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The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond

Scott W. Howe

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The Troubling Influence of Equality in Constitutional Criminal Procedure: From *Brown* to *Miranda*, *Furman* and Beyond

Scott W. Howe

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*This Article identifies and critiques a view of the criminal-procedure clauses in the Bill of Rights that is revealed in Supreme Court decisions after *Brown v. Board of Education*. Professor Howe argues that the Court has gone astray in constructing these clauses by focusing on equality. He contends that the criminal-procedure clauses are better understood as discrete protections of individual liberty than as reflecting a unified theory or separate theories about equality. Building on this perspective, the Article proposes a reformulation of doctrine in varied realms of constitutional criminal procedure, including police-interrogation, capital sentencing, and administrative searches and seizures.*

The Article also calls on a more general level for rethinking how judges should implement a call for equality as they regulate criminal procedure under the Constitution. The Fourteenth Amendment directs states to provide "equal protection of the laws" to all persons, a command that applies to the criminal process. However, equality is a derivative idea in that it always requires an external substantive standard for judging likeness and difference. Consequently, Professor Howe contends that even an explicit command of "equal" treatment can only serve as a rhetorical device, authorizing the judiciary to construct substantive standards regarding governmental conduct. It is for this same reason that equality has no role under the criminal procedure clauses, even as a rhetorical device;

those clauses already call for particularized substantive standards.

The Article proposes that judges apply the Bill of Rights and reconstruction amendments in criminal procedure by focusing on substantive standards concerning how government should treat persons. Judges should implement the substantive values embodied in the criminal-procedure clauses. They should impose further protections against discrimination deemed to warrant constitutional proscription through the more open-ended provisions, such as the Equal Protection and Due Process Clauses. However, the resolution of what the open-ended clauses should demand must itself build on the substantive construction given those clauses by the judiciary rather than on anything inherent in the notion of equality.

The Troubling Influence of Equality in Constitutional Criminal Procedure: From *Brown* to *Miranda*, *Furman* and Beyond

Scott W. Howe*

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During the three decades after *Brown v. Board of Education*,¹ particularly during the tenure of Chief Justice Warren, the Supreme Court demonstrated enthusiasm for pursuing social change based on the notion of equality.² "People who are alike

1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 103 ("[A] broadly conceived egalitarianism was the main theme in the music to which the Warren Court marched."); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 98 (1970) (asserting that the Warren Court's most significant activism "has been in the development of the concept of equality as a constitutional standard"); Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in *THE BURGER COURT; THE COUNTER-REVOLUTION THAT WASN'T* 132 (Vincent Blasi ed., 1983) (contending that, while equality for women was "not on the agenda of the Warren Court," the performance of the Burger Court on this score was "striking"); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 216-17 (1991) (asserting that the Warren Court espoused for the first time "the notion that racial classifications disadvantaging minorities are presumptively unconstitutional," "expanded equal protection to prohibit certain forms of wealth discrimination and infringements

should be treated alike."³ On this idea, the Court declared an expanded array of state actions to violate the Equal Protection Clause in the Fourteenth Amendment⁴ and enforced similar rulings against the federal government through the Due Process Clause in the Fifth Amendment.⁵

Various criminally oriented clauses in the Bill of Rights⁶ also became vessels for equality mandates. After *Brown*, the Court initially used the Equal Protection and Due Process Clauses to pursue equality in the criminal context.⁷ However, the Justices also soon began to pursue equality under several of the more narrowly worded, criminal provisions. For example, in the confessions area, the Court used the equality idea to expand suspect protections under the Sixth Amendment right to counsel.⁸ It then employed the concept to reach its famous *Miranda* holding under the Fifth Amendment privilege against self-incrimination.⁹ The Court also declared that the Eighth Amendment calls for equality in the sentencing of capital offenders.¹⁰ The emphasis on equality substan-

upon the franchise" and, most importantly, began to "transform[] equal protection from a check against deliberate governmental disadvantaging into an entitlement to particular government-guaranteed outcomes"); see also ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* 107 (1996) ("The list of egalitarian decisions [by the Warren Court] not warranted by law could be extended almost indefinitely as the Court, entranced with equality, extended the reach of the Equal Protection Clause of the Fourteenth Amendment far beyond any conceivable intention of those who made the amendment law and far beyond anything previous Courts had been willing to do.").

3. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539 (1982). The equality idea also includes the correlate, that "people who are unlike should be treated unlike." *Id.* at 540 & n.9. While there are as many substantive accounts of equality as there are substantive ideas by which multiple persons can be said to be "alike" or "unlike," it has frequently been said that there is only one formal principle of equality. *Id.* at 539-40, n.8 and authorities cited therein.

4. See Ginsburg, *supra* note 2, at 133-56 (documenting the expansive use of the Equal Protection Clause by the Burger Court to combat gender discrimination); Klarman, *supra* note 2, at 251-82 (documenting the expansive thrust of the Warren Court's decisions interpreting the Equal Protection Clause).

5. The Court relied, for example, on the Due Process Clause in the Fifth Amendment to strike down a federal statute maintaining segregated schools in Washington, D.C. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). See generally Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

6. At times throughout the Article, rather than use the term "criminally-oriented" clauses, I substitute the terms "criminal" clauses or "criminal-procedure" clauses. With each of these terms, I refer to the provisions in the Fourth, Fifth, Sixth, and Eighth Amendments, other than the Due Process Clause in the Fifth Amendment, that bear heavily or exclusively on the prosecution or punishment of persons for crime.

7. See *infra* text accompanying notes 92-150.

8. See *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

9. *Miranda v. Arizona*, 384 U.S. 436 (1966).

10. This rationale accounts for the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), to strike down capital punishment administered under standardless sen-

tially altered major areas of criminal-procedure doctrine in ways that persist today.¹¹

This Article questions whether constitutional theory can accommodate the Court's focus on equality as a significant precept in constructing various criminal clauses in the Bill of Rights. Little scholarly attention has focused on this question.¹² Indeed, a dearth of scholarship exists regarding, more generally, whether an integrated theoretical explanation can justify the Court's post-*Brown* application of the Constitution in the criminal sphere.¹³

The Article assesses the role of prescriptive equality in the Court's adjudication of four of the criminally oriented clauses: the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel as applied to suspect interrogation; the Cruel and Unusual Punishments Clause in the Eighth Amendment when applied to capital sentencing; and the Fourth Amendment as applied to administrative searches. These areas represent only some of those in which equality has influenced the Court's work

tencing systems. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring) (asserting that, after *Furman*, a death sentencing scheme must "result in death sentences being imposed with reasonable consistency"); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion) (asserting that *Furman* had mandated that states replace "arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death"); see also WELSH WHITE, *THE DEATH PENALTY IN THE NINETIES* 135 (1991) ("*Furman* invalidated a system of capital punishment that produced arbitrary results.").

11. See *infra* Part III.

12. The Court's focus on equality in adjudicating cases under the criminal-procedure clauses has been evaluated at times in discrete doctrinal areas. See, e.g., JOSEPH D. GRANO, *CONFESSIONS, TRUTH AND THE LAW* 32-38 (1993) (criticizing reliance on equality arguments to support Supreme Court doctrine concerning police interrogation and confessions); Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial*, 146 U. PA. L. REV. 795 (1998) (criticizing the Court's use of the equality idea to construct the prohibition against cruel and unusual punishments as that clause applies to capital sentencing).

13. Some have noted a scarcity of scholarship regarding integrated theory for application of the constitution in the criminal sphere. See Michael J. Klarman, *The Puzzling Resistance To Political Process Theory*, 77 VA. L. REV. 747, 763 (1991) ("Anyone pondering the constitutional justification for the modern criminal procedure revolution cannot help but be struck by the utter poverty of the scholarly literature."); cf. Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 21 (1988) (asserting that little scholarship has focused on how modern constitutional theory bears on questions to be decided under the Fourth Amendment).

For a recent work that sets for itself the task of articulating "a coherent, integrated vision of the entire field now known as constitutional criminal procedure," see AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE*, at x (1997); see also Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 591 (1990) (contending that a version of conservative premises committed to preventing unjust punishment "has the potential to support a comprehensive and coherent theory of constitutional criminal procedure").

under the criminal clauses.¹⁴ I focus on them to avoid unwieldiness and because they embody some of the Court's most prominent decisions on criminal procedure.

The Article rejects the Justices' emphasis on equality in constructing the criminal clauses. It advocates a view of the criminal clauses as discrete protections of personal liberty rather than as reflections of an integrated theory, or several theories, about equality. Further, the Article contends that the heavy emphasis given to the equality principle under some of the criminal clauses has repeatedly worked to subvert the substantive ideals that they embody. The Court's focus on equality has produced not merely unfounded adjuncts to Bill of Rights guarantees, but also unfortunate distortions of them.

The elusive nature of prescriptive equality lies at the core of the problem. The Court has pursued equality¹⁵ under the criminal clauses as if it were self-defining, when it is not. The mandate to treat like persons alike and unlike persons differently requires an external standard of appropriate treatment of persons as a prerequisite to judgment about likeness or difference. Further, once the substantive standard is determined, prescriptive equality makes sense as a general precept only if understood as a directive to follow the substantive standard. Thus, the work involved in pursuing equality lies in constructing the external, substantive standard. Pursuit of equality as if it were self-defining is a confused endeavor.

The Article does not argue against the implementation under the Constitution of efforts to restrict race and caste discrimination. Race and caste bias in the criminal process are serious concerns,¹⁶ often warranting constitutional action. However, the Article contends that supplemental protections to combat odious prejudices should be grounded in the open-ended clauses, not the criminal clauses.¹⁷ Reliance on the open-ended clauses will avoid the tempta-

14. For another area in which equality has influenced doctrine under a criminal clause, see *infra* note 173, discussing the Court's construction of the Sixth Amendment right to an impartial jury as applied to jury selection.

15. For the definition of equality, see *supra* note 3 and accompanying text.

16. See generally DAVID COLE, *NO EQUAL JUSTICE* (1999) (detailing evidence of racial and economic discrimination as a pervasive phenomenon in the criminal-procedure context); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997) (demonstrating that racial discrimination has long been pervasive in the criminal-justice system).

17. By the "open-ended" clauses, I mean the Due Process, Equal Protection, and Privileges and Immunities Clauses, along with the Ninth Amendment. Although the Supreme Court largely drained the privileges and immunities clause of meaning in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Justices recently breathed new life into that provision by using it to strike down a California law that denied full welfare benefits to newcomers during their first year of state residency. See *Saenz v. Roe*, 526 U.S. 489 (1999).

tion to subvert the criminal clauses and will encourage doctrine that more forthrightly addresses claims of improper discrimination.

The story of the Court's use of the equality idea under the criminal clauses is complex and varies from one doctrinal area to another. In some areas, the concern with equality played an obscured role in influencing doctrine. In other areas, the equality concern was used explicitly to describe the constitutional goal. Likewise, in some areas, liberal Justices introduced the equality precept, over wide objection within the Court. In other areas, conservative Justices supported or even proffered the equality principle. In each context, however, the Court's reliance on prescriptive equality was unwarranted, and it distorted constitutional doctrine.

The Article seeks to be reconstructive rather than merely critical. It returns to each of the doctrinal areas under focus and describes how they could have developed if the Court had not been so heavily distracted with equality. This effort proceeds on an approach to constitutional construction that is grounded on conventional authorities—textual language, history as it bears on purpose, the structure of the larger Constitution, and earlier political decisions, particularly those by the Court.¹⁸ However, my goal in each area is simply to show an alternative uninfluenced by equality, rather than to defend a particular construction against every objection that could be launched against it.

The project proceeds in five stages. Part I briefly discusses the derivative nature of the equality idea, one that assumes an external standard of appropriate treatment by which to judge likeness and difference. This discussion reveals that equality is never self-defining. Part II focuses on the Court's pursuit of equality in criminal procedure through the Equal Protection and Due Process Clauses. Here, the Article demonstrates how the Court began to pursue equality as if it were self-defining but then reversed course

18. This approach does not build on a view that there is a coherent, integrated theory, with consistent analytical bite, by which to view the Bill of Rights and Civil War amendments. A variety of prominent scholars have also claimed to eschew the effort to interpret the constitution according to such integrated theories. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW 7-12* (1996) (advocating a moral reading of those provisions that are drafted in the language of moral principles, limited by textual language, history, the structure of the constitution and prior decisions of the judiciary); RICHARD A. POSNER, *OVERCOMING LAW 207* (1995) (arguing for a pragmatic approach to constitutional interpretation that "includes but also transcends considerations of fidelity to a text and a tradition" and that recognizes the interpretive question as "ultimately a political, economic, or social one"); LAURENCE TRIBE, *CONSTITUTIONAL CHOICES 2* (1985) ("[T]he very idea of 'method,' with its illusory suggestion of the precise and the systematic, is mostly an outgrowth of technocratic thought and practice and is thus the antithesis of humane struggle with those commitments and visions that are the stuff of genuine constitutionalism.").

based on the recognition that prescriptive equality is derivative. Part III documents the Court's tendency to focus on equality under various criminal clauses in the Fourth, Fifth, Sixth, and Eighth Amendments. This description underscores that the Court has often found equality to be an important idea embodied in these clauses and that this view has continued to affect major aspects of criminal-procedure doctrine. Part IV discusses whether constitutional theory can justify understanding the criminal clauses as mandating equality. I contend that the criminal clauses are better understood as discrete protections of individual liberty than as reflecting an integrated vision or discrete notions about equality. Part V then sets out approaches for rethinking the construction of these criminal clauses and their relationships with the open-ended clauses. My thesis is that the criminal clauses, as well as the open-ended clauses, should be used to construct substantive rights, not to pursue equality.

I. THE NATURE OF PRESCRIPTIVE EQUALITY

As a social goal, equality is controversial. Certainly, it is the most debated among the grand social ideals.¹⁹ The controversy concerns the meaning and the significance of the equality command. Pursuit of identical life outcomes for all people is impractical and undesirable. A vast array of factors affects humans, and we could not possibly enforce an average of them.²⁰ We also do not believe that persons should have the same life outcomes. We want people who are gifted and industrious to realize more rewards than people who are talentless and lazy. We want people born to wealthy families to have the benefit of their family riches and do not want government to try to provide the same financial advantages to persons born to poverty. For a variety of reasons, we think that some people should enjoy better circumstances than others. Given our accep-

19. See generally Thomas Nagel, *Equality*, in *THE OXFORD COMPANION TO PHILOSOPHY* 248 (Ted Honderich ed., 1995) (describing "equality" as "[currently] the most controversial of the great social ideals").

20. See generally RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 308-17 (1998) (describing a variety of conceptual and practical problems with the notion of equality as a social ideal); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 57 (1995) ("What is quite impossible to do is to develop any system of rectification for the unending series of social wrongs attributable to inferior talents, unwelcome social circumstances, and bad luck."); F. A. HAYEK, II, *LAW, LEGISLATION AND LIBERTY* 82 (1976) ("Since people will differ in many attributes which government cannot alter, to secure for them the same material position would require that government treat them very differently."); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 232-38 (1974) (discussing the problems with altering social institutions to produce increased equality of material circumstances).

tance of these disparities, what does prescriptive equality command?

It is at least non-controversial that government should treat persons who are equally positioned equally and should treat persons who are differently positioned unequally.²¹ Differential treatment by government of persons identically situated seems wrong, as does identical treatment of persons who are not identically positioned.²²

This definition of the equality goal is non-controversial, however, precisely because it is contingent. An external standard is necessary before we can know the relevant factors to be used to decide which persons warrant a particular treatment and, ultimately, their equivalence or non-equivalence to one another in a given context.²³ Likewise, once we have such a standard, the equality mandate makes sense only as a command to follow the standard.²⁴ This means that equality as a normative principle is derivative and unhelpful by itself.

A. Historical Significance

Despite its contingent character, the equality principle as a social ideal has a long and distinguished pedigree. Some scholars argue that no value is more embedded in Western culture.²⁵ Among the ancients of Greece and Rome, equality was at least as important as liberty.²⁶ For example, both Socrates and Aristotle asserted that equality was among the most important of social ideals.²⁷

21. See, e.g., JOEL FEINBERG, SOCIAL PHILOSOPHY 319 (1973) (asserting that the idea of equality is so basic as to amount to "a principle of reason").

22. See, e.g., JURGEN HAABERMAAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 414 (1998) (asserting that the "principle of substantive legal equality" holds that "what is equal in all relevant respects should be treated equally, and what is unequal should be treated unequally").

23. See *id.* ("But what counts in each case as the 'relevant respects' requires justification."); Nagel, *supra* note 19, at 248 (stating that "everything depends on what kinds of similarity count as relevant, and what constitutes similar treatment").

24. In rare cases, the external standard might not tell us all that we need to know about how to treat people, but some other standard external to equality would have to help explain why not. See *infra* text at notes 53-55.

25. See, e.g., Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983) ("No value is more thoroughly entrenched in Western culture than is the notion of equality.").

26. See, e.g., ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 4 (1960) (noting that equality was a more important concept than liberty "among the Greek and Roman Stoics and the Christian Fathers").

27. See ARISTOTLE, NICOMACHEAN ETHICS V., at iii (J.A.K. Thompson trans., 1976) (defining equality and advocating it as essential to justice); PLATO, GORGIAS 489 (W.C. Helmbold trans.,

Equality also holds a strong position among the social values of the founders and of early Americans. The importance of the equality idea is demonstrated by the proclamation in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal." Of course, that some of the drafters owned slaves and did not believe in women's suffrage²⁸ underscores that equality is malleable. Nonetheless, the commitment to some notion of egalitarianism, at least among Caucasian, Protestant males, was stronger than in Europe.²⁹ The very notion of rights of mankind that were at the heart of the Anglo-American controversy connoted a social equivalence that was directed to the discriminations thought to have occurred between the English and the Americans but that carried a broader applicability.³⁰ Indeed, by the early 1830s, the commitment to egalitarianism was such that Alexis de Tocqueville identified it as a distinguishing feature of the Anglo-American social condition.³¹

Equality rhetoric also has continued to occupy an important position in our history. A mandate of equality was embodied in the Fourteenth Amendment's declaration that no state shall deprive

1952) (detailing Socrates' conclusion that it is not merely by "convention" but also by "nature" that "to do wrong is uglier than to be wronged and that justice is sharing equally").

28. See generally LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 88 (1993) (concluding that, when we look back from our current perspective, "[w]e see a republic created, on the whole, by and for white Protestant men; behind the flag-waving and the Fourth of July parades, we see the hideous grinning faces of inequality, oppression, biases overt and covert, cruelty, lack of understanding, intolerance"); PAULINE MAIER, *AMERICAN SCRIPTURE* 191-208 (1997) (discussing the conception of equality held by the founders and early Americans); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 70-75 (1969) (discussing the ambivalence of attitude of the founders and early Americans towards equality).

29. The idea of equality was also significant in promoting social change in the late 18th century in France. The Declaration of Rights of Man and Citizen, approved by the French National Assembly in 1789, in the midst of the French Revolution, asserted in the opening line of Article 1 that, "men are born and remain free and equal in rights." JEREMY D. POPKIN, *A SHORT HISTORY OF THE FRENCH REVOLUTION* 39 (2d. ed. 1998) (quoting the declaration). However, prominent French historians have doubted whether the revolutionary period in France did more to advance or to set back the commitment to individual liberty. See, e.g., *id.* at 142-43 & 146 (discussing the views of Alexis de Tocqueville and Francois Furet).

30. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 307 (1967) (noting the idea of social equivalence that was embodied in the views of American revolutionary leaders); see also JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 184 (A. Koch, ed. 1966) (quoting Charles Pinkney) ("[E]quality is . . . the leading feature of the [United] States").

31. He observed, for example:

America, then, exhibits in her social state an extraordinary phenomenon. Men are there seen on a greater equality in point of fortune and intellect, or, in other words, more equal in their strength, than in any other country of the world, or in any age of which history has preserved the remembrance.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 44 (1945).

any citizen of the equal protection of the laws,³² and the notion of equality played an animating role in the various reconstruction amendments.³³ The rhetoric of equality has defined important civil rights struggles.³⁴ It has been espoused in Supreme Court decisions.³⁵ Jurisprudential philosophers also continue to assert the idea of equality as a primary social ideal.³⁶ Equality is something we believe in even if—or perhaps because—it has no inherent substance.³⁷

B. Scholarly Challenge

The idea of equality, however, has come under attack in recent decades, particularly in the legal academy. In 1982, Professor Peter Westen published a scintillating article, arguing that the rhetoric of equality should be abandoned.³⁸ Professor Westen first contended that equality is derivative in that it depends for its meaning on external standards.³⁹ He also asserted that the equality mandate always remains, at best, “superfluous,” because the exter-

32. U.S. CONST. amend. XIV, § 1 (providing that no State shall “deny to any person within its jurisdiction the equal protection of the laws”).

In 1863, Lincoln quoted the equality language from the Declaration of Independence in his famous Gettysburg Address. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (Roy P. Basler ed., 1969).

33. See J. R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 203-10 (1978) (discussing the key role played by the idea of equality in the reconstruction amendments).

34. Equality has been a rallying idea in the movements to secure civil rights both for African Americans and for women, as well as many other groups. In the case of African Americans, this point is made by the title of the most prominent book documenting the struggle leading to the decision of the Supreme Court to invalidate segregated public schools. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975). In the case of women, the proposed Equal Rights Amendment provides an example. See Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 657 (1983) (“[T]he framers and supporters of the Equal Rights Amendment chose to express themselves through the rhetoric of equality.”) The provision was stated in terms of equality: “Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” *Id.*

35. See *infra* notes 92-134 and accompanying text.

36. See, e.g., RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000) (defending equality as the sovereign ideal that should guide government policy); JOHN RAWLS, *POLITICAL LIBERALISM* 3-46 (1996) (developing Rawls' conception of justice as fairness, presented as a comprehensive philosophical doctrine in his prior book, *A Theory of Justice*, into a political conception that recognizes each citizen as a free and equal person).

37. See George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1609 (1999) (asserting that, putting aside the “difficult problem” of affirmative action, “unity prevails in contemporary Western democracies that equal treatment is an indispensable premise of the rule of law, as we now understand it”).

38. See Westen, *supra* note 3, at 537. In 1990, Professor Westen reiterated his general views about equality. See PETER WESTEN, *SPEAKING OF EQUALITY* (1990).

39. See Westen, *supra* note 3, at 543-47.

nal standards tell us all that we need to know about how to treat people.⁴⁰ On this basis, Professor Westen concluded that the equality idea is "tautological," a redundant mandate that people entitled to equal treatment are entitled to equal treatment.⁴¹ He also contended that dangers of analytical confusion surround the use of the equality idea.⁴² Concluding that these dangers outweigh any rhetorical benefits, he advocated abandonment of the equality idea from moral and legal discourse.⁴³

In response to Professor Westen's article, several scholars argued that the equality idea has independent, moral force in a fairly wide array of circumstances,⁴⁴ but their arguments are problematic. Scholars have contended, for example, that, where persons are in competition for a finite amount of treatment, equality, rather than any non-egalitarian principle, is what should guide the government's distribution of treatment.⁴⁵ For example, assume two people live in separate houses with each having an equal need and entitlement to 100 kilowatts of electricity every month. Due to an unexpected catastrophe, only 120 kilowatts are available each month for them to share. Most of us would conclude that the only proper way to treat them is equally. Each should receive 60 kilowatts of electricity. This might suggest that prescriptive equality carries independent moral force in these cases. However, Professor Christopher Peters has demonstrated that prescriptive equality is not what guides us to prefer equal treatment; non-egalitarian justice is what controls.⁴⁶ Justice would not require that both people receive the full 100 kilowatts, because justice cannot demand the impossible. At the same time, the hypothetical assumes that each person has an equal entitlement to electricity. If they were entitled respectively to 125 kilowatts and 75 kilowatts per month, but only 120 kilowatts were available, we would not say that they should each receive 60 kilowatts. Likewise, in the original hypothetical, it

40. *Id.* at 547.

41. *Id.*

42. See *id.* at 577-92; see also Peter Westen, *On "Confusing Ideas": A Reply*, 91 *YALE L.J.* 1153 (1982) (responding to Steven J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 *YALE L.J.* 1136 (1982), by emphasizing that the equality idea is not simply empty, but confusing).

43. See Westen, *supra* note 3, at 542 ("Equality . . . is an idea that should be banished from moral and legal discourse as an explanatory norm.").

44. See, e.g., Chemerinsky, *supra* note 25, at 575; Anthony D'Amato, *Is Equality a Totally Empty Idea?*, 81 *MICH. L. REV.* 600 (1983); Kent Greenawalt, *How Empty Is the Idea of Equality*, 83 *COLUM. L. REV.* 1167, 1169-73 (1983).

45. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 222-25 (1986); Larry Alexander, *Constrained by Precedent*, 63 *S. CAL. L. REV.* 1, 11 (1989); D'Amato, *supra* note 44, at 600-01.

46. See Christopher J. Peters, *Equality Revisited*, 110 *HARV. L. REV.* 1210, 1232-54 (1997).

is not the equality principle that produces the equal outcome, but the assumption that the two people had an equal entitlement. To weigh each person's allocation according to her proportional entitlement is to follow a principle of non-egalitarian justice, not prescriptive equality.⁴⁷

While prescriptive equality is derivative, scholars have convincingly demonstrated that it should not be understood as "tautological." Professor Westen curiously excluded the possibility that prescriptive equality would operate where a person has been treated *wrongly* under an external standard. He asserted that if equality were thought to be a reason that other equals in such a case ought also to be treated wrongly, "no one would give [the equality idea] a moment's thought."⁴⁸ Yet, some scholars believe that this result is precisely what prescriptive equality means. "Treating likes alike" implies that "giving a form of treatment to one equal is a reason to give the same treatment to another equal."⁴⁹ Understood in this way, prescriptive equality is not a redundancy. Whether sensible or not, equality would sometimes call for a person to be treated wrongly merely because an identically situated person already has been treated wrongly.⁵⁰ The equality mandate would have meaning in this context independent of the external treatment rule.

47. Professor Peters divides into two general categories the possible situations in which equality might be thought to operate—conditions of "competition" and conditions of "infinite supply." *Id.* at 1232, 1245. Within the first general category, he identifies several subcategories, including conditions of scarcity, conditions of exact sufficiency, and conditions of finite surplus. *Id.* at 1232. Within each area, he uses hypothetical problems to support his assertions that equality is a derivative idea and lacks independent normative force. *Id.* at 1232-54. Professor Peters also separately discusses a category of cases that he calls "conditions of distinction." *Id.* at 1231. These cases involve "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." *Id.* These cases will all fall within the first two general categories, but Professor Peters concludes that they are sufficiently important to warrant separate discussion. *Id.* at 1254-56.

In a response, Professor Kent Greenawalt has sought to show that in a few situations falling within each of the two general categories of cases identified by Professor Peters, prescriptive equality may still carry normative force. See Kent Greenawalt, "Prescriptive Equality": *Two Steps Forward*, 110 HARV. L. REV. 1265, 1274-89 (1997).

48. Westen, *supra* note 3, at 546.

49. Greenawalt, *supra* note 47, at 1268; see also Peters, *supra* note 46, at 1223 (asserting that "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.*") (emphasis in original); Kenneth W. Simons, *Equality as a Comparative Right*, 65 B. U. L. REV. 387, 389 (1985) ("A right to equal treatment is a *comparative* claim to receive a particular treatment just because another person or class receives it.").

