**Equality Under the Law**

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Introduction

Law is a problem for the ideal of equality. Laws classify. They draw distinctions among people. Inevitably laws treat people differently. Yet, law also provides a solution to the problem of inequality. Law is general in application. It treats all those to whom it applies equally. In this sense, equality is instantiated in the idea of legality. In addition, law is the means by which various forms of substantive equality are pursued. What does this tension mean for the relationship between legality and equality? Is equality impossible within law? Or, instead, is legality a principle of equality.

Consider the following example. In response to evidence of racial disparities in sentences in capital cases, the Supreme Court required that judges and juries employ meaningful criteria to cabin their discretion. This is the solution of law to a problem of inequality. In order to guard against racial bias, the Supreme Court required some objective criteria (law) to govern judicial discretion. But, this solution creates its own problem. Individual defendants are unique human beings who are not equally culpable for the crimes they commit. In order to treat them equally in a person-regarding sense[[1]](#footnote-1), therefore, the sentencing judge or jury must take into consideration those factors that suggest less moral responsibility for the crime committed. The legal requirements that cabin judicial discretion and dictate that factors X, Y and Z and only those factors may affect sentencing inevitably miss some other possibly relevant factors. The generality of law therefore creates inequality of a different type. Is equality possible within law then? The nature of law seems to generate a conflict between equality of one kind and equality of another. Or as Justice Scalia remarked, calling the Supreme Court’s requirement of both individualized inquiry and restrictions on judicial discretion in the context of capital sentencing“an inherent tension” is “rather like saying that there was perhaps and inherent tension between the Allies and the Axis Powers in World War II.”[[2]](#footnote-2)

Part I: Law and Equality

Law can enhance or promote equality. In so saying, I refer to both equality in both a formal and a substantive sense. Below I discuss each.

1. Law and formal equality

Law, by virtue of its general applicability,[[3]](#footnote-3) creates or instantiates equality. A legal rule applies to all those whom it covers. In this sense, it creates equality among the class of people (or entities) that the law covers. A commitment to the rule of law is often expressed by saying that “no one is above the law.” We are all *equally* subject to the law, high and low, and thus equality is, in this formal sense, a dimension of the legality.

Equality is also one of the aims of the “rule of law.” The “rule of law” is, after all, usually contrasted with the “rule of men.” By drawing this contrast, we do not abandon a commitment to democratic decision-making -- in *that* sense, we do want a rule of men, or men and women. Rather, to say that a society is governed by the “rule of law,” as contrasted with a rule of men, suggests that it is the legal rule that determines the outcome of a case or the disposition of an official rather than the personal preferences or bias of individuals. Legality thus produces equality by cabining the arbitrariness and prejudice that the ungoverned power of individuals gives rise to. This is a second dimension of equality under the law.

Third, the ideal of legality – often expressed as the norm that “like cases should be treated alike” – itself imposes equality among all the individual cases found to be relevantly like one another. While it is true that to operationalize this ideal, we must supplement it with a substantive account of which cases are relevantly like which others in the particular context, or given the aims of the particular statute,[[4]](#footnote-4) still the command that one treat like cases alike is not empty, as some have charged.[[5]](#footnote-5) Rather it directs the judge that she must treat those cases she finds to be alike (given the goal of the statute) is the same way.

This directive produces or instantiates equality in at least two ways that relate distinctively to law. First, the commitment to treat like cases alike can be read as a restatement of the principle of *stare decisis.* Kent Greenawalt[[6]](#footnote-6) draws on an argument of this type in his reply to Westen. In Greenawalt’s view, the commitment to treat likes alike is not empty in that it exerts pressure on a judge in the following context. Greenawalt imagines the case of identical twins, with identical backgrounds and experiences, who are equally culpable with respect to a burglary that each committed. In one of Greenawalt’s variations on this hypothetical, it is unclear whether probation or imprisonment is the appropriate punishment. He imagines the situation of a judge faced with sentencing the second twin after the first has been sentenced. Suppose the first has been sentenced to probation and the judge handling the case of the second twin believes that imprisonment is the correct punishment for both. If this judge also believes that the twins are relevantly like one another (both equally culpable for committing the same offense), then, Greenawalt argues, this judge has a reason to also sentence the second twin to probation, notwithstanding the fact that he believes this outcome to be the is substantively incorrect disposition of the case. In this sense, the command to treat likes alike produces equality among relevantly similar offenders. Moreover it does so, *contra* Westen, on its own, without the substantive norm of appropriate treatment providing the outcome. To the extent that *stare decisis* is a familiar aspect of law, then law produces equality of this formal sort. Relevantly similarly cases are treated the same.

