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Equality: Form and Substance

Abstract: The principle of equality before the law is often characterized as procedural or formal in nature and consequently of minimal value. Recent scholarship has offered a more nuanced representation of this critique, maintaining that the principle is procedural in nature but emphasizing its instrumental importance. This paper challenges that characterization, arguing that equality before the law is best interpreted as a foundational constitutional principle which manifests substantive restrictions on the content of legal rules. Equality before the law, as an independent constitutional principle, should not be confused with the broader value of equality, nor with the rule of law: it incorporates aspects of both, mandating that legal subjects, including legal officials, be treated as prima facie equals in the creation, interpretation, and application of the law. As such, it in an integral normative foundation for the common law constitutional order. Any analysis of the common law constitution must adequately account for and give proper recognition to this fundamental constitutional principle.

Keywords: Equality Before the Law, Rule of Law, Constitutional Theory, Legal Constitutionalism, Discrimination

Introduction

Many constitutional frameworks contain some provision for the principle of equality before the law.[1] Usually these provisions are associated with the protection of both procedural and substantive rights that legal subjects have as against the misuse of governmental power. In particular, there is a strong connection between modern provisions for legal equality and the protection of anti-discrimination rights. However, philosophical analysis of the principle of equality before the law has

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[1] See e.g.; Canadian Charter for Rights and Freedoms, s. 15(1); Constitution of South Africa, s. 9(1); Constitution of India, Art. 14; Constitution of Ireland, Art 40; Constitution of the United States of America, Amend. 14.

generally resulted in the conclusion that the concept is empty, circular, or merely procedural. As a result, many scholars have concluded that equality before the law is of minimal value.[2] This paper challenges those accounts and argues that modern constitutional frameworks are not mistaken to draw a connection between legal equality and substantive restrictions on state power. Equality before the law is best conceived as a substantive constitutional principle which places concrete limitations on the content of legal rules. It should not be confused with the abstract value of equality, nor requirements that laws be sufficiently general or that there be congruence between laws as enacted and as applied.[3] Equality before the law incorporates aspects of both the rule of law and the value of equality, mandating that legal subjects, including legal officials, be treated as *prima facie* equals in the creation, interpretation, and application of the law. Any act or omission on the part of a legislator, judge, or governmental official which fails to respect the moral equality of persons breaches this fundamental constitutional principle.

The principle of equality before the law is best conceived as stand-alone constitutional principle, foundational to common law understanding of the rule of law and the separation of powers. The orthodox position operates within a theoretical framework which is premised on the claim that the principle of equality before the law is synonymous with and exhausted by the maxim that 'likes should be treated alike'.[4] When viewed through this lens, the principle becomes vulnerable to a powerful critique of emptiness and circularity.[5] However, recent scholarship has argued that the principle of equality before the law exerts pressure on adjudicators to

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[2] See; P. Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537–96; C. J. Peters, 'Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis' (1996) 105 *The Yale Law Journal* 2031–2115; C. Peters, 'Equality Revisited' (1997) 110 *Harvard Law Review* 1210; H. G. Frankfurt, 'Equality and Respect' Necessity, Violation and Love, (New York: Cambridge University Press, 1994), pp. 146–54.

[3] See; L. Fuller, *The Morality of Law* , Revised ed ed. (Yale University Press, 1969) chap. 2.

[4] See; Aristotle, 'Nicomachean Ethics' in Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press) V.3. 1131a10-b15; Aristotle, 'Politics' in Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press) III.9.1280a-15, III. 12. 1282b19-23; Westen (n 2) 539–540; Kenneth Simons, 'The Logic of Egalitarian Norms' (2000) 80 BUL Rev 693, 698, 727–728; John Rawls, *A Theory of Justice* (Revised edition, Harvard University Press 1971) 50–51.

[5] Westen, 'The Empty Idea of Equality'. Westen's original article prompted a number of critical responses. See; S. J. Burton, 'Comment on "Empty Ideas"; Logical Positivist Analyses of Equality and Rules' (1982) 91 *Yale Law Journal* 1136; E. Chemerinsky, 'In Defence of Equality: A Reply to Professor Westen' (1983) 81 *Michigan Law Review* 575–99; K. Greenawalt, 'How Empty is the Idea of Equality?' (1983) 83 *Columbia Law Review* 1167; K. L. Karst, 'Why Equality Matters' (1983) 17 *Georgia Law Review* 245. These critiques resulted in greater reflection from Westen and culminated in the publication of his 1990 book (Westen, *Speaking of Equality* (n 7)). This book marked a substantial departure from the arguments made in his 1982 article, moving from a claim that equality is completely empty towards an argument which puts greater stress on the nuances of egalitarian norms. The extent of this departure is seen starkly when one notes that his original article is not cited in the 1990 book and that he explicitly disavows its title in the preface to the book (Westen, *Speaking of Equality*, pp. xix–xx.

act in accordance with their previous decisions should there be multiple permissible options available to them.[6] This approach continues to maintain that equality before the law can only require that like cases be treated alike, but argues that such a principle may not be completely empty or circular.