50. Peters, *supra* note 46, at 1227.

Scholarly commentary has underscored, however, that prescriptive equality is highly problematic, even self-contradictory, if understood so as to be non-tautological.⁵¹ If Smith is denied a driver's license when he warrants it, the equality mandate could mean that another person, call him Jones, identical in all important respects to Smith, should also be denied a driver's license, although Jones warrants it. Yet, such a principle treats Jones improperly according to the substantive, external standard and unequally relative to other persons who previously have been treated correctly under the external standard. In search of a more palatable effect for the equality rule, one might posit, instead, the erroneous conferral of a benefit on an equal, but the outcome will also be troublesome. To demonstrate, suppose that Smith is given a driver's license when he does not warrant the benefit according to the substantive standard. Prescriptive equality would call for Jones, equal to Smith in all important respects, also to receive a license, although Jones clearly does not warrant the license. We might initially believe that prescriptive equality carries more force here because it is only conferring on Jones an unwarranted benefit rather than an unwarranted penalty. However, if drivers' licenses are to be issued according to the substantive standard, Jones' receipt of the license is wrong. Further, Jones' treatment here would not equal the treatment given in the past to other persons who are his equal. This conclusion means that the equality principle, to the extent that it is non-tautological, calls for action that is both wrong according to the treatment rule and unequal.⁵²

Scholarly debate has continued over whether there are some circumstances where prescriptive equality is non-tautological and has normative force, but the possibilities seem to constitute a small category. Professor Kent Greenawalt has explained that equality might have normative force where 1) the pool of relevant candidates who should be viewed as equal is small, 2) the candidates have a significant relationship to one another, and 3) the candidates are likely to be aware of the treatment afforded their equals in the pool.⁵³ An example could include siblings for whom their parents must make decisions about appropriate treatment.⁵⁴ After the erroneous conferral of an unwarranted benefit on one child, the equality

51. See, e.g., *id.* at 1231-57.

52. See, e.g., Alexander, *supra* note 45, at 10 ("[T]reating someone equally with another who was treated immorally is to deny that person equality with those who have been treated morally correctly.").

53. Greenawalt, *supra* note 47, at 1289.

54. See *id.* at 1265-66, 1279-80.

principle may carry more force than in cases concerning the treatment of equals in a much larger pool who have little relationship with each other. Assuming Professor Greenawalt is correct, debate then arises over whether the force of any such limited use of the equality principle represents only consequentialist factors related to non-egalitarian justice or, instead, a deontological norm.⁵⁵ Regardless of the answer, however, the problems with prescriptive equality as a generalized rule would remain. At best, prescriptive equality would carry non-tautological, normative force in only exceptional situations. Moreover, these extraordinary circumstances would themselves be defined by some standards outside of the notion of equality rather than by equality itself.⁵⁶

C. Application as a General Mandate

The central point about prescriptive equality relevant to this Article is that the mandate assumes an external rule about non-egalitarian justice. For example, suppose that H, an Hispanic male, claims that he was treated unequally because he was charged with soliciting a prostitute; whereas, C, a Caucasian male who was arrested shortly after H in the same location and for the same offense, was not charged. An apparent difference between the two cases is the race of the arrestees. H claims that this difference should not matter in the charging decision and, therefore, that he is being treated unequally. Yet, it is impossible to know what is a relevant difference without a substantive rule in mind that reveals what factors bear on likeness and difference in the context.⁵⁷ H's claim cannot be evaluated unless we have a rule about non-egalitarian justice that clarifies either what factors bear on the charging decision

55. See, e.g., Peters, *supra* note 46, at 1212 (contending that even nontautological equality "inescapably becomes merely an aspect of some wholly nonegalitarian norm" or else "collapses into incoherence"). But see Greenawalt, *supra* note 47, at 1266, 1285 (contending that "the deep feelings that underlie the principle in the exceptional cases may support a deontological norm").

56. Can equal treatment become a "default rule when we are insufficiently certain of the morality or correctness of our decisional criteria [?]" Joshua Sarnoff, *Equality As Uncertainty*, 84 IOWA L. REV. 377, 392 (1999). Typically the refinement of an external, substantive standard rather than prescriptive equality must occur even in cases where the contours of a previously articulated substantive standard are imprecise or where doubts arise about the correctness of the standard. In such cases, the question for the decision maker focuses on whether to apply or amend the substantive rule or standard. A decision to apply the existing standard becomes a default rule favoring that existing standard. The equality principle, uninformed by a substantive, external standard, would not reveal how to resolve the problem.

57. HAABERMAS, *supra* note 22, at 414 (asserting that the reasons for defining certain factors as relevant in an equality claim "are either themselves normative or are based on normative reasons").

or what factors are irrelevant to it. H could be relying upon this substantive rule: "A prosecutor should not consider the race of a suspect as a factor, in itself, favoring charging the suspect with a crime."⁵⁸ We can see that the equality principle also becomes irrelevant once this rule controls. The substantive rule itself then becomes the basis for resolving H's claim. If H can prove that the prosecutor charged him with the crime because he was Hispanic rather than Caucasian, the prosecutor's actions were improper. One could also then assert that H has been treated unequally, but the claim would derive entirely from "a substantive idea of the kinds of wrongs from which a person has a right to be free."⁵⁹

To criticize the analytic value of prescriptive equality is not to attack the validity of conclusions that distinctions based on factors such as race, gender, and caste, or a myriad of other factors, in particular contexts are condemnable. Substantive rules of appropriate treatment that can explain, for example, a decision like *Batson v. Kentucky*, carry their own moral force, which is unchanged by reference to prescriptive equality.⁶⁰ In *Batson*, the Supreme Court held that prosecutors may not use peremptory strikes against black venire members on account of their race even if those venire members are of the same race as the criminal defendant.⁶¹ The Court concluded that a prosecutor cannot assume "that black jurors as a group will be unable impartially to consider the State's case against a black defendant."⁶² This substantive rule underlies the Court's conclusion that the Equal Protection Clause was implicated. The need to find the underlying substantive rule, however, also reveals why such a decision could as easily have been reached under any open-ended provision in the Constitution that calls for the Court to announce unenumerated rights. The equality mandate revealed nothing more than that the Court should consider whether an unenumerated rule of non-egalitarian justice was involved. Likewise,

58. At first blush, one might suppose the applicable substantive rule to be that race or skin color should never influence the government in its decisions about how to treat persons. However, such a broad rule may not reflect one's true position. See generally Westen, *supra* note 3, at 581-84 (noting that the irrelevance of race or skin color to governmental decisions about how to treat people in one context does not mean that race or skin color is irrelevant to such decisions in all contexts).

59. *Id.* at 567.

60. *Batson v. Kentucky*, 476 U.S. 79 (1986).

61. *Id.* at 89.

62. *Id.*

the substantive rule identified would retain whatever moral force it carries even if prescriptive equality were abandoned.⁶³

Scholars have also shown that equality does not itself lead to any particular method by which to decide what is acceptable treatment.⁶⁴ In its Equal Protection jurisprudence, the Supreme Court has called for inquiry into whether a particular classification involves a "suspect" category or whether government action pushes against certain "fundamental" rights.⁶⁵ For example, racial classifications are "suspect,"⁶⁶ and First Amendment freedoms are "fundamental."⁶⁷ The Court has concluded that governmental action that falls within these spheres calls for heightened scrutiny in the determination of whether equality has been infringed.⁶⁸ Rhetorically, a heavy presumption of inequality applies in these cases, while only a mild presumption applies, through the "rational basis" test, to pedestrian cases.⁶⁹ However, neither the stratifying ideas nor the presumptions are derivable from anything in the notion of prescriptive equality. They derive from generalizations about rules of non-egalitarian justice.⁷⁰ Race is a suspect classification not because

63. For the view that the Justices are often aware that analysis of an equal protection argument "requires them to answer precisely the same question as in an alternative, substantive ground" for the decision, see William Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884, 888 (1985).

64. See, e.g., Westen, *supra* note 3, at 559-77.

65. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 529 (1997); NORMAN REDLICH ET AL., *UNDERSTANDING CONSTITUTIONAL LAW* 232-33 (1999).

66. *McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

67. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

68. See, e.g., *Maher v. Roe*, 432 U.S. 464, 470 (1977) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (noting that, regarding Equal Protection Clause claims, the Court has said: "We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.")). Sometimes, the Court has applied "intermediate" scrutiny to such cases. See CHERMERINSKY, *supra* note 65, at 529; James A. Hughes, Note, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529, 541-45 (1979).

69. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 19-21 (1972).

70. Professor Terrance Sandalow has succinctly described the problem:

Decisions under the Equal Protection Clause have always been heavily value-laden, and necessarily so, since value premises (other than values of "equality" and "rationality") are necessary to the determination that the clause requires. This is most obviously so under the so-called "new equal protection," which subjects legislation to "strict scrutiny" if it touches "fundamental interests" or employs "suspect" bases of classification. A determination of the interests that are to be ranked as "fundamental" or classifications that are to be viewed as "suspect" necessarily rests upon value premises drawn from a source other than the Equal Protection Clause itself. The need for such premises is no less, how-

people of all races are equal for purposes of every government action, but because it is thought to be wrong in a very large proportion of situations for government to consider race in its decisions about how to treat people. First Amendment rights are "fundamental" not because classifications that prevent some persons from exercising those rights treat them unequally, but because the government is not supposed to prevent people from exercising their First Amendment rights. The presumptions themselves should only be seen as preliminary "rules of thumb" because the question ultimately is not so much over the proof of facts as over the existence of a rule. Did the plaintiff have a right, which the state violated, not to have his race considered against him in the context? Did the plaintiff have a First-Amendment right that was infringed? The presumption of inequality does not help answer such questions, and, further, once those questions are answered, the presumption, like the equality idea itself, gives no assistance.⁷¹

Prescriptive equality also does not address the relevance or irrelevance of a government actor's intent. Should we say that an undesirably disparate impact resulting from government action is enough to violate equal protection without regard to the government actors' intents? Pondering the notion that "equals should be treated equally and unequals should be treated unequally" will not help resolve the issue. The equality principle only turns us to the question of whether the intent of government actors should be thought to bear on the likeness of positions or treatments of affected persons. The Supreme Court generally has required an intent to discriminate to make out an equal protection violation,⁷² a position that commentators have frequently criticized.⁷³ However, both the Court's conclusions that intent matters and the views that disparate impact should be sufficient derive from substantive rules about non-egalitarian justice, not from prescriptive equality.

ever, under the traditional equal protection test of "rationality": a determination whether there is a "rational basis" for the differing treatment accorded two classes requires the existence of an extrinsic standard—a value or values other than equality and rationality—with reference to which the classification can be measured.

Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1052-53 (1981).

71. See Westen, *supra* note 3, at 575.

72. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). See generally REDLICH ET AL., *supra* note 65, at 284-85 (noting that the Court's discriminatory intent requirement, as applied in *McCleskey*, prevents the state from having to rebut a showing of discriminatory impact alone).

73. For one of the more prominent critiques of the intent requirement, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 327 (1987).

In the final analysis, prescriptive equality is a contingent idea that often leads to misunderstanding because of the erroneous view that it is self-defining. Equality obtains meaning only through reference to an external standard of appropriate treatment by which to judge likeness and difference. Equality alone never tells us how to treat people.⁷⁴ Equality may have rhetorical value in legal discourse.⁷⁵ Nonetheless, pursuit of equality, as if it were self-defining, is an ill-fated effort.

II. THE SHORT-LIVED INFLUENCE OF EQUALITY UNDER THE OPEN-ENDED CLAUSES

I turn now to the Court's decisions addressing inequality claims in criminal procedure under the Equal Protection and Due Process Clauses. These decisions provide both context and contrast for evaluating the Court's pursuit of equality under the criminal clauses. The early Warren Court decisions endorsing prescriptive equality under the open-ended clauses shortly preceded the Court's focus on equality under the criminal clauses. However, a divergence later arose between the influence of the equality mandate under the open-ended clauses and its influence under the criminal clauses. Prescriptive equality soon receded as a normative idea under the open-ended clauses, while continuing to influence doctrine under the criminal provisions.

A. *The Rise of Prescriptive Equality*

In constructing Equal Protection and Due Process doctrines, the Court now seemingly recognizes the problems with the equality idea,⁷⁶ but this recognition was not always apparent. After *Brown v. Board of Education*,⁷⁷ some of the Court's early and most expansive endorsements of equality came through its application of the open-ended provisions, especially to the criminal process.⁷⁸ This focus on prescriptive equality reached its zenith in the mid-1960s, at the

74. As noted, prescriptive equality is not tautological, but this point does not contradict the conclusion that an equality mandate is unhelpful by itself. See *supra* text accompanying note 52.

75. See *infra* text accompanying notes 341-42.

76. See *infra* text accompanying note 173.

77. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

78. Regarding the Court's pre-*Brown* applications of the Equal Protection Clause, see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

peak of the Warren Court's liberal activism in criminal procedure.⁷⁹ However, gradually, the Court retreated. By the mid-1980s, the Court's decisions addressing claims of inequality brought under the open-ended clauses downplayed prescriptive equality in favor of substantive standards about non-egalitarian justice.⁸⁰ The Court seemed to signal that, at least under the open-ended clauses, its work lay in identifying unenumerated, substantive protections rather than in pursuing the vague and potentially misleading rhetoric of equality.⁸¹

1. Pre-*Brown*

Even before *Brown*, the Supreme Court had begun to regulate states' criminal processes under the open-ended clauses in ways that disproportionately benefited poor and minority defendants, but without relying on the notion of equality.⁸² In 1932, for example, the Court held in *Powell v. Alabama* that due process required that states appoint counsel for indigent, capital defendants.⁸³ And in 1936, in *Brown v. Mississippi*, the Court held that due process prohibited the use of an "involuntary" confession.⁸⁴ These holdings responded in part to the perception of discrimination against poor and African-American defendants,⁸⁵ but they were explicitly based on substantive rules about non-egalitarian justice rather than on the idea of equality.

The pre-*Brown* Court had also imposed restrictions on the most blatant forms of race or caste discrimination, but on fairly

79. See, e.g., Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1324-25 (1977) (asserting that the "three major themes" of the Warren Court's decisions were (1) "selective incorporation of Bill of Rights guarantees" into due process, (2) "equality," and (3) "expansive interpretations of constitutional rights that protect the accused").

80. See David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 474-83 (1992) (describing the Court's abandonment of the equality principle in favor of setting standards of minimum justice in applying the open-ended provisions in the criminal-procedure context).

81. See *infra* text accompanying notes 172-73.

82. For a summary of the highlights of the Court's pre-*Brown* cases regulating state criminal procedure under the Fourteenth Amendment, see Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 2-4 (1956).

83. *Powell v. Alabama*, 287 U.S. 45, 71, 73 (1932).

84. *Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936).

85. Cf. Francis A. Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 153-54 (1957) (noting that cases beginning with *Powell* set the stage for the Court's later decisions, particularly *Griffin*, concerning equality in criminal procedure).

specific grounds.⁸⁶ For example, beginning in 1880 with *Strauder v. West Virginia*, the Court had regulated under the Equal Protection Clause the exclusion of African-American jurors from criminal cases involving African-American defendants.⁸⁷ However, the Court had emphasized that the right was that of African Americans to be free from disparaging treatment by the states based on their color, not simply the right to equality.⁸⁸ Likewise, in *Cochrane v. Kansas* and *Dowd v. Cook*, the Court declared a convict's indigency to be an inappropriate basis, under the Equal Protection Clause, to prevent his criminal appeals.⁸⁹ State prisoners had challenged prison rules that effectively barred any appeals from inmates who did not have lawyers, but not from those who could retain counsel.⁹⁰ Without suggesting that convicts had a constitutional right to appeal, the Justices found, under the Fourteenth Amendment, that the prison rules improperly penalized impoverished prisoners. No good reason existed for preventing an impoverished defendant from filing an appeal *pro se*. *Cochrane* and *Dowd*, along with *Strauder* and its progeny, show that the pre-*Brown* Court found criminal-procedure practices to violate equal protection.⁹¹ However, the Court identi-

86. See Klarman, *supra* note 2, at 220 ("[T]he Court's pre-*Brown* decisions generally adhered to the dominant intention of the Fourteenth Amendment's drafters, which had been to protect blacks in the exercise of certain fundamental rights, rather than to proscribe all racial classifications.").

87. *Strauder v. West Virginia*, 100 U.S. 303 (1879); see also *Norris v. Alabama*, 294 U.S. 587 (1935) (finding a prima facie case of discriminatory purpose in jury selection where there had been a substantial population of African Americans in the community but almost a total exclusion of African Americans from jury service); *Neal v. Delaware*, 103 U.S. 370 (1880), (holding that administration of facially neutral jury-selection laws with racially discriminatory purpose violated Equal Protection Clause).

88. Regarding the Equal Protection Clause, the Court asserted:

What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

Strauder, 100 U.S. at 307-08.

89. *Dowd v. Cook*, 340 U.S. 206 (1951); *Cochrane v. Kansas*, 316 U.S. 255 (1942).

90. See Allen, *supra* note 85, at 156 (noting that the prison rules at issue in *Cochrane* and *Dowd* appeared to forbid the prisoners themselves from filing court pleadings but did not forbid those prisoners who could retain lawyers from having their lawyers do so).

91. Even pronouncements of a broad right against racial discrimination were rather exceptional in the pre-*Brown* era. Evidence appears in the Court's decision in *Akins v. Texas*, 325 U.S.

fied limited rights to be free in particular circumstances from race or caste discrimination, not an unrefined right to equality.

2. From *Brown* to the Early 1970s

Only two years after the landmark *Brown* decision, the Court began endorsing a much less refined notion of equality in criminal procedure. In *Griffin v. Illinois*, convicted petitioners challenged the Illinois practice of providing a free trial transcript for direct appeal in criminal cases only in limited circumstances.⁹² Griffin and a co-defendant were convicted of armed robbery and sentenced to prison. Indigent and unable to pursue state appeals without a trial transcript, they requested a transcript at state expense. The trial court denied their request because they did not qualify under the relevant statute. Likewise, their subsequent efforts to secure a transcript for collateral review were denied.⁹³ Consequently, they were unable to obtain state appellate review of their claims of trial error. The Supreme Court concluded that the failure of the state to provide petitioners with a transcript at state expense violated due process and equal protection.⁹⁴

A broad equality rationale was offered to support the decision.⁹⁵ In announcing the judgment, Justice Black asserted that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."⁹⁶ The Fourteenth Amendment, he stated, called for "equal justice for poor and rich,

398 (1945), rendered only a few years before *Brown*. The Court found no equal protection violation in the practice of a Texas jury commission of allowing only one African American on each grand jury panel. *Id.* at 405-06. All members of the jury commission had testified that they "had no intention of placing more than one" African American on each panel. *Id.* at 406. Nonetheless, the Supreme Court declined to find discrimination that infringed equal protection. *Id.* at 406-07.

92. *Griffin v. Illinois*, 351 U.S. 12 (1956).

93. *Id.* at 15.

94. *Id.* at 13, 20.

95. The Court made clear that appeals were not themselves constitutionally required. *Id.* at 18 (plurality opinion) ("It is true that a State is not required by the Federal Constitution to provide appellate review at all."); see also *id.* at 21 (Frankfurter, J., concurring) ("[I]t is now settled that due process of law does not require a State to afford review of criminal judgments."); *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law.")

The Court also did not find that trial transcripts were constitutionally mandated whenever an appeal was allowed. *Griffin*, 351 U.S. at 20 (plurality opinion) ("We do not hold . . . that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it."); see also *id.* at 21 (Frankfurter, J., concurring) (noting that it is permissible for States to "shap[e] the mechanism by which alleged errors may be brought before the appellate tribunal").

96. *Id.* at 19.

weak and powerful alike."⁹⁷ The vote was only five-to-four, and one member of the majority, Justice Frankfurter, wrote a special concurrence, joining only in the judgment.⁹⁸ Still, the decision could have been rationalized on the limited grounds of assuring some meaningful access by criminal defendants to the appellate courts. Instead, the basis for the decision, including the decision of Justice Frankfurter,⁹⁹ was the failure of the state to use the public fisc to ensure that the poor received litigative advantages similar to the rich.¹⁰⁰ The decision implied that the state should alleviate the poverty of the poor, although it had not created that poverty, to ensure equality in the litigation setting.¹⁰¹

Griffin's equality principle potentially called for many reforms. It seemed to demand more than mere parity between rich and poor regarding the availability of transcripts for criminal appeals.¹⁰² It strongly implied, for example, that filing fees or other financial requisites to appellate review could not prevent indigent,

97. *Id.* at 16.

98. *Id.* at 20 (Frankfurter, J., concurring). Justice Frankfurter qualified his conclusion that true equality between rich and poor was required in the treatment of criminal defendants, but ultimately found that Illinois had to avoid the disparity that it had produced regarding criminal appeals. *Id.* at 23-24 (Frankfurter, J., concurring). He asserted, for example, that "[t]he equality at which the 'equal protection' clause aims is not a disembodied equality." *Id.* at 21 (Frankfurter, J., concurring) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). He also stated that the ability of a rich man to afford the ablest of counsel not within the poor man's means involved "contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion." *Id.* at 23 (Frankfurter, J., concurring). Yet, as for the discrimination over appeals between rich and poor that resulted from Illinois' rule on transcripts, he concluded that "[t]he State is not free to produce such squalid discrimination." *Id.* at 24 (Frankfurter, J., concurring).

99. See Bertram F. Willcox & Edward J. Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 11 (1957) (asserting that "Frankfurter's concurring opinion did not really differ on the theory of decision").

100. For efforts to define the holding, see Schaefer, *supra* note 82, at 10 (asserting that, under *Griffin*, "indigence is constitutionally an irrelevance" so that a "defendant by reason of his poverty [cannot be] deprived of a right available to those who can afford to exercise it"), and Allen, *supra* note 85, at 156 (asserting that, in *Griffin*, "poverty was a significant element in the finding that equal protection had been withheld").

101. See YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 78 (9th ed. 1999) (asserting that *Griffin* initiated the "equality" principle); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 564 (1992) ("*Griffin* . . . is the seminal ruling on the state's general obligation to provide 'equal justice' in the criminal justice process.>").

102. See, e.g., Allen, *supra* note 85, at 151 (stating in 1957, shortly after the decision, that "[s]uch a principle, to say the least, contain[ed] the potentiality of growth"); Comment, *The Effect of Griffin v. Illinois on the Administration of the Criminal Law*, 25 U. CHI. L. REV. 161 (1957) (asserting that "the Court's rationale portends a greater significance for the decision than the mere furnishing of transcripts for appeal").

criminal defendants from pursuing appeals.¹⁰³ It seemed also to mean that indigents were entitled to appointed counsel on their criminal appeals.¹⁰⁴ Several prominent commentators argued that *Griffin* undermined *Betts v. Brady*,¹⁰⁵ which had held that appointed counsel were not required at trial for all indigent, felony defendants requesting a lawyer.¹⁰⁶ *Griffin* also raised questions about whether efforts would be required to disburse funds to and eliminate costs for indigents in civil proceedings.¹⁰⁷

By the early 1960s, predictions about *Griffin's* effect in announcing a broad equality principle began ringing true. In 1959 and again in 1961, the Court held that a state could not prevent indigent criminal defendants from pursuing appeals because of their inability to pay minor fees.¹⁰⁸ These decisions, like *Griffin*, required the state to assume particular expenses for which other defendants had to pay.¹⁰⁹

103. See, e.g., Willcox & Bloustein, *supra* note 99, at 17 (asserting that *Griffin* means that the state must "pay for [the indigent convict], or waive, appeal bond premium, filing fees for appeal, and other such expenses").

104. See, e.g., Comment, *supra* note 102, at 170 ("The Supreme Court's emphasis on the obligation of states to see that indigent defendants, as well as the more opulent, get 'adequate and effective appellate review' portends a requirement that the indigent appellant be provided with counsel.") (footnote omitted).

105. *Betts v. Brady*, 316 U.S. 455 (1942).

106. See, e.g., Schaefer, *supra* note 82, at 10 ("The analogy to the right to counsel is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, . . . it must furnish the same opportunity to those who are unable to hire a lawyer."); Willcox & Bloustein, *supra* note 99, at 23 ("There is a probability that the *Griffin* decision will eventually be construed to require a state to furnish reasonably competent counsel to all indigent persons accused of serious crimes."). But see Robert C. Casad, Comment, 55 MICH. L. REV. 413, 420 (1957) ("If any analogy to the right to counsel area is drawn, it should be limited to those cases where access to the courts could be had *only* through an attorney.").

107. See Willcox & Bloustein, *supra* note 99, at 2 (asserting that the reasoning underlying *Griffin* "is broad enough to apply to many other of the injustices arising from the poverty of litigants in our courts"); Casad, *supra* note 106, at 422 (noting that there was a question whether the equality rationale underlying *Griffin* would carry "over into the area of civil review" but arguing that "it should be applied only in criminal cases").

108. See *Smith v. Bennett*, 365 U.S. 708 (1961) (rejecting as a violation of equal protection an Iowa statute requiring a four-dollar filing fee by an indigent prisoner before an application for a writ of habeas corpus or for the allowance of an appeal would be docketed); *Burns v. Ohio*, 360 U.S. 252 (1959) (striking down under the due process and Equal Protection Clauses an Ohio statute requiring a twenty-dollar filing fee by an indigent prisoner seeking discretionary review in the Ohio Supreme Court).

109. In the 1959 decision, for example, the Court stated, "[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." *Burns*, 360 U.S. at 258. In the 1961 decision, the Court reasserted that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Smith*, 365 U.S. at 710 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

In 1963, in *Douglas v. California*, the Court also held that states were required to provide counsel to indigent, criminal defendants on their first appeal of right.¹¹⁰ *Douglas* was significant not only because a six-member majority endorsed *Griffin's* broad equality rationale,¹¹¹ but also because representation by counsel on appeal was not essential for access to the appellate courts. If an indigent requested appellate counsel, California procedure allowed the appellate court to review the record to determine whether appointed counsel could assist the defendant or the court.¹¹² All indigents received some review under this procedure, but the Supreme Court focused on the comparative advantage of the wealthy convict. Writing for the majority, Justice Douglas noted that perfect equality was not required between rich and poor in the criminal process, but that equality did require a lawyer for the appeal of right.¹¹³ The states were obligated to take affirmative steps to remedy the poverty of indigent defendants although the state had not caused that poverty.¹¹⁴ The conception of prescriptive equality that supported this conclusion was not further clarified.¹¹⁵

On the same day as the decision in *Douglas*, the Court also overruled *Betts v. Brady*,¹¹⁶ but without asserting an equality rationale.¹¹⁷ In *Gideon v. Wainwright*, a unanimous Court concluded that an indigent charged with a crime was automatically entitled to have counsel at trial.¹¹⁸ Writing for the Court, Justice Black grounded the decision, not on the idea that the poor were entitled to the same kind of defense as the rich, but on the notion that the es-

110. *Douglas v. California*, 372 U.S. 353 (1963).

111. *Id.* at 355.

112. *See id.*

113. *Id.* at 357.

114. *See* Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966) (noting that one of the distinct characteristics of the Court's decisions expanding the concept of equal protection, including *Griffin* and *Douglas*, was that they "impose affirmative obligations upon the states").

115. Justice Douglas stated:

There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.

Douglas, 372 U.S. at 357-58.

116. *Betts v. Brady*, 316 U.S. 455 (1942).

117. *See* Philip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 587 (1968) (noting that "the right to counsel at trial . . . was not rested on any notion of equal protection of the laws" but, instead, on "a notion of the minimum decencies demanded by our ideals of a fair trial").

118. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

entials of a fair trial demanded representation of the criminal defendant by counsel.¹¹⁹ On this view, the Court incorporated the Sixth Amendment right to counsel into due process,¹²⁰ making it apply against the states as it already applied in federal court.¹²¹ Justice Black's failure to mention *Griffin* or the equality principle was "somewhat surprising."¹²² The omission may have been based on his effort to demonstrate that his dissent in *Betts*, written long before *Griffin*'s equality principle was announced, had appropriately addressed why the accused indigent was entitled to counsel at trial.¹²³ In any event, articulation of a substantive Sixth Amendment rule about when counsel was required provided a more precise rationale than a vague call for equality.¹²⁴

However, after *Gideon*, the Justices continued to press the equality principle, despite its uncertain limits. In *Harper v. Virginia Board of Elections*, the Court struck down a state voting tax of a dollar and fifty cents because it treated indigent persons unequally.¹²⁵ *Harper* extended *Griffin*'s equality principle from the criminal-procedure context to a broader world of citizen activities. *Harper* conceivably meant only that equality was required outside of the criminal context regarding "fundamental" rights, like the right to vote.¹²⁶ However, as an effort to narrowly limit the equality principle, this approach would only work if the notion of a "fundamental" right were defined quite arbitrarily; the benefits conferred in *Griffin*, *Douglas*, and *Harper* were not, except on a questionable view, more "fundamental" than necessities like food, shelter, basic

119. *Id.* at 344.