Second, the consistency that law requires also instantiates the idea that we ought to treat like cases alike. The law requires consistency in at least the minimal sense that people should not be subject to contradictory mandates.[[7]](#footnote-7) And perhaps it requires even more. Ronald Dworkin, for example, has argued that the virtue of integrity – which is in some sense simply a grander version of this principle – is constitutive of law.[[8]](#footnote-8) The consistency aimed at by the principle that one should treat like cases alike, both produces equality and expresses equality. This is so at least if we understand equality in its merely formal dimension but perhaps also in a substantive manner as well. For Dworkin, for example, the integrity of law instantiates the commitment to treat all members of the political community with equal respect. [[9]](#footnote-9) Whether we should understand the commitment to consistency in law as expressing a commitment to only formal equality or instead whether we should see this equality in richer more substantive hues, I will not comment on here because law certainly has obvious connections to substantive equality (of various forms).

1. Law and substantive equality

We often use law as a tool to bring about substantive equality of various forms. For example, laws that provide resources and opportunities to those without them aim to ameliorate inequality of resources and opportunity. Statutory anti-discrimination law aims to provide substantive equality along different dimensions. For example, laws prohibiting age discrimination aim at equal job opportunity between equally qualified job seekers of different ages. These sorts of laws are limited or circumscribed in their aims in that they do not seek to equalize job opportunities between young and old job seekers with different job qualifications. Nor do they aim to equalize young and old job seekers along any other dimension that equal chance to obtain jobs for which they are equally qualified. If the young are healthier or have more wealth, these laws leave these inequalities in place.[[10]](#footnote-10) Nevertheless, law is a powerful tool that society can and does use to seek substantive equality in various forms.

The constitutional or basic law of a society may also *require* that laws meet a substantive standard of equality. The U.S. Constitution, for example, provides that “no state … shall deny to any person the *equal protection of the laws*.”[[11]](#footnote-11) In interpreting the meaning of the equal protection clause, the Court has been clear that it requires more than equal application of existing laws. Rather, “the law itself must be equal,”[[12]](#footnote-12) as the “equal protection of the laws is a pledge of the protection of equal laws.”[[13]](#footnote-13) However, what this substantive equality requires of law consists in is itself controversial. Some argue that was matters is how laws are adopted: were the interests of all given equal consideration.[[14]](#footnote-14) Others argue that what matters is the effect of the law: does the law make specially disadvantaged groups even worse off.[[15]](#footnote-15) Still others look to what the law expresses: does the law insult or denigrate those who are burdened by it?[[16]](#footnote-16) And there are other possibilities.[[17]](#footnote-17)

In sum, then, law by virtue of being general instantiates equality in its formal dimension. Moreover, the law of many jurisdictions aims at the attainment of some forms of substantive equality and incorporates a command that laws meet some (minimum) standard of substantive equality by virtue of constitutional guarantees.

Part II: Law and Inequality

However, the generality of law operates to produce inequality as well as to produce equality. Legal rules typically employ categories or classifications to capture the people or the conduct to be regulated. For example, laws regulating who may obtain a driver’s license require that the applicant be at least sixteen years old. This law produces inequality in two obvious ways. First, the law treats people fifteen and younger differently and worse than those who are sixteen and over. This is a formal inequality produced by legal categorization.

Second, if the law is enacted in order to identify those drivers with the dexterity and maturity to drive safely, then the law will be both over- and under-inclusive in that some 15 year olds will have the ability to drive safely and some 17 year olds will not. While the state is likely to use a driving test as well as age cut off, still, the immature seventeen year old who will drive recklessly is unlikely to be identified by this test. The over and under-inclusiveness of legal categories means that unlikes (and not only likes) will be treated alike. Both mature and immature seventeen year olds both will be able to attain driving licenses. This is the “painting with a broad brush” that Fred Schauer identifies as a facet of generalization.[[18]](#footnote-18) It is “[b]y ignoring differences that the justifications or rationales lying behind those very rules would recognize, . . . rules often treat as alike those cases that are relevantly different; and it is frequently only the fact of the rule itself that forces the rule-follower to treat the different cases similarly.”[[19]](#footnote-19)

For Schauer, the fact that the generalization of law forces unlikes to be treated alike is an equality enhancing, rather than an inequality producing, feature. For Schauer, “treating *un*like cases alike is not only inevitable and often desirable but also … is what lies at the heart of the idea of equality.”[[20]](#footnote-20) I think that in one sense he is correct and so perhaps we should add to list of the ways in which legality instantiates equality (found in Part I) the idea that the generality of law requires that different cases be treated alike. It is the corollary of the first point in Part I; that the law treats everyone to whom it applies the same. But it is also a form of inequality. Here we are talking about instances that are different not simply in the way that any two individuals are different from one another but rather we are focused on two individuals who are relevantly different, where relevance is assessed by reference to the purpose of the law. The mature seventeen year old is *relevantly* different from the immature seventeen year old, given the purpose of the age cut off in eligibility for driving licenses. The fact that the law treats them the same creates inequality because young immature drivers and older immature drivers are treated differently – the first not allowed to drive and the second allowed to drive, even though the purpose of the statute is to screen out immature drivers. And perhaps more troubling, young mature drivers are treated worse than older mature drivers in that the former are forbidden from driving and the latter may drive, even though they are relevant like one another with respect to the *purpose* of the statute.

