyranny; justice hardly requires rescuing none even when only luck, not any principle, will decide whom we save and whom we leave to torture.").

\(^{48}\) Actually, we have nine other options: let two people drown, let three people drown, etc., all the way up to ten. But each of these choices would offend prescriptive equality, assuming it exists, to the same degree as the option of letting one drown and saving ten, and each presumably would offend most notions of nonegalitarian justice to a greater degree than that option. If equality is strong enough to require that all eleven drown rather than just one, then a fortiori it is strong enough to require that all eleven drown rather than just two, or three, or four, and so forth.
impossible to give each sailor part of a place in the boat, nonegalitarian justice might dictate that each sailor be given no place in the boat — that is, that all the sailors drown. Our intuitions, though, are likely to suggest quite strongly that this result cannot be right; nonegalitarian justice cannot prefer eleven drownings to one, at least not justice conceived according to any moral code we believe worth having. So we are caught in a contradiction. Justice appears to demand what justice cannot permit.49

The paradox is an illusion, and there are two ways to deconstruct it. The first is to challenge our assumptions about the relevant "treatment" in our lifeboat hypothetical. It is true that if the relevant treatment is a place in the lifeboat, none of the sailors is fully entitled to it, and the hypothetical collapses into paradox. But suppose the relevant treatment is a chance at a place in the lifeboat. If this is so, the case becomes one of scarce divisible treatments: no sailor is entitled to a one hundred percent chance at a place in the boat, but each sailor is entitled to a ten-in-eleven chance at a place in the boat.50 Justice, in that case, can be satisfied merely by drawing lots. Each sailor receives the treatment to which nonegalitarian justice entitles him or her (a ten-in-eleven chance at being saved), and the overall result that we believe nonegalitarian justice demands — the rescue of as many of the sailors as possible — is achieved. (Again, recall that the fact that all the sailors receive the same treatment here has nothing to do with prescriptive equality; it is merely a byproduct of the application of only the relevant criteria in treating each of them.)

This solution might seem unsatisfactory to some because it smacks of artifice. Can any sort of differential result be justified merely by allocating benefits randomly and pointing out that everyone has the same chance of obtaining them? Could Congress (constitutional problems aside) revoke the right to vote from half the adult population

49 This contradiction might disappear if, again, the consequences of giving each person nothing are less distasteful than letting them all drown — if, for example, all eleven people will be denied World Series tickets rather than places in a lifeboat. In such a case, nonegalitarian justice might require denial of a benefit to everyone rather than allocation of the benefit to some but not all. As Lloyd Weinreb writes, "If two persons have an equal claim to some benefit and there is only a single, indivisible benefit to bestow, we may conclude that it is preferable to bestow the benefit on neither, even though it would be appropriate to bestow it on either person considered by himself." Lloyd L. Weinreb, Natural Law and Justice 163 (1987). If this is the case, our decision to deny everyone the benefit in question can be traced solely to nonegalitarian justice, not to prescriptive equality, for the same reasons that a decision equally to apportion scarce divisible treatments can be traced solely to nonegalitarian justice. See supra pp. 1232-37 and note 46. As the discussion below demonstrates, however, denying the benefit to everyone, even when doing so is not patently offensive to our notion of nonegalitarian justice (as letting all the shipwrecked sailors drown surely would be), is not the only alternative nonegalitarian justice offers. Consistent with nonegalitarian justice, each person may instead be given an equal chance at the scarce benefits. See infra pp. 1240-43. If we choose to deny a benefit to everyone rather than to give each person an equal chance to obtain it, we must have additional criteria of nonegalitarian justice — the advantage of avoiding costly controversy, for instance — that favor such a result.

50 For the curious without a calculator handy, this is approximately a 91% chance.
as long as it does so randomly and gives everyone an equal chance to retain it? One answer to this sort of concern is that a chance at a scarce treatment can be said to be a treatment in itself only in the special conditions of scarce indivisible treatments as we have described them — conditions in which the ideal amount of treatments is not present, and in which the treatments that are available cannot be divided into fractional units. In such conditions, allocating an equal chance to everyone may be the best we can do, because nonegalitarian justice precludes the other alternatives. In all other conditions, however — when each person's ideal entitlement to a treatment can be satisfied in full, or when the ultimate treatments themselves meaningfully can be distributed in partial form to everyone — transforming chances into treatments is both illegitimate and unnecessary.

This tactic, then, provides an avenue of escape from our paradox of justice. Nonegalitarian justice continues to demand that as many sailors be saved as possible, and it continues to dictate that no sailor is absolutely entitled to a place in the lifeboat. But we have found a way to divide our treatment among all the sailors: we can do so by recognizing that the relevant treatment is a chance at a place in the lifeboat, not a place in the lifeboat itself. We then can apply this treatment identically to each identically situated sailor. One sailor will drown, but not because he has been treated differently or unjustly. He will drown merely because of bad luck.

This result, of course, has been achieved entirely through the application of norms of nonegalitarian justice; prescriptive equality has not been involved. Our sailors are receiving equivalent treatment — each has a ten-in-eleven chance of survival — solely because we are applying to each of them the nonegalitarian criteria of justice relevant to his or her case. The bare fact that one sailor is being treated in a certain way has played no role in our treatment of the other, identically situated sailors. Equal distribution is a fortuitous effect; nonegalitarian justice is the only cause.

There is a second way to deconstruct the apparent paradox of indivisible scarce treatments, a way that may appear to some to be more satisfactory than our first method (although it amounts to the same thing, as I explain below). Recall our assumption that all eleven shipwrecked sailors are identically situated with respect to their entitlements to a place in the lifeboat. This assumption is responsible for our paradox, because it tells us, first, that nonegalitarian justice cannot demand that each sailor be given a place in the boat (because that is impossible), and therefore, second, that no sailor is entitled to a place in the boat, because treating any sailor differently from any other sailor violates the requirement of nonegalitarian justice that each sailor be treated only according to the relevant criteria applicable to him or her. But what if our assumption of identical situations is necessarily
incorrect? Let me explain how this might be so, and the implications if it is.

We know nonegalitarian justice must demand that as many of our sailors be saved as possible; it must demand, that is, that one sailor drown. If nonegalitarian justice demands that one sailor drown, then among the relevant criteria applicable to each sailor's treatment must be the fact that one of them must be left to drown. Nonegalitarian justice, that is, dictates that each sailor be exposed to a one-in-eleven risk of drowning. The relevant criteria applicable identically to all eleven sailors therefore permit one of those sailors ultimately to receive differential treatment. In essence, nonegalitarian justice makes chance a relevant criterion; it demands that chance be allowed to transform an identically situated person into a differently situated person by virtue of the fact that he has drawn the short straw.

Nonegalitarian justice, then, demands that the eleven sailors choose their unlucky martyr at random. This fact in turn transforms eleven identically situated people into ten identically situated people and one differently situated person, deserving of his fate because he has drawn the short straw. Justice is served by letting our martyr drown as fully as it is served by saving each of our survivors; he has been treated in accordance with all the relevant criteria, and only the relevant criteria, applicable to him. It is only that one of those relevant criteria is the unfortunate fact that he has been randomly chosen to drown.

The reader probably has noticed that this second option for escaping our apparent paradox is simply a more sophisticated version of the first option. It provides us with an articulable, legitimate reason for transforming chances into treatments: it tells us that one of the relevant criteria applicable to each of our shipwrecked sailors is the fact that one of them must drown. It tells us, then, that as long as each sailor is given a ten-in-eleven chance of survival, each sailor is being treated properly in the eyes of nonegalitarian justice. Justice in this circumstance is like justice in a lottery: each ticketholder is treated justly as long as she is given the correct chance of winning (which is the same chance every other ticketholder has of winning — not because of prescriptive equality, but because the same criteria for treatment apply to each ticketholder). The winners of the lottery are not "treated" differently from the losers merely because their numbers fortuitously were drawn while the losers' numbers were not. Both winners and losers are "treated" justly, and thus equally, merely by being given the correct chance to win.