It is a mistake to construe the principle of equality before the law as wholly contained within the maxim that like cases should be treated alike. This is but one requirement among many. Equality before the law can reasonably be associated with a number of distinct principles, varying from the requirement of congruence between laws as enacted and applied to the substantive prohibition of discrimination on the part of legislators, judges, or other legal officials. This paper, in its examination of these requirements, will show that equality before the law, as a foundational constitutional principle, should be interpreted as manifesting both procedural and substantive requirements which are all informed by a commitment to treating legal subjects as moral equals.[7] Consequently, there is no meaningful distinction between equality *before* the law and equality *in* the law, or even the equal *protection* of the law. These are all different labels which can be attached to the same fundamental constitutional commitment.

The proceeding analysis focuses primarily on jurisprudential arguments relating to equality before the law as a philosophical concept. Nevertheless, it should be stressed that correctly understanding the nature of this principle is a necessary precondition for its legal enforcement. Operating broadly within a common law constitutionalist framework, some of the arguments advanced below will draw on both theory and doctrine to present the best interpretation of this principle.[8] This is not to say that judicial analysis has historically recognised the important place of moral equality within constitutional requirements that the state respect the principle of equality before the law. Rather, the claim here is that one can best account for the divergent requirements of this principle by reference to an obligation to treat legal subjects as moral and legal equals. To that end, references within constitutions, including uncodified constitutions, to equality before the law should be interpreted substantively.

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[6] F. K. Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered' (2018) *Legal Theory* 1–32.

[7] See; R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) pp. 227–28; Simons, 'The Logic of Egalitarian Norms', 720–21; T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1993) p. 140; J. Waldron, *One Another's Equals: The Basis of Human Equality* (The Belknap Press of Harvard University Press, 2017).

[8] See; T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, 2013) pp. 333–49; J. Laws, *The Common Law Constitution* (Cambridge University Press, 2014).

Treating Like Cases Alike

In the 1980's and 1990's, theoretical debates concerning the nature of equality centred around the argument posed by Peter Westen that equality was an empty concept.[9] This critique was extremely influential and was the catalyst for a shift within anti-discrimination scholarship away from equality-based accounts towards liberty-based accounts.[10] Such a reconceptualization has the potential to significantly undermine the place of anti-discrimination rights within constitutional requirements of equality before the law. Additionally, the mantle of Westen's original critique was taken up by Christopher Peters in the late 1990's, when he argued that equality is a self-contradictory and absurd norm.[11] This critique is highly relevant for public lawyers interested in the principle of equality before the law as both Westen and Peters associated the concept of equality with the maxim that 'like cases should be treated alike'.[12]

According to Westen, the determination of like cases, for the purposes of equality before the law, is dependent upon the applicability of pertinent legal rules. He argues that "'likes should be treated alike' means that people for whom a certain treatment is prescribed by a standard should all be given the treatment prescribed by

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[9] Another notable strand of this critique has been proposed by Joseph Raz. See; J. Raz, *The Morality of Freedom* (Clarendon Press, 1988).

[10] See; E. Holmes, 'Anti-Discrimination Rights without Equality' 68 *The Modern Law Review* 175–94; T. Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) pp. 113–15, 130–34; S. Moreau, 'In Defense of a Liberty-based Account of Discrimination' in D. Hellman, S. Moreau (eds.), Philosophical Foundations of Discrimination Law, (Oxford: Oxford University Press, 2013); S. Moreau, 'What is Discrimination?' (2010) 38 *Philosophy & Public Affairs* 143; S. Moreau, 'Discrimination as Negligence' (2010) 40 *Canadian Journal of Philosophy* 123–49. Cf. D. Hellman, 'Equality and Unconstitutional Discrimination' in D. Hellman, S. Moreau (eds.), Philosophical Foundations of Discrimination Law, (Oxford: Oxford University Press, 2013), pp. 51–70; D. Hellman, 'Two Concepts of Discrimination' (2016) 102 *Virginia Law Review* 895–852; D. Hellman, *When Is Discrimination Wrong?* (Harvard University Press, 2011); S. Fredman, *Discrimination Law*, 2nd ed. (Oxford University Press, 2011) chap. 1.

[11] Peters, 'Equality Revisited'. This article also prompted a number of replies. See; K. Greenawalt, '"Prescriptive Equality": Two Steps Forward' (1997) 110 *Harvard Law Review* 1265; J. Sarnoff, 'Equality as Uncertainty' (1999) 84 *Iowa Law Review* 377; C. Peters, 'Slouching Towards Equality' (1999) 84 *Iowa Law Review* 801; J. Sarnoff, 'I Come to Praise Morality, Not To Bury It' (1999) 84 *Iowa Law Review* 819.

[12] Westen himself defined equality as "the position in law and morals that 'people who are alike should be treated alike', and its correlative, that "people who are unalike should be treated unalike."' Westen, 'The Empty Idea of Equality', 539–40. His focus on the relevant likeness being between 'people' differed slightly from other scholars who considered the principle of equality before the law to be concerned with like 'cases' being treated alike. This however did not change the core of Westen's argument as his definition of likeness eschewed any analysis that might hinge upon a focus on persons over cases. This is because, for Westen, determinations of likeness were premised on the applicability of some moral or legal rule to both parties. As such, persons were only alike under law where the legal cases that pertained to them were sufficiently alike. The importance of this conclusion will be elucidated further below.

