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THE SUBSTANCE OF EQUALITY

*Jeremy Waldron**

SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE. By *Peter Westen*. Princeton: Princeton University Press. 1990. Pp. xxi, 318. \$39.50.

What do the following cases have in common?

(1) A previously undemocratic country is about to expand its franchise so that all adult citizens have the right to vote. However, the suggestion is made that, because people with a college education have a greater knowledge of the world and deeper insight into public affairs, their votes should count double in any election.

(2) The constitution of a country gives its citizens the right to assemble peacefully to petition the government for redress of grievances. But the society is racially divided. When groups of white citizens assemble, their demonstrations are undisturbed; when groups of black citizens assemble, the police always break up their meetings, ostensibly "in the interests of public order."

(3) In Israel, during recent Iraqi missile attacks, gas masks are issued to all citizens. But gas masks are not issued to those who live in the "Occupied Territories" such as the West Bank or the Gaza Strip, even though some Iraqi missiles have landed in these areas. When challenged, the government says there are not enough masks to go around.

(4) In an American city, only ten percent of recent recruits to the police department are women. Partly this is because few women apply. But a smaller proportion are admitted of those who do apply (than the proportion of successful male applicants) because fewer women satisfy the minimum height requirement.

One thing these cases have in common is that they all seem to involve *inequality*. Case (1) involves an inequality of political rights. On the basis of claims about differential ability, various electors are made unequal in the political power assigned to their votes. In case (2), it is civil rights that are at stake: although blacks and whites are given the same rights by the constitution, their demonstrations are not treated equally by the police. Case (3) could be described as an issue of "equal protection." All inhabitants of the country are endangered by chemical attacks. But the government is offering protection only to

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its citizens; it is ignoring the equal needs of its "subjects" in the Occupied Territories. In case (4), critics of the police department's hiring practices are likely to say that the height restriction discriminates against women, and that women's abilities and interests have not equally been taken into account in formulating the various tests and restrictions for entry into this career.

The language of "equality" and "inequality," then, seems appropriate in the discussion of these cases. But that language can be frustratingly mercurial in its application. In each of these examples, the policy complained of as "unequal" could be defended on grounds of equality. Case (4) involves the equal application of a recruitment standard: male applicants who fall short of the height restriction are not treated any differently from short women. Similarly, with case (3): since there are not enough masks to go round, some criterion has to be used to determine who gets a mask and who does not. As far as one can tell, the relevant criterion — citizenship — has been equally and impartially administered. In case (2), the police department might argue that they are applying an equal standard of public order. In case (1), all citizens are equal in having a vote: no one is excluded from the franchise.¹ And all are equal in having the appropriate test applied to determine the weight to be assigned to their vote. The educational criterion, like the requirements in cases (3) and (4), is administered without fear or favor.

Reflection on arguments like these can easily convince us that the language of equality is too elusive to settle anything in politics. Those who are made equal in one respect are often thereby made unequal in another. Whatever one's political principles, it is easy to describe their fair application as equal and to condemn the application of one's opponents' principles as unequal. The important debate, therefore, should focus on the content of the principles themselves, not the real meaning of "equality." The language of equality is a rhetorical cover under which political claims are advanced and contested; but it very seldom captures the substance of those political claims in any clear or interesting way.

That is the thesis of Peter Westen's book, *Speaking of Equality*. Although he insists at the end of the book that he himself is "deeply committed to many of the social causes that are commonly advanced in the name of equality, including rights for women, nondiscrimination on the basis of race, and redistribution of wealth" (p. 287), the bulk of his argument is designed to show that the term "equality" is so ambiguous, and the concept of equality so equivocal and contested, that the mere fact of its occurrence in a political context tells us next

1. The proposal, and this defense of it, can be found in J. MILL, *Considerations on Representative Government*, in 19 COLLECTED WORKS 371, 474-475 (J. Robson ed. 1977).

to nothing about the content or the justification of the claim that is being advanced.

In this review, I do four things. In Part I, I examine Westen's argument that we should always look below the surface of "equality" rhetoric to the substantial claims of principle that are doing the real work in moral and political debate. I show that this is an important argument, and that it helps to clarify much of what is going on in the modern discussion of discrimination.

In Part II, however, I criticize Westen's implicit suggestion that arguments about appropriate principles are never themselves based on the idea of equality. According to Westen, talk of "equality" and "inequality" is always a surface phenomenon in politics; it can always be parsed out in favor of more direct discussion of what principles should determine who gets what in the way of goods, powers, and liberties. But I shall argue that we must often revert to the idea of equality — particularly the idea of equal human worth, or the right to equal concern and respect — as a basis for arguing about which principles are appropriate and which inappropriate to govern such distributions.

In Part III, I examine Westen's explanation of why we persist in using the language of equality. He claims that people gain considerable rhetorical advantage through the deployment of this terminology, and he tries to account for that advantage largely in terms of the ambiguities, connotations, and resonances of the words that people use. Some of his explanations are more convincing than others. But I suggest that in general his account is undermined by its failure to consider the substantive power of the egalitarian considerations discussed in the second part of the review.

Finally, in Part IV, I make some comments about the omissions in Westen's book — the way it avoids engagement with substantive social issues, and the way it also neglects some important analytical questions about the meaning of the terms "equal" and "unequal."

Throughout, I want to emphasize a general point about the nature of political theory. Westen makes a lot of the fact that the *word* "equality" and its verbal meaning are unhelpful guides to the nature and content of egalitarian ideals. I argue that this is an overly legalistic approach to political principles. "Equality," like "liberty" and "fraternity," is a shorthand slogan but not an abbreviation. It evokes a particular range of moral considerations and a particular set of complex arguments, and it does that, not by virtue of its meaning, but because every political theorist is familiar with a tradition of argumentation in and around certain texts and doctrines and knows that colleagues can be alerted to the possible relevance of that tradition by using that simple word. In some contexts, the precise formulation of a principle is important. But often in political theory, that is less important than the open-ended exploration of ideas and intimations, pinned

down no more precisely than is necessary to allow discussion to proceed.