Note here a crucial particular, however. Although nonegalitarian justice, in the conditions we have (somewhat inaccurately) called conditions of scarcity of indivisible treatments, demands that a "loser" be chosen by chance, it also demands that a loser not be chosen by any means other than chance (assuming, again, that all the affected people are identically situated in every relevant respect). Our lifeboat martyr
cannot (on most conceptions of nonegalitarian justice) be chosen by his peers because he is an African-American, because he speaks with a lisp, or because he roots for the Yankees. Our lottery winner cannot be chosen because she is Caucasian, because she has bribed the lottery commission, or even — given the strict rules of the lottery — because she is a philanthropist who would use the money to build orphanages. A treatment based on any of these irrelevant criteria would violate our formal principle of nonegalitarian justice, which forbids treatment based on irrelevant criteria. Only chance legitimately can be used in such cases to distinguish between otherwise identically situated people. All other criteria remain irrelevant.51

In cases of so-called scarcity of indivisible treatments, then, we know that prescriptive equality can tell us nothing that nonegalitarian justice does not already tell us. It cannot tell us to give the full treatment to everybody — to save all eleven sailors — because that is impossible. Equality so construed would be incoherent and meaningless. Nor can it tell us to deny the treatment to everybody — to let all eleven sailors drown — because even putting aside the fact that such a solution is prohibited by any rational notion of nonegalitarian justice,52 such a prescription incorrectly assumes that to let one sailor drown and ten sailors live is to treat identically situated people differently. As we have seen, though, either people in such a situation become by definition differently situated — because one (or more) must be singled out by chance for different treatment from the others — or they are being treated the same by being given correct, and therefore identical, chances at the preferred treatment. Under either interpretation (and each is a different side of the same coin), only nonegalitarian justice is necessary to explain the result. Prescriptive equality need play no part.

2. Conditions of Exact Sufficiency. — Accordingly, in one type of condition of competition, conditions of scarcity, prescriptive equality

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51 One could imagine a conception of nonegalitarian justice by which the differential treatment of people in cases like these is legitimate as long as certain specified decisionmaking procedures are employed, which procedures need not rely on chance. For instance, one might allow the decision of who will be left to drown to be made democratically, by fair and equal voting. Such a conception of justice would render the unlucky losing sailor differently situated from his or her compatriots in the same way that a random selection procedure would. But if such a procedure is really to be different from random selection, then it must allow the voters to choose their martyr according to irrelevant criteria — the fact that the martyr is an African-American, speaks with a lisp, or roots for the Yankees. Most people are unlikely to hold a conception of justice that completely elevates procedure over substance in this way. The Due Process and Equal Protection Clauses of the Constitution, for example, prevent people from receiving certain kinds of substantive treatments, even when the treatment decision has been made democratically.

52 Again, this solution — denial of an indivisible treatment to every entitled person because it cannot be given to all of them — need not always be prohibited by nonegalitarian justice; there may be circumstances (the World Series tickets, for instance) in which we would prefer simply to withhold the treatment from everyone rather than to give it to some but not all. See supra notes 46, 49.
is not prescriptive at all: our moral instincts are explained by nonegalitarian notions of justice. The same conclusion holds true in a second type of condition of competition: conditions of exact sufficiency.

In conditions of exact sufficiency, more than one person is identically entitled to a particular treatment, and there is precisely the right amount of that treatment available to satisfy every person’s legitimate claim to it. Imagine again that each of our two hypothetical people, Smith and Jones, is entitled by justice to 100 units of medicine and, this time, exactly 200 units of medicine are available.

Having analyzed conditions of so-called scarcity, our analysis of conditions of exact sufficiency is easy. Conditions of exact sufficiency mirror conditions of scarcity of divisible treatments, except that there is enough of a treatment extant to satisfy in full the claims of each competitor for the treatment. (Persons entitled to the treatment thus are not really “competitors,” because each can be fully satisfied without harming the other.) Recall that in conditions of scarcity of divisible treatments, unequal distribution of the treatment in question necessarily violates nonegalitarian justice: each person entitled to the treatment is, by definition, subject to exactly the same relevant treatment criteria bearing exactly the same force. Therefore, any difference in treatment must be the result of the application of an irrelevant criterion (or an incorrect weighing of relevant criteria applicable) to one or the other.

The same results obtain in conditions of exact sufficiency of treatments. Again, the fact that Smith and Jones are subject to the identical set of relevant treatment criteria means that any difference in treatment of the two must be the result of the application of an irrelevant criterion (or an incorrect weighing of relevant criteria). Nonegalitarian justice, therefore, demands that each receive the same amount of medicine. This requirement is especially salient in conditions of exact sufficiency, because there need be no competition for treatments; ideal justice can in fact be attained in the real world. Thus, there is none of the “free-for-all” flavor that might be thought to infect conditions of scarcity of treatments.

Moreover, as in conditions of scarcity of divisible treatments, the unjust distribution of more than 100 units of medicine to Smith unavoidably results in the unjust treatment of Jones as well. If Smith is unjustly given 125 units of the medicine, only 75 units will remain for Jones. As such, the application of an irrelevant criterion (or the incorrect weighing of relevant criteria) that caused Smith’s treatment also inevitably causes Jones’s treatment. Both Smith and Jones have been treated unjustly. Indeed, the injustice of Jones’s treatment is facially evident in conditions of exact sufficiency, because Jones’s treatment — receipt of only 75 units of medicine — clearly does not accord with the treatment prescribed for him by justice.
There is, then, no work left for prescriptive equality to perform in conditions of exact sufficiency. Again, nonegalitarian justice operates alone to demand equal distribution of treatments. Equality is an effect, not a cause.

3. Conditions of Finite Surplus. — In conditions of finite surplus, there is more than one legitimate claimant of a treatment, and there is more than enough of the treatment to satisfy in full each legitimate claim to it. However, there is not an unlimited supply of the treatment; consequently, at a certain point, giving more than enough treatment to one person will necessitate giving less than enough treatment to another. Suppose that each of Smith and Jones is entitled by justice to 100 units of medicine and there are 250 units of the medicine available. The legitimate claim of each of Smith and Jones can be satisfied in full, with 50 units of medicine left over. But if Smith is unjustly given 151 units of the medicine, only 99 units will be left for Jones.

Such conditions are hybrids of conditions of scarcity and conditions of exact sufficiency, which we analyzed above, and conditions of infinite supply, which we examine below. Until the crucial point at which giving more treatment to Smith causes insufficient treatment to be available for Jones — call it the contingency point, because it is the point at which the propriety of Jones’s treatment becomes contingent upon Smith’s treatment — conditions of finite surplus are identical to conditions of infinite supply, and our imminent investigation of those conditions applies here as well. But as soon as the contingency point is reached, conditions of finite surplus become analogous to both conditions of scarcity and conditions of exact sufficiency. As in those conditions, the excess treatment unjustly given to Smith inevitably results in an unjust treatment being given to Jones. The fact that Jones will receive less than the full 100 units of medicine to which he is entitled is directly attributable to the fact that Smith has received a certain amount more than the 100 units to which she was entitled, and thus Jones’s treatment is directly caused by the same consideration of an irrelevant criterion (or the same incorrect weighing of relevant criteria) that resulted in Smith’s unjust treatment. Both Smith and Jones have been treated unjustly. Again, nonegalitarian justice has done all our normative work for us, and prescriptive equality has played no role.

B. Conditions of Infinite Supply

In conditions of infinite supply, no shortage of a given type of treatment can occur, regardless of how much of that treatment is applied to anyone. Although prescriptive equality often is said to operate decisively in conditions of competition and conditions of distinction (which I discuss below), it is not so often defended in conditions of infinite supply. This is a strange, almost paradoxical state of affairs. In fact, equality’s claim to operate as a distinct substantive norm is in
one sense at its strongest in conditions of infinite supply, precisely because nonegalitarian justice does not play so salient a role in such conditions. In such conditions, prescriptive equality appears less "empty."

Let us see why this is so, switching hypotheticals this time from medicines to lotteries.\(^{53}\) (Lotteries provide better fodder for conditions of infinite supply, since it is easier to imagine someone possessing an insatiable appetite for money than an insatiable appetite for medicine. It might be said that a person can never have "too much" money, although a sick person might be given too much medicine.\(^{54}\)) Imagine a lottery in which two winning tickets are issued, each entitling the bearer to a $500,000 prize. Each holder of a winning ticket has a legitimate claim to a $500,000 prize because each has purchased a winning ticket. Suppose further that the lottery commission in our utopian hypothetical has unlimited millions of dollars in its treasury, so that no matter how much money is (rightly or wrongly) awarded to one winner, there will be sufficient funds left over to satisfy in full the other winner's claim.

How might advocates of prescriptive equality contend that equality operates in circumstances like these? Suppose a person — Ms. Lucky again, who is proving herself worthy of her name — holds one of the winning tickets in our imaginary lottery. Ms. Lucky goes to the lottery

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53 The argument that follows draws heavily from my discussion of prescriptive equality in the context of adjudication. See Peters, supra note 4, at 2065–73. Adjudication can be considered a condition of infinite supply: a correct adjudicative decision is a treatment that can be apportioned to everyone entitled to it (that is, every litigant) without reducing any other litigant's chances of getting that treatment. The fact of stare decisis, of course, can alter this analysis, because it can make a litigant's treatment contingent upon that given a previous litigant. See id. at 2067–69.