Consider another more consequential example. U.S. law prohibits providing “material support” to terrorists.[[21]](#footnote-21) The purpose of the statute is to make it more difficult for terrorist organizations to carry out terrorist activity. The prohibition on “material support” includes goods and services as well as money in order to avoid circumvention of the prohibition by the provision of valuable goods and services. Unfortunately, this law has also worked to inhibit activity by groups whose aim is not to support terrorist activity but instead to avoid it. In *Holder v. Humanitarian Law Project*,[[22]](#footnote-22) the law was challenged by groups who wished to work with the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both listed terrorist groups, in ways that would seem to further peace rather than terrorism. For example, the plaintiffs who wished to work with the PKK challenged the law’s application to “training members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes.”[[23]](#footnote-23) If the purpose of the law is to prevent terrorism, then the group wishing to help the PKK to present its grievances in international fora is relevantly different, given the aim of the statue, from a group wishing to provide military training services to a terrorist organization. Yet the law, by virtue of its generality, treats these unalike cases alike – forbidding both forms of “material support.”[[24]](#footnote-24) Groups working for peace are thus treated unequally. Those that can do so without providing any services to listed “terrorist organizations” are able to continue their activities while those who cannot are stopped. The generality of law thus produces inequality between groups that are similar with respect to the purpose of the statute and also may have the unfortunate effect of inhibiting the most fruitful forms of peacebuilding. But that’s a different kind of worry.

Law also produces inequality by virtue of the disparate impact that laws of general application predictably have. For example, laws criminalizing non-coital sexual relations have a disparate impact on gays and lesbians. While both heterosexual and homosexual couples engage in non-coital sexual relations, criminal bans on such conduct fall more heavily on gays and lesbians. In the case of generally applicable laws, the law groups together, and treats as the same, people who are different. As Rebecca Brown explains, laws that provide that ‘no one may [blank] can exploit difference as effectively as a classification, when the blank is an activity that ‘we,’ the political ins, have no wish to do, but that ‘they,’ the outs, claim a profound need to do in pursuit of personal fulfillment.”[[25]](#footnote-25) This is the familiar idea, captured by Anatole France, that “the law, in its majestic equality, forbids the rich and the poor alike to sleep under bridges, to beg in the streets, and to steal bread."[[26]](#footnote-26)

The final way that the generality of law produces inequality that I will discuss here[[27]](#footnote-27) is by substituting one form of inequality for another (or by choosing equality along one dimension over equality along another). Consider the familiar debate about the so-called “marriage penalty” under U.S. federal income tax law.[[28]](#footnote-28) Under current law, the tax paid by married couples is the same no matter whether the couple includes one person who earns all or most of the income or whether each person in the couple earns roughly half of their joint income. Given progressive tax rates, the effect of this rule is to create marriage penalties for dual-earner couples and/or marriage bonuses for couples with a primary of single earner. This “penalty” or “bonus” refers to the comparison between the amount of tax the married couple pays and the amount of tax the couple would have paid if not married. Current law thus creates an inequality between married and unmarried couples who earn the same amount. If the law were to eradicate this inequality, say by taxing single-earner and dual earner couples differently, it would create a new inequality. Under this regime, two married couples earning the same amount (considering their joint income) would pay different amounts of tax. If we wanted to eradicate both the inequality between married and unmarried couples *and* the inequality between dual earner and single earner couples, we could do this but only at the expense of progressive taxation, itself a means of creating equality of a different sort. By seeking equality in one dimension, we create inequality in another.[[29]](#footnote-29)

Another example illustrating the phenomenon by which alleviating one inequality created by law often produces a different inequality is made vivid by the current movement in the United States for marriage equality for gay couples. In the U.S., state bans on same-sex marriage are being challenged with increasing frequency and success.[[30]](#footnote-30) In those states in which same sex marriage is now legal, this new legal regime eradicates inequality between same-sex and opposite sex couples as both may now legally marry. However, by pursuing *marriage* equality, these developments heighten the significance of marriage and thereby risk exacerbating inequality between married and unmarried couples and between married couples and others with intimate bonds of others sorts.

In sum, law produces inequality in several different ways. Law produces inequality in a formal sense both by drawing lines and thereby treating some differently than others. The generality of law also produces inequality by treating unalike cases alike. Fred Schauer emphasizes the way in which the generality of law produces equality by treating relevantly different, as well as relevantly similar cases, alike. While I agree that this aspect of law can be seen as equality enhancing, I also argued that it produces inequalities as well. Finally, I argued that the pursuit of substantive equality within law creates substantive inequalities at the same time. The legal form seems to require a choice among dimensions or forms of equality.