the standard".[13] This is also the approach taken by legal theorist H.L.A Hart in his discussion of justice in the administration of law where he notes that "this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules".[14] Thus, on this conception, the principle of equality before the law (when understood as requiring only that like cases be treated alike) means that legal rules should be applied to those that they purport to apply to. This being the case, Westen and Peters argue that talk of equality adds nothing to this analysis; the only thing that equality provides in this context is the consistent application of legal rules, or, more precisely, the application of legal rules. If a rule is not being applied consistently it is not being applied. Similarly, Joseph Raz argues that "all principles can be regarded as principles of equality in virtue of their generality" but that this kind of equality is quite trivial.[15]

This understanding of equality maps quite closely to many of the aspects of Lon Fuller's requirement of congruence between official action and declared rule contained within the rule of law.[16] To Fuller, a lack of congruence between judicial action and statutory law threatens to undermine the entirety of the legal order through the consequent breach of a number of other aspects of the rule of law, resulting in "a failure to articulate reasonably clear general rules and an inconstance in decision manifesting itself in contradictory rulings, frequent changes in direction, and retrospective changes in law".[17] Thus, equality before the law, on this account ensures that we are subject to the same laws, but that is itself an empty statement with respect to equality; if laws are being applied to those they should be applied to, then, while we are 'equally' subject to the same laws, fidelity to the rule of law is really guiding this principle. Equality appears to be adding nothing. If this were true, then Peters would be right when he concludes that we could remove the term 'equal' from the language of the Equal Protection Clause of the US Constitution without changing the meaning of the clause.[18]

However, Frej Klem Thomsen has recently argued that it would be wrong to conclude from this that equality before the law is an empty principle. He argues that

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[13] Westen, 'The Empty Idea of Equality', 547.

[14] H. L. A. Hart, 'Positivism and the Separation of Law and Morality' (1958) 71 *Harvard Law Review* 593–629 at 623–24.

[15] Raz, *The Morality of Freedom*, p. 218.

[16] Fuller, *The Morality of Law*, pp. 81–91. However, it is not exhaustive of his principle of congruence. Fuller argued that congruence also required what we might call "procedural due process" including the right to representation by counsel, to cross-examination, and to appeal. Fuller, *The Morality of Law*, p. 81.

[17] Fuller, *The Morality of Law*, p. 82.

[18] Peters, 'Equality Revisited', 1258.

the principle that like cases should be treated alike does indeed have something to say independent from the demand for rule application in circumstances where a court has a number of legally permissible options open to it in its adjudication of a case. In such cases, Thomsen argues that the principle of equality before the law exerts pressure on judges to treat like cases according to the same (non-discriminatory) permissible action that has most frequently occurred in previous cases. The force of this principle is directly proportional to the proportion of previous cases that have been decided in that manner.[19]

This argument rescues the principle of equality before the law from the charge of emptiness levied by Westen and ties it intimately to the doctrine of precedent. Thomsen's principle of equal treatment, what he refers to as "procedural legal egalitarianism", is now a viable candidate for one of the requirements of equality before the law because, on this interpretation, it is grounded within an equality framework which is independent from simple rule application. In his paper, Thomsen argues convincingly that equal treatment in this sense is not inherently valuable. Nevertheless, the principle that like cases should be treated alike can instead be seen as instrumentally valuable such that a high degree of adherence to it would be necessary for maintaining a state of internal coherency and integrity within a legal system.[20] As such, it is an important aspect of the rule of law, even if it may be departed from in circumstances where it may require the duplication of wrongful treatment. Thus, following Peters, he argues that the principle that like cases should be treated alike is not inherently morally desirable and should not be followed in circumstances where it would require that a person "be treated *wrongly* simply because another, identically situated person has been treated wrongly".[21]

This conception of equality before the law views it as synonymous with and exhausted by a commitment to treating like cases alike where like cases are determined by reference to legal rules as opposed to moral principles. The result is the almost complete subsumption of equality before the law into the doctrine of precedent. It is not entirely clear if this principle even belongs under the umbrella of

[19] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 13, 19. The requirement of non-discrimination contained within this principle will be explored in greater detail below. For not it is sufficient to note that Thomsen does not consider this requirement of non-discrimination to manifest anything in the way of a substantive principle of equality before the law. To him this principle is completely procedural.

[20] See; R. Dworkin, *Law's Empire* (Harvard University Press, 1986); T. R. S. Allan, 'Dworkin and Dicey: The Rule of Law as Integrity' (1988) 8 *Oxford Journal of Legal Studies* 266–77; Fuller, *The Morality of Law*, p. 81; T. R. S. Allan, 'Principle, Practice, and Precedent: Vindicating Justice, According to Law' (2018) 77 *Cambridge Law Journal* 269–97.

[21] Peters, 'Equality Revisited', 1212. Peters argues that this wrong can take the form of undeserved positive treatment as well as undeserved negative treatment.

equality before the law, strictly speaking. It seems to have its home more within the ambit of the rule of law than equality before the law, if we are drawing sharp distinctions between these two constitutional principles.