54 For this reason, under some conceptions of substantive nonegalitarian justice, it might be thought that justice demands that a person be given a certain exact amount of medicine, but not that a person be given a certain exact amount of money. Justice might in fact demand that a person be given as much money as necessary to make her happy; and if more money always will make a person happier, then justice would demand that the person be given as much money as it is possible to give her. See Raz, supra note 31, at 235–40. On such a theory, a person's entitlement to money would be what Joseph Raz calls an "insatiable non-diminishing principle[."

Id. at 239. As Raz recognizes, prescriptive equality might be said to operate substantively with respect to insatiable non-diminishing principles to require that the treatments subject to those principles be distributed equally among claimants. See id. at 237–39.

Professor Raz believes that prescriptive equality nonetheless must be rejected as a substantive norm because "[t]he ideals at the foundation of morality and politics are all diminishing and satiable principles," id. at 241, that is, are all principles that impose some limit upon the treatment to which any person is entitled. We have already seen how nonegalitarian justice operates to apportion insatiable treatments equally in conditions of competition. Because the amount of treatment given to one claimant necessarily affects the amount given to another in such conditions, any unequal apportionment of the treatment results in unjust treatment of every identically situated claimant. Whether or not a treatment is capable of satiation does not matter in such conditions.

The analysis in this section suggests that whether a treatment is capable of satiation also does not matter in conditions of infinite supply. Even if, as Raz denies, there are legitimate insatiable non-diminishing principles — even if there are some treatments of which a person never can get "too much" under some conceptions of justice — there are good reasons of nonegalitarian justice to apportion such treatments equally, and there are no good reasons of prescriptive equality to do so.
commission office to collect her winnings and is given a check not for $500,000, the amount she deserves, but for $600,000. It does not matter for our purposes why Ms. Lucky is given the incorrect amount: it could be because of clerical error, the whim of the clerk on duty, or racial favoritism. All that matters for our purposes is that Ms. Lucky has been treated unjustly (although to her benefit); she has been treated according to some criterion that is not relevant (whether it is caprice, prejudice, or random chance). We know Ms. Lucky has been treated according to some irrelevant criterion because we know that, in our lottery hypothetical, the only relevant criterion is the purchase of a winning ticket in a lottery promising the winner exactly $500,000.

Now suppose another person — our Mr. Unlucky again, although he is considerably less unlucky this time — holds the other winning lottery ticket. Mr. Unlucky, we know, is situated identically to Ms. Lucky with respect to the treatment at issue, that is, the award of $500,000 in lottery winnings; each holds a winning ticket. Suppose Mr. Unlucky, on the day after Ms. Lucky collects her excessive check, goes to the lottery commission office to collect his own award and is given exactly the amount to which he is entitled under the relevant treatment rule: $500,000.

Applying only our nonegalitarian concept of justice to this sequence of events, we conclude that Ms. Lucky undeniably has been treated unjustly (but to her benefit) and Mr. Unlucky undeniably has been treated justly. But the advocate of prescriptive equality will point out that we are quite likely to believe nonetheless that Mr. Unlucky somehow has been treated wrongly. Because nonegalitarian justice cannot account for this wrong, the egalitarian will contend, that wrong must arise from the operation of some other norm. It must arise, that is, from prescriptive equality — from our sense that the bare fact of difference between Ms. Lucky’s and Mr. Unlucky’s treatments, in itself, is an inherent wrong, that the bare fact of similarity between the two ticketholders is itself a reason for treating them the same. There is no other way, the egalitarian will claim, to explain our intuition of “wrongness.”

There are a number of replies to this argument. The first category of replies challenges the conclusion of the egalitarian that our belief that Mr. Unlucky somehow has been treated wrongly can be explained only by prescriptive equality. The second category of replies challenges the assumption that prescriptive equality coherently can exist at all as a substantive norm in conditions of infinite supply.

I. Why Might We Think Mr. Unlucky Has Been Treated “Wrongly”? — Contrary to the conclusion drawn by the prescriptive egalitarian, it may be that any negative reaction we have to Mr. Unlucky’s treatment in fact stems from concerns of nonegalitarian justice in the broad sense, and not from a concern for equality. We may believe that the difference between Ms. Lucky’s and Mr. Unlucky’s
treatments is likely to have consequences that disserve nonegalitarian justice: perhaps public perception of differential treatment by the lottery commission might undermine confidence in government, reduce the willingness of people to play the lottery (and thus reduce funding for public education), or bring about some other socially undesirable result. If these sorts of concerns actually animate our dissatisfaction with Mr. Unlucky’s treatment, then we do not really care about the bare fact of the difference between Ms. Lucky’s and Mr. Unlucky’s treatments — a fact of concern to prescriptive equality. We care instead about the effects of that difference, or rather the effects of the general perception of that difference. We worry, that is, that the lottery commission, by awarding Mr. Unlucky only $500,000, inadequately weighed certain criteria of social welfare — confidence in government, for instance — that favor giving an additional $100,000 to Mr. Unlucky. We are concerned not with equality, but with nonegalitarian justice. 55

It is also possible that, despite the conclusion of the prescriptive egalitarian, it is not the just treatment of Mr. Unlucky, but the unjust treatment of Ms. Lucky, that bothers us about the whole lottery affair. After all, Mr. Unlucky’s treatment, because it is different from Ms. Lucky’s, has underscored the potentially hidden fact that Ms. Lucky’s treatment was wrong. Any offense we take when Mr. Unlucky is treated differently from Ms. Lucky might well arise not from the bare fact of the difference in treatments — again, a concern of prescriptive equality — but rather from the fact (and our perception of the fact) that Ms. Lucky has been treated in an unjustly beneficial way. Indeed, we might understandably misinterpret our offense as a perception that Mr. Unlucky, rather than Ms. Lucky, has been treated wrongly: the result of Mr. Unlucky’s treatment is comparatively worse than the result of Ms. Lucky’s treatment, and we may simply be conditioned to believe that beneficial treatments are more likely to be “just” than burdensome treatments are.

These points suggest rather forcefully that prescriptive equality might not play any role at all in our intuitive reactions, assuming we have them, to Mr. Unlucky’s treatment. They demonstrate that any intuitive offense we may feel upon discovering that Mr. Unlucky has been treated differently from Ms. Lucky can be explained quite convincingly as a product of some particular substantive conception of nonegalitarian justice. If prescriptive equality operates normatively

55 Note that if these sorts of considerations are at the root of our belief that Mr. Unlucky has been treated wrongly, then we believe that there are nonegalitarian criteria of justice that apply to Mr. Unlucky merely because of the treatment already given Ms. Lucky. We believe, in other words, that the fact of Ms. Lucky’s unjust treatment has, for entirely nonegalitarian reasons, altered Mr. Unlucky’s situation so that it is no longer identical to Ms. Lucky’s. Awarding Mr. Unlucky an additional $100,000 then becomes just even though awarding Ms. Lucky an extra $100,000 was unjust, because Mr. Unlucky has become differently situated from Ms. Lucky.
here, it does so invisibly; and, with Joseph Raz, we might believe there is always reason to suspect "[a]rguments for the existence of the invisible."\(^{56}\) Because nonegalitarian justice completely explains our belief that Mr. Unlucky has been treated "wrongly" despite having been awarded the amount to which he is otherwise entitled, we have strong reason to doubt that prescriptive equality is operating independently to produce a superfluous sense of wrong.

2. Can Prescriptive Equality Operate Coherently at All in Conditions of Infinite Supply? — The fact that nonegalitarian justice can be used to explain why we might think Mr. Unlucky has been treated wrongly does not mean prescriptive equality cannot exist at all in conditions of infinite supply. Although we can identify convincing nonegalitarian considerations to explain our moral intuitions in such conditions, prescriptive equality may nonetheless operate to strengthen or supplement those considerations. But there are good reasons to think that prescriptive equality simply is incoherent as a substantive norm in cases like our lottery hypothetical.

One reason to think that prescriptive equality is incoherent, and thus invalid, is that it necessarily contradicts itself. It is inherently impossible to treat one set of people equally according to one standard of entitlement without treating another set of people unequally according to another standard of entitlement. Suppose, for instance, that the lottery commissioner presented with Mr. Unlucky's claim of entitlement to an additional $100,000 believes in prescriptive equality and thinks that it is controlling in Mr. Unlucky's case. In accordance with this belief, she awards Mr. Unlucky the same amount of money that Ms. Lucky was (unjustly) awarded. Now Mr. Unlucky has been treated equally with respect to Ms. Lucky. But Mr. Unlucky has at the same time been treated \textit{unequally} with respect to a whole different set of people: everyone who has ever received just treatment according to nonegalitarian justice.\(^{57}\) Every person in the world is, by definition, identically entitled to be treated justly. To treat Mr. Unlucky equally with respect to Ms. Lucky, however, is to treat Mr. Unlucky unjustly according to nonegalitarian justice, and to treat Mr. Unlucky unjustly is to treat him \textit{unequally} with respect to everyone who has ever been (or ever will be) treated justly. Prescriptive equality, then, cannot operate in the only case in which it can ever make a substantive difference — the case in which an identically situated person already has been treated unjustly — without resulting in the rejection of prescriptive equality with respect to another category of cases. As such, pre-

\(^{56}\) Raz, \textit{supra} note 31, at 239; \textit{see supra} note 54. Raz contends that prescriptive equality is suspect because it adds nothing to "satiable, diminishing principle[s]," which "lead to an approximately equal distribution in any case." Raz, \textit{supra} note 31, at 239–40.