Part III: Implications for Anti-discrimination Law

The myriad ways in which the generality of law produces inequalities have led to familiar calls to particularize or individualize the application of law.[[31]](#footnote-31) Aristotle…. Martha Nussbaum, tracing the roots of law’s equity doctrines notes that “two features of the equitable [are] its attentiveness to particularity and its capacity for sympathetic understanding.”[[32]](#footnote-32)

Courts and legal advocates similarly argue for individualization. Because law rests on “an oversimplified caricaturized conception of social identity, it does not recognize or redress complex relations of inequality.”[[33]](#footnote-33) The recommendation to ameliorate the inequality produced by the gross categories of law is to avoid categories altogether , to look at the aim or purpose to be achieved by a particular statute and try to achieve that directly. For example, when a Canadian statute limited bereavement leave to “family members” and thereby excluded a man from attending the funeral of his partner’s father, the solution of these advocates of individualization not to redefine “family,” which did not include this relationship, because “these problems will arise whenever a claimant’s experience of adverse treatment, on the basis of some aspect of the claimant’s social identity, does not correspond to how the claimant’s difference is defined from the perspective of the dominant social identity.”[[34]](#footnote-34) Rather, we should “ask instead about the purpose of the benefit, and the concerns motivating a desire to limit it.” Thus the advocate suggested either allowing workers to determine for themselves who is their family and if this raises problems of abuse then putting a cap on the number allowed.[[35]](#footnote-35)

We might note, as an aside, that capping the number of employee-designated family members would still exclude some people’s intimate relations – those with large families. Rather, the solution of allowing employees to designate (or alternatively some other person to evaluate whether a designated relation is sufficiently close to the employee that leave for bereavement should be allowed) both are solutions that jettison categorization in favor of individualization.

 A similar move is evident in the U.S. Supreme Court’s treatment of affirmative action. Racial categories are problematic, to the Court, for a number of reasons. At the same time, they are important and useful. The Court’s solution: individualized inquiry. In approving the use of race as a plus factor in law school admissions in *Grutter v. Bollinger*, the Court emphasized that ““The Law school seriously considers each ‘applicant’s promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic – *e.g.* an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.’”[[36]](#footnote-36) In addition to being particularistic, “truly individualized consideration demands that race be used in a flexible, nonmechanical way.”[[37]](#footnote-37) This individualized inquiry which looks to particulars is “flexible,” and “nonmechanical” and includes a “holistic review of each applicant’s file.”[[38]](#footnote-38)

The idea behind these moves to avoid rigid, mechanical categorization and instead to use flexible and holistic attention to the particulars is to treat each person as the she should be treated (given the particular goals at issue) and thereby avoid the inequalities generated by the generality of law. However, if the observations of Part I are correct, then these equality gains produced by individualized inquiry will come at some cost. Legal categories produce equality as well as inequality and when we jettison the generality of law, we lose the equality producing elements of law. When we attend to the particulars of each case, we treat people differently. In addition, we risk treating people differently even when they are relevantly similar. This could be because bias or prejudice infects the decisionmaker employing the flexible, holistic review. Or it could simply be due to mistakes or incompetence. While the decisionmaker employing holistic or individualized inquiry may try to treat each person as she should be treated, she may nevertheless not succeed in doing so.

This discussion of the equality trade-offs is analogous to the familiar discussion of the benefits of rules versus standards. Legislators can pursue a purpose via a norm with a rule-like formation or a standard-like formulation. For example, if legislators want people to drive safely, they can adopt a speed limit of 65 miles per hour. However, this rule will be both over and under inclusive in that sometimes one can drive safely at higher speeds and sometimes driving 65 miles per hour is too fast to be safe. Weather, traffic conditions and driver skill all affect whether 65 is the right speed to be safe. So why not adopt individualized inquiry? We could post a sign that instructs drivers to “drive safely” – a more standard-like formulation that simply recapitulates the underlying purpose of the rule. But of course, this will have other problems. This way of achieving the legislative purpose will yield error too. Some drivers will mistakenly judge their driving ability. Some enforcers of the standard (i.e. police) will take a different view of what constitutes safe driving when done by one person than another. The current problem of being stopped for the “crime” of “driving while black,” may be dramatically exacerbated. On balance, the errors of the speed limit rule seem preferable to the errors of a “drive safely” standard.

But rules do not always get the right answer more than do standards. Which approach is preferable depends on how easy it is to translate the underlying aim into rule-like form and how much we worry about affording discretion to decision-makers on the ground. In the context of child custody decisions, for example, the law provides that judges should award custody in accordance with the “best interests of the child.” One suspects that the reason that the aim of the law is not articulated in a more rule-like way is that it is exceedingly hard to do so. At the same time, while judges may also suffer from biases and prejudices, we may trust them more than the decision-makers who would apply the “drive safely” standard.