I

Westen begins by distinguishing what he calls "descriptive equality" and "prescriptive equality." Although equality is usually put forward prescriptively as an ideal, the use of the concept almost always involves some factual claims about the world. I shall use the example of case (1), outlined above, as an illustration. Suppose a liberal objects to the idea of plural voting by demanding that people be made equal in their right to vote. It is likely, first, that this demand will rest on or presuppose some descriptive statement to the effect that people *are* equal in their possession of certain qualities (such as rationality and judgment), in virtue of which the demand for a vote is justified. Secondly, the liberal's prescriptive demand (that people *ought* to have an equal vote) is given its critical edge by the belief that, as a matter of fact, the political arrangements in the society in question (actual or suggested) do not give people what they ought to have. Thus the prescriptive demand brings two factual or descriptive claims into relation with one another. It takes a descriptive claim about what people are actually like:

(A) People are equal in their rationality.

It then relates that claim critically to a second descriptive claim, this time a claim about a certain political system:

(B) In this system, people's votes are given unequal weight.

The relation between (A) and (B) is *critical*, in virtue of the general prescriptive principle:

(C) Weight ought to be assigned to people's votes on the basis of their rationality.

Together propositions (A), (B), and (C) entail the prescriptive conclusion:

(D) Therefore this voting system ought to be changed.

Westen makes a number of interesting points about the relation between these statements. He notes first that even taken by themselves, claims like (A) and (B) are descriptively ambiguous. To say that two items are equal is to draw attention to the fact that they have been measured and compared against a common standard, and found to be indistinguishable by reference to that standard (p. 52). And to say that they are *unequal* is to say that they *are* distinguishable by reference to some such standard. So the first ambiguity, in the case of simple descriptions of equality and inequality, concerns the specification of the standard against which the measurement is being made. Things that are equal in length are not necessarily equal in weight. In the case of (A) and (B), the standards are actually mentioned in the statements. In (A), the standard is that of rationality; in (B), it is a

matter of the weight a vote is given in relation to other votes cast in an election.

However, another ambiguity remains. Once the standard is given, equality and inequality are matters of comparison and distinguishability. But what is "distinguishable" is not a determinate matter of fact. Whether two quantities are distinguishable has to do with the nature of the measuring process we are using, and in particular the margin of error in our measurements (p. 37). Two objects measured on a fine scientific balance may weigh 15.71 ounces and 16.01 ounces, respectively; yet a crude grocer's scale will indicate that they both weigh one pound. Which scale we use depends, obviously enough, on our purpose in making the measurement. This point is particularly important with regard to a statement like (A). Certainly, some measures of rationality (such as IQ tests) will reveal great differences among adult citizens. When we claim nevertheless that they are all *equal* in their rationality, we are indicating our belief that the purpose for which we are comparing them does not require the fine distinctions that such tests would indicate; for our purposes (in arguing about the franchise) a crude measure that simply indicates whether or not a person has the capacity to reason will be sufficient. So if a defender of the proposal mooted in case (1) denies the truth of statement (A), it is not likely to be because he disagrees with us on the facts. What he disagrees about is the way we make the measurement and the comparison, and in particular the very considerable margin of error we (liberals) think it appropriate to use.

Much the same can be said of (B). Whether or not people's votes have equal weight may depend on the scale we use. "Equal in the number of votes needed to outweigh it" is one thing; "having an equal likelihood of affecting the outcome" is another.² And given one or other of these scales, our margin of error may be more or less fastidious.

According to Westen, the distinction between descriptive and prescriptive equality is that "the standards of comparison that underlie descriptive equalities are standards for comparing people and things solely with respect to what they actually are, as opposed to how they ought to be treated" (pp. 65-66). But this is confusing. On the one hand, *any* comparing of people or things is done for a reason, and, as we have seen, the reason for doing it will determine what properties we are measuring, what scale we are using, and what margin of error we allow. Any assertion of descriptive equality has some *point* to it, and that point is a matter of what, prescriptively, we are to do with the things we are comparing in the light of our comparisons.

2. It is often claimed, for example, that votes are unequal, in the second sense, in electoral systems that are not based on proportional representation. For a discussion, see C. BEITZ, *POLITICAL EQUALITY* 123-40 (1989).

On the other hand, as we have seen, any prescription of equality requires us to engage in certain descriptive investigations. If we say that two quantities *ought* to be equal, we are committed to an investigation of a claim like (B), an investigation of whether they *are* equal (in order to see if anything needs to be done, in the light of our prescription). And often when we say that two quantities ought to be equal, we rest the assertion on some prescriptive principle, such as (C), whose application will then require a factual investigation of the truth of some other descriptive claim, like (A), as well.

It would have been simpler, then, if Westen had distinguished between states of affairs, like (B), that are being criticized in some prescription, and states of affairs, like (A), whose existence is asserted as a reason for the prescription. He could then have said that it is a descriptive matter of fact whether the latter state of affairs obtains or not, and that it is also a descriptive matter of fact whether or not the state of affairs called for (in the light of that) has actually been brought about. He could next have mentioned that what is prescriptive here is the *connection* between (A) and (B) — the connection between the state of affairs being called for and the state of affairs in the light of which that call is made. And then he could add finally that it is our prescriptive sense of that connection that explains the scales of measurement and the margins of error that we are willing to deploy in determining whether the descriptive equalities actually obtain or not.

This would not produce a simple distinction between descriptive equalities and prescriptive equalities. But it would nevertheless simplify a confusing and enormously complicated discussion that dominates a large part of Westen's book.

The underlying point that Westen really wants to make would also be much clearer. In a claim about political equality, what really matters is the underlying prescriptive principle, such as,

(C) Weight should be assigned to people's votes on the basis of their rationality.

Only because we accept this judgment do we think it important to determine whether or not (A) is true, and, on the basis of that, whether or not (B) is true of some political system as it stands.