\(^{57}\) \textit{See} Alexander, \textit{supra} note 40, at 10 (stating that "treating someone equally with another who was treated immorally is to deny that person equality with those who have been treated morally correctly").
scriptive equality implies its own negation — it contradicts itself, and a moral norm that necessarily contradicts itself can hardly claim substantive validity. 58

Another reason to think prescriptive equality incoherent and invalid is that it necessarily contradicts nonegalitarian justice in at least one way, and probably in two. First, prescriptive equality always requires for its operation the treatment of a person according to the same irrelevant criterion (or according to the same incorrect balancing of criteria) that has been applied in the unjust treatment of an identically situated person. The lottery commission issuing Ms. Lucky’s check reached an unjust decision with respect to Ms. Lucky: the commission relied on some irrelevant criterion or criteria in awarding Ms. Lucky her winnings. 59 The cause, then, of the unjust treatment of Ms. Lucky is the commission’s application of some irrelevant treatment criterion or criteria to her. To implement prescriptive equality, the lottery commission now must consider the fact of its excessive award to

58 Professor Greenawalt’s suggestion that “[s]ome comparisons and relationships are far more salient and important than others,” Greenawalt, supra note 30, at 1280, does not threaten the basic fact of prescriptive equality’s self-contradiction. For one thing, identifying those comparisons and relationships that are more important and those that are less so requires a theory of nonegalitarian justice; the command that “identically situated people be treated identically merely because they are identically situated” does not get us there. We need a theory of nonegalitarian justice to tell us, for instance, that comparisons between the treatment of two children in the same family, or of two defendants before the same judge (to borrow two of Professor Greenawalt’s examples), are more important than comparisons between the treatment of a child by her parents and the treatment of an unrelated defendant by a judge. The fact that nonegalitarian justice is needed to tell us when equal treatment is important suggests that the reasons we might seek equal treatment in those cases are in fact consequentialist reasons of nonegalitarian justice, not deontological reasons of prescriptive equality. We favor equal treatment of children by their parents, for example, because we want children to feel that they are equally loved and that their parents are unbiased and impartial; we favor equal treatment of defendants by judges because we want to avoid the impression that justice depends on bias, whim, or other irrelevant factors. See supra note 46. If these kinds of nonegalitarian considerations are not prominent, even decisive, in making treatment decisions in these contexts, then it is difficult to see how we can distinguish these “important” relationships from any other context in which prescriptive equality might be thought to apply. And if these kinds of considerations are prominent or decisive, then it is difficult to see what role is left for prescriptive equality.

More fundamentally, however, the inherent self-contradiction of applying prescriptive equality does not disappear if one thinks equality to be more important in some contexts than in others; at most it becomes less obvious. The prescriptive egalitarian holds that unequal treatment of identically situated people, measured according to any legitimate standard of identicality, is always to some degree wrong. Yet, as we have seen, applying prescriptive equality in one context necessarily requires violating it in others. This necessity must mean that prescriptive equality is fundamentally incoherent, in the same way that a theory of nonegalitarian justice that forbade torture would be incoherent if, to prevent torture in any given case, it required that someone be tortured in another case.

59 Remember, we have stipulated here that the lottery rules themselves are the only source of relevant criteria for treatment. If the universe of relevant criteria were broader, Ms. Lucky’s incorrect award could also be the result of an incorrect weighing of one or more relevant criteria for her treatment. This modification of our hypothetical would not change the ensuing analysis, but that analysis will be easier to follow in our hypothetical because the only relevant criterion for treatment is Ms. Lucky’s possession of a winning ticket.
Ms. Lucky as a reason to give the same amount of money to Mr. Unlucky — that is, as a relevant criterion in determining how much money to award Mr. Unlucky. As such, if prescriptive equality is applied, the commission’s treatment of Mr. Unlucky will in part be caused by its previous treatment of Ms. Lucky: but for the (erroneous) treatment of Ms. Lucky, the “right” treatment of Mr. Unlucky would be different. Because we know that Ms. Lucky’s treatment has itself been caused in part by the lottery commission’s application of some irrelevant treatment criterion or criteria, we also know that Mr. Unlucky’s treatment has been caused in part by the commission’s application to Ms. Lucky of the irrelevant treatment criterion or criteria. We know, that is, that Mr. Unlucky has been treated in accordance with the same irrelevant criterion or criteria responsible for Ms. Lucky’s treatment. If prescriptive equality has been applied in the decision-making process, both Ms. Lucky and Mr. Unlucky have been treated unjustly.

60 Note that if prescriptive equality is considered in the decisionmaking process, the treatment of Ms. Lucky is a cause of the treatment of Mr. Unlucky even if the commissioner deciding how to treat Mr. Unlucky believes that other criteria (of nonegalitarian justice) outweigh equality in that case and therefore awards Mr. Unlucky less money than Ms. Lucky was given. As long as the commissioner, in deciding how to treat Mr. Unlucky, considers the dictates of prescriptive equality among the criteria she applies in treating him, Mr. Unlucky is being “treated” based in part on that criterion, as I conceive of treatment here.

It might be objected that a person is not really “treated” in accordance with a certain criterion unless that criterion actually supports the resulting treatment. By this objection, the lottery commissioner’s mere consideration of prescriptive equality as a criterion in deciding how to treat Mr. Unlucky is not treatment in accordance with that criterion if the commissioner ultimately rejects it in favor of weightier nonegalitarian criteria. But the objection assumes an overly narrow conception of treatment. Suppose the lottery commissioner, in deciding how to treat Mr. Unlucky, weighs the dictates of prescriptive equality (which favor giving Mr. Unlucky extra money) against a number of countervailing criteria of nonegalitarian justice and finds the nonegalitarian criteria to be slightly stronger. The commissioner therefore decides not to award extra money to Mr. Unlucky. Now suppose that one of the nonegalitarian criteria is removed, such that in deciding how to treat Mr. Unlucky, the commissioner determines that the dictates of prescriptive equality carry the day. In each case, prescriptive equality has been given the same weight in the balancing of relevant criteria; it is only the weight of the countervailing criteria that has changed. It is artificial, therefore, to suppose that prescriptive equality has played a different causal role in the treatments in the two cases. In fact, prescriptive equality has carried the same causal force in both treatments.

Another way of looking at this question is to consider the lottery commissioner’s “treatment” of Mr. Unlucky to be a two-step process, consisting in fact of two treatments: the first being the commissioner’s act of deciding how much money to give Mr. Unlucky, and the second being the commissioner’s resulting act of actually awarding a certain amount of money to Mr. Unlucky. Whether prescriptive equality plays a causal role in the latter treatment might be said to depend on whether the commissioner does or does not actually award more money to Mr. Unlucky. Whether prescriptive equality plays a causal role in the former treatment, however, depends only on whether the commissioner considers prescriptive equality among the relevant criteria during her decisionmaking process. If she does, Mr. Unlucky has been treated in part according to prescriptive equality, regardless of how much money is given.

61 Professor Greenawalt, I think, misconstrues my point here. See Greenawalt, supra note 30, at 1281–82. My point is not that prescriptive equality, if applied, calls for treatment different from that dictated by nonegalitarian justice, see id. at 1281, and thus necessarily contradicts
The first way in which prescriptive equality necessarily violates nonegalitarian justice, then, is in its requirement that a person, to be treated “equally,” be treated in accordance with the same incorrect application of criteria already used to treat an identically situated person. There is a second way in which equality contradicts justice, although whether one recognizes it depends upon one’s substantive conception of what justice is — of what criteria are relevant to a person’s treatment. Prescriptive equality can be said to violate most views of justice because it requires that random chance itself be considered as a criterion for the treatment of people. If prescriptive equality is obeyed, the rightness or wrongness of a person’s treatment will depend on the sequence in which that person is treated with respect to the treatments of other identically situated people. As an example, prescriptive equality purports to tell us that the treatment of Mr. Unlucky in our lottery example is in some sense wrong simply because it is not identical to the prior treatment of Ms. Lucky. But if Mr. Unlucky had been first to the lottery commission offices and Ms. Lucky’s check had not yet been issued, then prescriptive equality would not take effect at all, and Mr. Unlucky’s treatment would be entirely right in the egalitarian view.