120. *Id.* at 342.

121. See *Johnson v. Zerbst*, 304 U.S. 458 (1938) (holding that the Sixth Amendment's guarantee of counsel applies to a person charged with a crime in federal court).

122. KAMISAR ET AL., *supra* note 101, at 80.

123. See Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 269-72 (questioning Justice Black's failure in *Gideon* to employ the typical overruling rationale that subsequent decisions had undermined the prior authority).

124. See Kurland, *supra* note 117, at 594 (casting doubt on the plausibility of an effort by courts to pursue equality in counsel services to all criminal defendants); cf. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 18 (1969) (noting that, because the Court was not seriously pursuing equality, it may have been rhetorically more comfortable in a single case to refer to the absence of equality rather than to a seemingly less grounded rule about justice).

125. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966). Justice Douglas stated for the six-member majority: "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666.

126. See Klarman *supra* note 2, at 266 (asserting that both *Griffin* and *Harper* involved "fundamental" rights).

medical care, and education.¹²⁷ For this reason, commentators argued that the *Griffin-Douglas-Harper* line could extend to require state aid in a wide array of circumstances.¹²⁸

Through the early 1970s, the Court continued to reaffirm the equality notion under the open-ended clauses. The Court extended the equality principle to the civil litigation sphere, striking down a state fee of \$60 required to bring a divorce action because of its inequitable effects on indigents.¹²⁹ In the criminal context, the Court held that convicted indigents could not be incarcerated simply because of their inability to pay a fine.¹³⁰ In addition, the Court ruled that appellate counsel for indigent convicts must file a brief with the court outlining the best arguments for the indigent, even if counsel did not believe the arguments ultimately could prevail.¹³¹ The Court also held repeatedly that indigent convicts were entitled to free transcripts and, unlike earlier cases, in contexts in which the transcript was not essential to gain access to the courts.¹³² The

127. See *id.* at 267 ("Only a lawyer, after all, could argue with a straight face that legal assistance in a criminal appeal is more important than, for example, food and shelter.").

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court arguably recognized that the equality principle logically applied to the provision of fundamental needs, like food and housing. The Court struck down a one-year residency requirement for welfare benefits, relying on a vague melding of equal protection and right-to-travel rationales. Subsequently, the Court read *Shapiro* as relying solely on right-to-travel grounds, although that is a strained view. See Klarman, *supra* note 2, at 268 ("Yet even accepting the right-to-travel construction of *Shapiro*, the only challengeable government action was refusal to provide newcomers to the jurisdiction with welfare benefits.").

128. See, e.g., Gary S. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 266 (1970) ("While there are reasonable justifications for a limitation of expenditures by the states for litigation-related costs of the poor, there is no satisfactory justification for denying the poor their fundamental and instrumental right of access to the [civil] courts for the settlement of disputes."); Harold W. Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 UCLA L. REV. 1147, 1168 (1966) (concluding that *Griffin* implicitly required government to provide remedial education to socially disadvantaged groups); Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 446 (1967) ("The most obvious applications are within the criminal-law area, but the principles might also be extended to civil litigation, education, medical care, or any area in which there is an important state involvement."); see also J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 1001 (1975) (asserting that *Griffin-Douglas-Harper* raised many constitutional questions about "economic inequality").

129. *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971).

130. *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

131. *Anders v. California*, 386 U.S. 738 (1967). But see *Smith v. Robbins*, 120 S.Ct. 746 (2000) (holding that states are free to follow procedures other than those specified in *Anders* as long as they adequately safeguard an accused's federal constitutional right to appellate counsel).

132. E.g., *Gardner v. California*, 393 U.S. 367, 368-71 (1969); *Roberts v. LaVallee*, 389 U.S. 40, 41-43 (1967) (per curiam); *Long v. District Court of Iowa*, 385 U.S. 192, 193-94 (1966) (per curiam).

Court also clarified that an indigent convicted of violating a mere city ordinance punishable only by a modest fine was entitled to a free record for appeal.¹³³ The theme of these decisions was that the state was obliged to reduce the inequitable position of indigents, though in what circumstances remained unclear.¹³⁴

B. Uncertain Limits and Justice Harlan's Concerns

Despite the Court's repeated endorsements, the equality principle of *Griffin-Douglas-Harper* proved troublesome as a constitutional norm. As a prescription, equality is meaningless by itself. Equality does not reveal who is equal or unequal or what action would render unequals alike. The *Griffin-Douglas-Harper* line also did little to give the equality command a meaning that would confine it. The decisions did not suggest that the only focus was on financial differences.¹³⁵ They also did not indicate that prescriptive equality was confined to the procedural treatment of criminal defendants or even of litigants in general.¹³⁶ The Court's opinions could not plausibly have been understood to mean that the government should strive to ensure equal life outcomes for all citizens. However, the meaning of the opinions was uncertain. Indeed, indeterminacy is a central problem with prescriptive equality. The mandate has no inherent limits.¹³⁷

Even if applied only to the judicial treatment of criminal defendants, the assertion that the government must provide "equal

133. *Mayer v. City of Chicago*, 404 U.S. 189, 195-99 (1971).

134. The Court gave a particularly strong reaffirmation of the equality principle in the *Mayer* opinion, where it rejected the state's argument that the *Griffin* transcript rule should not apply where only non-jailable, ordinance violations were involved. After repeatedly endorsing the equality language from *Griffin* and other opinions, the Court stated:

[The state's] argument misconceives the principle of *Griffin*. . . . *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way.

Mayer, 404 U.S. at 196-97.

135. In *Griffin*, for example, Justice Black asserted that inequitable treatment by government based on poverty was *as impermissible as* inequitable treatment based on other factors: "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

136. The application of the equality principle in *Harper* to the poll tax indicated that the *Griffin* rationale was not limited to the procedural treatment of criminal defendants. The Court's subsequent decision in *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971), in which the Court cited *Griffin* as the grounds for striking down a filing fee imposed on certain civil litigants, confirmed that the *Griffin* rule was not confined to the criminal context.

137. See Cox, *supra* note 114, at 91 ("Once loosed, the idea of Equality is not easily cabined.").

justice for poor and rich, weak and powerful alike"¹³⁸ could not be taken literally. First, the equality idea has no clear meaning even in this limited context. Without rules or standards by which to measure likenesses and differences among criminal litigants, we could not know when a practice furthered or thwarted equality. Even if we could agree on a standard to define a correct outcome in a criminal case,¹³⁹ we could not possibly equalize the many factors that affect each litigant's likelihood of receiving it. The effort would require, for example, attempting to gauge and balance the relative quality of every defense lawyer, numerous outcome-influencing factors about defendants, such as physical appearance, demeanor, intelligence, and criminal experience, and a plethora of outcome-affecting factors related to prosecutor(s), judge(s), witnesses, and jurors. The Court could not carry out this sort of undertaking. Unfortunately, what more narrow protections it intended to afford were not clarified by its endorsement of prescriptive equality.¹⁴⁰

Further, equality, conceived in any general terms, typically conflicts with particular liberties that we value. Consider, for example, the narrow question of the procedural treatment to be afforded criminal defendants in connection with the appointment of counsel for their first appeal. Assume that we assert an equality rule to cover that narrow situation: "All defendants should have

138. *Griffin*, 351 U.S. at 16.

139. The correct outcome does not necessarily involve the conviction of the guilty. For centuries, it has been part of our legal tradition that a substantial margin of error should be imposed in favor of the criminal defendant. Long before the founding, Blackstone noted the embodiment of this principle in the common law: "[T]he law holds that it is better that ten guilty escape, than that one innocent suffer." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PUBLIC WRONGS 358 (1962). This view still prevails. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) (concluding that, in a criminal proceeding, the burden of persuading the fact-finder beyond a reasonable doubt should be placed on the prosecution to help assure against an erroneous conviction). See generally Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1715 (1987) ("The procedures incorporated by the due process clause are not animated by a scientific preference for minimizing erroneous judgments, but by a political preference for minimizing erroneous convictions."); Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957) (asserting that one of the aims of due process is to ensure "the reliability of the guilt-determining process— reducing to a minimum the possibility that any innocent individual will be punished"); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1073 (1968) ("[O]ne of the fundamental feelings of our society is that it is far more serious to convict an innocent man than to let a guilty man go free."); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 4 (1990) ("In the Anglo-American tradition, the social cost of factual error against the [criminal] defendant . . . is deemed greater than the social cost of factual error against the government.").

140. See Wilkinson, *supra* note 128, at 1001 ("By the end of Chief Justice Warren's tenure, *Griffin-Douglas-Harper* had opened a plethora of unsolved constitutional questions in the area of economic inequality.").

legal representation of equal quality on their criminal appeal." Assume further that we could gauge the effectiveness of every attorney handling criminal appeals and that an attorney's effectiveness was the same for every kind of criminal appeal. In addition, suppose that the effectiveness ratings, if charted, would follow a bell curve. With these unrealistic, but heuristically helpful conditions in mind, consider the difficulty of implementing the equality mandate. To follow it would require rather onerous restrictions on the freedoms of many defendants and many attorneys. To promote less inequality, we might, for example, choose to exclude the attorneys on both ends of the array from taking criminal appeals. This action would eliminate the wide disparity between the best qualified and the least qualified attorneys, although it would not produce anything like true equality unless an adequate supply of attorneys had ratings that clustered around the average point on the array. Alternatively, or in addition, we might establish a lottery system so that all criminal appellants would have an equal chance of receiving an attorney with a rating at any position on the array. This would promote equal opportunities for good representation if not equal representation. Under any approach, however, major restrictions on the freedom of both clients and attorneys would be required.¹⁴¹ This mental exercise underscores that, assuming we knew how to measure equality, efforts to pursue it would run up against liberties not easily sacrificed.¹⁴²

For these sorts of reasons, Justice Harlan decried the Court's reliance on the equality principle in *Griffin*, *Douglas*, and *Harper*.¹⁴³ He emphasized the problems with striking down the financial exac-

141. Problems would also arise over how to decide the compensation level for attorneys and how to fund any compensation scheme. To retain high quality attorneys for the indigent accused, states might have to provide much more funding than they currently provide. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843-44 (1994) (attributing the poor quality of representation of defendants in capital trials and appeals in part to the "wholly inadequate funding for the defense of indigents").

142. The dual problems of definition and conflicts with liberty were noted long ago by Professor Kurland:

There are two primary problems that arise under the equal protection clause. The first is the ambiguity inherent in the relevant term, whether it be "equality" or "equal protection of the laws." The second major difficulty results from the possible conflict of the notion of equality with that of liberty or some other fundamental constitutional value.

Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 145 (1964).

143. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (Harlan, J., dissenting); *Douglas v. California*, 372 U.S. 353, 360 (1963) (Harlan, J., dissenting); *Griffin*, 351 U.S. at 29 (Harlan, J., dissenting).

tions that a state imposes equally on all citizens. What were the limits of a mandate that required states to take affirmative steps to alleviate pre-existing, financial disparities?¹⁴⁴ Because of his concerns about confining the equality notion, he urged that the Court analyze governmental actions that did not involve actual classification of persons, as in *Griffin*, *Douglas*, and *Harper*, under the Due Process Clause rather than under the Equal Protection Clause.¹⁴⁵ In *Griffin* and *Douglas*, the Court had seemed to rely on both clauses as the basis for its decision;¹⁴⁶ in *Harper*, the Court clearly relied on the Equal Protection Clause,¹⁴⁷ but over Justice Harlan's objection.¹⁴⁸

Justice Harlan's critique hit the mark in one respect, but missed the most important point. He correctly noted that the potential for confusing references to the broad equality principle is greatest when the Equal Protection Clause is applied, because the language of that clause facially invokes the equality principle. Yet, the potential for confusion in applying the Equal Protection Clause does not reveal any rule regarding when the Due Process, rather than the Equal Protection Clause, should control. The larger point is that courts ultimately must perform work under the Equal Protection Clause with the same approach that they employ under the Due Process Clause.¹⁴⁹ They must decide what substantive rule or standard, outside of the notion of equality, defines constitutional treatment of citizens by government in the relevant context.¹⁵⁰

C. *The Court's Retreat*

Beginning in the early 1970s, the Court began to avoid endorsements of prescriptive equality under the open-ended clauses. By 1970, the Court had already revealed its unwillingness to further extend the equality principle to basic needs, like food and

144. *E.g.*, *Douglas*, 372 U.S. at 361-63 (Harlan, J., dissenting).

145. *E.g.*, *Griffin*, 351 U.S. at 35-36 (Harlan, J., dissenting).

146. Harris, *supra* note 80, at 474-75.

147. *Harper*, 383 U.S. at 666.

148. *Id.* at 681 (Harlan, J., dissenting).

149. The Due Process Clause that appears in the Fifth Amendment and that is repeated in the Fourteenth Amendment actually may be seen as more limited than the Equal Protection Clause, but the Supreme Court has not given it a limited meaning. The word "process" may be thought to guarantee only fundamentally fair *procedure* and authorize no *substantive* oversight of legislation. Professor Ely, for example, has endorsed this purely procedural interpretation of due process, while acknowledging that this view conflicts with modern judicial and scholarly consensus. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14-21 (1980).

150. The Court recognized this same point later in *Bearden v. Georgia*, 461 U.S. 660, 672-74 (1983). For a discussion of *Bearden*, see *infra* note 165.

housing.¹⁵¹ In the criminal-procedure sphere, the Court also signaled a sharp turn with decisions like *Britt v. North Carolina* and *Ross v. Moffitt*.¹⁵² In *Britt*, the Court rejected an indigent's contention that he was entitled in a second trial to a free transcript of his first trial that had ended with a deadlocked jury.¹⁵³ In *Ross*, the Court rejected an indigent's claim to the assistance of counsel at state expense on a petition for discretionary review by the North Carolina Supreme Court and on a certiorari petition to the United States Supreme Court.¹⁵⁴

In each case, the Court attempted to distinguish *Griffin* or *Douglas*. In *Britt*, the Court emphasized that the trials took place in a small town with the same lawyers, judge, and court reporter, and that the reporter would have been willing, on request, to read back his notes to the defense lawyer before the second trial.¹⁵⁵ In *Ross*, the Court emphasized that the defendant had previously been given free counsel on his appeal of right to the state intermediate court, so that he already had been provided the benefit of a lawyer's brief on the trial errors.¹⁵⁶ However, these distinctions were unpersuasive if the rationale for *Griffin* and *Douglas* is equality of procedural advantage between the poor and the wealthy. A transcript of a previous trial was much more useful than access to a court reporter's verbal report of his notes,¹⁵⁷ and a lawyer for discretionary stages of appellate review was more valuable than no lawyer, regardless of whether lawyers had been involved earlier.¹⁵⁸ Indeed, the Court in *Britt* and *Ross* did not rely on the equality principle,

151. The Court had earlier hinted that it would extend the equality holding to the provision for basic needs. See *supra* note 127 (discussing the *Shapiro* decision). However, the Court manifested a rather clear intention to avoid such an extension in 1970. See *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970) (upholding, on a rational basis analysis, state decision to impose "maximum grant" limitation on welfare benefits to poor families, regardless of the number of children); Goodpaster, *supra* note 128, at 224 (concluding that, in *Dandridge*, "the Court, seemingly an oracle without memory, neglected its famous sympathy for the indigent, so exquisitely carved in rights to counsel in criminal cases and the provision of transcripts of criminal trials"); Wilkinson, *supra* note 128, at 1002 (asserting that *Dandridge* appeared to be a "crucial blow to affirmative duty doctrine" by holding that "welfare was not a fundamental right").

152. *Ross v. Moffitt*, 417 U.S. 600 (1974); *Britt v. North Carolina*, 404 U.S. 226 (1971).

153. *Britt*, 404 U.S. at 231 (Douglas, J., dissenting).

154. *Ross*, 417 U.S. at 614.

155. *Britt*, 404 U.S. at 230-31 (Douglas, J., dissenting).

156. *Ross*, 417 U.S. at 615-16.

157. See Harris, *supra* note 80, at 480 n.69 (raising doubts about the efficacy of the arrangement as compared with the provision of a transcript).

158. See *Ross*, 417 U.S. at 621 (Douglas, J., dissenting) (asserting that "the indigent defendant proceeding without counsel is at a substantial disadvantage relative to wealthy defendants represented by counsel when he is forced to fend for himself in seeking discretionary review from the State Supreme Court or from this Court").

and redefined the rationale of *Griffin* and *Douglas* as having been something other than equality.¹⁵⁹ In *Britt*, the mandate of the earlier cases became merely that states "provide indigent prisoners with the basic tools of an adequate defense or appeal."¹⁶⁰ In *Ross*, their mandate became that "indigents have an opportunity to present their claims fairly within the adversary system."¹⁶¹

During the subsequent decade, the Court continued to limit the import of *Griffin-Douglas-Harper*. In *United States v. MacCollom*, the Court rejected an indigent's claim to a free trial transcript for use in attacking his federal conviction in habeas proceedings, although the petitioner had not previously filed a regular appeal and, therefore, had not secured a free transcript.¹⁶² The Court conceded that its decision "place[d] an indigent in a somewhat less advantageous position than a person of means."¹⁶³ However, citing *Ross*, the Court reiterated that "[i]n the context of a criminal proceeding [, the open-ended clauses] require only 'an adequate opportunity to present [one's] claims fairly.'"¹⁶⁴ The accused indigent was guaranteed only the minimum of fair treatment rather than an equivalence of litigative advantage with wealthy defendants.

In the 1980s, the Justices reconfirmed this turn from reliance on the equality principle under the open-ended clauses. When overturning a state practice, they were careful to ground the decision on a substantive rule or standard rather than on the equality notion. Perhaps most telling was the decision in *Ake v. Oklahoma*.¹⁶⁵ There, the Court addressed a state's duty to provide an

159. See KAMISAR ET AL., *supra* note 101, at 88 ("[What *Ross*] really seems to be asking, and deciding, is whether an indigent in respondent's circumstances has a *fair chance*, a *fighting chance* (or the requisite *minimum chance*), to get the attention of the state supreme court.") (quoting YALE KAMISAR, *Poverty, Equality, and Criminal Procedure*, in NATIONAL COLLEGE OF DISTRICT ATTORNEYS, CONSTITUTIONAL LAW DESKBOOK 1-101 to 1-108 (1977)). *But see* Israel, *supra* note 79, at 1334-35 ("[T]he *Ross* ruling hardly placed a major limitation on the extension of the *Griffin-Douglas* doctrine.").

160. *Britt*, 404 U.S. at 227.

161. *Ross*, 417 U.S. at 612.

162. *United States v. MacCollom*, 426 U.S. 317, 325-26 (1976).

163. *Id.* at 324.

164. *Id.* (quoting *Ross*, 417 U.S. at 616).

165. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

The Court's opinion in *Bearden v. Georgia*, 461 U.S. 660 (1983), provides another example. A state trial judge had revoked Bearden's probation and imprisoned him because he had not, after losing his job, been able to pay off the fine that the judge previously had imposed along with the probation. *Id.* at 663. The Supreme Court found that the revocation of probation in favor of imprisonment, without a finding that Bearden had failed to make bona fide efforts to pay or that adequate alternative forms of punishment did not exist, violated equal protection. *Id.* at 674. However, the Court did not rely on the equality notion. Justice O'Connor, for the majority, asserted that "[d]ue process and equal protection principles converge in the Court's analysis in [the

indigent accused with assistance from a psychiatrist in evaluating, preparing, and presenting a mental-disorder defense. The Justices concluded that Oklahoma had erred in rejecting Ake's claim for such assistance.¹⁶⁶ The rationale was not that Ake was entitled to the same kind of assistance as a defendant with substantial means but that he was entitled to "the 'basic tools of an adequate defense or appeal.'" ¹⁶⁷ On this view, the Court substantially qualified the indigent's right to a psychiatrist's help. The defendant first had to show that his mental condition would likely be a significant factor in his defense.¹⁶⁸ Upon such a showing, the defendant also was not entitled "to choose a psychiatrist of his personal liking or to receive funds to hire his own," but only to have "access to a competent psychiatrist" to assist the defense.¹⁶⁹ The Court reiterated that the defendant was guaranteed not an opportunity to present a strong defense, but only that he be "fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."¹⁷⁰ While *Griffin* was cited,¹⁷¹ the equality notion of *Griffin-Douglas-Harper* was never mentioned.¹⁷²

This history reveals a rise and fall in the importance of the formal equality principle in the Court's post-*Brown* work under the open-ended clauses. Between *Brown* and the early 1970s, the Court often relied on the rationale of prescriptive equality, with little effort to define limits, when it struck down state criminal procedures. At least by 1974, with the opinion in *Ross v. Moffitt*, and certainly by the mid-1980s, with the decision in *Ake v. Oklahoma*, the Court's majority was no longer impressed with prescriptive equality as an analytic or explanatory tool. The Court's previous decisions under the open-ended clauses that had been rationalized on equality grounds, including *Griffin*, *Douglas*, and *Harper*, were allowed to stand because the decisions themselves imposed only limited de-

Griffin line of cases." *Id.* at 665. She then asserted that, under either equal protection or due process, the question was "when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine." *Id.* at 666. The Court concluded that it was fundamentally unfair to revoke probation except upon the findings noted above. *Id.* at 673-74. This amounted to reliance on a rule or standard external to the precept that equals should be treated equally.

166. *Ake*, 470 U.S. at 86-87.

167. *Id.* at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

168. *Id.* at 82-83.

169. *Id.* at 83.

170. *Id.* at 82.

171. *Id.* at 76.

172. For an argument that the Court should treat defense requests for expert assistance under a "truth seeking" standard rather than under a "basic tools" approach, see *Harris*, *supra* note 80, at 491-525.

mands on states. The Court could recast them as resting on narrow substantive grounds and foreclose their value as precedents for interpreting the Due Process and Equal Protection Clauses to mandate broad and burdensome obligations on government.

III. THE ENDURING INFLUENCE OF EQUALITY UNDER VARIOUS CRIMINAL CLAUSES

While abandoned as a normative principle under the Due Process and Equal Protection Clauses, equality retains a central place in the explanation of much of modern criminal procedure. Its impact has come through doctrines articulated by the Supreme Court under the criminal clauses. Equality rhetoric has not played prominently in the construction of all of the criminal clauses. However, it has been important in the Court's work under several of them. The following discussion provides three examples from each of the four criminal amendments.¹⁷³ For the sake of following historical progression, I discuss the doctrines in the order in which the equality notion began to manifest itself clearly in their construction by the Justices.

173. The Court's construction of the Sixth Amendment right to an impartial jury provides another example. In this area, the Court has held that procedures that result in the exclusion or failure to include cognizable segments of the community in the selection process may render the resulting jury biased as a whole, although all of those selected as jurors are individually impartial. *See, e.g., Adams v. Texas*, 448 U.S. 38, 41-49 (1980) (finding violative of the impartial jury clause the Texas practice in capital cases of excluding venire members who could not take oath promising that the mandatory penalty of death or life imprisonment would not "affect [their] deliberations on any issue of fact"); *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979) (holding system under which women could opt out of service by written request violative of the impartial jury clause). Nonetheless, a conservative majority on the Court has sometimes declined to find certain groups to be cognizable by viewing the impartial-jury requirement as designed to ensure equitable treatment of prospective jurors rather than to ensure a fair jury for the criminal defendant. *See, e.g., Lockhart v. McCree*, 476 U.S. 162, 175-76 (1986) (allowing exclusion on the guilt-or-innocence question in a capital case of jurors with significant opposition to the death penalty on grounds, in part, that this group has never been subject to the same need for protection to allow their participation on juries as blacks, women, and Mexican Americans). The Court has given meaning to the notion of equality in this area by imposing substantive standards derived from equal protection doctrine. However, the Sixth Amendment right to an impartial jury is not supposed to ensure equality of treatment for prospective jurors. *See generally* Scott W. Howe, *Juror Neutrality Or An Impartiality Array? A Structural Theory Of The Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1207 (1995) (rejecting the view that the impartiality mandate "exists for the protection of the excluded venire persons rather than for the protection of affected litigants"); *infra* note 341 (further discussing the meaning and function of the impartial jury mandate).

A. The Fifth and Sixth Amendments and Interrogation

The Warren Court's enthusiasm for prescriptive equality greatly influenced the holdings that form the basis of modern interrogation and confessions doctrine.¹⁷⁴ The Court constructed this doctrine under the Sixth Amendment right to counsel and the Fifth Amendment privilege against compelled self-incrimination. Under these clauses, the Justices concluded that the poor and ignorant should be made the equal of the rich and well-informed in their dealings with police interrogators. The Justices also concluded that the uncharged suspect who had not yet been to court should be treated as equal to the accused against whom adversary judicial proceedings had commenced. These notions of equality were crucial to the evolution of modern doctrine regulating interrogation and confessions practice.

Before the 1960s, the Court's efforts to impose constitutional regulation on police interrogation focused on the Due Process Clauses. The Court held that confessions were admissible under due process if given "voluntarily."¹⁷⁵ Between 1936, when the Court first held a confession inadmissible in state court,¹⁷⁶ and the early 1960s, the Court issued some 30 different opinions applying this voluntariness standard, attempting in part to provide guidance to

174. On the role of equality arguments in doctrine and commentary concerning police interrogation and confessions, see GRANO, *supra* note 12, at 32-38 (1996).

175. Initially, the Court equated voluntariness with trustworthiness, the English standard for admitting confessions. See *Hopt v. Utah*, 110 U.S. 574, 584 (1884). While the early cases seemed to focus on whether a promise or a threat had been made, the Court subsequently clarified that various kinds of police inducements could amount to improper coercion, thus making all of the circumstances of the detention and interrogation relevant. See *Ziang Sung Wan v. United States*, 266 U.S. 1, 14-15 (1924) ("[A] confession obtained by compulsion must be excluded whatever may have been the character of the compulsion.").

In the early case of *Bram v. United States*, 168 U.S. 532, 542-44 (1897), the Court hinted that voluntariness was not to be equated precisely with trustworthiness, grounding the voluntariness test on the Fifth Amendment privilege rather than on due process (a view that would go largely ignored by the Court for the next sixty years). In *Bram*, the Court found a statement made during a short custodial interrogation to be involuntary and, thus, "compelled" within the meaning of the Fifth Amendment privilege. *Id.* at 565. The Court also found that use of the statement at *Bram's* criminal trial amounted to making *Bram* "a witness against himself." *Id.* at 542. The Court's application of the Fifth Amendment privilege to the investigatory context and its claim of only effectuating the common law notion of voluntariness were denounced by Wigmore and others. See 3 WIGMORE, EVIDENCE § 823 (Chadbourn rev. ed. 1970); Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 453 (1938). Not until *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), did a majority of the Court again state that the Fifth Amendment privilege provided the basis for excluding a confession. Further, not until the *Miranda v. Arizona*, 384 U.S. 436 (1966), decision in 1966 did the Court hold that the Fifth Amendment privilege provided a more demanding regulatory rule than that imposed by the due process clauses. See *infra* notes 198-201 and accompanying text.

176. *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

lower courts and to the police.¹⁷⁷ Despite these enforcement efforts, the voluntariness standard was always quite vague, so that lower courts could manipulate it to admit statements despite evidence of questionable tactics by the police.¹⁷⁸ Also, the requirement that a court consider a confession's voluntariness in light of all of the circumstances meant that a Supreme Court opinion applying the standard carried only minor prescriptive force for future cases.¹⁷⁹ By the late 1950s, several of the Justices were looking for a new constitutional basis to curb what they saw as oppressive interrogation practices.¹⁸⁰

A majority initially coalesced behind the right-to-counsel provision in the Sixth Amendment. In *Massiah v. United States*, a six-Justice majority applied the counsel clause to foreclose the use of a statement elicited from Massiah by a co-defendant at the behest of the police.¹⁸¹ On pre-trial release after indictment, Massiah was unaware that his co-defendant was cooperating with the police and that the conversation was being monitored electronically. On those facts, it was a stretch to conclude that Massiah's right to counsel was violated when the statements were elicited.¹⁸² The

177. For a summary of some of these decisions, see KAMISAR ET AL., *supra* note 101, at 452-55. The decisions implied that both the vulnerabilities of the particular defendant and the level of offensiveness in the police tactics employed were relevant. Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 938-39 (1995) (noting that the Court was employing both a "police methods' test and a 'trustworthiness test'").