Now the interesting thing about (C) is that it is formulated without reference to equality at all. If we think weight should be assigned to votes on the basis of rationality, we will think it important to determine how (if at all) people differ in their rationality. If (A) is true, then (C) will command an equal assignment of weight. If (A) is false, then (C) commands an unequal assignment. Equality or inequality in the political sphere are contingent artifacts of applying to the real world a standard that, in itself, has nothing to do with equality.

The same seems to be true of several of the other cases we mentioned. Consider case (2) — the right to assemble peacefully.

Although we can imagine a complaint from black demonstrators that they are not being treated equally with whites, the real substance of their demand is for the simple recognition of *their right*. They have grievances to air, they are citizens, and they want recognition of their right to demonstrate. They would not be satisfied by *equal* recognition, if equality meant that blacks and whites alike were banned from demonstrating. That would be like the example Westen quotes from William Frankena: "If a ruler were to boil his subjects in oil, jumping in afterward himself, it would be an injustice, but there would be no inequality of treatment."³ Equality and inequality are not really the issue in such cases; the intrinsic wrongness of the treatment is the focus of the complaint.

Cases (1) and (2) also illustrate an interesting distinction that Westen discusses between "comparative" and "noncomparative" standards.⁴ A noncomparative standard is one that entitles each person to some good or liberty by virtue of possessing some feature or characteristic: "Anyone who is a citizen has the right to demonstrate peacefully." If *P* and *Q* are both citizens, then *P* has the right to demonstrate (because *P* is a citizen) and *Q* has the right to demonstrate (because *Q* is a citizen). Although they both end up with a similar liberty, the equality or similarity is incidental. *Q* has a right to a liberty which is similar to that afforded *P*, because *Q*, like *P*, is a citizen, not because it is important for *Q* and *P* to be treated the same.

With comparative principles, by contrast, what matters for a given person is the relation between what she gets and what others get. We usually think about voting this way. Since the value of someone's vote is the difference it makes in an election in which other people also cast their votes, anyone concerned to get a vote will be deeply interested in whether her vote has the same weight as that of other electors. The idea of a comparison matters here in a way that it does not matter in the case of the right to demonstrate. For the latter case, universalizability⁵ really does all the work that equality appears to do.

But although he notices this difference, Westen rightly points out that comparative principles need not involve an essential reference to

3. P. 90. The quotation is from William Frankena. Frankena, *The Concept of Social Justice*, in *SOCIAL JUSTICE* 17 (R. Brandt ed. 1962).

4. P. 72. The distinction was first introduced by Joel Feinberg in his article, *Noncomparative Justice*, 83 *PHIL. REV.* 297-338 (1974).

5. A judgment about some particular case is universalizable if and only if the person making the judgment is prepared to make the same judgment about any other case that is relevantly similar, and only if his criterion of relevant similarity is not dictated by the conclusion he wants to reach about the particular case in question. If the one redheaded guest at a party announces that he should receive a double helping of cake because redheads should always get more, we will suspect that his judgment is not really universalizable. He has selected redheadedness as his criterion of relevant similarity only because it benefits him in this particular case. See R. HARE, *FREEDOM AND REASON* (1963); J. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 83-102 (1977).

equality. A principle like (C), above, requires us to make comparisons: it requires us to compare people's rationality, and it then requires us to compare the weight that is assigned to their votes. The latter comparison is, in Robert Nozick's phrase, to be "patterned" on the former comparison.⁶ Now, if we like, we can say with Aristotle that what the principle requires is an *equality* between the proportion of *P*'s rationality to *Q*'s rationality and the proportion of the weight assigned to *P*'s vote and the weight assigned to *Q*'s vote.⁷ But strictly speaking, talk of equality is redundant here. What (C) calls for is simple proportionality. As Westen notes, the normatively significant step is always what should be proportionate to what, and that is something "about which the mathematical notion of proportional equality has nothing to say" (p. 57).

So far, Westen has shown that many cases that appear to involve issues of equality do not really involve equality at all. In issues of noncomparative justice, what matters is finding and applying the right principle for the assignment of individual rights. And in issues of comparative justice, what matters is that we find a principle that directs us to make the appropriate comparisons and establish the appropriate proportion (for example, of votes to rationality) on the basis of those comparisons.

Westen argues that a similar approach can be taken to all antidiscrimination and "disparate impact" law. Consider case (4), outlined earlier: the case of the height requirement for recruitment into the police force. On the face of it, the height requirement is neutral between the sexes. But we know it has an unequal impact on women: on average, women are a few inches shorter than men. Some say that this poses a dilemma about the meaning of "equal treatment." Men and women are to be treated equally in things like police recruitment, but commentators differ as to whether "equal treatment" prohibits the adoption of criteria that have disproportionate impact, or whether it prohibits only the use of criteria that are *intended* to disadvantage protected groups.⁸

But Westen argues that the debate is best understood in terms that have nothing to do with the concept of equal treatment. His point is worth quoting at length:

The controversy over disparate impact is not about the meaning of equal treatment. Rather, it is about the rules by which equal treatment should be measured. If a facially neutral rule is a legally relevant standard for assessing the treatment of all the people to whom it applies (that is, if the

6. See R. NOZICK, *ANARCHY, STATE AND UTOPIA* 155-60 (1974).

7. ARISTOTLE, *NICOMACHEAN ETHICS* 1131-a (D. Ross ed. 1980).

8. Westen (p. 109) cites Friedman, *Redefining Equality, Discrimination and Affirmative Action under Title VII: The Access Principle*, 65 *TEXAS L. REV.* 41, 60-61 (1986), and Rutherglen, *Disparate Impact under Title VII*, 73 *VA. L. REV.* 1297, 1311 (1987), respectively, as representatives of these points of view.

rule is a legally appropriate measure of how all such people ought to be treated), applying the rule necessarily treats them equally as measured by the baseline of the rule. Conversely, if a facially neutral rule is a legally inappropriate measure of the way some of the people to whom it applies ought to be treated, then applying the rule treats them unequally by reference to the baseline of how they ought to be treated, by giving some and denying others the treatments to which they are legally entitled. It follows, therefore, that to complain of disparate impact is simply to assert that a given rule is an inappropriate — an unjust — measure of the way some of the people to whom it applies ought to be treated. [p. 110]

In other words, the real dispute in case (4) is whether or not there should be a height restriction for entry into the police force. This is to be debated in terms of the social desirability of having tall police officers, not in terms of the idea of equality. It is a virtue of Westen's analysis that it makes these points clear.