This discussion of the virtues and vices of rules and standards is familiar.[[39]](#footnote-39) I rehearse it here to add to its general insight with a slightly different emphasis. Schauer and others have emphasized that the trade-off between rules and standards involves a calculation about which form yields less error in the particular context. Do we get more right answers with a rule or with a standard, where a right answer is the answer that should result if the underlying norm is correctly applied? What I want to emphasize is that the further we go toward truly flexible, individualized inquiry, the less law-like; the more we shun the generality of law for the particularity of discretion (even discretion guided by an aim or principle), the more we give up of the equality-promoting dimensions of legality. If the generality of law promotes both equality (Part I) and inequality (Part II), then in each particular context when we can choose more or less categorical approaches to a given legal problem, we must simultaneously weigh the equality gains of legality as compared to the equality losses. And like the trade-off between rules and standards, there may be no one-size fits all answer. Just as sometimes we will get more right and answers with rules and sometime more right answers with standards, so too sometimes the equality gains produced by the generality of law will be more important than the equality losses and sometimes the balance will tilt the other way.

1. Expanding the list of prohibited grounds

It is commonplace to see calls to add traits to the prohibited list of grounds on the basis of which discrimination is prohibited. In the United States, these include calls to add sexual orientation to the list of “suspect classifications” under Constitutional equal protection doctrine and calls to add traits like weight to statutory protections provided by states, cities and localities.[[40]](#footnote-40) Moreover national constitutions vary in the number of prohibited grounds of discrimination that are specified. For example, South Africa prohibits many more grounds that does the U.S., as does Canada (though less than South Africa).[[41]](#footnote-41) Can the inequalities created by limited lists be avoided or ameliorated by expanding the specified grounds on the basis of which discrimination is prohibited? The discussion above suggests that these attempts to alleviate the inequalities produced by a limited list of prohibited grounds of discrimination may come at some cost.

Anti-discrimination protections cover a wide variety of contexts including employment, housing, and education to name some of the most prominent. In order to make this discussion more manageable, I will focus here on employment. In the employment context, a legal regime could mandate that all employers hire the most qualified candidate. For reasons of both policy (difficulties of administerability, for example) and principle (the liberty interests of the employer), the current legal regime does not mandate such merit-based hiring. Instead, we prohibit employers from basing hiring decisions on a specified list of traits. An employer may hire employees on the basis of education, experience, training, personality, and countless other traits it wishes *except* race, sex, religion, disability, age, etc.[[42]](#footnote-42) In other words, our legal regime gives employers fairly wide discretion or power to decide for themselves what they value, so long as they abstain from relying on a specified list of criteria.

This approach sits in between two possible poles. At one pole, employers could be allowed complete discretion to determine whom to hire, unconstrained by prohibitions on the use of any traits. In such a regime, it is possible that the market itself could make some forms of discrimination unattractive, but whether or not the market does so, the law would not intervene.[[43]](#footnote-43) Alternatively, we might mandate that employers hire on the basis of merit. In such a regime, the law would provide the mandated criteria for the employer to use in hiring rather than providing a list of prohibited traits.[[44]](#footnote-44) Of course, a society might choose to adopt merit-based hiring rules in all employment contexts. My point here is not to argue for or against such a policy choice. Rather, I want to suggest that *if* a society chooses not to do so and instead to allow an employer genuine discretion to determine for himself or herself what traits are valued in employees, this freedom will bring with it a compromise of equality in some regard. The equality produced by law is given up when we allocate real freedom or power (even within a limited domain) to the employer.

A common reaction to the inequalities produced by the exercise of this power or freedom is often to add traits to the list of those already prohibited. We learn that employers often hire physically attractive workers rather than unattractive employees, even in contexts where appearance has little to do with the demands of the job. Overweight people are disadvantaged, as are smokers, people who dress unconventionally, people who do not conform to dominant gender categories, and surely many others. Perhaps we should add these traits to the list of those prohibited by anti-discrimination laws. But if we keep adding to this list until we have exhausted those traits which employers might use but which are rarely job-related (or if we allow them only when the employer demonstrates that in the particular context, the trait is job-related), we thereby in fact adopt a legal regime in which employers are required to hire on the basis of merit. Robert Post argues that this merit-based ideal in fact underlies U.S. anti-discrimination law.[[45]](#footnote-45) And perhaps he is right as an interpretive matter about the underlying aim or ethos of our law. He is surely right that if we continue to add traits to our proscribed list, we will end up adopting a regime that requires merit-based hiring. And perhaps we will choose to do so. But if that is not the endpoint we choose, if we decide it is important for other reasons to provide employers freedom in this sphere, then we must accept the real and important equality costs that this choice entails. We simply cannot have it all.