178. See generally Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1832-35 (1987) (discussing the many problems with the due process voluntariness standard as a means of limiting coercive police interrogation); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869-70 (1981) (noting that the due process voluntariness test, because of "its subtle mixture of factual and legal elements," enabled lower courts to admit statements elicited under questionable circumstances).

179. See Ogletree, *supra* note 178, at 1834 ("Because each case turned on its facts, the Court was unable to develop broad guidelines for acceptable, noncoercive conduct.").

180. The search by several Justices for an alternative doctrinal basis was revealed by their dissenting opinions in the late 1950s in which they found confessions to have been secured in violation of the Sixth Amendment right to counsel. See generally KAMISAR ET AL., *supra* note 101, at 459-60.

The Court also had used its supervisory power over federal courts to exclude from federal prosecutions all suspect statements elicited during delayed pre-presentment detention. See *Mallory v. United States*, 354 U.S. 449, 454-56 (1957); *McNabb v. United States*, 318 U.S. 332, 340-41 (1943). This *McNabb-Mallory* rule, as it was known, was not helpful in regulating interrogation practices used in state proceedings, because it was not constitutionally grounded.

181. *Massiah v. United States*, 377 U.S. 201, 205-06 (1964).

182. The Sixth Amendment guarantee of counsel in criminal cases was "a right traditionally associated with hearings before judicial officers." Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1002 (1964). However, the Court could point to *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam), to indicate that an indicted defendant was entitled to counsel in some pre-trial settings. The defendant in *White* had entered

Sixth Amendment guarantees the right to counsel in all criminal "prosecutions," and since Massiah had been indicted, the Justices plausibly could say that his "prosecution" had commenced. However, the clause had never before been held to apply in non-judicial, pre-trial settings. Also, as Justice White's dissent emphasized, it was not easy to see how Massiah's right to counsel, assuming it existed, was infringed.¹⁸³ Massiah was not deterred from seeking the assistance of counsel, and his private communications with counsel were not prevented or invaded.¹⁸⁴ Nonetheless, the majority concluded that Massiah's right to counsel not only had attached but that the state violated the right by "deliberately elicit[ing]" statements from Massiah without his counsel present.¹⁸⁵

In *Escobedo v. Illinois*, the Court extended the *Massiah* holding¹⁸⁶ to the pre-prosecution context, by using equality reasoning that ignored the language of the Sixth Amendment.¹⁸⁷ Upon his arrest, Escobedo was interrogated by police and a state attorney, and made incriminating statements.¹⁸⁸ These events occurred after he had asked for and been denied an opportunity to speak with his retained lawyer, and after his lawyer had been told he would have to wait to see Escobedo.¹⁸⁹ This scenario was difficult to view as covered by the Sixth Amendment, however, because Escobedo had not yet been formally charged and had not yet been presented in court on any complaint. For there to be a "prosecution," as required by the language of the right-to-counsel clause, the adversary judicial process would have to have begun.¹⁹⁰ Yet, the Court in *Escobedo*

a guilty plea at his preliminary hearing but had not been represented by counsel. *Id.* at 59. Later, after counsel was appointed, the defendant changed his plea to not guilty. *Id.* at 60. The defendant was convicted at trial following the state's introduction of his original guilty plea. *Id.* The Supreme Court later reversed on grounds that White had been denied his right to counsel at the preliminary hearing. *Id.*

183. *Massiah*, 377 U.S. at 209 (White, J., dissenting).

184. *Id.* (White, J., dissenting). Justice White questioned how *Massiah* presented an unconstitutional interference with Massiah's right to counsel, stating that "[i]t is only a sterile syllogism . . . to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." *Id.* (White, J., dissenting).

185. *Id.* at 205-06.

186. *Id.* at 206 ("We hold that the petitioner was denied the basic protections of [the right to counsel] when there was used against him at his trial evidence of his own incriminating words, elicited from him *after he had been indicted* and in the absence of his counsel.") (emphasis added).

187. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

188. *Id.* at 481-83.

189. *Id.* at 480-81.

190. See JOSHUA DRESSLER, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 597 (1999) ("The contrary argument is textually difficult, . . . because the Amendment begins, 'In

extended the right-to-counsel holding of *Massiah* to the pre-prosecution period, on grounds that *Escobedo* and *Massiah* were equally positioned regarding their need for a lawyer.¹⁹¹ The holding seemed to be qualified by the particular facts, such as that *Escobedo* had already retained counsel and asked to see him and that the lawyer had come to the police station and asked to see *Escobedo*.¹⁹² Still, nothing had occurred which easily supported the view that a "prosecution," as opposed to a police investigation, had begun. The failure of the majority to concern itself with the clause's triggering condition was not lost on Justice Stewart, the author of the *Massiah* opinion. In a vigorous dissent, he explained that the absence of adversary judicial proceedings was precisely why *Escobedo*'s circumstances were not like *Massiah*'s.¹⁹³ However, the notion that the defendants in the two cases faced equal situations propelled the *Escobedo* majority to find a violation, despite the Sixth Amendment language distinguishing between their cases.¹⁹⁴

The *Escobedo* decision stemmed from the Court's desire to promote equality not only between indicted and unindicted defendants, but between the affluent and the indigent. Extension of the right to counsel to investigatory stages manifested a concern not so much with protecting innocent indigents from conviction as with ensuring that guilty indigents received the same chances to escape conviction as guilty non-indigents.¹⁹⁵ The *Escobedo* Court did not suggest that the incriminating statements that were being admitted were unreliable. Concern grew instead from the recognition that police deception and interrogation of uncounseled suspects was

all criminal prosecutions' "); cf. Israel, *supra* note 79, at 1368 n.224 ("The Sixth Amendment, it can be argued, does not provide for counsel at every stage in which counsel's assistance is helpful. Rather, by its history, language, and function, the amendment sought to draw a starting point after which counsel's assistance is generally required as an element of our adversary system.").

191. *Escobedo*, 378 U.S. at 486 (asserting that, as in *Massiah*, the statements were made at a stage when counsel's assistance was "most critical" to *Escobedo* and that "[i]t would exalt form over substance to make the right to counsel . . . depend on whether at the time of the interrogation, the authorities had secured a formal indictment").

192. *Id.* at 490-91.

193. *Id.* at 493-94 (Stewart, J., dissenting) (asserting that the Sixth Amendment right to counsel attaches only upon the commencement of adversary judicial proceedings, which had not occurred when *Escobedo* made his statement, unlike in *Massiah*).

194. The majority focused on the fact that there was "no meaningful distinction" drawn between interrogation of the accused before and after informal indictment. *Id.* at 486; see also Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 491 (1964) (questioning whether the emphasis in *Massiah* on the commencement of adversary judicial proceedings was based on an overly "formalistic reading" of the Sixth Amendment).

195. Klarman, *supra* note 2, at 267 n.255.

more likely to extract incriminating comments from indigent and uneducated "street crime" defendants than from relatively affluent and informed "white-collar" defendants.¹⁹⁶ Yet, apart from its lack of any tether in the Sixth Amendment language, this effort to pursue equality had no practical end: "Even a ban on uncounseled interrogation [could] not solve the problem, for class and education disparities must be to some extent inherent in law enforcement, if only because more sophisticated criminals have a better chance of avoiding detection than less sophisticated criminals."¹⁹⁷

The error that underlies *Escobedo*, which the Court conceded in later decades,¹⁹⁸ was soon compounded when the Justices transmogrified *Escobedo* into a Fifth Amendment privilege case and then extended its meaning again through the equality notion. The result was *Miranda v. Arizona*.¹⁹⁹ The Court's central holding was that the Fifth Amendment privilege requires the police to provide certain warnings to an arrestee before interrogating him.²⁰⁰ However, the

196. See William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 838 (1989).

197. *Id.*

198. The Court has subsequently made clear that the Sixth Amendment clause cannot apply before the commencement of adversary judicial proceedings, as Justice Stewart had maintained in his *Escobedo* dissent. The Court seemed to implicitly repudiate the *Escobedo* view in *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972), holding that the Sixth Amendment did not require defense counsel at a pre-indictment line-up involving the accused. Then, in *Moran v. Burbine*, 475 U.S. 412, 430-32 (1986), the Court held explicitly that the interrogation of a suspect before the commencement of adversary judicial proceedings does not implicate the Sixth Amendment.

199. *Miranda v. Arizona*, 384 U.S. 436 (1966).

200. Since the 1970s, some commentators have asserted that *Miranda* may have announced only "constitutional common law." E.g., Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 & 20-23 (1975). *Miranda*'s promulgators, however, surely thought that it was constitutional law that was not subject to overruling by Congress. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 125 (1998) (asserting that "the principal authors of *Miranda* [Chief Justice Warren and Justice Brennan] considered its procedures the minimum required by the Fifth Amendment").

Although the Court itself has provided mixed messages over the years about whether *Miranda* is capable of being overruled by Congress, it recently clarified that Congress cannot overrule it. *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000). The *Miranda* opinion provided that states could implement procedures other than those set out by the Court as long as they were at least equally protective of a suspect's Fifth Amendment privilege. *Miranda*, 384 U.S. at 467, 490. Beginning in the early 1970s, conservative majorities of the Court pointed to this language to support the contention that the *Miranda* safeguards set forth only prophylactic measures designed to protect the Fifth Amendment privilege but not actually required by that clause. See generally Weisselberg, *supra*, at 126-29 and authorities cited therein. The Court repeatedly reaffirmed *Miranda*'s validity against the states, however, suggesting that the decision would be enforced as constitutional law. See, e.g., *Winthrow v. Williams*, 507 U.S. 680, 690-92 (1993) (holding that the *Miranda* safeguards, even if prophylactic, are enforceable against the states on federal habeas corpus); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (holding that where a suspect has asked for counsel, the police may not reinitiate communications with the suspect to secure a *Miranda* waiver without counsel present regardless of whether the accused

Miranda opinion actually represents a series of related holdings. Among them was the recognition of a new right to counsel emanating from the Fifth Amendment privilege. Through several rulings about warnings and waivers, the Court extended this right to counsel—on an equality rationale—to every person subjected to custodial interrogation by the police, regardless of whether a “prosecution” had commenced, the person could retain counsel, or the person had requested counsel.²⁰¹ As might have been expected in light of these dramatic and legislative-like changes, *Miranda* became the most controversial of all of the Warren Court’s criminal-procedure decisions.²⁰²

The forces that moved five Justices to endorse the *Miranda* opinion cannot be understood without an appreciation of the influence of the equality notion on the Court.²⁰³ The period between *Escobedo* and *Miranda* was the high point of the Warren Court’s concern with prescriptive equality in criminal procedure. *Douglas v. California*, which used the equality principle to find a right to counsel in criminal appeals, had been decided in 1963.²⁰⁴ *Harper v. Virginia Board of Elections*, extending the *Griffin-Douglas* equality principle beyond criminal procedure to invalidate a poll tax, was decided in early 1966, only a few weeks before *Miranda*.²⁰⁵ It was apparent that the Court held a “specific apparent receptivity . . . to egalitarian argumentation” during that period.²⁰⁶

The idea of reinterpreting *Escobedo* as a Fifth Amendment privilege case and then employing the *Griffin-Douglas* equality rationale to extend it to mere arrestees, even those who were uncoun-

has consulted with his attorney). Nevertheless, when a 1968 statute purporting to eviscerate *Miranda* in the federal courts came before the Court, a seven-Justice majority expressly held that it could not be overruled by legislation. *Dickerson*, 120 S. Ct. at 2336.

201. *Miranda*, 384 U.S. at 467-77.

202. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 158 (Levinson rev. 2d ed. 1994); see also A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 262 (1968) (“The case which seemed to galvanize opposition into a potent political force was the *Miranda* decision.”).

203. See BICKEL, *supra* note 2, at 13 (asserting that the “goal” of the “Justices of the Warren Court” was “the Egalitarian Society”); MCCLOSKEY, *supra* note 202, at 161 (noting that “[w]hether because of the pressure of the race-relations cases, including *Brown v. Board of Education*, or because of a more general cultural interest in egalitarianism, the Court in the 1960’s would engage in the most systematic exploration in American history of the meaning of equality”).

204. *Douglas v. California*, 372 U.S. 353 (1963).

205. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966). As the Court concluded in *Harper*, “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.” *Id.* at 666.

206. MCCLOSKEY, *supra* note 202, at 179.

seled, indigent, and uninformed, was revealed in a "classic" article published in 1965, after the decision in *Escobedo*.²⁰⁷ In *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, Professor Yale Kamisar provided what was, at the most general level, an argument for applying the Fifth Amendment privilege beyond the formal judicial setting to the police interrogation context.²⁰⁸ His theme was that an incongruity existed in providing grand protections against self-incrimination at the trial (the mansion) while largely nullifying those protections by allowing the police to use psychological coercion to extract incriminating statements from the accused at the police station (the gatehouse).²⁰⁹ Kamisar went much further, however, in suggesting how the Court might next move to regulate police interrogation after *Escobedo*. He explained that the right to counsel, recognized in *Escobedo* as emanating from the Sixth Amendment, could be seen as emanating from the Fifth Amendment privilege on the view that counsel's advice would assist in ensuring that the accused understood the right to silence and the benefits of exercising it.²¹⁰ He then explained how the equality principle of *Griffin* and *Douglas* supported two further points about this

207. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 437 n.5 (1987) (describing Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* (A. E. Dick Howard ed., 1965)).

208. Kamisar, *supra* note 207, at 1. For an overview of this central argument, see *id.* at 25-38.

209. Kamisar's powerful prose presented the analogy vividly:

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors. In this "gatehouse" of American criminal procedure—through which most defendants journey and beyond which many never get—the enemy of the state is a depersonalized "subject" to be "sized up" and subjected to "interrogation tactics and techniques most appropriate for the occasion"; he is "game" to be stalked and cornered. Here ideals are checked at the door, "realities" faced, and the prestige of law enforcement vindicated. Once he leaves the "gatehouse" and enters the "mansion"—if he ever gets there—the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated.

Id. at 19-20 (footnotes omitted).

210. See *id.* at 9, 35-36; see also *id.* at 62-64 (discussing an alternative ground for the *Escobedo* decision in the Fifth Amendment privilege). Implying that *Escobedo* was primarily based on the Fifth Amendment, Professor Kamisar states:

Danny Escobedo only claimed a right to consult with counsel, not a right to his continued presence during police interrogation. But the Supreme Court opinion assigned more weight to the privilege against self-incrimination—and may have given it a more expansive reading, to boot—than did the *Escobedo* briefs.

Id. at 63.

right to counsel.²¹¹ First, the equality principle of those prior cases demanded that all suspects have the right, even if they could not afford counsel.²¹² Second, the *Griffin-Douglas* principle demanded that all suspects have the same knowledge of their rights to counsel and to remain silent, thus requiring that suspects be advised of those protections so that they could make an informed decision about whether to exercise them.²¹³

This Fifth Amendment approach departed from conventional wisdom about the Court's direction on interrogation doctrine. *Miranda* and the three companion cases had generally been thought only to raise a dispute over the meaning of the Sixth Amendment.²¹⁴ Among the briefs filed in the case, only an *amicus curiae* brief for the American Civil Liberties Union, prepared by Professors Anthony Amsterdam and Paul Mishkin, relied primarily on Kamisar's contention that the Fifth Amendment privilege was the proper ground for decision.²¹⁵ The ingenuity of the argument was this: Once moved out of the Sixth Amendment and made an outgrowth of an expanded Fifth Amendment privilege, the right to counsel was not limited to stages of "criminal prosecution," and, on

211. See *id.* at 6-9; see also *id.* at 65, 66 n.195, 68, 93 (referencing *Griffin* or *Douglas*). See generally *id.* at 10-11, 68-81 (focusing on the application of the equality principle of *Griffin* and *Douglas* to the extension of the privilege against self-incrimination in the context of police interrogation).

212. See *id.* at 11; see also *id.* at 62 ("I do deny that modulation should be achieved at the expense of the poor and the ignorant, e.g., . . . by heeding requests for the assistance of counsel only if the suspect can afford to hire a lawyer, but not providing any at state expense."); *id.* at 73 (stating that "the inability of a suspect to retain counsel cannot constitute sufficient grounds for limiting the impact of *Escobedo*"); *id.* at 91 ("Why should the 'necessity' slogan no longer loom impenetrable when—and only when—[retained] counsel is pounding on the door or ringing the phone?"); *id.* at 93 ("In the wake of *Escobedo*, . . . the 'equality norm' exerts pressure to provide all suspects with the rights a Danny Escobedo may enjoy.").

213. See *id.* at 10; see also *id.* at 73 (contending that "inadequate formal education or insufficient native intelligence cannot be good enough reasons for failing to bring the right to counsel into play").

214. *Miranda*'s lawyers in the Supreme Court viewed the case as presenting a right-to-counsel claim under the Sixth Amendment. As one of *Miranda*'s lawyers in the Supreme Court later noted, "we agreed that the briefs should be written with the entire focus on the Sixth Amendment . . . because that is where the [C]ourt was headed after *Escobedo*." John J. Flynn, *The Exclusionary Rule*, 61 F.R.D. 259, 278 (1972) (panel discussion). This approach was consistent with the view taken by prominent commentators on the police interrogation-confessions issue in the months before *Miranda*. See Yale Kamisar, *Miranda: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1080 n. 26 (1984) (citing the authorities who had taken this view of the problem on the eve of *Miranda*).

The oral arguments in the cases, however, revealed that several of the Justices were thinking of addressing the police interrogation-confessions issues under the Fifth Amendment privilege. LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 136-39 (1983).

215. See Weisberg, *supra* note 200, at 118 & n.45 (discussing the various briefs that were filed urging reversal).

the equality rationale, could also be seen as extending to all suspects who could benefit as much from counsel's assistance as Escobedo could have benefitted from it, despite their ignorance or indigency.²¹⁶

The majority in *Miranda* adopted Kamisar's approach.²¹⁷ With only passing mention of the Sixth Amendment, the Court held that the Fifth Amendment privilege protects a person subject to non-judicial, police interrogation.²¹⁸ The majority also declared that the counsel right recognized in *Escobedo* had been justified on Fifth Amendment privilege grounds, in addition to Sixth Amendment grounds, without acknowledging that this view diverged from what the *Escobedo* opinion concluded.²¹⁹ Further, through code-like rules about police warnings to be given to suspects and about the need for clear waivers of rights before interrogation, the majority aimed to extend the new Fifth Amendment rights to silence and to counsel beyond the wealthy and well-educated to the indigent and ill-informed.²²⁰ Indeed, finding no basis in the equality rationale to stop with suspects under full-blown arrest, the Court implied that these far-reaching mandates applied even to suspects who were

216. DRESSLER, *supra* note 190, at 580.

217. Professor Kamisar's article was cited twice in the majority opinion. *Miranda v. Arizona*, 384 U.S. 436, 440 n.2, 472 n.42 (1966). The majority also relied on some of the principal authorities used in the article to support its conclusion. *E.g.*, *id.* at 469 n.38 (citing Yale Kamisar, *Betts v. Brady Twenty Years Later: Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962)); *id.* at 472 n.42 (quoting excerpts from the Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 9 (1963)).

Notably, two members of the *Miranda* majority, Chief Justice Warren and Justice Brennan, had heard Kamisar speak on interrogation issues at a panel discussion at the annual conference of the Third Circuit in the late summer of 1965. BAKER, *supra* note 214, at 88.

218. *Miranda*, 384 U.S. at 444.

219. *Id.* at 442. As the majority asserted, *Escobedo* "was but an explication of basic rights that are enshrined in our Constitution—that 'No person . . . shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall . . . have the Assistance of Counsel'—rights which were put in jeopardy in that case through official overbearing." *Id.*

220. The majority summarized the warnings and waiver rules as follows:

He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 479.

On the role of the equality idea in influencing the approach followed by the Court in *Miranda*, see Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1456 (1985).

questioned in mere temporary field stops,²²¹ a position that even Kamisar had not advocated.²²² The Court viewed all interrogated detainees as equal regarding their ability to benefit from legal counsel.

Although the Court limited the potential effects of *Miranda* in subsequent decades,²²³ the central holding was repeatedly reaffirmed and even extended.²²⁴ The most ironic development was the predominance given in subsequent cases to the right to counsel over the right to silence. *Miranda* had created the new right to counsel under the Fifth Amendment privilege ostensibly as a protection for the central guarantee embodied in the privilege—the right to silence. However, in subsequent decisions, the Court accorded more protections to the accused who asserted the right to an attorney than to those who asserted the right to silence.²²⁵ The protection

221. *Miranda*, 384 U.S. at 444, 477.

222. See Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, in YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* 41, 42 n.2 (1980) (criticizing this aspect of the *Miranda* opinion).

223. See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (holding that warnings are not required where the suspect is unaware that he is speaking with a law enforcement agent); *Oregon v. Elstad*, 470 U.S. 298, 305-09 (1985) (concluding that the only inadmissible fruit of a violation of *Miranda's* warning requirement is the statement made by the suspect before the warning was given); *Berkemer v. McCarty*, 468 U.S. 420, 430-32 (1984) (ruling that roadside questioning of a motorist detained in a traffic stop does not amount to custody for *Miranda* purposes); *New York v. Quarles*, 467 U.S. 649, 653 (1984) (finding a "public safety" exception to *Miranda's* requirement that warnings be given before custodial interrogation); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that statements obtained in violation of *Miranda* may be used for impeachment purposes).

224. See, e.g., *Winthrow v. Williams*, 507 U.S. 680, 690-92 (1993) (holding that the *Miranda* safeguards, even if prophylactic, are enforceable against the states on federal habeas corpus); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (reaffirming and extending *Miranda* and *Edwards* by holding that where a suspect has asked for counsel, the police may not reinitiate communications with the suspect to secure a *Miranda* waiver even after the suspect has been provided with counsel); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (reaffirming and extending *Miranda* by creating a new bright-line rule that the authorities may not secure a waiver from a suspect who has asserted the right to counsel, unless the suspect, rather than the police, initiates further conversation regarding the investigation); *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (holding that "interrogation" for purposes of *Miranda* includes not only express questions but also their functional equivalent).

225. Assertion of the right to counsel was held to trigger a prophylactic rule—that no waiver was possible unless the accused, rather than the police, initiated further communications concerning the investigation. *Edwards*, 451 U.S. at 484-85; see also *Minnick*, 498 U.S. at 153 (holding that the *Edwards* protection does not cease merely because the suspect has consulted an attorney).

Assertion of the core right to silence was held not to prevent the police from simply waiting a short period before trying again to secure a waiver. *Michigan v. Mosely*, 423 U.S. 96, 104-07 (1975); see also Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 83 & n.133 (Vincent Blasi ed., 1983) (con-

that had been grafted onto the Fifth Amendment privilege, due to the Court's concern with equality, attained a more elevated status than the central protection embodied in the provision.²²⁶

B. The Eighth Amendment and Capital Sentencing

The Court has incorporated prescriptive equality explicitly in the regulation of capital sentencing under the Eighth Amendment. Since the early 1970s, the Justices have repeatedly declared equality to be the central goal of this doctrine. The Court has not promulgated a substantive standard under the Eighth Amendment by which to judge when capital offenders have been correctly sentenced to death.²²⁷ Without such a standard, the Court's pursuit of consistency is bound to be confused.²²⁸ However, the larger point for present purposes is simply that an equality mandate has been read into the Eighth Amendment.

The Court's use of the Eighth Amendment to require equality in capital sentencing is juxtaposed against its continuing rejection of arguments that the open-ended clauses require such equality. Propelled by a group of lawyers connected with the NAACP Legal Defense Fund led by Professor Anthony Amsterdam, the argument for equality was first presented to the Court as a due process claim in *Maxwell v. Bishop*.²²⁹ The Court skirted the issue by ruling for the condemned defendant on other, narrow grounds.²³⁰ However,

tending that *Mosely* might well allow a waiver where the later questioning concerns the same offenses for which the defendant was arrested). *But see* Geoffrey Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 134 (asserting that the interrogation would probably have to concern a crime unrelated to the one for which the defendant was arrested).

226. Cf. Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1560-61 & n.6 (1996) (describing the competing rules as an example of "unprincipled and inconsistent" laws).

227. On a few occasions, a majority has asserted that the substantive measure is offender "culpability." *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989)). The Court has not conformed its capital-sentencing doctrine to this view, however. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 372-73 (1993) (upholding Texas statute that made a defendant's probable future dangerousness a dispositive factor in the capital-sentencing decision and that failed to advise the capital sentencer to assess the defendant's "culpability").

228. The Court's work in this area has appropriately been described as "a confusing array of ill-defined concepts, conflicting pronouncements, ipse dixits and short-lived precedents". Shelley Clarke, Note, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407, 416-18 (1990).

229. *Maxwell v. Bishop*, 398 U.S. 262, 264-66 (1970) (per curiam).

230. *Id.* at 262 (ruling for the condemned defendant on grounds of improper jury selection). For a discussion of the arguments presented to the Justices in the briefs and oral presentations in *Maxwell*, see MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 149-67, 199-213 (1973).

the Court rejected the due process claim for equality in *McGautha v. California*, declining to require capital-sentencing standards to promote consistency in the treatment of capital offenders.²³¹ The Court has not retreated from this view of due process. Moreover, fifteen years after *McGautha*, the Court held that equal protection also does not demand consistency in the distribution of capital sentences, except in forbidding *purposeful* discrimination by relevant decision makers based on such improper grounds as the race of the defendant or of the victim.²³²

The mandate of consistency under the Eighth Amendment began with the landmark 1972 decision in *Furman v. Georgia*.²³³ As counsel for Furman, Professor Amsterdam again proposed that death sentences should be imposed equally and that this mandate was not met through the standardless capital sentencing then prevailing in Georgia and across the country.²³⁴ Professor Amsterdam tied the claim to the Eighth Amendment by asserting that, if the death penalty were "*evenhandedly applied*," it would be "unacceptable to contemporary standards of decency," and, thus, should qualify as cruel and unusual.²³⁵ While the Court in *Furman* did not declare the death penalty altogether improper, Amsterdam's argument swayed several Justices to find a less categorical rationale for reversal. A five-member majority concluded that the practice of conferring standardless discretion on the capital sentencer violated the Eighth Amendment. The decision turned on inequality,²³⁶ though

231. *McGautha v. California*, 402 U.S. 183, 207-08 (1971). *McGautha* had been convicted of a capital murder and then sentenced to die after a separate hearing in which no substantive standards governed the jury's choice between death and imprisonment. *Id.* at 189-90.

Although the Court had become more liberal when Marshall replaced Clark in 1968, it soon became more conservative when Burger replaced Warren and Blackmun replaced Fortas. This conservative shift was reflected in *McGautha*. The majority opinion was written by Harlan and joined by Burger, Stewart, White, and Blackmun; *id.* at 184; Black concurred; *id.* at 225 (Black, J., concurring); and the dissenters were Douglas, Brennan, and Marshall; *id.* at 226 (Douglas, J., dissenting).

232. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that establishing equal-protection claim required the defendant to prove "that the decisionmakers in *his* case acted with discriminatory purpose").

233. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). This decision was surprising, because the Court had not been expected to become more liberal despite changes in its membership after *McGautha*. Powell and Rehnquist had replaced Black and Harlan, respectively. Both new Justices were expected to be conservative, Rehnquist particularly so. MELTSNER, *supra* note 230, at 257-65.

234. *Id.* at 246-52 (describing Amsterdam's preparation of written pleadings).