The argument advanced by Westen and Thomsen is committed to the view that equality principles presuppose the existence of other prescriptive rules, thus rendering restatement of those rules superfluous. It does not account for how equality could form the basis of independent principles that may in some cases place limits on the substance of these very rules. This is a uniquely legal conception of equality, fundamentally bound up with principles of constitutional governance. Legal equality may not guarantee substantive justice, but it places substantive restrictions on the character of juridical relations operative within a legal system, and manifests within law a commitment to respecting the dignity and moral equality of legal subjects. What follows is an examination of some of the other principles which, when properly understood, are associated with equality before the law. These principles move beyond the procedural requirements mentioned above and manifest substantive restrictions on the content of legal rules.

Equal Subjection to Law:

A.V. Dicey, in *An Introduction of the Study of the Law of the Constitution*, defined the rule of law as "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[22] As such, he stressed that "Englishmen are ruled by the law, and by the law alone".[23] To elaborate upon this, he posited three meanings of the rule of law.[24] He expressed one of these meanings as guaranteeing "not only that no man is above the law, but (which is a different thing) that here, every man, whatever be his rank or condition, is subject to the ordinary laws of the realm and amenable to the jurisdiction of the ordinary tribunals".[25] Dicey referred to this as the 'idea of legal equality' and argued that it had been pushed to its utmost limit within England.[26] Core to this understanding of equality before the law is the notion of equal subjection of all to governance by law. It may be the case that certain classes of persons (for example,

[22] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Oxford University Press, 2013) p. 119.
[23] Dicey, *Law of the Constitution*, p. 119.
[24] Dicey, *Law of the Constitution*, pp. 183–206.
[25] Dicey, *Law of the Constitution*, p. 193.
[26] Dicey, *Law of the Constitution*, p. 193.

soldiers) are subject to legal duties that ordinary citizens are not and, as such, may be said to be subject to different laws. However, Dicey quite rightly stressed that this is not inconsistent with the principle of equal subjection to law so long as those persons, or any other legal officials, are not *exempted* from the application of ordinary law or the legal duties which are entailed by it.[27] According to the principle of equal subjection to law, the government and the individual are to be regarded as equally subject to the law.

Consider the case of *M v Home Office* to elucidate this point.[28] M was a citizen of Zaire who came to the United Kingdom seeking asylum. His applications were rejected, as were his requests for judicial review of those decisions. However, while his latest application for judicial review was pending, he was deported. Upon learning of this deportation, the court ordered his return. The Secretary of State refused to comply, convinced that the application for asylum had been correctly rejected and that the deportation was lawful. The High Court proceeded to hold him in contempt of court for failing to obey a judicial order. This case illustrates a number of key aspects of the principle of equal subjection to law and the connection between that principle and the separation of powers. Of central concern was the ability of government to place itself above the law or, more precisely, to usurp the judicial function and decide for itself the applicability of a given legal rule to their present circumstances. The court held that, even if the Crown itself was immune from the judicial process, the government, and by extension its ministers and departments were not. Lord Templeman stressed that "the proposition that the executive obey the law as a matter of grace and not as a matter of necessity is a proposition which would reverse the result of the Civil War".[29] In so holding, the court reiterated a long-standing commitment of the common law to the principle of equal subjection to law. Core to this principle is a robust protection of the separation of powers, ensuring that no governmental official can exempt themselves from or ignore the law.

While one could interpret the judgement in this case by reference to the separation of powers alone, such a reading would fail to account for a key normative underpinning for that principle itself: the constitutional commitment to equal subjugation to law. In this case, a breach of the separation of powers amounted to one organ of state attempting to place itself beyond the reach of law. The same legal wrong can be constitutionally prohibited for a number of reasons. In *M v Home* Office, there

[27] Dicey, *Law of the Constitution*, p. 194.

[28] [1994] 1 AC 377.

[29] ibid 395.

were at least two constitutional claims at issue: a violation of the separation of powers, yes; but, also a violation of the principle of legal equality and equal subjection to law.

This being said, Dicey's conception, if it is interpreted as a purely procedural constraint on government is open to the charge of emptiness expressed above. As Marshall stresses, 'the prescription of equality in law, as in morals, seems sometimes to fall away into an empty formality'.[30] Again, the issue here is not that there is no value in ensuring that law applies to those that it purports to apply to. No, the problem is that such an understanding could be explained by reference to the rule of law without any recourse to the language of equality.[31] That is, of course, if we see this as pertaining only to a *procedural* restriction, as opposed to a principle which manifestly limits the content of legal rules. Such an interpretation would seem to collapse his second requirement of legal equality into the first. No man may be above the law in the sense that all must follow it. However, Dicey seems to have envisaged an additional requirement, one which prevented the existence of legally enshrined exemptions to law for legal or political rulers.

Marshall argues that Dicey's conception of legal equality, leaving aside his rejection of overly-broad discretionary powers, is purely procedural.[32] The two procedural constraints that he identifies from Dicey are: (1) that everyone is to be (equally) subject to general laws rather than individualised commands or mob rule, and (2) that everyone is to be (equally) covered by a body of law that is "impartially applied without fear, favour, or anything similar, by an independent judiciary".[33] Aspects of these constrains are certainly procedural. But these procedural constraints are also unrelated to equality in any meaningful sense. They simply require that legal enactments are properly applied to those that they are supposed to apply to. It is the equivalent of demanding that one enforces the rules and not break them. References to equality here are superfluous except as a basic requirement of consistency and the doctrine of precedent mentioned above. That being said, other aspects of these principles are evidently more than procedural. They clearly manifest more than the requirement of congruence between judicial action and legislative pronouncement; equal subjection to law limits the potential scope of legal enactments by requiring that those enactments be general in nature.