1. Individualized inquiry

Another strategy commonly used to address the drawbacks of legal categories is the turn to so-called “individualized inquiry.” In the United States, admissions to colleges and universities are governed by a regime that looks very similar to the employment context discussed above. The legal regime could give universities complete discretion about whom to admit. Alternatively, the law could require that these admissions decisions be governed by specified criteria of academic merit. Instead, U.S. law adopts a hybrid approach that permits the university wide discretion about whom to admit yet forbids the use of certain specified traits. However, whether and how a university may use race in its admissions decisions is the subject of intense debate. While a university clearly may not exclude a racial minority on racial grounds, the law is somewhat ambivalent about whether racial minority status can count positively toward admission. Nevertheless, Supreme Court decisions explicitly provide that the benign use of race will be governed by the same standards as the pernicious use of race – both will be invalid unless justified by a “compelling” governmental interest and used in a way that is “narrowly tailored” to the achievement of this interest.

One can debate whether the form of “strict scrutiny” applied in an affirmative action context really is as strict as the scrutiny applied to racial categories used to exclude racial minorities, nonetheless the Court says it treats them both the same and, at least for the moment, I’d like to take them at their word. In *Grutter*, the Court stresses that treating someone differently because of his race constitutes a wrong that raises important equal protection concerns: “As we have explained, ‘whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.’”[[46]](#footnote-46) While many disagree with this view, it is easy to understand and clearly stated.

Nevertheless, this view has other equality-related problems. Universities have for some time used the flexibility in their admissions systems to produce a class with different abilities and viewpoints – people from cities and from rural areas, sports players and musicians, men and women. Within this system, someone with an unusual background is often especially desirable: a high school student who speaks another language, a recent immigrant who has overcome special challenges, etc. The prohibition on consideration of race, as it operates within this framework, seems to treat racial minorities unequally. The challenges faced by the Russian immigrant are worth points in the admissions processes but the challenges faced by the racial minority are not. The special perspective that the artist might bring to classroom discussion is recognized while the special perspective that the black male who has frequently been stopped by the police is not. This seems unfair. A prohibition on consideration of race thus treats as the same things that are not (ignoring the significance of white race and ignoring the significance of minority race) and treats differently things that are the same (the perspective of the student from an unusual background that is not tied to race and the perspective of the student from the less well-represented background that is tied to race). These inequalities in treatment are produced by the prohibition on using race in admissions.

Can we avoid this form of inequality while also resisting the inequality that worries the Court – treating people of different races differently? Perhaps flexible, holistic, individualized inquiry will help. Will it? Using individualized inquiry the university can consider race and other traits that individuals bring and “[b]y this flexible approach … sufficiently take[] into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.”[[47]](#footnote-47) Sounds promising until we dig a little deeper. If the Court allows the university the discretion to consider race and decide for itself how important or significant race is, in the case of a particular student, to its goal of attaining diversity in the classroom, then race plays a role in the decision-making and a white student with a particular set of other traits is not treated the same as a black student with the same set of other traits. Alternatively, the Court could decide that race may not be used, period. This approach avoids the inequality of treating a white student with traits X, Y, Z differently than a black student with these same traits or qualities but it produces the inequality we have just laid out. The viewpoint diversity or special experiences associated with minority status are the single form of diversity disallowed by the admissions process – thereby treating the minority worse than the student whose unusual qualities derives from a different source (unusual sport or immigrant background, for example). Perhaps we could avoid both these inequalities if the law were to prescribe how exactly minority status should be weighed. Perhaps (though most likely not). But even if one could, doing so would forgo the discretion or freedom we have given to universities in choosing their students and that we may well find valuable.

Justice O’Connor’s opinion for the Court in *Grutter* exemplifies a palpable ambivalence about whether to defer to the university regarding if, when and how it considers race in admissions. She begins by asserting that the Court should accord the university a freedom, grounded in the First Amendment, to determine its admissions procedures on its own: **“**The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”[[48]](#footnote-48) But quite quickly she hedges that grant of power: “Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies *primarily* within the expertise of the university. Our holding today is in keeping with our tradition of giving *a degree* of deference to a university’s academic decisions, within constitutionally prescribed limits.”[[49]](#footnote-49) The lesson of the discussion is that there is, for her and for the Court, no easy way out. Each path has pros and cons and each of these pros and cons relate to equality in some form.

Conclusion: the imperative of choice

In this essay, I have discussed the ways in which the generality of law has implications for equality. Law both creates and enhances equalities and inequalities. Efforts to avoid the inequalities produced by law, and especially by its generality and uniformity, are doomed to failure. We can trade these inequalities for other inequalities but we cannot avoid inequalities altogether. I have tried to support this claim by focusing on antidiscrimination law in particular. In this context, we see the ways in which articulating a limited number of grounds on the basis of which one might assert a claim for discrimination give rise to inequalities of various sorts. As a result, it is tempting to push to enlarge the list of prohibited grounds. While we can do so to some degree, an ever-growing list will lead to a requirement that an employer hire on the basis of merit. This mandate will produce different sorts of inequalities as it constitutes a legal category of another sort. Moreover, it comes at the cost of allowing an employer freedom in the context of hiring.