235. *Id.* at 269 (drawing on Amsterdam's oral argument before the Justices).

236. See Stephen P. Garvey, "As the Gentle Rain From Heaven:" *Mercy In Capital Sentencing*, 81 CORNELL L. REV. 989, 997 (1996) (asserting that *Furman* required "some appreciable sense of

the holding was not easy to define, because each of the majority Justices confined his views to a separate opinion.²³⁷ Justices Brennan and Marshall concluded that the death penalty was per se unconstitutional, in part based on its inevitably unequal application.²³⁸ Justices Douglas, Stewart and White each found fault with the standardless sentencing approach, because it led to discriminatory or arbitrary death sentences.²³⁹ What alternative approach might satisfy these three Justices remained unclear. However, the decision implied that the Eighth Amendment demanded reasonable equality in the distribution of capital sentences.²⁴⁰

In 1976, the Court returned to the question of *Furman's* meaning. Soon after the *Furman* decision, many states enacted new capital-sentencing systems.²⁴¹ Most opted for schemes that man-

consistency, predictability, and even-handedness when the state applies its coercive power, especially its ultimate power").

237. The four dissenters were Burger, Blackmun, Powell, and Rehnquist. They rejected the view that the Eighth Amendment proscribed the death penalty altogether or that it regulated the process by which the death penalty was imposed. While each wrote a separate opinion, Burger's opinion was also joined by the other three dissenting Justices. See *Furman*, 408 U.S. at 375 (Burger, C.J., dissenting).

238. See *id.* at 295 (Brennan, J., concurring) (declaring that "[t]he probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with other principles, in reaching a judgment on the constitutionality of this punishment"); *id.* at 305 (Brennan, J., concurring) (asserting that the death penalty violates the Eighth Amendment and that "the States may no longer inflict it as a punishment for crimes"); *id.* at 364 (Marshall, J., concurring) (finding that "capital punishment is imposed discriminatorily against certain identifiable classes of people"); *id.* at 359 (Marshall, J., concurring) (concluding that the death penalty is "excessive" punishment and "therefore violates the Eighth Amendment").

239. See *id.* at 256-57 (Douglas, J., concurring) (asserting that the discretionary statutes were "pregnant with discrimination" against minorities and the underprivileged and that "discrimination . . . is not compatible with the idea of equal protection of the laws that is implicit in [the Eighth Amendment]"); *id.* at 310 (Stewart, J., concurring) (finding that the discretionary statutes allowed the capital sanction to be "wantonly and . . . freakishly imposed"); *id.* at 313 (White, J., concurring) (concluding that the statutes permitted the death penalty to be used with "great infrequency" while offering "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many in which it [was] not").

While Justice White emphasized the rare imposition of the death penalty and the resulting failure of the penalty to serve a valid penological purpose, the lack of consistency in the distribution of capital sanctions was key to his argument. If a small number of death sentences were imposed regularly within "an identifiable subclass of all capital defendants," the penalty could serve a legitimate penological purpose within the subclass. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1693 n.15 (1974).

240. The dissenting Justices identified the common objection of the majority Justices as grounded on inequality concerns: "The decisive grievance of the opinions . . . is that the present system of discretionary systems . . . has failed to produce even handed justice." *Furman*, 408 U.S. at 398-99 (Burger, C.J., dissenting).

241. Between *Furman* and the 1976 decisions, thirty-five states passed new capital sentencing statutes. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 226

dated the death penalty upon conviction. A minority created systems involving a separate sentencing hearing after conviction, but with some standards designed ostensibly to confine sentencer discretion. The Supreme Court granted certiorari in five cases, two from states with mandatory statutes—North Carolina and Louisiana—and three from states providing for sentencing hearings with standards—Georgia, Florida, and Texas. Ultimately, the Court struck down the two mandatory systems but upheld the three systems with sentencing hearings and standards.²⁴²

In these 1976 cases, equality was again asserted to be the goal of Eighth Amendment regulation. For example, in approving the Georgia system in *Gregg v. Georgia*, Justice White, writing for himself and three others, asserted that the Eighth Amendment required "reasonable consistency" in the distribution of death sentences.²⁴³ Similarly, in endorsing the Georgia statute, Justice Stewart, joined by Powell and Stevens, asserted that the Eighth Amendment outlawed sentencing schemes that involved a "substantial risk" that the capital sanction would be imposed "in an arbitrary and capricious manner."²⁴⁴ Likewise, in striking down the

(1986). While the definition of capital crimes varied among them, twenty-two of these states created systems in which the death penalty was mandatory upon conviction. *Id.* at 220-27.

242. See *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding the Georgia system); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding the Florida scheme); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding the Texas system); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (rejecting the North Carolina system); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (rejecting the Louisiana statute).

The Court was divided in a consistent pattern in the five cases. Four Justices—Burger, White, Rehnquist and Blackmun—concluded that all five statutes passed constitutional muster. *Gregg*, 428 U.S. at 207-26 (White, J., concurring); *id.* at 226-27 (Burger, C.J., concurring); *id.* at 227 (Blackmun, J., concurring); *Proffitt*, 428 U.S. at 260-61 (White, J., concurring); *id.* at 261 (Blackmun, J., concurring); *Jurek*, 428 U.S. at 277 (Burger, C.J., concurring); *id.* at 277-79 (White, J., concurring); *id.* at 279 (Blackmun, J., concurring); *Woodson*, 428 U.S., at 306-07 (White, J., dissenting); *id.* at 307-08 (Blackmun, J., dissenting); *id.* at 308-24 (Rehnquist, J., dissenting); *Roberts*, 428 U.S. at 337 (Burger, C.J., dissenting); *id.* at 338-63 (White, J., dissenting); *id.* at 363 (Blackmun, J., dissenting). Justices Brennan and Marshall maintained their position from *Furman* that the death penalty was altogether unconstitutional and voted to strike down all five statutes. *Gregg*, 428 U.S. at 227-31 (Brennan, J., dissenting); *id.* at 231-41 (Marshall, J., dissenting); *Woodson*, 428 U.S. at 305-06 (Brennan, J., concurring); *id.* at 306 (Marshall, J., concurring); *Roberts*, 428 U.S. at 336 (Brennan, J., concurring); *id.* at 336-37 (Marshall, J., concurring). Therefore, the disposition in each case turned on the views of a plurality made up of Justices Stewart, Powell and Stevens. These three Justices filed a joint opinion in each case, striking down the mandatory schemes but upholding those with sentencing hearings and standards. *Gregg*, 428 U.S. at 154-207 (plurality opinion); *Proffitt*, 428 U.S., at 244-60 (plurality opinion); *Jurek*, 428 U.S. at 264-77 (plurality opinion); *Woodson*, 428 U.S. at 282-305 (plurality opinion); *Roberts*, 428 U.S. at 327-36 (plurality opinion).

243. *Gregg*, 428 U.S. at 222 (White, J., concurring).

244. *Id.* at 188 (plurality opinion).

mandatory statute in *Woodson v. North Carolina*,²⁴⁵ Justice Stewart, for a plurality, claimed that *Furman* required death-penalty states to abandon "arbitrary and wanton jury discretion" for "objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death."²⁴⁶ Such language implied that the function of the Eighth Amendment, as applied to capital sentencing, was to promote equality in the treatment of capital defendants.

At first blush, the Court's holdings in the 1976 cases also seemed to coincide with the equality rationale. The three statutes providing for sentencing hearings with guidelines seemed to promote at least formal consistency in the distribution of death sentences. They were characterized as "channel[ing]" the sentencer to a decision.²⁴⁷ However, while the Texas statute channeled the sentencer's consideration to a final decision through three dispositive questions, those questions did not seem to correspond to any substantive standard derived from the Eighth Amendment.²⁴⁸ Likewise, the Georgia and Florida statutes did not actually guide sentencer discretion. These two systems only required the sentencer to identify one of many statutory "aggravating factors" before exercising unbridled discretion.²⁴⁹ Since an aggravating factor was almost always applied,²⁵⁰ unbridled discretion almost always operated. Nonetheless, the complexity of the statutes gave an appear-

245. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

246. *Id.* at 303 (plurality opinion).

247. *Gregg*, 428 U.S. at 206.

248. The Texas statute presented the sentencing jury with the following questions:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071(b) (West 1981).

249. For the list of aggravating factors contained in the original post-*Furman* statute, see *Gregg*, 428 U.S. at 165-66 & n.9 (plurality opinion of Stewart, J., Powell, J., and Stevens, J.). For the lists of aggravating and mitigating circumstances in the original post-*Furman* legislation in Florida, see *Proffitt*, 428 U.S. at 248-49 n.6 (1976) (plurality opinion of Stewart, J., Powell, J., and Stevens, J.).

These systems built on a "model" statute prepared by the drafters of the Model Penal Code. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

250. See DAVID G. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990) (noting that in the vast majority of capital murder cases prosecuted in Georgia for several years after the legislative reform, at least one of the statutory aggravating circumstances was present).

ance of "enormous regulatory effort,"²⁵¹ and so, of substantial regulatory effect.²⁵²

On the surface, the decisions striking down the mandatory statutes also seemed to promote equality. The mandatory death statutes treated all convicted capital offenders alike when there could be relevant differences among them. If pertinent differences existed, the mandatory statutes would produce inequality. Partly on this basis, the plurality concluded that a sentencing hearing was required in every capital case to consider the character and record of the offender and the facts of the capital crime.²⁵³ Yet, the plurality did not clarify what substantive issue was to be resolved by considering this information, and the Court has never clarified what substantive standard or standards define any constitutionally relevant distinctions to be drawn among capital offenders.²⁵⁴ The conclusion that an unguided inquiry into the defense's mitigating evidence would tend to produce more equal results depended on the unlikely assumption that all capital sentencers would intuitively know and apply an unarticulated substantive standard.

Whether they promoted equality or not, the 1976 opinions were generally understood to confirm *Furman's* call for equality, and the Court's subsequent holdings on capital sentencing have reaffirmed those early decisions. The Court has invalidated systems that significantly restrict sentencer discretion, underscoring that

251. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357, 436 (1995).

252. In upholding the Georgia scheme, the Court noted that the Georgia statute called for review for consistency by the Georgia appellate court. See *Gregg*, 428 U.S. at 204 (plurality opinion). However, a few years later, in *Pulley v. Harris*, 465 U.S. 37, 44-57 (1984), the Court rejected the notion that a review for consistency was required for a sentencing scheme like Georgia's to satisfy the Eighth Amendment. *Harris* concerned the absence of appellate consistency review in the California capital-punishment system. The Court asserted that consistency review could be required if other protections against arbitrariness appeared inadequate. *Id.* at 51. However, the California system was the same as the Georgia system in all significant respects. Consequently, it became clear after *Harris* that the Court would not invalidate the Georgia system even if the Georgia Supreme Court abandoned consistency review. By rejecting the need for consistency review in *Harris*, the Court avoided the need to define a substantive standard constructed from the Eighth Amendment by which to measure equality.

253. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion).

254 It was not apparent whether the inquiry concerned offender deserts or some utilitarian question. If the inquiry was about offender deserts, it was unclear how the sentencer should measure deserts. Was the sentencer to consider all of the good and bad things that the offender had accomplished in his life? Or was the sentencer to focus on the more narrow deserts question of the level of the offender's culpability for the capital offense? If the inquiry was about utilitarian considerations, other ambiguities existed. Was the sentencer to decide something relatively narrow, such as whether the offender posed a future danger if not executed? Or, was the inquiry much more general, such as whether a death sentence served the interests of the community?

the sentencer should be free to consider some (unspecified) facets of character, record, and crime.²⁵⁵ The Court has also clarified that, while meeting the requirement of individualized consideration, a system need only slightly "narrow" the group of persons subject to a death sentence rather than channel the sentencer to a specific decision.²⁵⁶ The kinds of systems that will pass muster are those, like the general sort maintained in Georgia and Florida, that require essentially standardless capital sentencing. These systems allow the capital offender and the prosecution to present almost any evi-

255. The Court concluded in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), that the defendant was entitled to mitigating consideration of any evidence that he proffered concerning his character, record or crime. Ohio's capital-sentencing scheme provided for a sentencing hearing with three "special issue" questions similar to the Texas approach that had been upheld in 1976. *Id.* at 606-08 (plurality opinion). However, the Court found the Ohio questions to be too narrowly focused because they did not allow mitigating effect to be given to evidence bearing on character, record or crime, such as the offender's youth and minor role in the offense. *Id.* at 604-05 (plurality opinion); *id.* at 620-21 (Marshall, J., concurring). A capital sentencing system had to allow a capital sentencer to give "independent mitigating weight to aspects of a defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605 (plurality opinion).

During the next decade, the Court subsequently struck down several other death sentences from different states based on violations of the *Lockett* rule. *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 397-99 (1987) (rejecting trial court's interpretation of list of mitigating factors in Florida scheme as exclusive so as to preclude consideration of evidence of drug use and turbulent upbringing); *Eddings v. Oklahoma*, 455 U.S. 104, 110, 113-14 (1982) (declaring unconstitutional the Oklahoma statute's failure to permit mitigating consideration of evidence of emotional disturbance and turbulent and violent upbringing). These cases culminated with *Penry v. Lynaugh*, 492 U.S. 302, 320-28 (1989), where the Court found the Texas system that it had upheld in 1976 to contravene *Lockett* when applied to the case of a retarded defendant.

256. The narrowing presumably must occur within the group otherwise subject to the death penalty. Today, capital punishment is constitutionally permissible only for murder and perhaps for a tiny number of other exceptionally serious crimes, such as some acts of treason. *See Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion) (implying that the death penalty was per se inapplicable to most serious crimes that do not involve the taking of human life); *see id.* at 600 (Brennan, J., and Marshall, J., concurring in judgment). Narrowing within the murder category can be accomplished by requiring the finding of an aggravating factor at either the guilt-or-innocence or sentencing trials. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (stating that the narrowing function can be satisfied at the sentencing trial or at the guilt-or-innocence phase through the legislature's implementation of a narrow definition of the capital offense). The Supreme Court has not required significant narrowing and has not suggested that the narrowing must build on any particular substantive theory. A state can provide a lengthy list of aggravating factors and the system apparently will meet the "narrowing" requirement, as long as each factor is not so vague as to cover virtually all capital offenders. The Court's decisions striking down systems for failing to narrow adequately have been grounded on the extreme vagueness of particular statutory aggravators. *See, e.g., Maynard v. Cartwright*, 486 U.S. 356, 363-65 (1988) (striking down death sentence based on a statutory aggravating circumstance that the murder was especially "heinous, atrocious, or cruel" because the language was unduly vague); *Godfrey v. Georgia*, 446 U.S. 420, 432-33 (1980) (plurality opinion) (striking down a death sentence based on a statutory aggravating circumstance that the murder was "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind," "because this language was unduly vague"); *id.* at 434-35 (Marshall, J., concurring).

dence about the defendant and his crime that the parties desire. The systems do little more, except to require a trier to find one of many statutory aggravating factors as a prerequisite to imposing a death sentence.²⁵⁷ At least one of the statutory factors will apply to almost every murder.²⁵⁸ Consequently, as two prominent commentators on the Court's capital-sentencing doctrine have observed, the Court's post-*Furman* decisions have essentially only reproduced the pre-*Furman* world of standardless capital sentencing.²⁵⁹

Despite these problems, the Court has rationalized its regulation of capital sentencing under the Eighth Amendment as an effort to promote equality.²⁶⁰ Of course, an equality mandate cannot

257. In Florida, the sentencer is instructed to balance aggravators against mitigators and to only impose the death sentence if the aggravators are weightier, but there is no limit at this stage on what the sentencer may view as aggravating or mitigating and no method suggesting how to weigh the factors identified. See FLA. STA. ANN. ch. 921.141(3) (West 1996). In Georgia, the applicable statute does not even call for such balancing of factors. See GA. CODE ANN. § 17-10-30 (1997). As a result, the sentencer basically has "unbridled" discretion once a single aggravating factor has been identified. *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (describing the functioning of the Georgia system).

258. See, e.g., BALDUS ET AL., *supra* note 250, at 102 (concluding that ninety percent of the pre-*Furman* death-penalty cases in Georgia would have implicated one of the aggravating factors in the post-*Furman* Georgia statute).

259. See *Steiker & Steiker*, *supra* note 251, at 436 ("The Supreme Court's death penalty law, by creating an impression of enormous regulatory effort while achieving negligible regulatory effects, effectively obscures the nature of our capital sentencing system, in which the pre-*Furman* world of unreviewable sentencer discretion lives on.").

260. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (quoting *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring)) ("A capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.").

While Eighth-Amendment doctrine on capital sentencing does little to promote equality, the Court has also turned a deaf ear to claims of racial discrimination. Most importantly, in *McCleskey v. Kemp*, 481 U.S. 279, 292-97 (1987), the Court rejected powerful statistical evidence of race-based sentencing in the post-*Furman* Georgia system. Professor David Baldus, of the University of Iowa Law School, led a study employing regression analysis of dozens of variables identified in hundreds of Georgia murder cases prosecuted in the decade after *Furman*. BALDUS ET AL., *supra* note 250. The study revealed strong bias against killers of white victims, and, within white-victim cases, significant bias against black defendants. *Id.* at 316. The researchers concluded that, because of the racial factor, a killer of a white victim was 4.3 times more likely to receive a death sentence than a killer of a black victim. *Id.* The study revealed no evidence of discrimination against black defendants across all cases. *Id.* However, within the white victim cases, the study concluded that a black defendant was 2.4 times more likely to receive a death sentence than a white defendant simply because of the race of the defendant. *Id.*

The Supreme Court granted certiorari in *McCleskey's* case on his Eighth Amendment claim that the Baldus study demonstrated that his death sentence was arbitrary and capricious given that he was black and his victim was white. *McCleskey*, 481 U.S. at 290-01. A five-to-four majority rejected his claim, however, while purporting to assume the methodological validity of the study. *Id.* at 319. The majority's central rationale was simply that the Eighth Amendment required no more consistency than that which would result from the individualized consideration and narrowing functions supplied by the Georgia statute. BALDUS ET AL., *supra* note 250, at 308.

be sensibly pursued or enforced where there is no standard by which to judge which capital offenders are alike and which are different.²⁶¹ The Supreme Court's opinions in the capital sentencing context fail to acknowledge this point. Yet, the Court's unwillingness to articulate a significant substantive role for the Eighth Amendment in limiting the use of the death penalty may explain why the Court has continued to assert, instead, the vague goal of equality.

C. The Fourth Amendment and Administrative Searches

In evaluating government searches and seizures under the Fourth Amendment, the Court has also often implied that inequality is a vice against which the Amendment protects. The Court has carried this view furthest in its doctrine governing what are commonly called "administrative" or "regulatory" searches. In this area, the Court frequently has implied that inequality is the predominant vice against which the Amendment operates. As in the capital-sentencing sphere, the Justices have not provided the substantive standards by which to judge when inequality exists or when equality has been achieved. Perhaps unsurprisingly, the Court's efforts have produced prosecution-oriented results.

Administrative searches are those deemed to have an important purpose other than to investigate for crime or to arrest a criminal suspect.²⁶² The field of administrative searches, as opposed to criminal searches, is now extensive because of the possibility of

On this basis, the majority avoided addressing whether its Eighth Amendment doctrine had allowed racially-biased sentencing.

The Court also granted certiorari on McCleskey's contention that the statistical evidence revealed an equal protection violation. A majority of the Court rejected this claim as well, finding that McCleskey had not established *purposeful* discrimination by the particular prosecutor or jury in his case. *McCleskey*, 481 U.S. at 292.

In the end, however, the majority declined to concede that the study even established that racial bias infected the Georgia capital-sentencing system. *See id.* at 312-13 ("At most, the Baldus study indicates a discrepancy that appears to correlate with race . . . [W]e decline to assume that what is unexplained is invidious."). These protestations appeared disingenuous; since the majority Justices assumed the methodological validity of the study, they could not claim that the study failed to reveal racial bias unless they did not believe that such a study, based as it was on regression analysis, could ever indicate racial bias. The view that regression analysis could not provide strong evidence of racial bias, however, would be difficult to defend.

261. The methodology of regression analysis of dozens of variables over many cases, which was employed in the Baldus study, is not a feasible approach for capital sentencers to use to determine individual sentences. The approach is time-consuming, highly complex, and depends on much information from many cases not before the sentencer.

262. *See KAMISAR ET AL.*, *supra* note 101, at 339 (noting that in these cases, "the Court typically has emphasized certain 'special needs' beyond those present in the more typical law enforcement context").

viewing many intrusions as having primarily a regulatory, rather than a criminal-prosecution function.²⁶³ A sobriety checkpoint on a roadway, for example, is deemed an administrative search on the notion that it aims to help rid the roads of intoxicated drivers and only incidentally to prosecute and punish the violators.²⁶⁴ Searches by school officials of a student's personal effects for contraband can be characterized as aimed primarily at pursuing orderly school environments rather than prosecuting the contraband possessor.²⁶⁵ These examples suggest the potentially broad ambit of the administrative-search category.

While subject to different constitutional regulation than criminal searches, administrative searches are governed by the Fourth Amendment.²⁶⁶ Under the first clause in the amendment, which requires that searches and seizures of protected interests be "reasonable," the government must at least demonstrate a valid, non-criminal purpose for pursuing the category of intrusions alleged to be administrative. For example, searches by state agents of impounded automobiles, to be administrative, must be justified by a purpose other than ferreting out crime.²⁶⁷ The Court has also deemed administrative searches, in some circumstances, to be covered by the amendment's second clause, requiring a warrant with descriptive specificity, but the Court has not enforced the accompanying mandate that the magistrate find probable cause. Because individual administrative searches are generally conducted without an expectation that they will reveal evidence of crime, the Court has deemed a showing of probable cause inappropriate.

These requirements of a valid purpose for the general category of search and, occasionally, of an antecedent review, provide only minor limits on the use of the administrative search power. The Court has rarely found a category of administrative search to

263. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 269 (3d ed. 1993) (noting that federal and state governments "have devised a vast array of 'administrative' schemes designed to monitor the activities of their constituents, ranging from highway license checks and safety inspections of residential and commercial buildings to border patrols and school disciplinary rules").

264. See, e.g., *Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding such a program after noting "the State's interest in preventing drunken driving").

265. See *New Jersey v. T.L.O.*, 469 U.S. 325, 347 (1985) (upholding a Vice Principal's warrantless search of a fourteen year old's purse on reasonable suspicion that she possessed cigarettes, resulting in the discovery of rolling papers, marijuana, and evidence of drug dealing).

266. See WHITEBREAD & SLOBOGIN, *supra* note 263, at 269 ("The Supreme Court has recognized that many of these regulatory efforts can result in significant intrusions on personal privacy or autonomy, and thus has usually held that they implicate the Fourth Amendment.").

267. See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 373 (1987).

lack a sufficient governmental purpose. Also, neither the requirement of an administrative purpose for the category nor the occasionally imposed warrant requirement reveals a basis to judge the validity of individual searches. Consequently, the Court has sought to articulate a rationale by which to judge when particular administrative searches are "reasonable," as the Amendment requires.

The Court has tended to use equality as the predominant measure for judging reasonableness in this area.²⁶⁸ The Justices frequently have concluded that because a government agency has promulgated policies to limit the discretion of its agents to search and seize, concerns about arbitrariness are satisfied when the policies are followed. Largely for this reason, the Court has found searches conducted under such policies to satisfy the Fourth Amendment.²⁶⁹

In *Camara v. Municipal Court*, an early decision authorizing administrative searches, the Court promoted the Fourth Amendment as more concerned with limiting official discretion, to promote formal equality, than with supplying substantive limits governing particular searches and seizures.²⁷⁰ *Camara* concerned routine, annual inspections of San Francisco residences for possible violations of the city housing code. The majority employed a balancing test to conclude that the category of searches involved could be reasonable without probable cause to believe a code violation existed in each residence to be inspected.²⁷¹ The Court required the inspector to obtain a warrant before searching the residence of a non-consenting person, and on this basis held the particular search invalid. However, the Court required only that the inspector make a minimal showing of need, such as that the "conditions in the area as a whole"²⁷² were poor or that "a certain period [had passed] without inspection."²⁷³ This kind of warrant did not provide a judicial assessment of the justifications for a search of an individual building

268. See Robert L. Misner, *Justifying Searches on the Basis of Equality of Treatment*, 82 J. CRIM. L. & CRIMINOLOGY 547, 549 (1991) ("The growing tendency in Supreme Court decisions is to permit searches if the searches invade equally the privacy interests of all those necessarily affected.").

269. *Id.*

270. *Camara v. Mun. Court*, 387 U.S. 523 (1967).

271. *Id.* at 534-36. The majority was overwhelmingly comprised of liberal Justices. Justice White, as the author of the opinion, was joined by Chief Justice Warren, and Justices Black, Douglas, Brennan, and Fortas. *Id.* at 525. The dissenting Justices were Clark, Harlan, and Stewart. *Id.* at 546 (Clark, J., dissenting).

272. *Id.* at 536.

273. *Id.* at 538.

but rather the justifications for searches of an urban area.²⁷⁴ Although the Court's view of the Fourth Amendment's function in this context was unclear, its actions seemed to be aimed at promoting formal equality. The holding worked to ensure that the inspectors applied the same standard to all residence owners more than to ensure that they acted according to a substantive justificatory standard derived from the Fourth Amendment.²⁷⁵

In an influential article published after *Camara*, Professor Anthony Amsterdam—the same scholar who had influenced the Court on interrogations and on capital sentencing—theorized that the Supreme Court should use the Fourth Amendment to prevent inequality.²⁷⁶ He asserted: "A paramount purpose of the Fourth Amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures."²⁷⁷ Amsterdam meant that equality and substantive justification were *independent* concerns under the Amendment.²⁷⁸ He found support for this view in the *Camara* opinion.²⁷⁹ Emphasizing formal equality over substantive

274. See Wayne R. LaFare, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 466 (1990) (criticizing the *Camara* majority's failure to clarify the need for judicial assessment of the basic question whether the administrative program is itself reasonable).

275. As the Court stated, "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara*, 387 U.S. at 528. Although the term "arbitrary" here is best understood from the perspective of the Court's earlier decisions as simply a substitute for "unjustified," in the context of the *Camara* decision, its meaning is more susceptible to an interpretation of "inequitable."

The Court's earlier decisions only required that intrusions be substantively justified. Unjustifiable decisions do not accord with the substantive, justificatory standard that should control. Arbitrary decisions do not accord with any identifiable standard. The identification and application of a correct justificatory standard can be thought to make subsequent decisions both justified and non-arbitrary.

The nature of the warrant mandated by the Court in *Camara* suggested that the Court was actually more interested in achieving equality than a substantive justificatory standard. The Court did not clarify what substantive standards should control the decision to conduct individual inspections, suggesting only that official discretion should be controlled by some agency policy. See *id.* at 532. The inspections would not necessarily be justified under the Fourth Amendment, however, because the standard articulated in the local policy might not be the correct justificatory standard.

276. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

277. *Id.* at 417.

278. See *id.* at 366 (asserting that the Fourth Amendment may protect against improper discrimination in the decisions of which allowable searches should be pursued).

279. See *id.* at 452 & n.194 (citing *Camara* as supporting the view that the amendment proscribes improper selectivity in pursuing otherwise permissible searches); *id.* at 472 & n.549 (describing *Camara* as supporting the view that the Fourth Amendment is concerned with pro-

Fourth Amendment construction,²⁸⁰ Amsterdam proposed that government agencies be required to engage in rule-making to govern their search-and-seizure practices and that their agents be held to those agency rules.²⁸¹ Agency rule-making as a means of controlling discretion was not a new idea,²⁸² but Professor Amsterdam gave prominence to the notion of incorporating it into Fourth Amendment doctrine. The Amsterdam article has been criticized for focusing too heavily on the view that the Fourth Amendment promotes formal equality.²⁸³ However, other prominent commentators have endorsed Amsterdam's view that the Fourth Amendment limits inequality even beyond requiring searches and seizures to be substantively justified.²⁸⁴ Amsterdam's ideas have also been noticed by members of the Supreme Court as demonstrated by the fact that the article has been cited, although on other points, in many Supreme Court opinions.²⁸⁵

The Supreme Court has pursued the notion that the Fourth Amendment addresses inequality, but in ways that do not comport with Professor Amsterdam's intentions. Largely conservative majorities of the Court have used the purported concern with equality not to limit government searches and seizures but rather to provide expanded authority for them. The method for achieving this result has been twofold. First, the Court has promoted formal equality as a replacement for, rather than a supplement to, a requirement that

scribing arbitrariness in addition to requiring that each search or seizure be substantively justified).