II

The central thesis of Westen's book is that political debates conducted in terms of "equality" and "inequality" are often really debates about appropriate and inappropriate principles of distribution. Should the suffrage be conferred on the basis of rationality? Should some certain height be a requirement for recruitment into the police force? Do people have a right to demonstrate in public? These are the real issues; "equality" is just a rhetorical smokescreen.

But Westen says almost nothing about how these matters of principle are to be discussed. How are we to decide whether a minimum height should be a requirement for the police force? The answer usually given refers to "business necessity": whether the requirement is related to job performance.⁹ But necessity and relation to job performance are not all-or-nothing matters. Perhaps, other things being equal, it is good to have tall officers. But maybe it is good, from a social point of view, to have a mix of men and women police officers as well. How "necessary" the height restriction is depends on how important the goals that it serves are, in relation to other social goals that could be served by recruiting shorter officers. In working through these issues, on a matter of public importance like police recruitment, we think it appropriate to appeal to criteria like "the common good," or "the maximization of utility."¹⁰

Suppose, however, someone were to defend the use of the height

9. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (cited by Westen at p. 109).

10. That is clear in the context of public sector recruitment. In private sector cases, there are similar questions of degree. Is it enough for an employer to show that use of some criterion marginally enhances profitability? Or does he have to show that his business would go bankrupt if he did not use the criterion in question. Elsewhere I have argued that what is really going on in the context of private decisionmaking is a determination of how great a cost it is reasonable to expect private businesses to bear in the social struggle for equality. See Waldron, *Indirect Dis-*

criterion on the ground that it helps to validate masculine values. One response to that defense might be that such a purpose is unacceptable because it does not take into account the interests of everyone in society: the purpose benefits men, in regard to their self-image, but it does not promote the interests of men and women alike. In my view, it would be natural to express this objection to the “masculinist” defense in terms of *equality*: in advancing social justifications, we are required to accord equal concern to the interests of everyone in society. A case can be made that utilitarian criteria do that, but the “masculinist” defense we are considering almost certainly does not.

The example I have just given may seem a little contrived. I think the point can be illustrated more strikingly by reference to case (3), outlined earlier: the failure of the Israeli government to distribute gas masks to its subjects in the Occupied Territories.

The example is not one that Westen discusses, but arguments like his can easily show that a simple requirement of equal treatment is unhelpful in this case. If there are not enough gas masks to make one available for each inhabitant of the state of Israel and its occupied territories, then there is no sense to any requirement that each person should receive the same number of gas masks.¹¹ The only number capable of satisfying that formula would be zero. Since there are some gas masks, and since it is desirable to distribute them rather than withhold them from everyone (on grounds of equality), the question is “Who should receive a mask and who should not?” Various principles of priority might be suggested. The one the government acted on was this:

(P1) If gas masks are scarce, citizens are to have priority over noncitizens.

But others can be imagined, for example:

(P2) If gas masks are scarce, priority is to be given to those whose job it is to render aid to people who are victims of a missile attack.

Or:

(P3) If gas masks are scarce, priority is to be given to those who are otherwise most vulnerable to the effects of a missile attack.

On Westen’s view, the thing to do in a case like this is to choose the appropriate principle for distributing something that not everyone can have, not to haggle over the meaning of “equal protection.”

But how do we go about choosing a principle? In my view, the idea of equality — considered as a deep principle of political justification — can provide some assistance here, even if the surface slogan

crimination, in *EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE* 93, 99 (S. Guest & A. Milne eds. 1985).

11. Though see Waldron, *Rights in Conflict*, 99 *ETHICS* 503, 512 (1989), where I argue that, in the face of scarcity, a right to be given some good generates a secondary duty on the government to obtain additional supplies of the good if it can.

“equal protection” cannot. Consider, for example, the choice between principles (P1) and (P2). If some ambulance drivers, paramedics, peace officers, or civil defense rescue workers in the Occupied Territories are noncitizens, then (P2) will dictate a different distribution from (P1). I can imagine someone arguing for (P2) as follows. Although (like any principle that applies to these circumstances) (P2) is going to have the result that some people get gas masks while others do not, the principle at least takes into account the interests of all those who are governed by the state which is making this decision. Everyone has an interest in receiving medical and civil defense aid in the event of an attack, and so everyone has an interest in the health and availability of the emergency personnel. Given that some people are going to have to do without gas masks, the distributive principle should appeal to their interests as well. (P2) does this, because for any given person who is denied a gas mask, the chance of that person surviving a chemical attack is somewhat enhanced if masks are distributed according to (P2) than if they are distributed according to any other principle.

Now perhaps this is not a conclusive argument. What concerns me is the range of interests which its justification takes into account. The justification of (P2) purports to serve the interests of every individual (citizen or subject) affected by the government’s decision. A similar case cannot be made for (P1). Confining the distribution of gas masks to citizens does not seem to benefit, or to have any probability of benefiting, noncitizens at all. A person who argues in favor of (P1) may say that he has considered the interests of all in arriving at his decision. But it is a sense of “considered” that is quite different from that involved in the defense of (P2). The proponent of (P1) will have run his finger down the list of people whose interests are at stake — citizens and subjects alike — and as he passes each name, he “considers” whether to benefit that person or not. Having considered all the interests, he decides to benefit only those who are citizens. The other interests have been “considered” but denied.