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[30] G. Marshall, *Constitutional Theory* (Clarendon Press, 1971) p. 137.

[31] Leaving aside the argument that the rule of law is itself a commitment to fundamental moral equality; Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, pp. 22, 163–83.

[32] Marshall, *Constitutional Theory*, pp. 137–38. It should be noted that the rejection of discretionary powers is clearly an example of the principle of equality before the law amounting to substantive restrictions on legal enactments.

[33] Marshall, *Constitutional Theory*, p. 138.

In this sense, the principle of equal subjection to law is closely related to requirements of generality contained within the rule of law. According to the requirement of generality, law must be expressed in the form of general rules and not determined solely on the basis of ad hoc adjudicative decisions.[34] Additionally, following Dicey, the rule of law may also require generality in aim: that laws be impersonal, applied only to general classes of persons, and contain no proper names, to be contrasted with blatant arbitrariness or caprice.[35] Thus, it is not open to lawmakers to enact a law, the substantive content of which specifically targets an identified individual. If a legislature were to enact a bill of attainder this would manifestly be in breach of the principle of equality before the law.[36] Crucially, it would be the content of the law that was at issue, not the procedure by which it came to be.[37] As such, the principle of equality before the law, if it includes a requirement of equal subjection to law and generality in aim, must consequently limit the content of legal rules such that particularised laws or enactments which attempted to grant exemptions to legal officials would be pre-emptively precluded from the class of legitimate legal aims. What is more, full conformity with the second aspect of Dicey's conception of legal equality would require adherence to some degree of separation of powers, such that an independent judiciary is secured.[38] Any legislation attempting to abolish the judicial branch of government would be in violation of the rule of law, the separation of powers and the principle of legal equality.

Another aspect of the principle of equal subjection to law is the complete rejection of slavery. A slave is not a legal subject: he is denied the protection of law and the capacity to bear legal rights. To be a slave is to be cast out from the system of juridical relationships; to be a mere object of proprietary claims.[39] In this sense, we can

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[34] Fuller, *The Morality of Law*, pp. 46–47.

[35] See; Marshall, *Constitutional Theory*, pp. 136–37; T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) pp. 122–23. Note, however, that Fuller would not consider these requirements to be contained within his generality desideratum; to him, these belonged within the realm of external morality and the doctrine of fairness, not the more foundational requirement that there be a system of general rules.

[36] Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, pp. 93–94, 140–41.

[37] See; J. Gardner, 'The Supposed Formality of the Rule of Law' Law as a Leap of Faith: Essays on Law in General, (Oxford University Press, 2012), pp. 195–220 pp. 198–201. Here the common assumption that requirements of generality amount to formal or procedural restraints on law is challenged and rebutted. See also; M. P. Foran, 'The Rule of Good Law: Form, Substance and Fundamental Rights' (2019) 78(3) *The Cambridge Law Journal* 570-595.

[38] See also; J. Raz, 'The Rule of Law and its Virtue' The Authority of Law: Essays on Law and Morality, (Oxford University Press, 2009), pp. 210–29 pp. 216–17.

[39] N. Simmonds, *Law as a Moral Idea* (Oxford University Press, 2008) p. 101; N. E. Simmonds, 'Rights at the Cutting Edge' A Debate Over Rights, (Oxford: Clarendon Press, 1998) pp. 113, 165–67. Note that there may be times when a slave enjoys some legal protections, for example against excessive violence from his master. Those protections are dependent upon law and to that extent, a slave may have legal rights. However, this is a narrowly defined exception to the nature of slavery as a denial of subjection to law and might be better seen as analogous to the protections offered to animals within contemporary legal systems.

see starkly the distinction between subjection to law and subjection to the arbitrary will of a master, a distinction which echoes Dicey's distinction between the rule of law and arbitrary power. Nigel Simmonds makes this point when he argues that "to be governed by law is to enjoy a degree of independence from the will of others".[40] This is to be contrasted with an interpretation of liberty which views it as pertaining to the range of choices one can avail of. It is possible for a slave to have a greater range of options open to them than a free man. Indeed, this was particularly the case in ancient Rome where some slaves had access to vast amounts wealth and social privilege relative to many free persons.[41] Nevertheless, Simmonds is right to stress that this does not make the slave free. Clearly freedom entails more than simply a wide range of possibilities open to an individual; it must also include some degree of independence from the arbitrary interference of others.[42] It is only through subjection to law that this independence can be secured. As Simmonds notes;

> [w]hen a citizen lives under the rule of law, it is conceivable that the duties imposed upon him or her will be very extensive and onerous, and the interstices between these duties might leave very few options available. Yet, if the rule of law is a reality, the duties will have limits and the limits will not be dependent upon the will of any other person.[43]

Thus, equal subjection to law manifestly and emphatically rejects any system of slavery. To be subjected to law is to be protected by the rule of law and the principles of legality which recognise the dignity and autonomy of the legal subject.[44] Once more we can see intimate connections between the rule of law and the principle of equality before the law. Equal subjugation to law, like the requirement that like cases be treated alike is derived from and obtains meaning and coherence as a result of this more foundational commitment to legal equality.