280. See, e.g., *id.* at 425 ("Rulemaking tends to ensure the fair and equal treatment of citizens.") (italics in original).

281. See, e.g., *id.* at 417 ("The emergence of modern professional police forces and our knowledge of the vast discretion that they exercise demonstrate both the need and the capability to provide an effective safeguard against arbitrariness in these kinds of searches and seizures; and the manifestly serviceable instrument to do it is . . . administrative rulemaking.").

282. See *id.* (citing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* (1969)); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 676-81 (1972). Professor Amsterdam himself had previously proposed that the Supreme Court use the Due Process Clause to spur the promulgation of local rules regulating police practices. Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810-15 (1970).

283. See, e.g., Carol S. Steiker, "First Principles" of Constitutional Criminal Procedure: A Mistake?, 112 HARV. L. REV. 680, 684 & n.10 (1999) (asserting that the article is "flawed by its single-minded focus on police discretion as the policy problem to be managed by the Fourth Amendment").

284. See, e.g., ELY, *supra* note 149, at 97 ("[T]he Fourth Amendment can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment."); LaFave, *supra* note 274, at 449 (concurring that the Fourth Amendment is concerned both with unjustified searches and seizures and with inequitable searches and seizures).

285. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1984) (White, J., concurring); *United States v. Caceres*, 440 U.S. 741, 755 n.23 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 n.6 (1978); *Stone v. Powell*, 428 U.S. 465, 492 n.32 (1976).

individual searches meet a substantive, justificatory standard constructed by the Justices under the Fourth Amendment.²⁸⁶ For example, a local policy that calls for stops of many autos and questioning of many drivers passing a particular point may be upheld as reasonable because it reduces police discretion, although a more discretionary policy could produce fewer invasions of privacy. At the same time, the Court has often declined to require local rules that foreclose all or even substantial discretion.²⁸⁷ Local policies therefore may allow discretionary judgments that incorporate biases based on factors like race. Ironically, the best that a civil libertarian can say about the Court's concern with formal equality in search and seizure is that it has focused on the administrative-search decisions.²⁸⁸

Colorado v. Bertine exemplifies the Court's use of the equality notion in constructing Fourth Amendment doctrine.²⁸⁹ Boulder police had relied on city police regulations to impound Bertine's auto and search its contents after arresting Bertine for drunk driving.²⁹⁰ As a result of these intrusions, the police found drugs and other contraband in the auto.²⁹¹ Chief Justice Rehnquist, writing for a majority that included all but Justices Marshall and Brennan, found the seizure and the search to be administrative actions, within categories serving legitimate governmental ends.²⁹² As for the particular intrusions involved, the Court found that they were carried out according to "reasonable police regulations"²⁹³ and "on the basis of something other than suspicion of evidence of criminal activity."²⁹⁴ The opinion posited that the intrusion was reasonable, seemingly on the assumption that the regulations applied even-

286. See Misner, *supra* note 268, at 549.

287. See, e.g., LaFave, *supra* note 274, at 460-61 (discussing *Colorado v. Bertine*, 479 U.S. 367 (1987)).

288. See William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551, 563 (1984).

289. *Bertine*, 479 U.S. at 374.

290. *Id.* at 368-69.

291. *Id.* at 369.

292. *Id.* at 373. The Court found the "inventory search" of the car to serve three purposes:

By securing the property, the police protected the property from unauthorized interference. Knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence. Such knowledge also helped to avert any danger to police or others that may have been posed by the property.

Id. The Court did not address precisely what interests were served by impounding the automobile, but, presumably, thought they were similar.

293. *Id.* at 374.

294. *Id.* at 375.

handedly, but the Court failed to reveal any substantive standard to support this assumption. Nor did the impoundment regulations meaningfully confine police discretion. The impoundment regulations only limited the officers' discretion to leave a vehicle near the scene of the arrest, not their authority to impound it. Impoundment would never violate the regulations.²⁹⁵ Thus, Boulder police officers could impound the car of an arrested driver based on their personal prejudices.²⁹⁶ Likewise, the search regulations provided little guidance as to the breadth of the search to be conducted, leaving the scope of the inventory largely up to the individual officer.²⁹⁷ Again, however, the majority concluded that the search of the car was reasonable because it was carried out under standardized criteria.²⁹⁸ In the end, the Court upheld policies that allowed expansive authority to seize and search without ever articulating a substantive measure by which they were judged "reasonable."²⁹⁹

The Court's decision concerning police roadblocks, in *Michigan Department of State Police v. Sitz*, also exemplifies the Court's incorporation of equality thinking into Fourth Amendment doctrine, with similar results.³⁰⁰ Motorists challenged a highway sobriety checkpoint instituted by the Michigan state police under guidelines created by an advisory committee. Michigan courts struck down the action on grounds that even an initial stop of all motorists passing through the checkpoint was an unreasonable invasion of privacy. In

295. See *id.* at 376 & n.7 (noting only that the regulations imposed restrictions on the "park-and-lock" alternative, not on the decision to impound and, thus, allowed impoundment even when the "park-and-lock" requirements were met).

296. See *id.* at 379-80 (Marshall, J., dissenting); see also LaFave, *supra* note 274, at 461 (asserting that "the challenged Boulder police regulation which passed muster in that case falls significantly short of performing its Fourth Amendment function of limiting police discretion").

297. See *Bertine*, 479 U.S. at 379, 381 (Marshall, J., dissenting). As Justice Marshall noted, the officers failed to proceed as if they were conducting an administrative search. They omitted from the administrative search form hundreds of dollars in cash and other expensive items found in the automobile, although listing these items was essential to serve the administrative purposes of their purported inventory. *Id.* at 383 (Marshall, J., dissenting).

298. See *id.* at 374 & n.6 (asserting that the inventory was authorized by standard procedures of the Boulder Police Department).

299. Three members of the seven-Justice majority—Blackmun, Powell, and O'Connor—agreed that the search itself was permissible only because they accepted the trial court's conclusion that the regulations mandated the opening of closed containers. *Id.* at 376-77 (Blackmun, J., concurring). Why these Justices required such discretion-limiting rules at the stage of opening containers but not at the stage when the officer had to decide whether to seize the vehicle is unclear. Further, in a subsequent decision, a five-Justice majority (including Justice O'Connor, who had relied on the mandatory nature of the policy in *Bertine*), indicated that no greater restriction on police discretion would be required for the opening of closed containers in a car than for other stages of the automobile impoundment and inventorying process. *Florida v. Wells*, 495 U.S. 1, 4-5 (1990).

300. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

an opinion by Chief Justice Rehnquist, the Court reversed, upholding the police action as a valid administrative search.³⁰¹ To justify this decision, the Court did little more than assert that the state had a valid interest in reducing drunk driving, which the checkpoint served slightly, and that the intrusion posed by the initial stop of motorists was minor.³⁰² The Court also noted that "the guidelines governing checkpoint operation minimize the discretion of the officers on the scene."³⁰³ However, the Court failed to discuss the reasonableness of the guidelines, declining to subject them "to meaningful judicial review."³⁰⁴ The Court substituted an empty equality idea for a substantive standard as the measure of reasonableness.³⁰⁵

IV. THE CASE AGAINST USING EQUALITY TO CONSTRUCT THE CRIMINAL CLAUSES

Having established that equality thinking has influenced the Supreme Court's constructions of doctrine under several of the criminal clauses, I now address why these constructions are ill-founded. First, I examine possible theories for understanding the role of prescriptive equality in constitutional adjudication. I contend that there is a way to understand such a mandate which ex-

301. *Id.* at 455. Joining Justice Rehnquist in the majority were Justices White, O'Connor, Scalia, and Kennedy, with Justice Blackmun concurring in the judgment. *Id.* at 447. The dissenters were Justices Brennan, Marshall, and Stevens. *Id.* at 460.

302. *Id.* at 451-52.

303. *Id.* at 452.

304. LaFave, *supra* note 274, at 475.

305. Additional examples of the Court's use of equality thinking in the administrative-search context can be found in decisions concerning employee drug testing. In *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 606-08 (1989), the Court addressed the propriety of blood and urine testing for drugs of certain railway employees. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 654-63 (1989), the Justices addressed drug testing of certain categories of Customs Service employees. In both cases, the majority, through Justice Kennedy, found a governmental purpose for drug testing that was deemed to weigh heavily against employee privacy expectations. See *Skinner*, 489 U.S. at 630-33; *Von Raab*, 489 U.S. at 677. In both cases, the Court also found that applicable federal regulations would reduce the potential for arbitrariness in the administration of the tests. See *Skinner*, 489 U.S. at 634; *Von Raab*, 489 U.S. at 667. In *Skinner*, the Court upheld the testing. *Id.* at 601. In *Von Raab*, the Court remanded merely for an inquiry into whether the purposes of the testing could be fulfilled without extending coverage to all persons within the Customs Service who applied for positions that would enable them to "handle classified material." *Von Raab*, 489 U.S. at 678. In these situations, as in many other administrative search cases, the Court evinced no concern with identifying a substantive standard of proper treatment of citizens derived from the Fourth Amendment. The Court avoided this task by instead purporting to pursue equality. See Misner, *supra* note 268, at 569 (asserting that the Court "elevated its concern regarding equality of treatment above the legitimate expectations of privacy of its citizens").

plains how the Court can function under the textual mandate of equality in the Fourteenth Amendment. However, I conclude that this view of equality fails to justify the Court's use of equality in constructing the criminal clauses.

A. *Finding a Function for Prescriptive Equality*

In this Section, I evaluate three theories about the meaning and function of equality as it is used in constitutional construction. These theories are stated at a level of generality such that any plausible argument for using equality in constitutional construction would fall within one of them. They are 1) equality is an explanatory end in itself; 2) equality is a means to produce other substantive ends; and 3) equality is a rhetorical device facilitating the piecemeal announcement of substantive rights. I conclude that the first two theories are internally flawed, and, therefore, could not legitimate the use of equality rationales in constitutional adjudication. By contrast, the third theory—equality as a rhetorical device through which the Court can announce substantive rights—is plausible. However, I later show why this theory cannot justify the Court's use of prescriptive equality under the criminal clauses.

1. Equality Cannot Be an Explanatory End

The Supreme Court sometimes has mandated equality as if it were an explanatory end. For example, the Court's repeated calls in the 1960s for equality in criminal procedure under the open-ended clauses assumed that equality itself was a coherent goal.³⁰⁶ The Court gave no hint in those cases that it was trying to achieve some goal beyond equality, and it often failed to identify in its opinions any clear substantive rules or standards regarding the treatment of persons by government. In constructing the *Miranda* doctrine in the mid-1960s, the Court also seemed to pursue equality as if it were a self-defining end. The Court eschewed the relevant language and history of the Fifth and Sixth Amendments in pursuit of a notion of equality in the elicitation of statements from suspects by the government.³⁰⁷ The Court's efforts during the 1970s to form an Eighth Amendment theory for regulating capital sentencing also seemed to assume that equality was an explanatory end. The Court offered no theory to explain the consistency that it concluded the

306. See *supra* notes 92-134 and accompanying text.

307. See *supra* notes 174-226 and accompanying text.

Cruel and Unusual Punishment Clause required.³⁰⁸ The need for equality was endorsed as if it carried independent moral force.

Part I established that equality cannot be an explanatory end in constitutional adjudication. As we saw, equality attains meaning only in relation to one or more external standards defining the appropriate treatment of persons.³⁰⁹ Without the external, substantive standards, two persons cannot be determined to be equal or unequal. Likewise, once the external standards of appropriate treatment have been defined, a mandate of equality will still never itself reveal what is appropriate treatment.³¹⁰ Thus, pursuit of prescriptive equality as if it were self-defining is an ill-fated endeavor.

Rejecting equality as an end in constitutional adjudication does not require adherence to a particular ideology about how we should make sense of the document. Whether one believes, for example, in giving meaning to the Constitution according to some form of originalism,³¹¹ or accepts, instead, the legitimacy of a continuous construction not confined by the original understanding or intention,³¹² equality as an explanatory end could never make sense. Even in interpreting the Fourteenth Amendment, which uses the language of equality, the Court could not sensibly conclude that prescriptive equality alone is a coherent end. Equality is too vacuous to be a constitutional ideal.

2. Equality Cannot Be an Intermediate Goal

Some advocates have contended that pursuing equality will tend to produce substantively correct rules regarding how the gov-

308. See *supra* notes 227-621 and accompanying text.

309. See *supra* text accompanying notes 38-48.

310. See *supra* text accompanying notes 49-56.

311. Compare ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.") with RAOUL BERGER, GOVERNMENT BY JUDICIARY 421 (2d ed. 1997) (arguing for a constitutional jurisprudence based on the original intention of the drafters).

312. Compare DWORKIN, *supra* note 18, at 7-12 (arguing for a "moral reading" of the Constitution, but one constrained in some degree by the language and historical meaning of a constitutional provision, its place within the structure of the larger document and "the dominant lines of past constitutional interpretation by other judges") with Sandalow, *supra* note 70, at 1034 (proposing that constitutional law should be understood "not as an expression of values written into the Constitution by the framers, but as the product of a continuing process of valuation carried on by those to whom the task of constitutional interpretation has been entrusted"), and Thomas Grey, *Do We Have An Unwritten Constitution*, 27 STAN. L. REV. 703, 710 (1975) (advocating that courts declare and enforce unwritten constitutional principles by discerning and enforcing the "society's most basic contemporary values").

ernment treats persons. This position often starts with a call to reduce the discretion of governmental actors. This action supposedly will, in turn, reduce the potential for arbitrariness, or, in other words, increase the potential for equality. The argument proceeds that equality in the application of legal rules will create a pressure to adopt rules that the politically influential will accept when applied to them and, thus, rules that are substantively appropriate. As Philip Kurland once described, before rejecting, the contention: "[I]t could be argued that by putting everyone in the same boat, we force the influential members of our society to see to the improvement of their own lot by improving the lot of all."³¹³

This view of equality, as an intermediate ideal to be pursued for its spin-off consequences, finds support in the writings of several adherents of Warren-era liberalism. For example, Professor John Hart Ely has argued that pursuing equality in capital sentencing under the Eighth Amendment, by reducing sentencer discretion, can produce sentencing rules that are substantively appropriate for all capital offenders.³¹⁴ Likewise, Professor Anthony Amsterdam has argued that requiring local regulations that reduce police discretion on search-and-seizure issues can produce practices that are substantively acceptable under the Fourth Amendment.³¹⁵ Other commentators have proffered a similar view of the function of pursuing equality as an intermediate goal in constitutional construction.³¹⁶

The Court also seems to have sometimes adopted this view of equality as an intermediate ideal. Particularly in the Fourth Amendment context, the Justices have at times implied that the purpose of requiring the adoption of and adherence to local regulations that limit government discretion is to ensure equality, which will, in turn, promote, through the political process, substantively reasonable search-and-seizure policies. For example, in *Camara*,

313. KURLAND, *supra* note 2, at 591.

314. ELY, *supra* note 149, at 174.

315. Amsterdam, *supra* note 276, at 425.

316. See, e.g., Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 94-95 (1988) ("According to this approach, the purpose of that intervention is not to assign a substantive value to individual security and privacy, but, rather, to assure that the tradeoff between privacy and law enforcement is that which a hypothetical political system would strike if everyone's interests were equally represented."); cf. Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1175-76 (1998) (arguing that constitutional vagueness issues should be addressed by focusing not on the clarity of the law but on whether the law's impact falls as much upon citizens with a political voice as upon the disenfranchised and that a law against loitering targeted at gang members, because it imposes a burden on average citizens, is not too vague).

the Court upheld annual inspections of residences to discover possible violations of a city housing code.³¹⁷ Although requiring a warrant to search the residence of any non-consenting owner, the Court mandated only that there be some showing that would effectively restrain governmental discretion, rather than a showing of probable cause to believe that a violation existed within the targeted residence. A showing by the inspector establishing that the housing conditions in the surrounding area were poor,³¹⁸ or that inspections had not occurred for some time³¹⁹ would suffice. The Court focused not on whether the particular search was substantively justified, but on whether the search authority was applied to all or most residences in the area. The Court implicitly concluded that, if the search authority were applied to all residences, there would be pressure for policies that were substantively appropriate.

This view of equality as an intermediate goal is also incoherent. Reducing the discretion of government officials in a certain context cannot appropriately be thought to treat the influential and the disenfranchised equally. Only by reference to a substantive standard that defines how persons should be treated in the context can one decide whether equality has been furthered. The substantive standard would itself define the appropriate distinctions to be drawn, and, unless the discretion-reducing regulations conformed with that standard, they would not promote equality. Further, without the substantive standard and the concomitant ability to determine whether equality existed, courts could not intelligently decide when to uphold or overturn local policies.

This discretion-reduction approach to formal equality and, in turn, to substantive correctness also cannot be salvaged on the argument that it is really the *similar* application of laws to the politically influential and the powerless rather than true equality that matters. Even the question of similarity cannot be determined in the abstract. For example, does a local policy on housing inspections that authorizes inspections in an area where housing conditions "as a whole" are poor impinge similarly on the influential and the powerless? Without a substantive reference point defining how people should be treated, this question cannot be answered.

This theory also is unpersuasive in its assumption that equality is a position of natural stability. Influential persons may

317. *Camara v. Mun. Court*, 387 U.S. 523 (1967); see *supra* text accompanying notes 270-75.

318. *Id.* at 536.

319. *Id.* at 538.

not wish to share the plight of the powerless, even if a position of equality between them initially could be established. If the influential perceive themselves as squeezed by a local policy, there is little reason to believe they will try to improve their own lot by improving the lot of everyone. They may use their influence merely to have the policies changed in ways that further their own interests. As Professor Kurland once noted, "for the affluent, there is . . . no obligation to remain in the same boat" with the downtrodden.³²⁰ Of course, without reference to a substantive standard defining appropriate treatment, a court also could not sensibly decide whether a changed local policy treated everyone similarly or differently.

The theory is also problematic in its assumption that government discretion can be tightly controlled—and thus "non-arbitrariness" promoted—through constitutional oversight. Local policies concerning governmental action, even those seeming to eliminate discretion, would not prevent government agents from ignoring the policies to benefit some persons. For example, in the search context, government agents could often decline to invade the privacy of certain persons, no matter what the local policies or regulations might seem to require. These decisions not to intrude go largely unrecognized because they are generally not recorded, let alone challenged.³²¹ For this reason, the supposed pressure from the influential toward substantively reasonable policies may be slight even where regulations are discretionless and are proffered as non-arbitrary. Very intensive oversight of the government agency, accompanied by strong reporting requirements, could promote greater adherence to the local policies.³²² However, as we have seen in the Fourth Amendment context, the Supreme Court has been unwilling to require significant limits on governmental discretion in local regulations or to closely monitor agency compliance.³²³ Arguably, this result only signifies a problem with the Court's level of oversight rather than with the theory of how reducing government discretion produces substantive reasonableness. However, if the theory

320. Kurland, *supra* note 117, at 591.

321. See COLE, *supra* note 16, at 54 (arguing for requiring "police officers to keep public records of the race of those whom they stop, question and subject to consent searches").

322. See *id.*

323. See, e.g., *Colorado v. Bertine*, 479 U.S. 367 (1987) (upholding an impoundment and search of a car on an administrative-seizure-and-search theory although the local regulations conferred great discretion on the police and the officers failed to follow the prescribed procedure in their "inventory" search of the car).

depends, as I believe it does, on a level of supervision by the Court that is implausible, the problem is with the theory.³²⁴

3. Equality Can Only Be a Rhetorical Device

While equality lacks the substance to be an explanatory end or intermediate goal, equality rhetoric must have a legitimate function in constitutional construction. The Fourteenth Amendment itself mandates that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."³²⁵ Under this clause, the Court is obligated to give meaning to the terminology of equality. How should we view this unavoidable mandate of equality? I submit that we can only appropriately see it as a rhetorical device through which the Court can articulate and enforce substantive rules regarding the appropriate treatment of persons by government. This view need not assume any particular notions about the limits that should govern the Court's construction of equal protection doctrine.³²⁶ It does mean, however, that the construction of the clause will necessarily involve substantive standards of treatment that are not revealed by the notion of equality.

The view of prescriptive equality, as a rhetorical device authorizing the Court to construct substantive rights, comports with the Court's approach to adjudicating equal protection claims in criminal procedure, except for the period between *Brown* and the early 1970s. In the pre-*Brown* era, the Court had decided cases in favor of criminal defendants under the Equal Protection Clause by

324. Professor Ely seems to concede, for example, that it is impossible, as a practical matter, for the Supreme Court to effectively limit discretion in the capital sentencing process. This concession comes after he asserts that the Eighth Amendment regulates capital sentencing by calling for constraints on the discretion of official decision makers, which he contends will produce less arbitrariness in the distribution of death penalties and, in turn, substantively reasonable policies on the use of the death penalty. ELY, *supra* note 149, at 174.

325. U.S. CONST. amend. XIV, § 5.

326. The proper method for constructing equal protection doctrine, of course, has been disputed. Compare BERGER, *supra* note 311, at 198-220 (arguing that the Equal Protection Clause should be constructed according to the intent of the drafters to proscribe only state legislation that accords certain fundamental rights concerning personal and property security and the freedom to travel to whites but not to blacks), and ROBERT H. BORK, *THE TEMPTING OF AMERICA* 81 (1990) (asserting that the Equal Protection Clause was originally understood to ensure "black equality" and that it should be so construed even to proscribe segregation, although equality and segregation were originally understood as compatible), with ELY, *supra* note 149, at 32 (contending that the meaning of the clause "will not be found anywhere in its terms or in the ruminations of its writers") and Sandalow, *supra* note 70, at 1053 (arguing that equal protection provides "the means by which the Court may protect interests that have come to be viewed as fundamental but that cannot easily be read into more specific constitutional provisions limiting governmental power").

delineating substantive rules about the treatment of persons by government. During the two decades after *Brown*, the Court often merely repeated the vacuous language of prescriptive equality. However, beginning in the early 1970s, the Court again reverted to a delineation of substantive rights when it decided cases in favor of criminal defendants under the Equal Protection Clause.

This same general view of equality as a rhetorical device would have to explain its use in constructing the criminal clauses. As an ultimate or intermediate goal in itself, prescriptive equality lacks substance. As a rhetorical device through which to articulate substantive rights, prescriptive equality at least serves a coherent function.³²⁷ The Justices may not have viewed their use of prescriptive equality under the criminal clauses in this way. However, understanding equality as a rhetorical device facilitating the development of substantive rights is the only possibility by which to justify its use in constitutional construction.

B. The Problems With Using Equality as a Rhetorical Device Under the Criminal Clauses

While equality rhetoric can serve a comprehensible function in constitutional adjudication, whether it is appropriately used to construct the criminal clauses raises questions about how we should understand those clauses. Equality rhetoric is embodied explicitly in the Fourteenth Amendment. However, this rhetoric may not be appropriately employed in the construction of specific criminal provisions. Understood as a rhetorical device, a command to treat people equally is somewhat like a vague directive to treat persons "properly," or "fairly," or "reasonably;" all of the details must still be worked out.³²⁸ Can the criminal clauses under focus be understood to carry such a command? I now turn to that question.

1. Equality Rhetoric Cannot Serve as a Unifying Gloss on the Bill of Rights

We should ask at the outset why equality rhetoric could not provide a unifying gloss for constructing all of the provisions in the Bill of Rights. To say that equality provides a unifying gloss would mean that the various clauses throughout the Bill of Rights should

327. Cf. Cohen, *supra* note 63, at 888 (asserting that Justices often realize that an equality rationale is simply a surrogate for announcing a substantive ground for decision).

328. However, the equality command is potentially more misleading because of the tendency to think that equality is more self-defining. See Westen, *supra* note 3, at 577-92.

be understood to command government simply to "treat persons equally" or "treat persons equally in this context." Yet, this approach is untenable under any view of construction that concerns itself with the language and history of constitutional clauses and their roles in the larger structure of the Constitution.

Giving meaning to Bill of Rights clauses must often be an act of creation, because their mandates are often uncertain. Structural considerations can help in this process of construction.³²⁹ Indeed, the Court has long taken into account structural factors in arriving at the meaning of constitutional provisions.³³⁰ Based partly on a belief in the importance of structural factors, constitutional scholars have also sought to identify unifying theories for understanding the Constitution or the Bill of Rights.³³¹ The danger for efforts to find unifying theories, however, is that they will either ignore the language and history of certain clauses or that the theories will be stated at such a high level of generality as to be of little analytical value in deciding most constitutional controversies.³³² Any effort to

329. See, e.g., Mary Ann Glendon, *Toward a Structural Approach to Constitutional Interpretation*, in BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 141, 148 (Terry Eastland ed., 1995) (advocating that courts approach "interpretive problems by attending to the overall design of the Constitution and mutually conditioning relationships among its provisions"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on the Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235 (1995) ("Read in isolation, most of the Constitution's provisions make only a highly limited kind of sense.").

330. For example, the Court has concluded that most Bill of Rights provisions assumed new applications against the states through the Fourteenth Amendment, which created broad new protections for individuals in their relations with the states.

331. John Hart Ely proposed a process-perfecting theory for understanding the constitution, arguing that the document should be viewed throughout as ensuring a procedural structure for democracy and as guaranteeing procedural liberties, not substantive liberties. See ELY, *supra* note 149, at 87 (arguing that "the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government"). For a trenchant critique of Ely's argument, see James E. Fleming, *A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretivism of Representative Democracy*, 80 MICH. L. REV. 634 (1982). For a better liberal republican theory, one which aims to secure both *deliberative democracy* and *deliberative autonomy*, on the view that both are basic preconditions for self-government, see James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995).

332. Judge Posner has noted a related ground for suspicion:

The arguments against the holistic approach are familiar. The basic one is that it gives judges too much power. When you think of all those constitutional theories jostling against one another—Epstein's that would repeal the New Deal, Ackerman's and Sunstein's that would constitutionalize it, Michelman's that would constitutionalize the welfare state, Mark Tushnet's that would make the Constitution a charter of socialism, Ely's that would resurrect Earl Warren, and some that would mold constitutional law to the Thomists' version of natural law you see the range of choice that the approach legitimizes, the instability of constitutional doctrine that it portends.

see prescriptive equality as providing a unifying gloss throughout the Bill of Rights would run afoul of these kinds of problems.

The language and history of many of the criminal clauses fail to support an argument for reinventing them as a group through the rhetoric of prescriptive equality. Most of the criminal clauses are far too specific to bear such a construction. Consider the provisions in the Sixth Amendment that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb"³³³ or the requirement in the Sixth Amendment that "the accused shall enjoy the right to a speedy and public trial."³³⁴ While not without ambiguities, these clauses say nothing that would suggest that they were understood to speak in the vague terms of equality. Substituting an "equality" command would likely alter their meanings. Their language guarantees relatively specific substantive rights.³³⁵ Indeed, the Court has not used equality rhetoric in constructing these or several other criminal clauses.³³⁶ That some of the criminal clauses have never been thought to incorporate equality rhetoric undermines the notion of any unifying theory based on equality for constructing all of them.

Considerations of constitutional structure themselves weigh against any unifying theory of the Bill of Rights based on equality rhetoric. Structural considerations reveal the absence of any need for such a construction. The Equal Protection Clause in the Fourteenth Amendment applies only against the states. Consequently, no explicit equality mandate operates against the federal government. Yet, if an equality mandate against the federal government were thought necessary, the source should be the broad language of

POSNER, *supra* note 18, at 186.