What about the contrast between (P1) and (P3)? By (P3), those in particular need (for example, those who do not have access to sealed rooms) are given priority over those who are less vulnerable. Isn’t this making exactly the same sort of discrimination as (P1), only on a somewhat different basis? No. In fact, a powerful argument can be made in support of (P3) on the basis of equal concern. Our fundamental aim is that all should have the same protection from chemical attack. Suppose the population, before the issuing of gas masks, divides into two classes — the more vulnerable and the less vulnerable. Those in the latter class have a ten percent chance of suffering harm in the event of a chemical attack: they can lock themselves in a sealed room and only a direct hit will affect them. Those who have no sealed room (because they are homeless or their homes are dilapidated) have a fifty percent chance of suffering harm in the event of an attack. By issuing

gas masks to them, we can reduce their vulnerability to somewhere near the ten percent level of their more fortunate neighbors. A commitment to the equal protection of interests therefore argues for a distribution on the basis of (P3).¹²

What are we to say, then, about the relation between (P2) and (P3)? Both are supported by arguments based on equal concern, but they still compete as principles of distribution. There is no ready answer. Choosing between them requires complicated argumentation about which distributive criterion better serves the principle of equal concern. Some aspects of that argument will be consequentialist: are the interests of the vulnerable better served by issuing them gas masks or by assuring paramedical assistance? Some aspects will involve deeper issues about how to conceive "equal concern." Is utilitarian maximization an appropriate expression of equal concern (because it considers all preferences and assigns them equal weight)? Or does equal concern demand a different social welfare function: equalization, for example, or Rawlsian maximin? As Ronald Dworkin has argued, the principle of equal concern and respect is heavily contested in political theory.¹³ But that does not mean it is empty. We have already seen how it works to exclude some criteria, like (P1).

Westen says very little about this approach. He does, however, briefly discuss Dworkin's distinction between "treatment as an equal" and "equal treatment" (pp. 102-08). In a famous example, Dworkin suggested that a parent with two children, one of whom is dying from a disease that is making the other merely uncomfortable, does not treat them as equals if he flips a coin to decide who should receive the remaining dose of medicine.¹⁴ By flipping the coin, he gives them in a sense equal treatment, since each has the same probability of receiving the drug. But to distribute the probabilities in this way is to violate a deeper duty of equal concern for their needs (along lines suggested by our argument for (P3)). To this, Westen responds that Dworkin is not really distinguishing between two egalitarian ideas. Instead, he is simply indicating his preference for one distributive principle over another. If I think it appropriate to flip coins in cases like this, I should apply the coin-flipping rule equally; and if I think it appropriate to distribute medicine according to need, I should apply *that* rule equally. It is the same concept of equality, Westen argues, only it is applied to different principles (p. 105).

Westen's point is correct but superficial. It leaves open the possibility that a rule distributing medicine according to need may be easier

12. This is an adaptation of an argument by Gregory Vlastos. Vlastos, *Justice and Equality*, in *THEORIES OF RIGHTS* 41, 49-51 (J. Waldron ed. 1984).

13. See generally, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 226-29 (1977); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 127-40 (S. Hampshire ed. 1978).

14. R. DWORKIN, *supra* note 13, at 227.

to defend on the basis of a more fundamental commitment to equal concern than a coin-flipping rule.

In a footnote, Westen echoes Joseph Raz's suggestion that the idea of equality is redundant in Dworkin's principle of equal concern and respect (pp. 102-03):

[W]hen Dworkin talks of a right to equal concern and respect, he really has in mind a right to concern and respect. He adds "equal" to indicate that none has a greater right than another; but this again follows not from any conception of equality but from the fact that he is here referring to a group with equal claim to have the right¹⁵

That may be true. But in political philosophy, the claim that people have a right to concern and respect in virtue of their humanity (their being human agents, moral persons, or whatever) has been advanced so often to counter claims about radical *differences* in human worth, it is not surprising that it has come to be characterized in terms of "equality." Its typical use is to argue against a common temptation to differentiate human rights on the basis of birth, ability, race, sex, or merit.

Thus, for example, Gregory Vlastos notes that doctrines of equal human worth are characteristically put forward in the face of evident differences of merit. The whole purpose of the equal worth doctrine is to insist that there are limits to the appeals that may be made to differential merit in certain fundamental issues of morality.¹⁶ Now I have no doubt of the syntactical capabilities of Raz and Westen; they can easily show how the same point could be made without breathing the word "equality" at all. But it is not at all clear why they should want to do that, or why it matters.

At any rate, I think it a central defect of this book that the author does not address the possibility that some deep idea, conventionally labeled "equality" or "equal concern," might form the basis of many important arguments in politics favoring the choice of some distributive principles over others. There is no sustained discussion of Vlastos' doctrine of equal worth,¹⁷ no sustained discussion of Bernard Williams' account of equality,¹⁸ no real exploration at all of the suggestion that "equality" might be something other than a misleading word at the confusing surface of politics.

This, as I say, is a serious omission, because such a deep principle of equality has the potential to explain a lot in our political thinking. Consider the four cases I outlined at the beginning of this review. We

15. P. 103 n.10 (quoting Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123, 130 (1978) (citation omitted)).

16. Vlastos, *supra* note 12, at 51-60.

17. *Id.*

18. Williams, *The Idea of Equality*, in PHILOSOPHY, POLITICS AND SOCIETY 110-19 (2d ser., P. Laslett & W. Runciman eds. 1962). Westen briefly refers to Williams' article but not in a way that addresses these issues. P. 266.

have already seen how a principle of equality explains some of our concerns about (3) and (4). In cases (2) and (4), we are dealing with issues of apparent discrimination on grounds of race and sex. Everyone knows that sexual and racial differences have been used in the past to justify profound differences of treatment, rights, and social status. Racist and sexist institutions have involved the ranking of human beings, the determination of how much each is worth in relation to the others, and the claim that the interests of some can be outweighed by the interests of others simply because the former are inferior. Here is an example, from an English philosopher writing about human perfectibility in 1907.