I also explored the attempt to mitigate inequalities by adopting flexible, individualized inquiry. In order to grant flexibility to the decisionmaker, we give the decisionmaker power. Within the specified domain, the decisionmaker’s discretion is unconstrained. By mandating holistic review, the law abstains from providing criteria. While we may well want to do precisely this, as there are important reasons to grant universities, employers and others such freedom, these benefits come at a cost. We risk giving license to prejudice made possible by discretion. In addition, we risk creating inequalities that arise from arbitrary decisionmaking.

This exploration of the equalities produced by law and alleviated by law aims to show that rather than trying to avoid inequality in law, the task as one of choosing between or among inequalities of various sorts. In addition, the freedom permitted by discretion may be of value in its own right. In *Grutter*, for example, the Supreme Court recognized that the First Amendment’s protection of free speech is implicated in the academic freedom of the university to select its own students.[[50]](#footnote-50) Martha Nussbaum argues for the importance of particularized judgment in the sentencing context in terms of its connection to mercy.[[51]](#footnote-51) To the extent that we value academic freedom in the context of the selection of university students (which we may reject) or mercy in the context of criminal sentencing (which, again, we may reject), we must accept that these may come at some costs in terms of equality. The suggestion of this essay is that the choice between such freedom, discretion or mercy and some loss of equality is genuine. Moreover, if we choose the generality of law over the freedom of discretion, we eliminate inequalities of one kind but not of all kinds. Rather, this essay has also argued, that any legal standards eliminates some inequalities while creating others. In each particular context, we must choose which inequalities are most pressing or most important.

Most specifically, I have illustrated these ideas by arguing that two familiar moves within antidiscrimination law are unlikely to be satisfying. Adding traits or grounds to the list of prohibited grounds of discrimination ameliorates some inequalities but cannot eliminate all. In making this argument, I do not mean to suggest that I oppose adding any particular grounds, nor to argue that the current list is best. Rather, the upshot of this argument is to suggest that when addressing the question of what traits to put on the list we should ask ourselves which forms of discrimination are most common or most troubling and accept that in creating such a list we will not capture all forms of wrongful discrimination. Moreover, by limiting the prohibited legal grounds, we also stand the best chance of actually addressing the wrongs singled out by the law. In addition, I argued that the turn to individualized inquiry or holistic review should be understood frankly as an endorsement of discretion. We should frankly assess whether the context is one in which we do wish to allocate freedom to the decisionmaker, given the predictable equality costs. Simply put, equality within law involves trade-offs of various kinds.