The sequence in which Ms. Lucky and Mr. Unlucky have been treated, however, is probably a matter of sheer happenstance. We are unlikely to think that happenstance — the chance fact that Ms. Lucky lives closer to the lottery commission offices, for instance, or that Mr. Unlucky’s car broke down the day before — can have any relevance to the question of Ms. Lucky’s and Mr. Unlucky’s respective entitlements to lottery winnings (or their respective entitlements to any other treatment, for that matter). That is, we are unlikely to think that chance can be a relevant treatment criterion. Prescriptive equality, nonegalitarian justice. Such a point would indeed be subject to the objection that Professor Greenawalt makes: it is not a “contradiction” of nonegalitarian justice to suppose that nonegalitarian criteria of justice demand one result — “pull in a [certain] direction,” in Professor Greenawalt’s terms — while prescriptive equality demands a different result — “pull[s] in a different direction.” Id. (emphasis omitted). Whatever result is reached after a proper consideration and weighing of all the relevant criteria, including prescriptive equality, would still be the “just” result. But my point is somewhat different; it is that the application of prescriptive equality demands the consideration of an irrelevant (nonegalitarian) criterion (or the improper weighing of relevant criteria). This problem arises because, as noted earlier, the application of prescriptive equality makes the prior treatment of a person according to an irrelevant criterion a “but for” cause of the subsequent treatment of an identical person: it “passes through” to the second person the unjust treatment of the first person. This “pass through” effect truly is a contradiction of nonegalitarian justice, not because it produces a different ultimate result from that which nonegalitarian justice otherwise would require — indeed it need not do so, see supra note 60 — but because it necessitates the treatment of the second person according to an irrelevant criterion.

62 There are, of course, exceptions. For one thing, we have seen that chance can be a relevant treatment criterion in certain circumstances — in conditions of scarcity of indivisible treatments like our lifeboat hypothetical (or like the question of who is entitled to win the lottery in the first place). But most people are unlikely to think that chance can, by itself, be relevant in any other context.
however, tells us to consider the random sequence of treatments as a relevant (even a decisive) factor in the treatment of both Ms. Lucky and Mr. Unlucky. Prescriptive equality thus requires the application of an irrelevant criterion, chance, to determine how a person should be treated. For this reason as well, it necessarily violates most conceptions of nonegalitarian justice. 63

As such, we have good reasons to suspect that prescriptive equality necessarily is incoherent in conditions of infinite supply. Prescriptive equality always implies its own negation — it is self-contradictory — and a principle that is self-contradictory in every case in which it is

Another exception of sorts is the fact that chance can produce relevant treatment criteria. This will occur, though, only when chance produces an actual, physical event, not simply a logical or temporal relationship. An example I have used elsewhere, see Peters, supra note 4, at 2069 n.134, is lightning striking a person: such a random event can produce the relevant treatment criteria that the person is injured, needs immediate medical attention, etc. In this way, random events can have real, causal, physical effects on people, effects that trigger criteria relevant to how such people should be treated. The fact of the sequence in which Ms. Lucky and Mr. Unlucky have received their lottery winnings is not a random event of this nature, however. It is a temporal fact, not a physical event; it "exists" only in abstract, temporal space. As such, it can have no real, causal, physical effect on either Ms. Lucky or Mr. Unlucky. Its effect is only upon the temporal relationship between the treatment of Ms. Lucky and that of Mr. Unlucky; it produces the merely temporal, not causal, fact that Mr. Unlucky has been treated subsequently to Ms. Lucky. Unlike a physical event, a temporal or logical relationship cannot produce effects in the real world (although someone's perception of a temporal or logical relationship can, as a physical event, produce real world effects). Thus, the bare, random fact that Ms. Lucky's check already has been issued, because it does not affect Mr. Unlucky in any real, physical way (there is an unlimited fund in the treasury, remember), cannot by itself give rise to relevant criteria for determining how Mr. Unlucky should be treated.

63 Professor Greenawalt points out that random sequence would not play a role in treatment if a prescient decisionmaker predicts that an incorrect treatment will be given to someone in a future case and applies prescriptive equality anticipatorily, to give the same treatment in advance to an identically situated person. See Greenawalt, supra note 30, at 1282. In such a case, the treatment given to the first person would not depend on whether she is treated before or after the second person. Such situations, however, probably will be rare compared with circumstances in which a decisionmaker is faced with an existing incorrect treatment. It is also interesting to note the element of self-fulfilling prophecy in this kind of anticipatory decision: if the second decisionmaker is also a prescriptive egalitarian, her treatment of the second person will be influenced by the treatment given the first person, and thus to apply prescriptive equality predictively in this way is to increase the likelihood that one's prediction will be correct. The significant truth underlying Professor Greenawalt's point, however, is that, strictly speaking, prescriptive equality always requires treatment according to chance, and only usually requires treatment according to random sequence, which is one manifestation of chance. If Mr. Unlucky arrives to pick up his lottery check first and clerk A gives him an extra $100,000 because of a belief that clerk B, who will be on duty tomorrow, will give Ms. Lucky an extra $100,000, Mr. Unlucky has not been treated according to the random sequence of his treatment and Ms. Lucky's. Mr. Unlucky, however, still has been treated according to the chance fact that Ms. Lucky's award will be administered by the overly generous clerk B and not the stricter clerk A. In this way, prescriptive equality always requires that chance play a decisive role in the treatment of a person to whom it is applied. Often chance will appear as the random fact of sequence of treatments, but sometimes it will appear as well, or alternatively, in the form of other random facts: the fact that clerk B issues a check rather than clerk A, or the fact that a judge had something disagreeable for breakfast and is not thinking clearly on a given day. On most conceptions of nonegalitarian justice, such random facts by themselves are irrelevant criteria for the treatment of people.
said to apply simply cannot claim to be a valid normative proposition. Prescriptive equality also necessarily contradicts nonegalitarian justice in every case — perhaps in more than one way, if we believe that chance cannot be a relevant treatment criterion. All of this amplifies what we already know about prescriptive equality: that all of the normative work it might be thought to accomplish in conditions of infinite supply can be performed as well by nonegalitarian justice. This, then, is where we stand: nonegalitarian justice can be used to explain fully our normative instincts in these conditions, and it does so without self-contradiction. Prescriptive equality, however, can explain those instincts only at the price of self-contradiction and violation of nonegalitarian justice.

C. Conditions of Distinction

There is one final category of conditions in which prescriptive equality might be said to operate, although such conditions really are only special cases of either conditions of competition or conditions of infinite supply. This category deserves special mention, however, because it so frequently produces claims that purport to be “egalitarian.”

In conditions of distinction, more than one person is identically entitled by nonegalitarian justice to a certain treatment, and a single decisionmaker makes an ex ante decision to apportion the treatment unequally among the claimants based upon an irrelevant differentiating criterion. Suppose again that each of Smith and Jones is entitled to 100 units of medicine. Suppose further that Smith and Jones go together to a medical clinic to receive their treatments. The doctor in charge of the clinic is a racist and decides to give Smith her full 100 units of medicine because she is Caucasian but to give Jones no medicine because he is African-American. The doctor has made a decision to distinguish between the treatments given Smith and Jones based on an irrelevant differentiating criterion: race. These are conditions of distinction.

Because conditions of distinction will also be either conditions of competition or conditions of infinite supply, we know for the reasons discussed in sections IV.A and IV.B above that prescriptive equality cannot tell us anything substantive about the treatments of Smith and Jones. But we also might feel that a special sort of wrong has been done to Jones by the racist doctor, a kind of wrong that does not appear to be present in simple conditions of competition or infinite supply. Is this special wrong a violation of prescriptive equality?

In fact, it is fairly easy to see that the special wrong done to Jones is a wrong of injustice, not inequality. Recall that in conditions of distinction, a single decisionmaker decides to treat identically situated

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64 I have used the term “differentiating criterion” elsewhere in this sense. Peters, supra note 4, at 2097.
people differently based upon an irrelevant criterion. Such a decision, by definition, affects more than one person; it affects every identically situated person within the purview of the decision. The racist doctor's decision to give medicine to Smith because she is Caucasian but to deny it to Jones because he is African-American treats both Smith and Jones according to the same irrelevant criterion: race. Treatment according to an irrelevant criterion violates nonegalitarian justice.

As such, nonegalitarian justice operates alone in conditions of distinction to demand that Smith and Jones be treated only according to the relevant criteria — and thus, incidentally, equally. Nongalitarian justice, moreover, operates more conspicuously in conditions of distinction than it typically does in simple conditions of competition or infinite supply. In the latter types of conditions, differential treatments of people often occur as discrete, self-contained events, separated by the passage of time and perhaps perpetrated by different decisionmakers. For this reason, it may be difficult to compare the prior treatment of person A with the current treatment of person B, and thus to recognize any disparity between the two treatments. 65

In contrast, conditions of distinction involve a conscious decision to treat two or more identically situated people differently, with more or less instantaneous effects. Such a decision is more salient than a series of disconnected, discrete decisions because it obviously affects more than one person. As such, it may set off intuitive moral alarms that are not triggered by the self-contained decisions that occur in simple conditions of competition or infinite supply.