I will now mention a case in which probably no one will hesitate. It is becoming tolerably obvious at the present day that all improvement in the social condition of the higher races of mankind postulates the exclusion of competition with the lower races. That means that, sooner or later, the lower Well-being — it may be ultimately the very existence — of countless Chinamen or negroes must be sacrificed that a higher life may be possible for a much smaller number of white men.¹⁹

There is nothing ironical about this passage, and indeed its author goes on to note that his perfectionist position is impossible to defend “upon the principle of equal consideration taken by itself.”²⁰ Reading it, we become aware how much of our modern political thinking rests on the profound denial of such rankings. As we become aware of that, we can see, I think, how natural it is to express that denial using the term “equality.” Certainly, as Westen argues, we could formulate our convictions using different words. We could say that respect is due to humanity as such. But “equality” has the extra and important resonance of indicating the sort of heritage we are struggling against. We believe in a profound respect due to humanity, and we maintain that belief in the face of those who claim that humanity admits of degrees.

Even in the first of our examples, plural voting, we can see how natural it is to express our apprehensions about giving greater weight to the votes of the educated in terms of a principle of equality. Of course people could be ranked in terms of their knowledge and intellectual capacity. But the things we consider important are agency and the sheer ability to reason. They are capacities whose importance for certain purposes far outweighs the intellectual differences that might exist between people. As always, our commitment to the importance of these basic capacities can be expressed without using the word “equal.” But “equality” is a useful term here all the same, rebutting as

19. I H. RASHDALL, *THE THEORY OF GOOD AND EVIL: A TREATISE ON MORAL PHILOSOPHY* 238-39 (2d ed. 1924). This work was first published in 1907. Rashdall also appends a footnote: “The exclusion is far more difficult to justify in the case of people like the Japanese, who are equally civilized but have fewer wants than the Western.” *Id.* at 239 n.1.

20. *Id.* at 239.

it does from the outset any suggestion that what matters in politics is the ranking or differentiation of human knowledge and intelligence.

I have gone on at length about this in my review, not because Westen argues against the position, but precisely because he does not make it one of the themes of his study. He simply fails to see that the language of equality may be used to convey subtleties like these in the process of political justification. Because he thinks the only legitimate use of such language is to convey precise information about surface political positions, it is not surprising that he concludes that most of it is hopelessly ambiguous.

III

Even if Westen's main thesis were correct — that the language of "equality" is often redundant and unclear in political argument — there would remain a puzzle about why people so frequently invoke it. Why, Westen asks, do arguments for equality put opposing arguments on the defensive? Why is it that to our ears "inequality" has the ring of injustice, unfairness, and discrimination (pp. 255-56)? Westen's subtitle suggests that the solution of this puzzle is one of the main items on his agenda (although in fact the positive explanation of the rhetoric of equality is confined to the final twenty pages of the book).

Westen makes short work of the common view that, as a theoretical or philosophical matter, there is a "presumption" in favor of equality. He shows first that the presumption of equality is not an a priori principle, and that in particular it does not follow from the formal principle that requires like cases to be treated alike. Instead, the presumption operates in circumstances in which we are unsure which cases are (relevantly) like or unlike others (p. 236).

An example may help clarify this. Suppose I come into the playroom and find such havoc that it is clear some if not all of my four children have been misbehaving. Each of them pleads innocence and blames the others, but the evidence clearly indicates three who are guilty. Those three are sent to bed without any tea. The fourth child presents a problem. It is simply not clear whether he engaged in the relevant misconduct: there is evidence to suggest that he did, but also evidence to support his earnest protestations of innocence. What should be done with him? The presumption of equality, if it has any force in cases like this, suggests that he should be punished like the others. But while that may eventually be our decision, it seems neither automatic nor obvious. If we decide to punish the fourth child too, it may be because we think more is to be gained in some sort of solidarity among the children, than lost in the possibly unjust application of a sanction for misbehavior. But where the sanction is a grave one, some other presumption (like the presumption of innocence) may come into effect, and that will dictate *unequal* treatment on precisely the grounds

— of uncertainty, and so on, that are supposed to trigger the demand for equality. Since the presumption of equal treatment is controversial in cases like this, it cannot be invoked to explain the negative connotations of “unequal.”

So Westen’s explanation of what he calls “the persuasiveness of equality” (p. 257) is necessarily an exercise in rhetorical pathology. The language of equality adds little of substance to any political claims; nevertheless, “expressing claims in the language of equality tends to invest them with greater weight than stating them in alternative modes” (p. xviii).

Westen considers a number of explanations for this pathology. The first is that “equality,” like “justice,” is an evaluative term. He rejects this explanation, saying that “equality” is a word “which tends to have favorable connotations without being defined as having favorable connotations” (p. 261). Because the term’s *definition* does not account for its uses to show approval, it is not an evaluative term. But his discussion here is embarrassingly weak. It ignores the connection between use and meaning that characterizes almost all post-Wittgensteinian accounts of language. Westen simply asserts, without explanation, that how a word is “defined” is one thing, and how it is used is another. He does not explain how these two things — a word’s definition and a word’s typical use — can come apart. In addition, he offers no account of what it is for a term to be an evaluative term. There is only one reference (p. 161) in the book to Charles Stevenson’s account of emotive language,²¹ and that is incidental to an attack on a specific egalitarian argument; it is not deployed where it could be of some help, in the discussion of rhetorical force. There is no appeal to Austin’s idea of “illocutionary force”²² or to Hare’s account of “prescriptive language”²³ to elucidate these mysteries. Philosophers have thought about the nature of evaluative language, and it is a mistake for Westen to ignore their ideas.