There is strong evidence to suggest that this interpretation of legal equality has been accepted by the British courts, notwithstanding an historical deference to the capacity of Parliament to disregard fundamental constitutional principle. This can be seen quite clearly in the case of *Somerset v Stewart*, a landmark decision of the Kings Bench in 1772 which held that the common law was incapable of supporting chattel

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[40] Simmonds, *Law as a Moral Idea*, p. 101.

[41] R. Gamauf, 'Slaves Doing Business: The role of Roman Law in the Economy of a Roman Household' (2009) 16 *European Review of History* 331–46.

[42] Simmonds, *Law as a Moral Idea*, pp. 101, 141–42, 156.

[43] Simmonds, *Law as a Moral Idea*, p. 101.

[44] See; J. Waldron, 'How Law Protects Dignity' (2012) 71 *The Cambridge Law Journal* 200–222; Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, p. 96; Foran, 'The Rule of Good Law'.

slavery.[45] The decision of the court, given by Lord Mansfield held that '[t]he state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law'. Reaffirming that it was not simply the case that slavery had not been authorised by statute, Lord Mansfield noted that '[i]t is so odious, that nothing can be suffered to support is, but positive law'. As such, the common law was incapable of supporting slavery. What is it about slavery that makes it so odious that the common law cannot support it? Of course, there are basic moral commitments that explain the odiousness of slavery. But it seems that there is a distinctly legal, constitutional reason for objecting to slavery: to countenance slavery is to deny the equal subjection and protection of law to all and consequently to run afoul of constitutional commitments to the rule of law and legal equality.[46]

As we explore these more substantive restrictions on legal content it is worth stressing that, notwithstanding the substantive nature of the principle of equality before the law, the ability of Parliament to ignore those requirements is an entirely separate issue. While there is clearly support for equal subjection to law expressed in a refutation of the capacity of the common law to sanction an institution of slavery, the judgement in this case did not amount to a ringing endorsement of the capacity of the common law to actually overturn or limit posited laws which would introduce slavery into England. Lord Mansfield's decision is premised on the fact that no such enactments existed. It is likely that, had they been in force at the time of this decision, the court would not have ordered Somerset to be discharged. Nevertheless, a decision such as that would be premised on the inability of the common law to overturn acts of Parliament. It is still the case that slavery, the institution which most fundamentally undermines the principle of equal subjection to law, is incompatible with the common law. A decision to breach or set aside that principle in favour of enforcing an act of Parliament is one which brings the ostensible conflict between the rule of law and parliamentary sovereignty into sharp focus, but that is a separate issue.[47] For now, it suffices to note that Somerset's case signifies a notable shift towards a deeper understanding of what 'equal' means when we speak of equality before the law, one which establishes some level of basic equality in status as between individuals within the state, as opposed to simply requiring that governmental officials obey the law,

[45] [1772] 98 ER 499 (KB), [1772] 20 St Tr 1. See also; F. Shyllon, *Black Slaves in Britain* (Oxford University Press, 1974); E. Fiddes, 'Lord Mansfield and the Sommersett Case' (1934) 50 *LQR* 499.

[46] See; Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, chap. 7.

[47] See; Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, pp. 133–68; Allan, 'Principle, Practice, and Precedent: Vindicating Justice, According to Law'; T. R. S. Allan, 'Questions of legality and legitimacy: Form and substance in British constitutionalism' (2011) 9 *International Journal of Constitutional Law* 155–62.

whatever its content may be.[48] The common law may be informed by a concept of equality before the law that could never support the establishment of slavery, even if it may yield to the principle of parliamentary sovereignty. While Parliament could refuse to conform to the principle, and the judiciary could refuse to enforce it, the principle of equality before the law, in both theory and practice, requires substantive limitations to be placed on the content of legal rules.

Non-Discrimination

Principles of non-discrimination seem to be obviously and intrinsically linked to the concept of equality before the law. Indeed, when one ponders what equality before the law might require within a contemporary constitutional system, often non-discrimination is the first thing that comes to mind. Other aspects of the principle, such as adherence to the doctrine of precedent and a commitment to equal subjection of law are rarely seen as prime or emblematic instantiations. Nevertheless, while principles of non-discrimination are regularly associated with equality before the law, they are often seen as contained within the other requirements set out above. For example, Thomsen considers non-discrimination to be a necessary element of the principle that like cases should be treated alike.[49] Recall, however, that Thomsen considers determinations of likeness to arise non-comparatively, by reference to specific legal rules as opposed to determinations that individuals are moral or legal equals. He argues that two cases are alike "in the sense required for equality before the law *iff* they share the set of permissible actions, that is, if the court ought non-comparatively to treat them the same".[50] Thomsen's commitment to the belief that determinations of likeness must be made non-comparatively, by reference to legal rules as opposed to moral principles, results in him facing conclusion which he finds intuitively unsatisfying.[51] Not wishing to conclude that treating like cases alike could be compatible with blatant discrimination whilst holding steadfast to the claim that determinations of likeness must be done by reference only to existing rules, he must then locate a requirement of non-discriminatory treatment within the concept of like *treatment*. A principle that likes should be treated alike contains (i) a determination of

[48] On equality and status, see; J. Waldron, *Dignity, Rank, and Rights* (Oxford University Press, 2012); Waldron, *One Another's Equals: The Basis of Human Equality*.