Moreover, the irrelevant differentiating criteria employed in conditions of distinction often seem particularly odious. When someone

65 Our lottery hypothetical again provides a useful example. Suppose Ms. Lucky is awarded extra lottery winnings due to a clerical error. The next day, Mr. Unlucky appears at the lottery commission office to collect his winnings and is awarded the correct amount. Because the awards have not occurred simultaneously and might not even have been issued by the same lottery commission clerk, it might be difficult for anyone to recognize that two identically situated people have been treated differently. But if the two winners appear at the same time to collect their awards, and the lottery clerk consciously decides to give more money to Ms. Lucky than to Mr. Unlucky — creating conditions of distinction — then the difference in treatment (and thus the injustice) will be salient. Of course, conditions of distinction will not always be so obvious. For instance, if the lottery clerk decides on Monday to give Ms. Lucky extra money because she is Caucasian and then decides on Tuesday to give Mr. Unlucky only the correct amount because he is not Caucasian, conditions of distinction have been created, but their existence may be no more conspicuous than if the clerk had simply punched the wrong key on his typewriter when issuing the check to Ms. Lucky.

I thus use the concept of a “single decisionmaker” as a shorthand way of indicating that, for conditions of distinction to exist, the reason for the differential treatment of two identically situated people must be an actual comparison of the two — an intentional distinction between them based upon an irrelevant criterion. Such conditions do not exist when a person is given an incorrect treatment without regard to how other identically situated people have been or will be treated. If a clerical error is responsible for the fact that Ms. Lucky has received $100,000 more than Mr. Lucky, these are not conditions of distinction, because the treatment of the two people has not been based upon an illegitimate comparison of them.
makes a conscious decision to differentiate between two seemingly identical people or classes of people, the basis for that decision often turns out to be a freighted criterion like race, gender, or sexual orientation — criteria likely to evoke complex and emotional responses in our society. But in condemning such decisions with extraordinary vehemence, we are merely claiming that particularly strong reasons of nonegalitarian justice preclude reliance on such criteria in making decisions about how to treat people. We are not making a claim of prescriptive equality. The wrong of such decisions lies not in the difference in treatments that results from them; it lies in the application of an especially harmful irrelevant criterion to produce that difference.66

D. Summary

In this Part, I have taken the notion of prescriptive equality through its paces and have found it wanting in every context. In conditions of competition, in which equality is most often advocated as a substantive norm, it has proven to be empty in the same way, although not for the same reason, that tautological equality is empty: it is entirely superfluous in light of nonegalitarian justice. In conditions of infinite supply, we cannot say for sure that prescriptive equality is empty (although it certainly appears to be), but we can say for sure that even if it is not empty, it is incoherent: it necessarily contradicts both itself and nonegalitarian justice. Finally, in the special case of conditions of distinction, prescriptive equality must be empty or incoherent as well: our strong sense of moral impropriety in such conditions stems not from a belief in prescriptive equality, but from our intuitive understanding that a decisionmaker has consciously decided to treat identical people differently based upon an irrelevant (perhaps an abhorrent) criterion. This concern, of course, is one of nonegalitarian justice, not one of equality.

In light of all this, it makes little sense to think of prescriptive equality as a valid moral norm. In most cases, prescriptive equality, distilled to its essence, can add nothing to our understanding of how people should be treated, an understanding that arises entirely from some nonegalitarian conception of justice. To see that prescriptive equality

66 Recognition of the mechanics of conditions of distinction might help illuminate many contemporary debates about "equality" — the affirmative action debate, for example. Those who oppose affirmative action on the ground that it is merely "reverse discrimination" claim, in essence, that the decision to treat two people differently — by, for instance, giving an African-American business owner a preference in the award of government contracts that is not available to a Caucasian business owner — is based upon an irrelevant differentiating criterion: the simple fact of race. On the other hand, those who support affirmative action claim that such a distinction is based on a relevant criterion or set of criteria: the fact that the African-American business owner, due to historical and sociological conditions, faces artificial obstacles to obtaining government contracts that the Caucasian business owner does not face. Neither argument is really an argument of prescriptive equality; both are arguments of nonegalitarian justice.
equality adds nothing in such cases is to say that it has no prescriptive force at all — it is an empty, analytically worthless concept. Indeed, focusing on "equality" in such cases may obscure our real concern, which is whether someone has been treated according to the criteria relevant to her treatment.

The strongest impact of the foregoing analysis, however, is felt in those few cases in which prescriptive equality commands a result different from that required by nonegalitarian justice — when, in conditions of infinite supply, it purports to tell us that a person should be treated unjustly merely because another person has been so treated. In such cases, prescriptive equality is worse than empty; it is both incongruous and inherently unjust, and thus it is morally invalid.

This is not to say that the idea of equality, applied in a certain way, is always useless or harmful. Sometimes calling attention to inequality of treatment reveals injustice in treatment; recognizing a symptom can help us diagnose the disease. But once the disease has been identified, the important thing is to remedy the injustice, not the resulting inequality. Equality can serve only as a descriptive device; prescriptively, equality is analytically empty. It can do nothing to explain our moral intuitions or to tell us how people should be treated.

67 One of the most interesting positive claims made by Professor Greenawalt in his Response is that the principle of prescriptive equality "has force" if it is based upon "the desirability of satisfying feelings of affected persons that unequal treatment is intrinsically unfair." Greenawalt, supra note 30, at 1273. (A related claim is Professor Greenawalt's suggestion that prescriptive equality might apply in certain circumstances "largely because of the significance of symbolic and expressive functions." Id. at 1289.) As the reader hopefully will see by now, and as I think Professor Greenawalt himself understands, to apply equal treatment for these kinds of reasons is not to apply prescriptive equality as I describe that principle in this Article; it is not to treat someone in a certain way based upon the bare fact that an identically situated person has been treated in the same way. Rather, it is to apply certain consequentialist considerations of nonegalitarian justice in deciding how to treat someone. One could agree, then, that these kinds of reasons often provide powerful support for treating people equally, and still have no grounds to challenge my conclusions in this Article.

It is another question whether the kinds of egalitarian feelings Professor Greenawalt describes, assuming they exist, deserve to be respected at all in making decisions. Professor Greenawalt's tentative answer is that such feelings should be respected and taken into account, at least in certain contexts. See id. at 1288. As Professor Greenawalt is quick to acknowledge, these are complex issues, and they warrant a depth of analysis that is far beyond the scope of this Article. Surely Professor Greenawalt is right that people's feelings about how they should be treated must at least be considered in many areas of decisionmaking, whatever the intrinsic merits of those feelings. But if those feelings are wrongheaded — if they are based on faulty logic or ill-founded assumptions — then we should be careful how much respect we give them, just as we are wary of respecting feelings of racial superiority or beliefs that the earth is flat. We may do well here to recall John Stuart Mill's words in critique of gender discrimination: "For the apotheosis of Reason we have substituted that of Instinct; and we call everything instinct which we find in ourselves and for which we cannot trace any rational foundation." 21 JOHN STUART MILL, THE SUBJECTION OF WOMEN, IN COLLECTED WORKS OF JOHN STUART MILL 259, 263 (John M. Robson ed., 1984). If there is no rational foundation for feelings of prescriptive equality, then the mere fact that some people have those feelings is not a sufficient reason to heed them.
V. A FEW THOUGHTS ON THE IMPLICATIONS OF PRESCRIPTIVE EQUALITY'S INVALIDITY

What does it mean, or matter, that prescriptive equality does not exist as a substantive norm? Do we have license to treat similarly situated people any old way we please? Is the Equal Protection Clause based upon a fallacy? Are egalitarian theories of justice, such as John Rawls's well-known theory, necessarily so much folderol?

The answer to each of the last three questions is "no," for reasons that become more complex with each respective question. Of course the nonexistence of prescriptive equality does not mean we have license to treat similarly situated people in any way we please. We still have nonegalitarian justice, in whatever form we conceive of it, to tell us how people should and should not be treated. By definition, two identically situated people are entitled by nonegalitarian justice to be treated in an identical way. It is only that, as we have seen, no separate principle of equality is necessary to tell us this.