333. U.S. CONST. amend. V.

334. U.S. CONST. amend. VI.

335. See, e.g., AMAR, *supra* note 13, at 103 (discussing the historical understanding of the speedy trial provision); WHITEBREAD & SLOBOGIN, *supra* note 263, at 793 (discussing the historical understanding of the double jeopardy clause).

336. The Court has sometimes even rejected the notion that the Fourth Amendment, under which the Court has frequently employed equality rhetoric, incorporates an equality command. For example, in *Whren v. United States*, 517 U.S. 806 (1996), a unanimous Court held that the Fourth Amendment permits a traffic stop, as long as the police officer had antecedent justification to believe that the detainee committed a traffic violation, even if the officer actually decided to stop the car based on suspicion of a more serious offense fueled by inappropriate factors. The Court concluded that the Fourth Amendment's concern with reasonableness "allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Id.* at 814 (emphasis in original). The Court was also explicit that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.* at 813. The decision indicated that the Fourth Amendment is concerned with whether there is a substantive basis for an intrusion, but not with whether a basis for intrusion is pursued by the officers against all suspicious people.

the Ninth Amendment or, perhaps, the Due Process Clause in the Fifth Amendment, rather than all of the criminal clauses.³³⁷ By reading equal protection into one of the broad provisions,³³⁸ the Court could augment rather than alter the specific criminal clauses. Of course, in a companion case to *Brown*, the Court used the Fifth Amendment's Due Process Clause to apply the equal protection mandate of *Brown* against the federal government.³³⁹ This decision only proves the point. Given the availability of open-ended clauses to construct rights against both the states and the federal government,³⁴⁰ no need exists to view the criminal clauses through the unbounded rhetoric of equality.

2. Equality Rhetoric Cannot Serve as a Gloss on Specific Criminal Clauses

Equality rhetoric also has been improperly used in constructing the particular criminal clauses under scrutiny in this Article. I have focused on three important areas of doctrine arising under the Fourth, Fifth, Sixth, and Eighth Amendments. The language and history of the relevant clauses do not support their interpretation as vessels for an open-ended, equality mandate.³⁴¹ Fur-

337. See U.S. CONST. amend. IX; U.S. CONST. amend. V.

338. The proper method for constructing these two open-ended clauses, of course, has been disputed. For the view that the Ninth Amendment provides the best ground for the Court to enforce Equal Protection rulings against the federal government, see ELY, *supra* note 149, at 33; cf. Grey, *supra* note 312, at 709 ("[The Ninth Amendment] is . . . a license to constitutional decisionmakers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein.") But see BORK, *supra* note 326, at 183 ("Nothing could be clearer, however, than that, whatever purpose the Ninth Amendment was intended to serve, the creation of a mandate to invent constitutional rights was not one of them."). For the view that the Due Process Clause in the Fifth Amendment allows the Court to enforce equal protection rulings against the federal government, see AMAR, *supra* note 13, at 79-84. But see ELY, *supra* note 149, at 32 (contending that the argument for applying the equal protection principles through the Fifth Amendment is "gibberish both syntactically and historically").

339. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (outlawing segregation in the public schools of the District of Columbia).

340. See generally CHEMERINSKY, *supra* note 65, at 527 ("It is now well-settled that the requirements of equal protection are the same whether the challenge is to the federal government under the Fifth Amendment or to state and local actions under the Fourteenth Amendment.")

341. The Supreme Court's importation of equality thinking has also affected doctrine under the impartial jury clause in the Sixth Amendment. The problem in this area is not that the Justices have failed to give content to the notion of prescriptive equality; they have articulated a substantive standard derived from equal protection doctrine regarding which potential jurors are equal. The problem is that the Court has ignored that the Sixth Amendment aims not for equality for potential jurors but a fair jury for the criminal defendant. The impartial jury clause, by its explicit terms, aims to protect the accused: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury." U.S. CONST. amend. VI.

ther, the structural considerations that weigh against a broad use of equality rhetoric throughout the Bill of Rights also weigh against such an approach to the construction of these specific clauses.

Most of the criminal clauses that are the focus of this Article cannot linguistically bear an equality gloss. The Fifth Amendment privilege against self incrimination, the Sixth Amendment right to counsel, and the Eighth Amendment protection against "cruel and unusual punishments," while not entirely transparent, are fairly specific. To view them as general mandates for "equal" treatment is to inappropriately change the commands that they embody.³⁴²

The Fourth Amendment is the only one of these provisions that can accommodate an equality gloss without torturing its terms. It essentially provides, in its first clause, that people are not subject to searches and seizures that are "unreasonable," and, in its second clause, that warrants shall not issue except on probable cause and

The impartial jury mandate in the Sixth Amendment also was not originally understood as making the equal treatment of potential jurors, however their equality is defined, of paramount concern. Professor Amar has made the strongest claim for an original understanding of the Sixth Amendment as protecting potential jurors, but his arguments do not support the pursuit of equality. Amar has contended that Article III created a right on the part of the people to participate on juries and that the Sixth Amendment did not make the right one only for the defendant. AMAR, *supra* note 13, at 120. The relevant clause in Article III states: "The Trial of all Crimes . . . shall be by Jury." U.S. CONST. art. III, § 2, cl. 3. However, Amar's argument only implies that a bench trial rather than a jury trial is improper and that a defendant has no right to a jury pool with members of groups not "like" him excluded. (Amar notes that the Court has not enforced the first "requirement" of jury rather than bench trials.) Amar does not suggest that the Sixth Amendment should be understood as guaranteeing equality for potential jurors. Indeed, the Court has not found that potential jurors have an actionable claim for violation of the Sixth Amendment when they are excluded from jury service. Because the impartial jury clause aims to protect the accused, the rights of potential jurors under equal protection should not define the outer limits of Sixth Amendment protection. Members of the Republican Party, for instance, are not a cognizable group for purposes of equal-protection doctrine on jury selection, but their systematic exclusion from federal juries could violate the defendant's right to an impartial jury. Of course, the notion of an impartial jury would have expanded as equal protection doctrine guaranteed more groups the right to serve on juries. For example, as African Americans and women gained the right to serve under equal protection, the notion of an impartial jury also guaranteed the accused that those groups would not be systematically excluded. Nonetheless, the number of cognizable groups under the Sixth Amendment should exceed those cognizable under equal protection. See, e.g., Mitchell S. Zuklie, Note, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 132 (1996) (noting that, while the interests protected by the two provisions may frequently overlap, they are certainly not identical); cf. *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979) (concluding that scheme allowing women to opt out of jury service on written request violated the defendant's rights under the Sixth Amendment).

342. In any event, the Court has not employed equality under these clauses as if it were a mere rhetorical device. In the confessions context, the arguments that pushed the Court to its famous *Miranda* decision treated equality as a coherent idea and simply misapprehended the substantive standards in the Constitution for deciding how persons should be treated, and, thus, how equality should be measured. See *supra* text accompanying note 203. In the Eighth Amendment context, the Court has mandated equality as if it were self-defining. See *supra* Part III.B.

with descriptive specificity. The term "unreasonable" in the first clause is sufficiently vague that the rhetoric of equality could perhaps be substituted and rights of treatment announced without altering the substantive rules that would otherwise have been constructed.

Yet, as we have seen, this is not the way that the Justices have used equality in the Fourth Amendment context. Instead, they have promoted equality as if it were an explanatory end in itself or an intermediate goal with beneficial consequences.³⁴³ We have seen that this view of equality is inherently flawed and, therefore, can never appropriately be used in constructing constitutional provisions, not even the Equal Protection Clause.³⁴⁴ Hence, while using equality as a mere rhetorical device in the Fourth Amendment context could be inconsequential (but, therefore, unnecessary), the Court has used equality in a way that could only derail the proper construction of substantive Fourth Amendment protections.

The argument is also unpersuasive that these criminal clauses were understood at the time of their promulgation to do, in more limited contexts, the same thing as the Equal Protection Clause. A dearth of support exists for such a view of the Fifth and Sixth Amendment clauses relied on by the Court in the confessions context. As we have seen, the Warren Court tackled the confessions problem by extending the right to counsel and the privilege against self-incrimination outside of the formal, judicial setting.³⁴⁵ The Court also was persuaded by equality arguments to require warnings to suspects in custodial interrogation contexts and to impose prohibitions on police interrogation where the suspect asserted one of the rights, the strongest prohibition arising upon assertion of the right to counsel.³⁴⁶ Yet, the Sixth Amendment right to counsel was not historically understood to apply outside of hearings before judicial officers.³⁴⁷ Likewise, the Fifth Amendment privilege was not originally understood to apply outside of the judicial setting, nor to require the assistance of counsel.³⁴⁸

Insufficient historical evidence also exists for an equality gloss on the Cruel and Unusual Punishments Clause. Actually, the

343. See *supra* text accompanying notes 262-305.

344. See *supra* text accompanying notes 306-24.

345. See *supra* text accompanying notes 217-19.

346. See *supra* text accompanying notes 220-22.

347. See Note, *supra* note 182, at 1002 (asserting that the right was only "traditionally associated with hearings before judicial officers").

348. See, e.g., GRANO, *supra* note 12, at 123-31 (contending that the privilege was not originally understood to apply to informal compulsion exerted by law-enforcement officers).

Eighth Amendment clause may have been generally understood when adopted to prohibit only barbarous *methods* of punishment.³⁴⁹ The same language had been understood in earlier decades in England as proscribing not barbarous methods but penalties deemed excessive in relation to the crime.³⁵⁰ The United States Supreme Court began viewing the language as proscribing both barbarous punishments and excessive punishments in the early 1900s.³⁵¹ However, assuming the clause properly prohibits excessive punishments, an equality veneer confuses its command. The excessiveness prohibition simply requires that no person receive a punishment that is deemed too severe, without prohibiting unwarranted acts of leniency.³⁵² By contrast, an equality mandate would call for every person to receive the same punishment under the same circumstances. But, what would this command mean? Would unwarranted reprieves produce inequality? If so, the effect of the Eighth Amendment changes. Indeed, until *Furman v. Georgia*, the Justices had never ventured such a construction.³⁵³

Historical support is also lacking for the notion that the Fourth Amendment was generally understood to carry an equality veneer. Professor Amsterdam has concluded that the aim of the amendment was to proscribe arbitrary searches, and, from this conclusion, that it should proscribe both substantively unjustified searches and substantively justified searches that are pursued unequally against certain groups of persons.³⁵⁴ Yet, this view finds no

349. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 840-42 (1969) (explaining that the clause was understood by its framers and by early state and federal jurists as only prohibiting certain forms of punishment).

350. See *id.* at 860 ("The English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties.").

351. See *Weems v. United States*, 217 U.S. 349, 366-67 (1910) (striking down certain penalties as too severe for the particular crime involved, and asserting that "[s]uch penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense").

352. To determine what is excessive, a pattern of rare use of a penalty might be thought relevant. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 594-95 (1977) (holding the death penalty to be cruel and unusual punishment for the crime of rape based, in part, on the limited use of the sanction for that offense).

353. *Furman v. Georgia*, 408 U.S. 238, 398 (1972) (Burger, C.J., dissenting) ("[I]t seemingly follows that the flexible sentencing system . . . has yielded more mercy than the Eighth Amendment can stand.").

354. See Amsterdam, *supra* note 276, at 417 (asserting that the Fourth Amendment prohibits "arbitrary searches and seizures as well as unjustified searches and seizures"); *id.* at 366 (asserting that Fourth Amendment regulates the selective pursuit of searches that are otherwise allowable).

persuasive support in historical evidence. The Amendment seems to have been understood to proscribe "arbitrary" governmental actions only because it demanded that the regulated intrusions be substantively justified and that, in some if not all cases, a magistrate make that determination in advance through issuance of a specific warrant.³⁵⁵ An otherwise justified search was not understood to become "unreasonable" because others who could also justifiably have been searched were not pursued.

Structural considerations also disfavor reliance on equality rhetoric to construct a limited group of the criminal clauses, just as those considerations disfavor that view for the Bill of Rights more generally.³⁵⁶ Open-ended clauses are available to construct new protections against the state and federal governments.³⁵⁷ The criminal clauses embody more specific mandates that are subverted when overlaid with the confusing veneer of equality. Because the open-ended clauses could be used to construct unenumerated rights against both the states and the federal government,³⁵⁸ no need exists to understand these criminal clauses through the misleading rhetoric of equality.³⁵⁹ Indeed, in the end, no compelling argument arises for allowing equality, in any form, to alter the substantive ideals that these clauses embody.³⁶⁰

355. See generally LEONARD W. LEVY, SEASONED JUDGMENTS 163-168 (1995) (indicating that the pre-adoption history revealed a motivating concern about searches conducted without just cause); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1726 (1996) ("[T]he historical record suggests that objections to general warrants and general searches alike rested upon broad concerns about protecting privacy, property and liberty from unwarranted and unlimited intrusions."); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551-52 (2000) ("[T]he evidence indicates that the Framers understood 'unreasonable searches and seizures' simply as a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrants, [and they] expected that warrants would be used.").

356. See *supra* text accompanying notes 338-40.

357. See *supra* note 338 and accompanying text.

358. See generally CHEMERINSKY, *supra* note 65, at 527 ("It is now well-settled that the requirements of equal protection are the same whether the challenge is to the federal government under the Fifth Amendment or to state and local actions under the Fourteenth Amendment.").

359. As a descriptive matter, constitutional construction may not be significantly confined by the text and history of constitutional provisions or their place in the document's larger structure. See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 191 (1988) ("There is nothing that is unsayable in the language of the Constitution."). Yet, from a normative standpoint, to ignore these considerations is effectively to say that the constitution should mean whatever the Justices of the Supreme Court want it to mean.

360. This premise does not imply that the Justices should never consider the potential for improper discrimination in deciding how to construct rights under these clauses. The choice between a malleable standard or a relatively bright-line rule can sometimes depend on the potential for race or caste discrimination by government officials. However, that sort of limited

V. RECONSTRUCTING THE CRIMINAL CLAUSES AND THEIR RELATIONSHIP WITH THE OPEN-ENDED CLAUSES

I now turn to the question of how the criminal clauses under scrutiny could have been developed if the Court had not been so distracted with equality in constructing them. The effort proceeds on an approach that is grounded in conventional considerations.³⁶¹ However, my goal is not to defend in each instance a particular construction against all of the arguments that could be offered against it. Instead, my aim is simply to show how the doctrines could have developed if the Court had not been caught up in the demonstrably erroneous effort to read notions of equality into these clauses.

A. An Alternative View of the Fifth and Sixth Amendments as They Apply to Police Interrogation of Suspects: Modifying the Warnings and Waiver Rules

The Court's modern interrogation doctrine could reasonably be reformed to serve the substantive values that the Fifth Amendment privilege actually embodies.³⁶² *Dickerson v. United States*, in which the Court recently held that Congress could not overrule *Miranda* through legislation, suggests that the Court is not itself soon likely to overrule *Miranda*.³⁶³ Nonetheless, the Court could reform parts of *Miranda* doctrine without abandoning *Miranda* entirely and without rejecting *Miranda*'s core premise. Therefore, it remains worthwhile to ask: Which parts of the doctrine are plausibly required by the Fifth Amendment privilege and which are not? Some parts of *Miranda* doctrine arguably are mandated by the

effort to construct substantive rights in light of concerns over the interaction of race bias and vague standards is a far cry from what the Court has done.

361. For what I mean by "conventional" approach to constitutional construction, see *supra* text accompanying note 18.

362. Since the early 1970s, many of the Justices, at times a majority, have sought to undermine *Miranda* and its progeny by creating exceptions rationalized on the claim that the doctrine is merely prophylaxis rather than constitutional mandate. See generally *KAMISAR ET AL.*, *supra* note 101, at 502-05, and authorities cited therein. This view of *Miranda* as mere prophylaxis provided the central argument in *Dickerson* for allowing Congressional overruling.

The dispute within the Court about the jurisprudential basis for *Miranda* has always been off the mark in an important sense. In questioning *Miranda*'s constitutional grounding, the Justices who have been critics of *Miranda* have implicitly supported a view of the Court's authority that they themselves do not endorse, namely that the Court can properly announce constitutional common law. See *supra* note 200. Absent a concession that the Court is authorized to announce this sort of common law, the claim that *Miranda* authorized it is unconvincing.

363 *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000) ("[T]he principles of *stare decisis* weigh heavily against overruling [*Miranda*] now.").

privilege.³⁶⁴ However, other parts are more clearly unfounded, supported only by the Warren Court's preoccupation with egalitarianism.

The Court has retracted some of its erroneous interrogation doctrine. The correction has come in the reconstruction of the Sixth Amendment right to counsel. We saw that the Court initially used the Sixth Amendment right in *Massiah v. United States* to exclude a statement deliberately elicited from a suspect who had already been indicted.³⁶⁵ That conclusion at least comported with the Sixth Amendment language conditioning an accused's right to counsel on the commencement of a "criminal prosecution." However, we saw that, in *Escobedo*, the Court soon extended the Sixth Amendment right to a suspect who had neither been formally charged nor presented in court but who had already retained and asked to consult with counsel.³⁶⁶ The Court's conclusion lacked a grounding in the Sixth Amendment, and, as we saw, the Court later retracted it.³⁶⁷ In overruling *Escobedo*, the Court correctly clarified that the Sixth Amendment right to counsel arises only with the commencement of adversary judicial proceedings.

The Court has failed to retract unfounded portions of *Miranda* doctrine. As we saw, *Miranda* built on *Massiah* and on the erroneous conclusion set forth in *Escobedo*.³⁶⁸ Under the Fifth Amendment privilege, the Court aimed to give the poor and ill-informed what the more wealthy and well-educated had secured under the Sixth Amendment. The Court did so through the *Miranda* warnings, including one regarding a new, Fifth Amendment right to counsel, and through rules requiring waivers of the right to silence and the new right to counsel. However, the right-to-counsel aspects of *Miranda* doctrine are unfounded. A right to remain silent does not confer a right to a lawyer's help to decide whether to waive it. The Court has never held that the Fourth Amendment creates a right to counsel for the decision whether to consent to a search. Moreover, if the Sixth Amendment clause, which defines when the right to counsel arises, does not provide counsel to detainees during interrogation, the Fifth Amendment privilege should not guarantee it. The right-to-counsel aspects of

364. There is genuine dispute, however, about whether *Miranda* doctrine as a whole lacked grounding in the Fifth Amendment privilege. See *infra* notes 378-81 and accompanying text.

365. See *supra* text accompanying notes 181-85.

366. See *supra* text accompanying notes 187-94.

367. See *supra* note 198.

368. See *supra* text accompanying notes 198-222.

Miranda were explained by the Court's pursuit of equality rather than by a plausible construction of the Fifth Amendment privilege. Yet, the equality explanation itself was ill-founded, as the Court later made clear in retracting the explanation for *Escobedo*.³⁶⁹ Until adversary judicial proceedings commence, the Sixth Amendment does not require the police to grant even a wealthy arrestee's request to speak with retained counsel. Concomitantly, no disparate treatment of detainees would arise from holding that the Fifth Amendment privilege does not confer a right to counsel.³⁷⁰

This conclusion indicates that two aspects of the *Miranda* requirements were groundless. First, the Court should not have required that detainees be told that they have a right to counsel before and during police questioning. Secondly, the Court should not have held that the Fifth Amendment requires the police to secure a waiver of a right to counsel before custodial interrogation, because such a right does not exist. The constitutional requirement should be fulfilled if the detainee simply waives the option to remain silent.

Many of the progeny of *Miranda* were also unfounded. The second-level rules that have arisen around the assertion of the *Miranda* right to counsel cannot survive if there is no Fifth Amendment right to counsel.³⁷¹ These second-level rules have imposed obstacles to police questioning after assertion of the right to counsel that exceed those arising upon assertion of the right to remain silent. Such protections make little sense under any circumstances. The *Miranda* right to counsel, at best, was only a means to protect the more central right to remain silent. For this reason alone, assertion of the right to counsel should not call for more protection than assertion of the right to silence. In any event, because the *Miranda* right to counsel should itself be retracted, so too should the additional protection arising upon a request for counsel.³⁷² Supplemental protections need only arise when a suspect asserts the right to silence.

Eliminating the right-to-counsel aspects of *Miranda* would also go far towards avoiding the practical problems caused by the

369. See *supra* note 198 (discussing the *Kirby* and *Burbine* cases).

370. See GRANO, *supra* note 12, at 37 ("Inequality . . . cannot exist if no defendant, rich or poor, sophisticated or unsophisticated, has a right to counsel's assistance in the police station.").

371. See *supra* notes 225-26 and accompanying text.

372. Under the Fifth Amendment, a request for counsel should invoke no more protection than a request for a priest, a family member, or a probation officer. See, e.g., *Fare v. Michael C.*, 442 U.S. 707 (1979) (holding that a suspect's request to speak with his probation officer triggered no special protections under *Miranda* doctrine).

doctrine.³⁷³ Studies suggest that the mandated statements regarding the right to counsel deter confessions more than any other part of the *Miranda* warnings.³⁷⁴ The stringent rules that adhere upon assertion of the right to counsel also go further to prevent the introduction of a subsequently secured confession than the rules that apply when the accused asserts the right to silence.³⁷⁵ As supporters of *Miranda* have emphasized, *Miranda* doctrine as a whole produces only a small effect on the overall conviction rate, both because the vast majority of suspects who are advised of their rights waive them and because convictions can often be obtained without the suspect's statements.³⁷⁶ Nonetheless, to the extent that *Miranda* does prevent convictions or force the expenditure of valuable investigative resources—and even *Miranda*'s supporters must concede that *Miranda* sometimes has such effects—a large share of the problem appears attributable to the most constitutionally suspect aspects of the doctrine.

Concern over odious discriminations in police interrogation could still find constitutional remedy. If a police officer or a police department treated suspects differently in the interrogation context based, for example, on race or caste, the police action could likely be found to infringe the Constitution. However, the condemnation should be grounded on one of the open-ended provisions, such as the Equal Protection Clause, rather than the Fifth Amendment

373. An overriding concern raised by critics of *Miranda* doctrine is that it lacks a constitutional grounding. See, e.g., GRANO, *supra* note 12, at 199 ("Read as an interpretation of what the [Fifth Amendment privilege], even broadly construed, actually requires, *Miranda* is seriously flawed."); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,"* 54 U. CHI. L. REV. 938, 948 (1987) ("The various restrictions imposed by the *Miranda* rules were unheard of prior to the innovative decisions of the 1960s and have no basis in the Constitution."). Another concern raised is that the doctrine significantly impedes the use by the state of reliable evidence of an accused's guilt. See, e.g., Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U. L. REV. 1084 (1996) (arguing, based on reassessment of previous empirical studies, that *Miranda* has significant social costs in terms of lost convictions and unduly favorable plea bargains for defendants); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. REV. 387 (1996) (same) [hereinafter Cassell, *Miranda's Social Costs*]; Markman, *supra*, at 945 ("[A] number of studies . . . found immediate, dramatic reductions in statements and admissions obtained in custodial questioning following the implementation of the *Miranda* rules.").

374. See, e.g., Cassell, *Miranda's Social Costs*, *supra* note 373, at 496, n.630, and authorities cited therein.

375. See *supra* text accompanying note 225.

376. See, e.g., Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. REV. 500, 562 (1996) ("*Miranda*'s detectable social costs are vanishingly small."); Schulhofer, *supra* note 207, at 456-57 ("[S]uspects agree to talk without the need for pressure or deception . . . , and convictions are still obtained without confessions.").

privilege against self-incrimination. By addressing pernicious biases under the Equal Protection Clause, the Court could avoid obscuring or subverting the meaning of the Fifth Amendment privilege. Likewise, the Court could avoid the need to create anti-discrimination rules that are distorted by the specific language in the privilege. Under this approach, the Court would not likely find, as it did in *Miranda*, a right to counsel for all interrogated detainees. The Court has required the equal-protection claimant to demonstrate a purpose to discriminate on odious grounds in his particular case to make out a violation.³⁷⁷ The Court has not created bright-line rules that assume that purposeful improper discrimination is rampant among police or prosecuting authorities throughout the country.

Eliminating the right-to-counsel aspects of *Miranda* would not avoid all dispute about the doctrine's grounding in the Fifth Amendment privilege, but much of the controversy would disappear. Some critics would question whether the privilege was originally understood to apply to informal, police interrogation.³⁷⁸ They would also note that the clause purports to give its beneficiaries not a right to silence but a right not to be "compelled" to incriminate themselves.³⁷⁹ This point makes *Miranda's* waiver requirement suspect, because, while the idea of waiving a right to silence is comprehensible, the notion of waiving a right to be free from compelled self-incrimination makes no sense.³⁸⁰ These additional challenges to *Miranda* build on substantial arguments, but they are also not without plausible responses by proponents of *Miranda*.³⁸¹

377. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (declaring that death-row inmate using statistical study to challenge death sentence under equal protection on grounds of racial discrimination must prove "that the decisionmakers in his case acted with discriminatory purpose").

378. See, e.g., GRANO, *supra* note 12, at 131 (arguing that *Miranda* incorrectly held the privilege applicable to the informal setting of police interrogation).

379. See, e.g., *id.*, at 141-42 (arguing that even if the Fifth Amendment privilege applies to informal, police interrogation of suspects, it "confers a right not to be compelled to answer questions; it does not confer a substantive or formal right of silence").

380. See, e.g., *id.* at 142 ("[W]hile the notion of waiving a right of silence is intelligible, the notion of waiving a right not to be compelled, especially when compelled is a synonym for coercion, is not.").

381. For example, police interrogation did not exist at the time of the founding in the way it exists today, so that the original understanding may not be thought very helpful in deciding whether the privilege applies. See, e.g., Schulhofer, *supra* note 207, at 438 ("[I]t seems clear that the privilege was intended to bar pretrial examination by magistrates, the only form of pretrial interrogation known at the time."). Likewise, a warning regarding one's option to remain silent and the requirement of a waiver might plausibly be thought to reduce a "compulsion" to cooperate created by the station house environment. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) ("[S]uch a warning is an absolute prerequisite in overcoming the inherent pressures of the

By contrast, arguments for the right-to-counsel aspects of *Miranda* are unpersuasive if only because they call for ignoring the Sixth Amendment provision that defines when a right to counsel arises. The Fifth Amendment privilege might support a right to silence as well as warning and waiver requirements. It might even call for better warnings regarding the right to silence than the Court articulated in *Miranda*.³⁸² However, the privilege does not support a right to counsel. The *Miranda* right to counsel was grounded only in a misguided pursuit of equality.

B. Rethinking the Eighth Amendment and Capital Sentencing: A Substantive Measure of Justice in the Use of the Death Penalty

The Court could also reorient its regulation of capital sentencing so that the doctrine would have a plausible grounding in the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Court has rationalized its capital sentencing rules as an effort to achieve equality, but it has not provided the substantive content that would give the equality mandate any meaning.³⁸³ If the Eighth Amendment regulates the use of the death penalty, it mandates a substantive standard about when the capital sanction is appropriate, not a command that capital sentences be equal. The Court must focus on what, if any, substantive standard regarding the use of the death penalty the Cruel and Unusual Punishment Clause imposes.

The Eighth Amendment can be understood to establish a substantive standard about when the death penalty is just. For the Eighth Amendment to regulate who receives the death penalty, but not abolish capital punishment altogether, it must proscribe punishments that are excessive in particular contexts but not prohibited per se. The Court has long concluded that the Amendment pro-

interrogation atmosphere.”). Unlike with the right-to-counsel warning and waiver, such a view does not conflict with another provision of the Constitution.

382. The warnings articulated in *Miranda* omitted two important cautions connected with the right to silence: (1) the Court did not require police to advise a suspect of his right to cut off questioning after a prior waiver of the privilege, and (2) the Court did not require authorities to advise a suspect that his silence could not be used against him in court. The first of these additional protections was established in *Miranda* itself. See *Miranda*, 384 U.S. at 479 (“Opportunity to exercise these rights must be afforded to him through out the interrogation.”). The second was established in *Doyle v. Ohio*, 426 U.S. 610 (1976). Knowledge of these protections would seem helpful to a detained suspect in deciding how to respond to police pressure to answer questions.