[49] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 9–11.

[50] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 8.

[51] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 10–11.

likeness, and (ii) a commitment to treat those like cases alike – like treatment.[52] He argues that:

> A court treats two cases alike *iff* 1) the court φ's in case A and φ's in case B, and 2) φ'ing does not requires [sic] the court to distinguish on the basis of a property that case A and case B do not share.[53]

This additional requirement of non-discrimination or non-arbitrariness as a component of like *treatment* (and in no way related to determinations of like cases or like persons) appears from nowhere. It is not grounded in or informed by any explicit theoretical foundation; it exists entirely to prevent equality before the law from being compatible with wrongful discrimination on the part of adjudicative bodies such as courts without having to concede that likeness may be determined by reference to moral truth. Thomsen and I are in agreement that non-discrimination is an aspect of equality before the law. However, his explanation for why this is the case is unsatisfactory. He simply asserts that a principle of equality before the law which fails to prohibit discriminatory application of law would be intuitively unpalatable.

A principle of non-discrimination arises because we consider individuals who differ with regards to a particular characteristic to nevertheless be sufficiently alike (in spite of that difference) by virtue of their equal moral dignity. It is not something that is inherent within the concept of like treatment; it originates from a determination of likeness which is comparative in terms of moral worth. Where there is overlap between equal treatment and non-discriminatory treatment, it occurs at the point of determining likeness. It is only when the moral equality of two individuals is recognized – when we see them as alike despite a normatively irrelevant difference – that we can conclude that treating them differently would amount to a moral or legal wrong. To that end, there is nothing special about the requirement of like treatment; the normative work is done entirely by determinations of likeness. Once we have done that, a requirement of equal treatment demands only that treatment accorded to one is consistent with the treatment accorded to the other. Of course, it is no surprise that

[52] It should be noted that Thomsen's description of this requirement as one of non-discrimination might be better described as a requirement of non-arbitrariness as a common interpretation of discrimination would require that decisions be made on the basis very particularised grounds such as race or sex but not necessarily parentage. See; Khaitan, *A Theory of Discrimination Law*, chap. 2; T. Khaitan and S. Steel, 'Wrongs, Group Disadvantage and the Legitimacy of Indirect Discrimination Law' in H. Collins, T. Khaitan (eds.), Foundations of Indirect Discrimination Law, (Oxford: Hart Publishing, 2018).

[53] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 10.

this has led many, including Thomsen, to conclude that equal treatment may not be desirable in circumstances where it requires the duplication of wrongful treatment.[54]

In contrast, a principle of non-discrimination focuses only on the prohibition of certain kinds of wrongful treatment. It does not mandate uniformity in treatment. This is of vital importance. Too often it is assumed that equal treatment *means* non-discriminatory treatment. Rather, equal treatment demands far more than the prohibition of less favourable treatment afforded on the basis of certain personal characteristics. It requires that likes are afforded the same treatment regardless of what that treatment is. Non-discrimination, on the other hand, is only focused on prohibiting those decisions which are based on normatively irrelevant characteristics.[55] One principle *mandates* consistency in action, the other *prohibits* certain actions. The equal treatment principles which we have in mind for our purposes then are exactly those that Thomsen identifies: the equal treatment of like cases in accordance with the doctrine of precedent. He is wrong to think that this is all that equality before the law requires, but it may be all that it requires in the way of equal treatment. Thomsen is entirely correct to conclude that this principle may yield in circumstances where the duplication of wrongful treatment is threatened. Non-discriminatory treatment, however, is a free-standing principle which may be more central to the British constitutional order due to its intrinsic value and its connection to the concept of non-arbitrariness.[56]

The idea that legal recognition of the equal moral status of citizens should be viewed as a societal aspiration is a relatively modern innovation, originating as a move away from collectivist hierarchy which dominated classical and medieval societies. As Fredman notes, in these eras, "society was ordered in hierarchical form, with entitlements and duties determined by birth or status rather than by virtue of an individual's inherent worth as a human being".[57] The movement towards mercantile capitalism, democracy and classical liberalism within the West was informed by shifts in the way we understand the composition of society. Political morality was increasingly focused on individual rights and concerns rather than group affiliation. Class-based hierarchy was resisted, and individualism flourished.

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[54] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 23–25; Peters, 'Foolish Consistency'; M. Kramer, *In Defence of Legal Positivism: Law without Trimmings* (Oxford University Press, 1999) chap. 2.

[55] Even indirect discrimination is concerned with decisions that are *discriminatory* in effect not simply unequal in effect. See; Holmes, 'Anti-Discrimination Rights without Equality'.

[56] Indeed, the classic example of complete arbitrariness is treatment which discriminates on the basis of hair colour: *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, 229.

[57] S. Fredman, *Discrimination law* , 2nd ed. (Oxford University Press, 2011) p. 4.