Nor does the nonexistence of prescriptive equality as a substantive norm challenge the premise of the Equal Protection Clause. Granted, it makes a prominent word in that clause redundant: removing the word "equal" from its prohibition against "den[y]ing to any person . . . the equal protection of the laws" would not change the meaning of the provision. A person who is "protected" by "the laws" will be protected "equally" with respect to any other person who is identically entitled by those laws to protection. But the bite of the Equal Protection Clause is its guarantee that everyone will be protected by "the laws" in the first place. What the Clause means by "equal protection" is not the tautological requirement that people identically entitled to legal protection are identically entitled to legal protection; what the Clause means is that no one can be denied legal protection without a good reason — that is, on the basis of irrelevant criteria. The Clause expresses a rule of nonegalitarian justice, not a principle of prescriptive equality. That rule remains a powerful one indeed, however, because it forces government to have a valid reason before making legal distinctions among people. 70

The same analysis demonstrates why a debunking of prescriptive equality is not an attack on the notion of "racial equality" (or "gender equality," or other concepts aimed at the unwarranted differential treatment of people). Someone who supports racial equality is not saying that an African-American, for instance, is entitled to a certain treatment just because a Caucasian-American has been treated that

69 U.S. CONST. amend. XIV, § 1.
70 Professor Westen reaches the same conclusion about the Equal Protection Clause. His conclusion, however, stems from his premise that prescriptive equality is necessarily tautological. See Westen, Empty Idea, supra note 1, at 559–77.
way. Someone who supports racial equality is, in fact, saying that the characteristic of a person's race, by itself, is not a relevant criterion upon which to base that person's treatment — that nonegalitarian justice demands that the bare fact of race not play a role in how a person is treated. She is saying that African-Americans and Caucasians are, all else being equal, identically situated with respect to their entitlements to a given treatment. People who are identically situated are, by definition, entitled to identical treatment. As we have seen, it is nonegalitarian justice, not prescriptive equality, that demands this result.

Finally, what about so-called egalitarian theories of justice such as Rawls's? Must we jettison them because prescriptive equality is invalid? Not necessarily; the answer depends on just what the particular egalitarian theory holds. If a particular theory incorporates the belief that the treatment given a person is itself a moral reason to give the same treatment to an identically situated person, then that theory cannot be correct. But if a theory merely speaks the language of "equality" or produces "equal" results by nonegalitarian means — if it does not rely upon a prescriptive egalitarian premise — then we should have no quarrel with it, at least not on the grounds that I discuss in this Article.

Rawls's theory of justice can serve here as a good test case. The core "egalitarian" component of that theory is what Rawls calls the "difference principle": no benefit may be distributed unequally unless doing so makes the "least advantaged" members of society "better off" than they otherwise would be.71

In assessing Rawls's theory, we first have to make a threshold assumption: in speaking of "equal" or "unequal" distributions, Rawls is concerned with individuals who are identically situated in all relevant respects. If Rawls is concerned with equal distribution among people he believes to be dissimilar in material ways, then he is not talking about "equality" at all, and we need not worry about whether his theory is erroneously "egalitarian." It seems fairly clear, however, that Rawls is referring to identically situated people when he discusses "equal distribution." For Rawls, entitlement is determined by "the principles of justice,"72 which are those principles that would be agreed upon by "free and rational persons . . . in an original position of equality."73 Whether two or more people are identically situated with respect to their entitlements to a particular treatment, then, depends for Rawls on whether persons in the original position would agree that such people are identically situated. According to Rawls, persons in the original position would agree that "all social primary

71 Rawls, Theory, supra note 68, at 75; see also id. at 75–83 (elaborating the manner in which the difference principle operates).
72 Id. at 11.
73 Id.
goods . . . are to be distributed equally," subject to the difference principle.74 This statement is equivalent to an assertion that persons in the original position would deem everyone in society to be identically situated with respect to entitlement to the social primary goods, which Rawls enumerates as "rights and liberties, opportunities and powers, income and wealth,"75 and "the bases of self-respect."76 I think we can safely assume, then, that Rawls is concerned with "equal distribution" among identically situated people.

Does Rawls's difference principle incorporate notions of prescriptive equality, rendering it suspect as a normative principle of political theory? The difference principle recognizes two possible alternative results of distributing primary goods unequally: either the least advantaged members of society are made better off by the unequal distribution, or they are not made better off. Let us suppose the former is true in a particular instance: distribution of more of a primary good (wealth, let us say) to person X than to person Y will make the least advantaged members of society better off than they otherwise would be. (Perhaps X, but not Y, will invest the wealth in a way that benefits society as a whole.) The difference principle would allow the unequal distribution in such a case. This result does not implicate prescriptive equality at all, of course, because the fact that X but not Y will invest the wealth in a socially beneficial way means that X and Y are not identically entitled to the wealth. Prescriptive equality has no application between people who are not identically situated.

Now let us suppose that distribution of more wealth to X than to Y will not improve the position of the least advantaged members of society. This is to suppose that X and Y are in fact identically entitled to wealth, because we now have no valid reason of nonegalitarian justice (at least, none that Rawls would recognize) to give X more wealth than Y. Rawls's difference principle would require distributing wealth equally between X and Y in such circumstances. In most cases, this is precisely the result that nonegalitarian justice would require. As we have seen, nonegalitarian justice demands that identically situated people receive equal treatment in conditions of competition.77 If wealth is a competitive resource, therefore, the difference principle can be explained solely in terms of nonegalitarian justice, and there is no reason to suspect that it relies on considerations of prescriptive equality.

There is one kind of case, however, in which the difference principle might be interpreted to demand a different result from that which nonegalitarian justice would require: a case in which the primary good at issue (here, wealth) exists in infinite supply. To be sure, on one

74 Id. at 303.
75 Id. at 92.
76 Id. at 303; see also id. at 440-46 (explaining why self-respect is the most important primary good).
77 See supra pp. 1232-45.
interpretation of the difference principle as applied in such a case, that principle need not depend upon prescriptive equality. The difference principle would forbid giving more wealth to \( X \) than to \( Y \) in conditions of infinite supply (again, assuming that doing so will not benefit society's worst off). Nonegalitarian justice would also forbid giving \( X \) more wealth than \( Y \) in such conditions, because to do so would, by definition, be to give \( X \) more wealth than she justly deserves.\(^{78}\) Nonegalitarian justice might also forbid unequal distribution on consequentialist grounds — for example, that favoring particular individuals undermines confidence in government, foments discord and dissent, discourages productivity, or produces some other harmful effects. Additionally, if the unequal distribution would be a product of conditions of distinction — a single ex ante decision to distribute wealth unequally between \( X \) and \( Y \) — then nonegalitarian justice would forbid the unequal distribution as the product of an irrelevant differentiating criterion. Assuming that Rawls's difference principle is animated by these sorts of nonegalitarian concerns, that principle does not rely upon prescriptive equality; it is simply a principle of nonegalitarian justice.

But on another interpretation of the difference principle as applied in conditions of infinite supply, that principle incorporates notions of prescriptive equality. Suppose that \( X \) already has been given more wealth than she deserves, but \( Y \) has not yet been given anything. The difference principle might be interpreted, from this intermediate perspective,\(^{79}\) to require that \( Y \) be given the same excess amount of wealth that \( X \) has been given.\(^{80}\) Again, there may be a nonegalitarian, consequentialist reason for such a result (the avoidance of discord, for

\(^{78}\) Recall that nonegalitarian justice is treatment of a person in accordance with the net effect of all the relevant criteria, and only the relevant criteria. \textit{See supra} p. 1228. If the net effect of all and only the relevant criteria applicable to the treatment of \( X \) requires giving her a certain amount of benefits, and if \( X \) is given a different amount of benefits, then \( X \) has been treated unjustly.

\(^{79}\) Regarding the distinction among the various temporal perspectives from which prescriptive equality might be applied, see note 28 above.

\(^{80}\) It is not clear to me whether Rawls himself would interpret the difference principle to apply in this way. Rawls intends his theory of justice, of which the difference principle is a component, to apply in a very general, anterior sense, as the blueprint for "a perfectly just society," \textit{Rawls, Theory}, \textit{supra} note 68, at 8; he is concerned with "the basic structure of society, . . . the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages," \textit{id.} at 7. Seen in this light, the difference principle operates from an entirely ex ante perspective to require that social institutions be structured in such a way as to ensure the appropriate distribution of primary goods. As such, it is possible that the principle does not apply at all to specific instances of deviation from this ex ante norm — where, for instance, a social institution has malfunctioned and given \( X \) more wealth than \( Y \) without making society's least advantaged better off. Rawls, however, does intend his "ideal theory" to "provide . . . [a] basis for the systematic grasp of [real world problems]." \textit{id.} at 9, as indeed he must to justify having a theory at all. If the difference principle is meant to provide guidance in solving real world problems, then it might be applied as a corrective norm in particular cases in which the distribution of a primary good has fallen short of Rawls's ideal. It might, that is, be applied to require remediation of an unequal distribution that has not improved the lot of society's least
instance). But absent such a reason, the distribution of excess wealth to \( Y \) would bring prescriptive equality into operation; it would be to treat \( Y \) unjustly merely because \( X \) has been treated unjustly. As in our lottery example in section IV.B, doing so would violate nonegalitarian justice in two ways. First, it would make \( X \)'s treatment a cause of \( Y \)'s treatment, thus treating \( Y \) according to the same irrelevant criterion or incorrect weighing of criteria involved in treating \( X \). Second, it would make the irrelevant criterion of random sequence a factor in \( Y \)'s treatment. Moreover, incorporating prescriptive equality into the difference principle would be self-contradictory, because it would violate prescriptive equality while attempting to obey it: in making \( Y \)'s treatment equal to \( X \)'s, it would make \( Y \)'s treatment unequal to the treatments of every person who ever has been or will be treated in accordance with nonegalitarian justice.