1. Cite Douglas Rae [↑](#footnote-ref-1)
2. Id. at 665. [↑](#footnote-ref-2)
3. The idea that legal norms must be general in form is well articulated by Lon Fuller when he describes “Eight Ways to Fail to Make Law.” The first and most important failure he describes is the failure to appreciate that legal norms require generality: “The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality.” Lon L. Fuller, The Morality of Law, 46 (1964). [↑](#footnote-ref-3)
4. See e.g. Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 346 (1949) (claiming that to evaluate whether a law which classifies treats like cases alike, one must look to the “purpose of the law”). [↑](#footnote-ref-4)
5. Peter Westen, “The Empty Idea of Equality,” 95 Harv. L. Rev. 537 (1982). Westen ignited a vigorous exchange with this article. For some representative examples of the replies, s*ee* Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 Mich. L. Rev. 575 (1983); Kent Dreenawalt, “How Empty is the Idea of Equality?” 83 Colum. L. Rev. 1167 (1983); Jeremy Waldron, *The Substance of Equality*, 89 Mich. L. Rev. 1350 (1991)(reviewing West’s book that based on his equality article); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice and Stare Decisis,* 105 Yale L. J. 2031 (1996). [↑](#footnote-ref-5)
6. Greenawalt, *supra* note 5 at 1172. [↑](#footnote-ref-6)
7. For example, Fuller claims that “the enactment of contradictory rules” is one of the ways to fail to make law. Fuller, *supra* note 3 at 39. [↑](#footnote-ref-7)
8. Ronald Dworkin, Law’s Empire 165(1986) (explaining that the idea that we must treat like cases alike as follows: “It requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some). [↑](#footnote-ref-8)
9. *Id*. at 96 (claiming that law as integrity explains that the limits on the use of force by the state not simply inter instrumental ways “but by securing a kind of equality among citizens that makes their community more genuine”). [↑](#footnote-ref-9)
10. *See generally* Rae, *supra* note 1. [↑](#footnote-ref-10)
11. Fourteenth Amendment to the United States Constitution (my emphasis). [↑](#footnote-ref-11)
12. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 342 (1949). [↑](#footnote-ref-12)
13. Yick Wo v. Hopkins, 118 U.S. 356, X (1896). [↑](#footnote-ref-13)
14. *See e.g.* John Hart Ely, Democracy and Distrust (date). [↑](#footnote-ref-14)
15. *See e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, Phil. & Public Affairs 5, no. 2 (Winter 1976), [↑](#footnote-ref-15)
16. *See e.g.* Deborah Hellman, When is Discrimination Wrong? (2008) and Ronald Dworkin, A Matter of Principle (date) at 300-303 (arguing that affirmative action in higher education does not violate equal protection because it does not express contempt for whites). [↑](#footnote-ref-16)
17. Laws enacted with the purpose to harm some group, laws based on stereotypes, laws drawing distinctions on the basis of particular prohibited traits like race, laws burdening the exercise of important liberties, for example. [↑](#footnote-ref-17)
18. Frederick SChauer, Profiles, Probabilities and Stereotypes (2003). [↑](#footnote-ref-18)
19. *Id*. at 207. [↑](#footnote-ref-19)
20. *Id*. at 203. [↑](#footnote-ref-20)
21. Antiterroristm and Effective Death Penalty Act of 1996. The law also refers to lists of “terrorist” organizations as so designated by the State and Treasury departments. [↑](#footnote-ref-21)
22. cite [↑](#footnote-ref-22)
23. cite [↑](#footnote-ref-23)
24. In *Holder*, the Court upheld the law against a First Amendment challenge. [↑](#footnote-ref-24)
25. Rebecca Brown, *Liberty, The New Equality*, 77 N. Y. U. Law. Rev. 1491, 1498 (2002). [↑](#footnote-ref-25)
26. *Le Lys Rouge* – the Red Lily, a novel. [↑](#footnote-ref-26)
27. [↑](#footnote-ref-27)
28. This example was suggested to me by my colleague George Yin. [↑](#footnote-ref-28)
29. Douglas Rae explores this phenomenon, *see* Rae, *supra* note 1 at \_\_\_. [↑](#footnote-ref-29)
30. Same-sex marriage is now legal in seventeen states: In six states court decisions invalidated laws restricting marriage to opposite sex couples (California, Connecticut, Iowa, Massachusetts, New Jersey and New Mexico); In eight states, laws passed by state legislatures made same-sex marriage legal (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island and Vermont); and in three same-sex marriage was legalized by popular vote (Maine, Maryland and Washington). [↑](#footnote-ref-30)
31. The push for particularization is animated both by a sense of that the generality of law misjudges the particular case thereby producing an injustice as well as by the inequities created. *Cite*. [↑](#footnote-ref-31)
32. Martha C. Nussbaum, *Equity and Mercy*, Philosophy & Public Affairs at 105. [↑](#footnote-ref-32)
33. Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 Queens L. J. 179, 204 (1993-94). [↑](#footnote-ref-33)
34. *Id*. at 199. [↑](#footnote-ref-34)
35. *Id.* at 205. [↑](#footnote-ref-35)
36. 539 U.S. 306, 338 (2003) [↑](#footnote-ref-36)
37. *Id*. at 334. [↑](#footnote-ref-37)
38. *Id*. [↑](#footnote-ref-38)
39. *See* Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and LIfe (1991); etc. [↑](#footnote-ref-39)
40. cite [↑](#footnote-ref-40)
41. cite [↑](#footnote-ref-41)
42. Cite representative statute. [↑](#footnote-ref-42)
43. *See* Richard Epstein, Forbidden Grounds, who argues in favor of such a regime. [↑](#footnote-ref-43)
44. This could be accomplished without actually specifying the traits that constitute merit in any particular job, for example by requiring that any hiring procedure be job-related. [↑](#footnote-ref-44)
45. Robert Post, “Prejudicial Appearances: The Logic of American Anti-Discrimination Law,” 88 Cal. L. Rev. 1, 13 (2000) (arguing that “in fact what antidiscrimination law seeks is an apprehension of ‘individual merit’”). [↑](#footnote-ref-45)
46. Grutter at 327, citing *Adarand v. Pena* [↑](#footnote-ref-46)
47. *Id*. at 328-9. [↑](#footnote-ref-47)
48. *Id*. at 328 [↑](#footnote-ref-48)
49. *Id*. (my emphasis) [↑](#footnote-ref-49)
50. Cite. [↑](#footnote-ref-50)
51. Nussbaum, *supra* note 32. She argues, for example that “looking at the circumstances of human life, one comes to understand how such things have happened, and this ‘medical’ understanding leads to mercy.” *Id*. at 102. [↑](#footnote-ref-51)