Still, his claim is probably correct: “equality” is not an evaluative term. What that means (and what Westen fails to explain) is that, unlike terms such as “right,” “good,” and “just,” the term “equal” is not used *for the purpose of* commending some social or political arrangement. Instead, it denotes a feature of social or political arrangements in virtue of which people use *another* term (like “good” or “just”) to commend such arrangements. “Equality” is used, in other words, to identify properties on which commendations would supervene. What is to be explained, then, is the common assumption in the

21. See C. STEVENSON, *The Emotive Meaning of Ethical Terms, & Persuasive Definitions*, in *FACTS AND VALUES* (1963).

22. See J. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975).

23. See R. HARE, *THE LANGUAGE OF MORALS* 1-16 (1952).

rhetoric of politics that the putative equality of an arrangement is a good-making property rather than a bad-making property.

Some parts of Westen's explanation are less convincing than others. He says that people who use the term "equal" trade on a certain fact about arithmetic: mathematical entities that are equal in one respect are necessarily equal in others. "To the extent that people accept mathematical equality as the paradigm for other equalities, therefore, they will be inclined to assume that people who are prescriptively equal in one respect are prescriptively equal in other respects" (p. 265). But until I read Chapter Two of Westen's book I had not given any thought to this aspect of arithmetical theory; even now I think I should need expert guidance from philosophers and mathematicians on the point.²⁴ It seems quite far-fetched to say that my openness to egalitarian argument is explained by my readiness to make fallacious inferences from arithmetical theorems with which, like most liberals, I am unacquainted.

Another explanation for equality's rhetorical force is that claims about "equality" are characteristically made in a way that allows them to be all things to all people:

[O]ne cannot meaningfully assert a "right" without specifying more or less precisely *who* is entitled to *what* from *whom*. Nor can one meaningfully assert a prescriptive "freedom" without specifying more or less precisely who ought to be unconstrained by what to do what. Yet speakers regularly assert B and A to be equal, without specifying anything about *the respect* in which they are equal . . . [p. 269]

But Westen's claims about "rights" and "freedom" here are quite controversial. Some theorists argue that the concept of a *free man* is prior to any precise determination of what counts as a constraint on what action.²⁵ And Neil MacCormick has shown that people can talk meaningfully about rights *in advance* of determining who they are rights against.²⁶ Indeed we sometimes use the idea of a right-bearer, or the idea of some very abstract right (such as the right to basic human respect), or the idea of freedom, as fundamental premises in political philosophy from which more concrete conclusions may be generated. The same, I argued in the previous section, may be true of equality. In other words, the openness and abstraction of egalitarian talk may be nothing more than a legitimate feature of its philosophical use.

There is a general point to be made here. Too much of Westen's

24. Westen cites G. FREGE, *GRUNDGESETZE DER ARITHMETIK* (1893), and B. RUSSELL, *PRINCIPLES OF MATHEMATICS* (2d ed. 1938), in support of his view, which amounts, he says, to the claim that the relation of equality in mathematics is reflexive. P. 47.

25. See, for example Isaiah Berlin's "Introduction" to his collection, I. BERLIN, *FOUR ESSAYS ON LIBERTY* xliii (1969).

26. MacCormick, *Rights in Legislation*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOR OF H.L.A. HART* 189, 200-03 (P. Hacker & J. Raz eds. 1977).

book is premised on the assumption that precision and detailed specification are crucial in political theory. In fact they are crucial at some levels and in some types of arguments, and not at others. If we adopt a very precisely formulated principle, it behooves us to adduce arguments as to why precisely *this* principle, rather than some slightly different one, should be adopted. *Those* arguments are likely to be more broadly formulated: it is concerns of this or that abstract kind that have led us to want to pin things down in this way. The theorist's task is as much to explore the general features of these broad concerns as to pin down the precise formulation of the more detailed principles that they dictate. I hope it is not unfair to repeat that there is more than a whiff of *legalism* in the implication, pervading Westen's book, that nothing that is not precisely formulated can possibly be of interest in political thinking. Not every form of vagueness is a pernicious form of ambiguity; not every instance of formulaic elusiveness is a case of equivocation. We have tasks to perform in political theory that are different from those of the drafter or the legislator.

Westen's other explanations of egalitarian rhetoric are more interesting. Claims about equality are often equivocal as between description and prescription, giving rise perhaps to the misleading impression that "equality" can bridge the gulf between "is" and "ought" without having to make an independent case for the "ought" (p. 266). This is not merely because "equality" is a concept, like "courage," that brings normative and descriptive criteria together. (The whole point of the descriptive/evaluative nexus in the case of "courage" is to express, in the use of one word, a complete principle of virtue.) It is partly because even in its descriptive use, "equal" must be taken to connote to "equal in some respect that interests us," and so already implies normative connotations of relevance. And it is also because when we enunciate a principle such as "Equals should be treated equally," the first occurrence of the word, which *seems* descriptive, is in fact already expressing a prescriptive standard: "*Those who are equal in the respects relevant to the way in which they should be treated (in this context) should be treated equally.*" Westen's analysis along these lines (pp. 186-94 and elsewhere), is one of the most interesting and helpful arguments in the book.

Likewise, when someone says, "These two people are being treated *unequally*," she may appear to be merely drawing attention to some *difference* in the way they are being treated — drawing attention to it purely as an observation without any hint of criticism. But, as Westen argues, "unequally" usually connotes much more than this (pp. 274-80). It is reserved for cases where two people are being treated differently notwithstanding the fact that they are indistinguishable by reference to the criteria that are normatively relevant for the treatment in

question.²⁷ So we have a term which (a) *might* be used simply to describe, without prejudice, a difference in the way people are being treated, but which (b) is *characteristically* used to complain about a failure to apply appropriate standards. The slippage from (a) to (b) creates some rhetorical advantage in favor of those who, for whatever reason, have an interest in complaining about differences in the way people are treated.