As applied in conditions of infinite supply, then, Rawls's difference principle could be interpreted to rely upon the faulty premise of prescriptive equality. This possibility does not mean that the difference principle must be rejected in toto; it is perfectly consistent with nonegalitarian justice in many, probably most, situations in which it might be applied. For this reason, it is unlikely that the conclusion of this Article — that prescriptive equality is invalid — poses a significant challenge to Rawls's theory of justice as a whole. But that conclusion, and the analysis used to reach it, does give us a reason to examine closely any legal, political, or moral theory that makes the proper treatment of some people contingent upon the treatment given to others. Such a theory might be based upon prescriptive equality. If so, it is grounded in a fiction.81

VI. CONCLUSION

Until now, I have left a fundamental question mostly unanswered. That question is: so what? If the rejection of prescriptive equality does not require us to rethink equal protection or to discard advantaged members. Whenever it is impossible or impractical to revoke the excess wealth given to \( X \), the difference principle might then require distribution of excess wealth to \( Y \) as well.

81 Ronald Dworkin formerly held such a theory of adjudication, although I do not think he holds it any longer. As articulated prior to his 1986 book, Law's Empire, Dworkin's theory held that "the fairness of treating like cases alike" required consistency among court decisions. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1978). Although Dworkin's expression of equality was tautological, his theory was probably best interpreted as grounding consistency in nontautological prescriptive equality. In Law's Empire, however, Dworkin based the requirement of consistency upon the similar, but different, principle of "integrity." See DWORKIN, supra note 47, at 126–224. Elsewhere, I have interpreted integrity to be a fundamentally different concept from prescriptive equality. See Peters, supra note 4, at 2076–77. Although Professor Dworkin has suggested to me in subsequent correspondence that he conceives of integrity "as a mode or aspect of equality, deriving from the requirements of a community of equals," Letter from Ronald Dworkin to Christopher J. Peters 1 (July 16, 1996) (on file with author and at the Harvard Law Library), I do not believe that his current theory of adjudication is grounded in nontautological prescriptive equality as I have articulated that concept in this Article.
"egalitarian" political theories, what has been the point of rejecting it? Unless one takes Professor Westen's position that even speaking the language of prescriptive equality usually has harmful consequences\textsuperscript{82}— a position that I, for one, am not prepared to take — I seem to have been bashing a straw man.

The answer to this question is that many people appear to believe in prescriptive equality, and that prescriptive equality, if acted upon, can have harmful consequences. There is really only one kind of case in which prescriptive equality ever matters, in which it ever purports to tell us to do something we would not already do under some conception of nongalitarian justice. That is the case in which a person already has been treated wrongly — unjustly — and we must decide whether, because of that fact, to treat another similar person similarly unjustly. Someone who believes in the force of prescriptive equality will contend, at least, that a reason exists to treat the subsequent person unjustly; she might even contend that this reason is decisive in a particular case. The result, if this person gets her way, will be two instances of unjust treatment instead of only one.

There are many real life situations in which such a result is possible and would make a significant difference. One of these situations, as I have argued elsewhere,\textsuperscript{83} is adjudication: a judge who follows a wrongly decided precedent from a sense of prescriptive equality does the parties before her an injustice and has no good reason for doing so. Indeed, government decisionmaking in general, or decisionmaking by anyone when the decisions affect how people will be treated — that is, most decisionmaking in the world — is susceptible to the lure of prescriptive equality, of treating someone unjustly merely because someone else has been treated that way.\textsuperscript{84}

\textsuperscript{82} See Westen, Empty Idea, supra note 1, at 577-92.
\textsuperscript{83} See Peters, supra note 4, at 2033-39.
\textsuperscript{84} Equal Protection Clause jurisprudence is particularly vulnerable to this error. A case in point is Palmer v. Thompson, 403 U.S. 217 (1971), in which the Supreme Court rejected an equal protection challenge to a city's decision to close all of its public swimming pools rather than open them to African-Americans as well as Caucasians. Although it recognized that maintenance of segregated public pools would violate the Equal Protection Clause, see id. at 219-20, the Palmer Court held that the closing of the pools to members of both races was an adequate remedy because the races thereby were being treated "alike," see id. at 219-21, 226. The decision reflects the Court's implicit endorsement of an invalid egalitarian premise: the denial of a benefit to one group of people (in Palmer, Caucasians who wanted to use the city's pools) is sufficient to remedy the denial of that benefit to another, identically situated group of people (African-Americans who wanted to use the pools). This premise is simply the remedial conclusion to be drawn from prescriptive equality, which holds that the treatment of one person or group in a certain way is itself a reason for similar treatment of an identically situated person or group.

Another contemporary controversy frequently tainted by prescriptive equality is the school "parity" issue — the question whether states are required, on equal protection or state constitutional grounds, to ensure that poorer, usually urban public schools receive as much funding as richer, usually suburban public schools. The experience of New Jersey is particularly illuminating. That state's constitution requires the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in..."
My argument against prescriptive equality has really been an argument in favor of making every decision on its own merits, of treating people the way justice dictates that they be treated, regardless of how someone else has been treated in the past. Other people’s treatments may be relevant, of course; the treatment given one person can change the world in subtle (and not so subtle) ways, can alter the situation of a subsequent person who otherwise would have been identically situated. No one would argue that we cannot learn something important, or that our world has not been altered, by the way the parties to Brown v. Board of Education were treated by the Supreme Court, or the way Hitler was treated by Chamberlain, or the way O.J. Simpson was treated by his juries. Right or wrong, just or unjust, these treatments have constituted part of the universe in which we live. In this way, they are of the utmost relevance to how people should be treated today.

But it is the effects of those treatments that are relevant, not the mere fact that they occurred. No principle of prescriptive equality can tell us that we must replicate those treatments merely for the sake of replicating them, whether we want to or not.

the State between the ages of five and eighteen years.” N.J. CONST. art. VIII, § 4, ¶ 1. By its terms, this provision demands only that every child receive “a thorough and efficient . . . free” education; as long as these threshold requirements are met, the provision’s language does not forbid spending more money per student in some districts than in others. In a series of decisions, however, the New Jersey Supreme Court has interpreted this “thorough and efficient” clause to require that the state “assure that poorer urban districts’ educational funding is substantially equal to that of property-rich districts.” Abbott ex rel. Abbott v. Burke, 575 A.2d 359, 408 (N.J. 1990); see also Abbott ex rel. Abbott v. Burke, 643 A.2d 575, 576, 580 (N.J. 1994) (applying Abbott, 575 A.2d at 408, in striking down as unconstitutional a 1994 school funding act); Robinson v. Cahill, 358 A.2d 457, 459 (N.J. 1976) (striking down as unconstitutional a 1976 school funding act because it failed to provide full funding); Robinson v. Cahill, 351 A.2d 713, 716–17 (N.J. 1975) (following Robinson v. Cahill, 303 A.2d 273, 294–95 (N.J. 1973), which read the New Jersey Constitution to require equal educational opportunities, measured by per pupil expenditures). In response to these decisions, Governor Christine Todd Whitman in essence called the court’s bluff; she proposed a plan that, rather than bringing the funding of poorer schools up to the level enjoyed by richer schools, would “level[] down” spending in the richer districts to achieve equality. Neil MacFarquhar, Whitman Offers Fiscal Plan for Parity in Schools, N.Y. TIMES, May 18, 1996, at 1. However, public outcry, see Jennifer Preston, Wealthier School Districts Chafe at Whitman’s Spending Plan, N.Y. TIMES, Aug. 12, 1996, at B1, forced the Governor and the State legislature to change the plan, see Neil MacFarquhar, Vote in Trenton Sets Standards on Curriculum, N.Y. TIMES, Dec. 20, 1996, at A1. The episode demonstrates the harmful implications of applying equality for its own sake. As the citizens of New Jersey almost learned the hard way, the important thing is not equality per se, but the assurance that each person be treated as he or she deserves — in New Jersey, that each student receive a “thorough and efficient” education.