383. See *supra* text accompanying notes 227-61. For discussion focusing specifically on the Court’s limited assertions regarding the substantive measure justifying Eighth-Amendment regulation of capital sentencing, see *supra* text accompanying notes 227-61.

hibits excessive punishments, along with punishments deemed inherently inhumane.³⁸⁴ Some Justices have dissented from this view,³⁸⁵ but it is plausible. A ten-year prison term for a minor offense can reasonably be described as "cruel and unusual," even though the same sentence would be permitted for a serious crime. The original understanding also is not sufficiently clear to foreclose the conclusion that the clause disallows excessive punishments as well as those deemed inhumane *per se*.³⁸⁶

The measure of excessiveness is only sensibly grounded in retributive ideals, which means that the propriety of each death sentence should turn on whether the offender deserves that pun-

384. In *Weems v. United States*, 217 U.S. 349 (1910), the Court held that the clause proscribes a sanction that is excessive as applied. For falsifying a public document, Weems had been sentenced to *cadena temporal*, which, in addition to twelve years of hard labor, involved a loss of civil rights and perpetual supervision. The Court alluded to the extreme and unusual character of the forfeitures as well as the long term of incarceration. See *id.* at 366. Some have doubted that *Weems* supported excessiveness analysis under the Eighth Amendment. See, e.g., Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075-76 (1964) (contending that the combination of the long prison sentence and "a good deal of laid-on unpleasantness" caused the Court's conclusion). However, the *Weems* Court at one point implied rather clearly that it found the sanctions excessive in relation to Weems's particular offense, not improper *per se*: "Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Weems*, 217 U.S. at 366-67; see also *O'Neil v. Vermont*, 144 U.S. 323, 364 (1892) (Field, J., dissenting) ("It is against the excessive severity of the punishment, as applied to the offenses for which it is inflicted, that the inhibition is directed."). The Court has more recently reiterated that excessiveness analysis is appropriate under the Eighth Amendment in the death-penalty context. See *Coker v. Georgia*, 433 U.S. 584, 599 (1977) (finding the death penalty excessive for "rape not involving the taking of life"). On a more limited basis, the Court has also reaffirmed its appropriateness in the non-death-penalty context. See *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., joined by O'Connor & Souter, JJ., concurring in part and concurring in judgment) (supporting a "narrow proportionality principle"); *id.* at 1009 (White, J., dissenting) (contending that it violates the clause "to impose any punishment that is grossly disproportionate" to the defendant's offense).

385. See *Graham v. Collins*, 506 U.S. 461, 488 (1993) (Thomas, J., concurring) (concluding that "the better view" is that the clause "was intended to place only substantive limitations on punishments"); *Harmelin*, 501 U.S. at 976 (asserting that the clause only "disables the Legislature from authorizing particular forms or 'modes' of punishment").

386. See, e.g., Phillip E. Johnson, *Cruel and Unusual Punishment*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 575, 575 (Sanford H. Kadish ed., 1983) ("The history of the clause provides no conclusive answer to the recurring question of whether its American authors meant only to bar certain barbarous punishments altogether or whether they also meant to ban penalties, not unlawful *per se*, that are disproportionate to the crime."). Compare RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 44-49 (1982) (concluding that the Framers intended only to prohibit certain forms of punishment, not including capital punishment in general), with Granucci, *supra* note 349, at 839-42 (contending that the clause was probably understood by its drafters and by early jurists as prohibiting only certain modes of punishment, but noting that the clause as used in the English Bill of Rights, from which it derived, was understood only to prohibit excessive punishments).

ishment and not on utilitarian considerations.³⁸⁷ Why? The proposition that a person should not suffer a punishment that he does not deserve corresponds with basic and widely shared views of justice.³⁸⁸ Indeed, the Supreme Court adopted this view in *Coker v. Georgia*, declaring the death penalty categorically excessive punishment for rape.³⁸⁹ Although the execution of some rapists might greatly serve utilitarian ends, the majority concluded that the death penalty for such a crime was too severe, at least when the victim was an adult and no life was taken.³⁹⁰ The decision under-

387. See NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 38-40 (1980) (contending that the "retributive theory" of punishment in its most general form focuses on offender deserts and not on utilitarian issues); Richard O. Lempert, *Desert and Deterrence: Assessing the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1177 (1981) (noting that advocates of the retributive ground for capital punishment believe that persons who commit the most serious offenses "deserve" to die).

388. See, e.g., ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45 (1976) ("Ask the person on the street why a wrongdoer should be punished, and he is likely to say that he 'deserves' it."); John Hospers, *Retribution: The Ethics of Punishment*, in ASSESSING THE CRIMINAL 181, 183 (Randy E. Barnett & John Hagel III eds., 1977) ("[T]reatment in accord with desert' is probably the most frequently encountered definition of the term 'justice' itself.").

389. *Coker*, 433 U.S. at 592. Justice White wrote for a four-Justice plurality, and Justices Marshall and Brennan individually concurred in the judgment on the broader ground that the death penalty always violates the Eighth Amendment. *Id.* at 600 (Marshall, J., concurring); *id.* (Brennan, J., concurring). Justice Powell concurred in the judgment on the narrow rationale that, on the particular facts of *Coker's* crime, the death penalty was excessive. *Id.* at 601 (Powell, J., concurring).

390. *Id.* at 592. After looking for objective proof that society had found the death penalty an inappropriate punishment for rape, the *Coker* Court cited some rather unconvincing evidence and concluded that the question of excessiveness was for the Court's own judgment. *Id.* at 597. In later cases, the Court has been less clear about the extent to which the objective evidence should be decisive in resolving questions of categorical excessiveness, and the tendency to weigh such considerations too heavily has been criticized. See, e.g., Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1036 (1978) (asserting that an analysis that turns heavily on what legislatures have done is "circular" because it allows constitutional doctrine to be governed by the acts of institutions the constitution is supposed to check); Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning The Execution of Juveniles and Persons With Mental Retardation*, 61 LAW & CONTEMP. PROBS. 89, 97-98 (1998) (noting that cases after *Coker* underscore the difficulty the Court has faced in attempting to discern from the actions of legislatures and juries a societal consensus about the appropriate uses of the death penalty).

In reaching its own judgment about excessiveness in *Coker*, the retributive basis for the decision was clearly implied. The Court did not try to deny the utilitarian argument that executing rapists would deter future rapes as much as executing murderer would deter future murders. See, e.g., Packer, *supra* note 384, at 1079-80 (contending that, if general deterrence justifies capital punishment, the capital sanction for rape is as efficacious as the death penalty for murder). Because *Coker* had a horrendous record of convictions, including other rapes and a capital murder, and had committed the charged rape while on escape from prison, the Court also did not try to deny the utilitarian benefits of permanently incapacitating him. Justice White focused, instead, on the the absence of a death. He concluded that, while rape infringed serious personal interests, they were not equal to the personal interest in life itself. *Coker*, 433 U.S. at 598. His

scored that the substantive measure the Eighth Amendment imposes on the use of the capital sanction is grounded in retributive theory—that persons cannot be sentenced to death who do not *deserve* that punishment.³⁹¹

This deserts-limitation theory carries important implications for the job of the capital sentencer but is ultimately too vague to justify a constitutional doctrine regulating the capital sentencing process.³⁹² The deserts-limitation theory, more than an equality theory, explains the Supreme Court's mandate of a broad, individualized inquiry in capital sentencing.³⁹³ Still, the Court's efforts to regulate capital sentencing also depart in important ways from what a deserts-limitation theory implies.³⁹⁴ Reforms in the capital-sentencing process possibly could help promote a deserts justification for each death sentence. However, prudential considerations weigh against the Supreme Court attempting to pursue these reforms. The deserts-limitation is itself based on a theory of a widely-shared consensus about justice,³⁹⁵ and the Court has repeatedly indicated that the consensus notion helps explain its effort under the Cruel and Unusual Punishment Clause.³⁹⁶ The problem is that no consensus exists about how to refine the deserts-limitation. Consensus is not apparent even over whether deserts should be assessed based on all of the offender's works or only on his culpability for the capital crime.³⁹⁷ Even if the Court were to declare culpability for the capital crime to control, no apparent consensus exists about

reasoning assumed that the application of the death penalty was to be judged by the moral deserts of the offender, without consideration of the utilitarian benefits of his execution.

391. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 45 (2d ed. 1995) (observing that, "[i]n effect, Justice White [in *Coker*] applied a strictly retributive conception of proportionality").

392. Many offenders may be deemed undeserving of the death penalty, but their execution might also be thought beneficial to society. For example, a mentally retarded offender with a history of being sexually and physically abused could be thought less morally culpable for a murder than a person without such an excuse. Yet, for that same reason, the offender could be thought more dangerous. See *Penry v. Lynaugh*, 492 U.S. 302, 318-19 (1989) (noting the potential for jurors to reach such a conclusion). Under a deserts-limitation approach, such an offender should not be sentenced to death unless he is deemed by the sentencer to deserve that sanction.

393. See *Howe*, *supra* note 12, at 831-34 (detailing how the deserts theory, more than an equality theory, can explain the Court's capital sentencing doctrine).

394. See *id.* at 834-35 (discussing how the Court's capital-sentencing doctrine fails to fulfill a desert-oriented theory of regulation).

395. See *supra* text accompanying note 388.

396. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)) ("[T]he Amendment . . . recognizes . . . the 'evolving standards of decency that mark the progress of a maturing society.'").

397. See generally *Howe*, *supra* note 12, at 836-38 (discussing the evident lack of consensus over how to refine the deserts measure).

how to measure culpability.³⁹⁸ Hence, while the deserts-limitation gives a plausible meaning to the notion of Eighth Amendment excessiveness, it remains unclear how the Court should use it to regulate the capital-sentencing proceeding. Indeed, the inability to refine the deserts-limitation idea casts serious doubt on the function and value of the Court's mandate that an individualized-sentencing inquiry precede any death sentence.³⁹⁹

The deserts-limitation theory does imply, however, that the Court should draw categorical lines to separate death-eligible crimes and offenders from crimes and offenders for which the death penalty is per se improper.⁴⁰⁰ In *Coker*, the Court held that rape is not a death-eligible crime, but the Court has declared the death penalty categorically inapplicable in few other circumstances.⁴⁰¹ The Court should expand these categorical prohibitions while eliminating the requirement of individualized inquiry at the sentencing stage. For example, the Court could declare the death penalty per se improper for offenders under age eighteen at the time of their crimes and those suffering from mental retardation.⁴⁰² Although some capital offenders from these groups have the culpability to warrant the death penalty, the Court could plausibly conclude that the vast majority do not.⁴⁰³ On this view, drawing the categorical proscription in favor of all such offenders would serve the Eighth Amendment's substantive purpose, with only limited intrusion on states' legitimate use of the capital sanction.⁴⁰⁴

398. See Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing; Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989, 1012-36 (1994) (discussing disagreement among philosophers and criminal-law theorists about how to measure culpability for crime).

399. See Howe, *supra* note 12, at 840-43.

400. Of course, legislatures could continue to provide for sentencing hearings regarding the factual issues they deem important to the sentencing decision. See *id.* at 853 ("In articulating proportionality rules, the Court only sets low eligibility requirements above which state legislatures may govern the process for selecting those who should die.").

401. See Steiker & Steiker, *supra* note 390, at 97-98 (noting that, after *Coker*, the Court has exempted only one additional class of offenders; "persons convicted via the felony-murder rule who did not themselves kill, intend to kill, or attempt to kill").

402. *But see* Stanford v. Kentucky, 492 U.S. 361 (1989) (allowing the imposition of the death penalty on offenders who are at least sixteen when the crime occurred); Penry v. Lynaugh, 492 U.S. 302 (1989) (allowing the imposition of the death penalty on a retarded offender).

403. See Steiker & Steiker *supra* note 390, at 101 ("[J]uveniles and persons with mental retardation are . . . groups about whom, when their members are aggregated, there is a substantial risk that an individual sentencer might err in concluding that an individual member of the group is appropriately subject to the death penalty.").

404. See *id.* at 101-02 (noting that an exemption is particularly important for these groups because the grounds for their reduced culpability are also grounds for their enhanced

While enforcing the Eighth Amendment's substantive mandate, the Court can also use the open-ended clauses to reduce improper discrimination in the distribution of death sentences.⁴⁰⁵ The Court's recent application of the Equal Protection Clause to the use of peremptory strikes in jury selection provides minor protection against racial discrimination,⁴⁰⁶ although only by juries and only in states that employ juries as capital sentencers. However, under equal protection, the courts also can address purposeful discrimination in death-penalty cases based on factors such as race.⁴⁰⁷ The Justices are unlikely to go much further under equal protection in the near future. The Court has rejected the notion that equal protection proscribes capital-sentencing schemes that produce disparities correlating with race.⁴⁰⁸ This view has drawn substantial criticism.⁴⁰⁹ However, the resolution of what equal protection means must also come from the substantive construction that the Justices give the clause rather than from anything inherent in the idea of equality.⁴¹⁰

dangerousness so that individual sentencers will be tempted to sentence them to death rather than life imprisonment for consequentialist reasons).

405. Other provisions in the Bill of Rights might be used to protect against undesirable disparities in the use of the death penalty. For example, the Court has invalidated a death sentence under the Sixth Amendment right to an impartial jury where an African-American defendant charged with an interracial murder was denied an opportunity to query potential jurors about their racial prejudices. See *Turner v. Murray*, 476 U.S. 28, 37 (1986). The Court could also use the Sixth Amendment right to counsel to remedy the great disparity in the quality of counsel afforded capital defendants. See, e.g., *Steiker & Steiker*, *supra* note 390, at 421 (noting the substantial unevenness in the quality of counsel in capital cases).

406. See, e.g., *Powers v. Ohio*, 499 U.S. 400 (1991) (allowing white criminal defendant to challenge prosecutor's peremptory dismissals of African Americans); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that equal protection enabled African-American criminal defendant to challenge a prosecutor's use of peremptories to dismiss African Americans from venire).

407. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (declaring that the equal-protection violation is established with proof "that the decision-makers in [the defendant's] case acted with discriminatory purpose").

408. See *id.* at 297.

409. See, e.g., Shari Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1603-28 (1988).

410. Studies suggest that the racial disparities in capital sentencing may, on the whole, favor minority defendants over majority defendants, because the race of the victim seems to exert a predominant influence on the selection process, and most capital murders are committed by blacks offenders on black victims. See, e.g., BALDUS ET AL., *supra* note 250, at 315 tbl.50. This reality means that pursuing a racially proportionate distribution of death sentences according to the race of the victim could substantially increase the number of minority offenders receiving the death penalty. Many of those who favor invalidating current schemes under equal protection would surely prefer to achieve the balance by abolishing capital punishment. However, a proportionate distribution according to the race of the victim can be achieved through increasing the use of the death penalty in black victim cases as well as through abolition. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV.

C. Reconsidering Administrative Searches Under the Fourth Amendment: Substantive Measures of Reasonableness for Judging Governmental Action

Regarding administrative searches, the Court also should give substantive content to its regulatory efforts. In this area, the Court could not feasibly rely on a single formula, because administrative-search cases are so factually varied. The Court should articulate a variety of contextual rules. This approach would require the Court to invest increased resources in controlling administrative searches, but the results could be worth the effort. The Justices cannot appropriately continue to substitute the mandate of equality for substantive measures.

We saw that the Court's Fourth Amendment doctrine on administrative searches has had the ironic effect of expanding governmental authority to search while providing little protection against improper discrimination.⁴¹¹ Two features of the Court's approach have produced this outcome. First, the Court has substituted equality for substantive reasonableness by focusing on whether there are facially non-discriminatory, local policies governing the questioned invasion. Second, the Court generally has not required that the local regulations significantly restrict authorities' discretion to search. The Court's approach sanctions local regulations that allow for expansive authority to search based on criteria that, while facially non-discriminatory, allow great discretion in their application. The result will often be an expanded number of invasions of privacy characterized by largely unchecked racial and caste disparities.

The Court should recognize that a substantive judgment is essential to evaluating the Fourth Amendment propriety of administrative searches. The politics surrounding the promulgation of local policies or regulations will likely mean that the results will not be substantively correct under the Fourth Amendment.⁴¹² Instead, the kinds of administrative-search policies that will often appear will mirror those that the Court has all too often upheld—broadly worded authorizations to search that also confer substantial discretion on government officials.⁴¹³ In addressing these kinds of policies, the Court cannot appropriately uphold

1388, 1436-37 (1988) (noting that this "level-up" solution, rather than abolition, would likely be the option of many states if put to the choice).

411. See *supra* text accompanying notes 262-305.

412. See *supra* text accompanying notes 320-23.

413. See *supra* text accompanying notes 286-305.

them on the proposition that they appear even-handed.

A reconsideration of the problem presented in *Colorado v. Bertine*, involving automobile impoundments and inventories, can demonstrate the alternative approach that the Court should employ.⁴¹⁴ After Bertine was arrested for driving under the influence, drugs were found when his automobile was impounded and inventoried.⁴¹⁵ The Supreme Court endorsed the police actions upon finding that the officers followed local policies.⁴¹⁶ However, the Court should have focused on the substantive justification for the intrusions. Why did the police seize Bertine's automobile? The record implied that the police could have parked and locked the van in a safe location nearby, and Bertine would likely have been quickly released to retrieve it.⁴¹⁷ The officers involved offered no substantive justification for impoundment, admitting that they thought the decision was within their discretion.⁴¹⁸ Their view accurately described the effect of the local regulations, which, as even the majority implicitly conceded, only placed limits on a decision to park and lock an automobile, not on the decision to impound it.⁴¹⁹ The Court should have recognized that those regulations, although not facially discriminatory, could not define what was reasonable under the Fourth Amendment. The Court should also have acknowledged that there was no apparent substantive basis for the impoundment in Bertine's case.

The inventory search in *Bertine* was also unreasonable apart from the impropriety of the impoundment. The intruding officers acted like they were searching Bertine's van for contraband, not like they were conducting an inventory.⁴²⁰ An administrative inventory is designed principally to catalog the contents of a seized car to protect the arrestee against theft and to protect the police against false claims of theft.⁴²¹ However, in Bertine's case, the officers failed

414. *Colorado v. Bertine*, 479 U.S. 367 (1987).

415. *Id.* at 368-69.

416. *Id.* at 374.

417. *See id.* at 378-79 (Marshall, J., dissenting) (noting, without contradiction by the majority, that there was ample appropriate parking adjacent to the point where Bertine was stopped and that Bertine would likely have been released quickly).

418. *See id.* at 378 (Marshall, J., dissenting) (quoting the principal officer's testimony that the decision not to park and lock the van "was his 'own individual discretionary decision'").

419. *See id.* at 376 n.7 (indicating that the local guidelines placed limitations on a decision to park and lock a vehicle after the arrest of a driver but that there were no limitations on a decision to impound).

420. *See id.* at 383 (Marshall, J., dissenting).

421. *See Illinois v. LaFayette*, 462 U.S. 640, 647 (1983). The Supreme Court has also concluded that an inventory can protect against the presence of a dangerous item, such as a firearm.

even to list on an inventory form most of the valuable items that they found in Bertine's van.⁴²² Their intrusion looked much more like a search for evidence than an administrative action.⁴²³

In defining when administrative searches are reasonable, the Court cannot avoid articulating substantive rules. For example, in the car impoundment context, the Court should hold that it is generally improper to seize without consent the car of an arrested driver where the car could be safely parked and locked near the scene. Nonconsensual impoundment should also generally be improper where another family member in the vehicle at the time of the stop could legally operate the auto. These sorts of conclusions were not required by the regulations in *Bertine*. However, to ignore these as Fourth Amendment mandates is to abandon sensible oversight of governmental car impoundments.

In deciding on substantive rules to govern administrative searches, the Court would have to balance competing interests on a contextualized basis. The competing interests involved, for example, in the execution of administrative highway checkpoints or of mandated urine-testing of public employees would differ from those involved in the impoundment of automobiles. Even in a limited context, a single formula would not lead to perfect resolutions of varying factual scenarios. The Court would have to invest the resources to decide more cases on a more individualized basis. However, these efforts should improve current doctrine. The Court's deference to local policies has under-protected legitimate privacy interests.

The open-ended clauses would also remain available to confront improper discrimination in the execution of administrative searches. The Court's current approach builds on the illusion that deference to the promulgation of local policies will help to thwart offensive discrimination. However, there is little inherent pressure at the local level towards the production of non-discretionary

See, e.g., id. at 646 (recognizing that "[d]angerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles").

⁴²² *Bertine*, 479 U.S. at 383 (Marshall, J., dissenting).

⁴²³ *See id.* at 367 (Marshall, J., dissenting). Justice Marshall discussed the problems in his dissent:

For example, Officer Reichenbach failed to list \$150 in cash found in respondent's wallet or the contents of a sealed envelope marked "rent," \$210, in the relevant section of the property form. His reports make no reference to other items of value, including respondent's credit cards, and a converter, a hydraulic jack, and a set of tire chains, worth a total of \$125. The \$700 in cash found in respondent's backpack, along with the contraband, appeared only on a property form completed later by someone other than Officer Reichenbach.

Id. (Marshall, J., dissenting) (internal citations omitted).

search-and-seizure policies, and, even if there were, those policies could simply be under-applied on race or caste grounds.⁴²⁴ Therefore, even under the Court's current doctrine, improper discrimination in administrative searches must be remedied through the opened clauses.⁴²⁵ How those clauses should be construed is not easily resolved. Yet, that resolution must come, just as in the Fourth Amendment context, through the construction of substantive rules and standards by the Justices.

VI. CONCLUSION

Beginning in the era of the Warren Court, misuse of the equality idea infected constitutional criminal procedure in ways that continue to distort doctrine today. The problem arose from the Supreme Court's willingness to promote equality as if it were a self-defining goal and one to be pursued through the specific criminal clauses in the Bill of Rights. Neither of these assumptions is sensible. Prescriptive equality can be pursued only in relation to substantive standards concerning how government should treat people, and, even then, only makes sense as a command to follow the substantive standards. Likewise, pursuing equality under the criminal clauses as if it were self-defining can only serve to obscure and pervert the substantive standards that those clauses embody.

The Justices must confront the call for equality as they regulate criminal procedure under the Constitution, but they should approach this task by acknowledging the derivative nature of equality. The Fourteenth Amendment explicitly directs states to ensure "equal protection" for all persons, a command that applies to the criminal process. While the Justices must give meaning to this clause, they should recognize that even an explicit command of "equal" treatment is only a rhetorical device, authorizing the Court to construct substantive standards regarding governmental conduct. The Justices should also recognize that equality has no role under the specific criminal clauses, even as a rhetorical device, because the clauses themselves amount to a call for substantive standards.

424. See *supra* text accompanying notes 320-22.

425. See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory action of laws is the Equal Protection Clause, not the Fourth Amendment."); *United States v. Avery*, 137 F.3d 343, 352 (6th Cir. 1997) (declaring that the Equal Protection Clause "provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures").

To demonstrate the misuse of prescriptive equality in constitutional criminal procedure, I have explored segments of the Court's work under a variety of criminal clauses: the Fifth Amendment privilege and Sixth Amendment right to counsel as applied to suspect interrogation; the Eighth Amendment prohibition on cruel and unusual punishments as applied to capital sentencing; and the Fourth Amendment as applied to administrative searches. In the interrogation context, the Court's creation of the *Miranda* doctrine was propelled by its drive to treat impoverished and ignorant suspects the same as wealthy and well-educated ones, even though that goal required subverting the substantive standard in the Sixth Amendment concerning the attachment of the right to counsel and the substantive ideals embodied in the Fifth Amendment privilege. In regulating capital sentencing, the Court called for equality of treatment, but failed to provide standards by which to determine when capital murderers are the same or different. Likewise, in defining limits on administrative searches, the Court proceeded as if equality itself, without substantive standards derived from the Fourth Amendment, was a viable constraint on governmental action. In each of these areas, the Court's work resulted in doctrine that departed from constitutional meaning in ways that persist today.

The irony in the Court's misuse of prescriptive equality under the criminal clauses is that the Court has effectively constrained similar misuse in its equal protection doctrine, where one would expect the problem to be greatest. During the pre-*Brown* era, the Court appropriately regulated the criminal process under the Equal Protection and Due Process Clauses by articulating substantive rules concerning the treatment of persons by government.⁴²⁶ Problems arose during the era of the Warren Court. Between *Brown* and the early 1970s, the Court frequently relied on the vague rationale of prescriptive equality when it struck down state criminal procedures under the Equal Protection or Due Process Clauses.⁴²⁷ However, by the early 1970s, the Court returned to the practice of articulating substantive bases for its decisions under these open-ended clauses.⁴²⁸ Earlier rulings based on limitless equality rhetoric were also reinterpreted on narrow substantive grounds. The result is that misuse of prescriptive equality has distorted criminal-

426. See *supra* text accompanying notes 82-91.

427. See *supra* text accompanying notes 92-134.

428. See *supra* text accompanying notes 151-72.

procedure doctrine more under the specific, criminal clauses than under the open-ended clauses.

The Court's focus on equality under the criminal clauses has also accomplished little in the way of ameliorating significant injustice in our criminal process. The resulting doctrines have not significantly combated prejudices based on race or caste. They have done little, if anything, to protect the personal privacy of citizens. They have done little to protect suspects from physical or serious mental abuse by the police.⁴²⁹ They have also done little to protect against the conviction of the innocent.⁴³⁰ Despite the proclaimed goal of the Warren court to provide "equal justice for the poor and rich, weak and powerful alike,"⁴³¹ the doctrines created under the criminal clauses in pursuit of this credo appear, at best, tangentially related to core concerns about mistreatment of suspects or accused persons.

My argument that the Court has misused equality under the criminal clauses does not discount the problem of improper discrimination in the investigation and prosecution of crimes. Race and caste prejudice in the criminal justice system are serious problems.⁴³² The Supreme Court can appropriately ground decisions protecting against such prejudice on the Constitution. However, the Court need not subvert the function of the criminal clauses in this process.

The proper approach for applying the Bill of Rights and reconstruction amendments in criminal procedure is through a focus on substantive standards concerning how government should treat persons. The Court should give effect to the substantive values that the criminal clauses embody rather than ignore their meaning in an

429. Even *Miranda* doctrine has probably done little to reduce significant mental abuse of suspects in police stations, and the *Miranda* court itself noted that the problem was not physical abuse. See *Miranda v. Arizona*, 384 U.S. 436, 448 (1966) ("[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented."). *Miranda* supporters themselves have noted that "the underlying psychology of police interrogation has not changed since 1966." Weisselberg, *supra* note 200, at 153; see also Schulhofer, *supra* note 178, at 880-81 (noting that, despite *Miranda*, "it is hard to see how the intimidation can be reduced very much"). Moreover, the benefits on this score of the right-to-counsel aspects of *Miranda* seem minor. I have argued that this part of the doctrine was the most objectionable. See *supra* text accompanying notes 368-76.

430. The Court's capital-sentencing cases also are not easily understood as protecting those who do not warrant the death penalty. The Court has never clarified what substantive measures define who warrants the death penalty. Without reference to such standards, the efficacy of the Court's doctrine in protecting those who do not warrant capital punishment cannot be determined. See *supra* text accompanying notes 227-61.

431. *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

432. See COLE, *supra* note 16; KENNEDY, *supra* note 16.

effort to pursue the vacuous notion of equality. The Court must sometimes conclude that additional protections are necessary to remedy offensive discrimination. In these situations, the Court can turn to the open-ended clauses, such as the Ninth Amendment, or the Equal Protection, Due Process, or Privileges and Immunities Clauses. The Court can preserve the meaning of the specific, criminal clauses by viewing these open-ended clauses as a viable source of supplemental protection. As with the criminal clauses, however, the resolution of what the open-ended clauses should require must come from the substantive construction given the clauses by the Justices rather than anything intrinsic to the notion of equality.