Still, Westen's account of the rhetoric of equality is missing something. He tries to explain the rhetorical force of "equal" and "unequal" in terms of verbal slippage, fallacious inference, equivocation, and ambiguity. But none of those explanations accounts for the power and importance of the ideal of equality or the accusation of inequality. All they explain is our readiness to move from more plausible to less plausible claims about identity and difference. That gap in Westen's account and others like it is going to remain until they acknowledge that equality also functions in political philosophy as a deep and important justificatory idea, as well as a term for formulating surface positions. I certainly do not want to suggest that *every* occurrence of the word is appropriately invested with the importance accorded to the deeper idea outlined in Part II. Westen is right: a lot of putatively egalitarian talk *is* fallacious and confused. But until we understand the force that is legitimately associated with the idea in some of its philosophical uses, we will not understand why it is a fallacy to invoke that force in other more superficial contexts. For this reason, Westen's final chapter on rhetoric suffers, like the rest of the book, from a failure to take seriously the possibility that equality functions as a deep and abstract ideal in political justification.

IV

Part of the frustration one feels with *Speaking of Equality* is that there *are* some interesting ambiguities in the surface use of the terms "equal" and "unequal," but that many of these are simply not explored in Westen's study.

Consider the following table summarizing data about median household incomes by race in the United States in 1950 and 1975, in constant 1967 dollars:²⁸

Year	Median income for blacks	Median income for whites
1950	\$2592	\$4778
1975	\$5452	\$8860

27. Westen attributes this point to John Hart Ely. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 32 (1980). For some reason this book is referred to repeatedly on pp. 279-80 as "*Democracy and Dissent*."

28. The table is taken from Douglas Rae and others. D. RAE, D. YATES, J. HOCHSCHILD, J. MORONE & C. FESSLER, *EQUALITIES* 111 (1981).

Have the median incomes become more equal or less equal by 1975?
Has inequality increased or diminished?

The questions are simply ambiguous, for several different things have happened so far as the income disparity is concerned. On the one hand, the real dollar gap between the incomes has increased. On the other hand, the median black income in 1975 is a greater fraction of the median white income than it was in 1950. Which of these is the better measure of (in)equality? There is no sense to the question. Both propositions are true, and each might be thought relevant for some reason. An increasing gap might indicate a greater disparity of consumption patterns and lifestyle, and thus raise concerns about social solidarity. An increasing ratio, however, answers slightly different concerns about relative economic power and the ability to deploy economic assets to obtain political or other positional advantage. The figures indicate that the danger associated with disparate economic power and political advantage may have diminished a little even while the danger to social solidarity has gone up. Other putative measures of inequality may tell a different story again. By the maximin criterion, a distribution counts as more equal if the real position of the less advantaged party has improved. Once more, there is no point to asking whether or not this captures the "true" meaning of "equality." The point is simply that an improvement on this criterion will certainly be of interest to anyone whose "egalitarianism" is based on a concern about sheer poverty and need.

These ambiguities are real, not verbal. They betoken differences of interest, not merely differences of formulation. They raise questions about *why* we are concerned with equality and inequality, and they reach the unsurprising answer that people's interests in the distribution of income are multiple and diverse, for there are a variety of ways in which income distribution affects other factors in society.

For reasons that are not indicated in the book, Peter Westen says nothing about any of this.²⁹ Instead, the chapter devoted to "Per-Capita Distributions" is taken up with such insights as the following. Even if *A* and *B* each receive 3 cc. of a certain vaccine, we cannot say that *A*'s dose is identical in all respects to *B*'s dose, because it is a fact about *A*'s dose that it goes into the mouth of *A* and that is not true of *B*'s dose (p. 154). It is hard to resist the conclusion that the author is unwilling to consider which ambiguities are important and which unimportant. Any ambiguity is worth invoking if it contributes to the allegation of conceptual imprecision. Any opportunity for deeper

29. He cites Rae's book several times, but makes no reference to Rae's extraordinarily instructive discussion of the relations between these various criteria. He does not even mention Rae's suggestion — which one would have thought congenial — that conventional social science measures of inequality, such as the Gini coefficient, "[r]esolve [a]ll of the [a]bove by [m]eans [w]ell-[k]nown to [o]striches." *Id.* at 121.

discussion is worth overlooking if it conveys the impression that equality is worth talking about.

It may seem that I have concentrated unfairly in this review on the analytic side of Westen's argument: his account of the way the term "equality" is and should be used, rather than his substantive critique of egalitarian ideals. The trouble is that the book does not really have a substantive side. In some works, the exposure of the ambiguity of the term "equality" is presented as a prelude to a more substantial attack on particular egalitarian doctrines, or as an analytic prolegomenon to a deeper discussion of less equivocal principles and values.³⁰ That is not the case here. The author does use a large number of examples, many of them taken from American constitutional law — nondiscrimination doctrines, equal protection cases, and the like. But they are used simply as examples of the difficulty of construing phrases like "equal opportunity" and "treat like cases alike." Anyone who comes to this book expecting that its 300 pages will contain sustained discussion of issues like those intimated in my first four cases will be disappointed.

I noted at the beginning of the review that Westen says he is "deeply committed" to many of the social causes that are put forward under the slogan of "equality" (p. 287). But he is not interested in saying very much about those causes. The arguments he makes are not calculated to advance them; on the contrary, they are, he says, "arguments that will tend to inhibit my ideological friends (as I feel myself being inhibited) from resorting to 'equality' to expound values we happen to share" (p. 287). He is not even interested in showing that the use of egalitarian rhetoric in a good cause might lead to its use (by others) in a bad cause. The only case he makes is that the rhetoric itself is analytically disreputable.

So I do not think it unfair to say that Westen's book is primarily a discussion of words, written with very little sense of why words matter. If that seems unfair, then let the closing sentence of the book speak for itself: "To this I can only respond that I have tried to say true things about how a commonplace word significantly affects our moral and legal thinking, and that I take the pursuit of knowledge to be a virtue which is second to none" (p. 288).

30. See, e.g. A. FLEW, *THE POLITICS OF PROCURSTES* (1981); J. LUCAS, *ON JUSTICE* (1980).