A society embraces individualism when its people "hold the individual to be as important as, or more important than, clan, caste, estate, race, or nation".[58] The rise of individualism in the West acted as a catalyst for a wide variety of shifts in our conceptions of justice and the basic requirements of the rule of law. The explosion of liberalism during the 17th and 18th centuries, encapsulated by Locke's proclamation that "Men [are] by Nature all free, equal and independent"[59] resulted in significant challenges to the authority of the monarchy, culminating in the conclusion that the rule of law required that the laws be general and that legal officials could not exempt themselves from their own laws.[60]

As individualism flourished, there was a gradual movement towards acceptance of the belief that differences in class, race or other status should no longer ground sufficient moral difference so as to justify discriminatory treatment. This belief has come to form a core component of modern political morality. These changes in societal notions of equality have had profound effects on the ways that courts have interpreted the requirements of the principle of equality before the law. Most notably, consensus has formed around the conclusion that principles of equality before the law and equal protection of the laws place a substantive limitation on government which prohibits laws from being arbitrarily discriminatory.

Modern constitutional frameworks are therefore not wrong to draw a connection between legal equality and non-discrimination.[61] For example, in 1954, the US Supreme Court had, in a landmark case declared that state laws establishing segregated schools for black and white pupils were in breach of the fourteenth amendment to the Constitution, which holds that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.[62] The case, *Brown v Board of Education*,[63] was in many ways the beginning of modern manifestations of the principle of equality before the law which link legal equality to non-discrimination. *Brown* overturned the decision of *Plessy v Ferguson*,[64] which had promoted a doctrine of 'separate but equal' that was based on the notion that "equality of treatment is accorded when the races are provided substantially equal facilities, even though these

[58] A. Béteille, 'Individualism and Equality' (1986) 27 *Current Anthropology* 121–34 at 122.

[59] J. Locke, 'The Second Treaties' Two Treaties of Government, (Cambridge University Press, 1988) para. 95.

[60] Dicey, *Law of the Constitution*, pp. 100, 119.

[61] See; e.g.; Canadian Charter for Rights and Freedoms, s. 15(1); Constitution of South Africa, s. 9(1); Constitution of India, Art. 14; Constitution of Ireland, Art 40.

[62] Constitution of the United States of America, Am.14, s.1.

[63] [1954] 347 US 483 (SC).

[64] [1896] 163 US 537 (SC).

facilities be separate".[65] In *Brown*, the court concluded that "[s]eparate educational facilities are inherently unequal", and that, as such, those who are subject to segregation have been denied equal protection of the laws guaranteed by the fourteenth amendment.[66]

It should be noted however, that often judicial decisions concerning the precise nature of the principle of equality before the law leave much to be desired. The *Brown* decision is a prime example. The court made little effort to substantiate any connection between the fourteenth amendment and principles of non-discrimination save a bare assertion that segregated educational systems are inherently unequal. Nevertheless, it is possible for an informed reader to present a more charitable interpretation of the fourteenth amendment and the cases which flow from it.

While *Brown* operates within a constitutional framework that is quite distinct from the British common law system, I suggest that the court nevertheless relied on a similar interpretation of equality before the law that I wish to advance: namely, that this is a substantive principle which affects legal content and entails respect for the equal moral status of the legal subject. Only this could explain how the equal protection of law might require the state to act in a non-discriminatory manner. Nothing within a formal or procedural interpretation can explain why faithfully and consistently applied discriminatory laws violate legal equality.

Another example of equality before the law entailing principles of non-discrimination, this time in the UK context, is the Belmarsh case.[67] This case concerned the indefinite detention without trial of foreign suspected terrorists under anti-terrorism law.[68] UK law prevented British nationals from being detained indefinitely without trial. However, non-nationals seemingly did not have that protection. The House of Lords held that such discrimination against non-nationals was not compatible with the European Convention of Human Rights and issued a declaration to that effect. For our purposes, attention should be drawn to the judgements of Lord Hoffmann and Baroness Hale. Lord Hoffmann dissented from the majority, agreeing that the appeal should be allowed but grounded this decision in a denial that there was a public emergency of the kind needed to justify detention. However, he also indicated strong disagreement with the majority focus on the ECHR, instead wishing to emphasise an incompatibility between the Constitution and any law that attempted

[65] *Brown v. Board of Education of Topeka* (n 57) 489.

[66] *Brown v. Board of Education of Topeka 347 U.S. 483 (1954)*, p. 496.

[67] *A v. Secretary of State for the Home Dept* [2004] UKHL 56:

[68] *Anti-Terrorism, Crime & Security Act* (2001) sec. 23.

to imprison an individual indefinitely without trial.[69] As such, this case may have been decided by reference to UK constitutional law independently of the ECHR. With that in mind, the following extract from the judgement of Baroness Hale may be hinting towards the principle of equality before the law playing a role in deciding this case:

> Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities. … No one has the right to be an international terrorist. But substitute "black", "disabled", "female", "gay", or any other similar adjective for "foreign" before "suspected international terrorist" and ask whether it would be justifiable to take power to lock up that group but not the "white", "able- bodied", "male" or "straight" suspected international terrorists. The answer is clear.[70]

This aspect of her judgement is grounded in fundamental principles of democracy and legal equality. The decision of the court in *Brown* and the implications of Baroness Hale's judgement in the Belmarsh case evidently rejected an understanding of legal equality as simply the application of laws to those the laws purport to apply to, regardless of their content. As this paper has argued; that understanding represents only one aspect of the principle of equality before the law. At its core, equality before the law demands that individuals be treated as legal and moral equals. Such treatment seems now to necessitate non-discrimination in the creation, interpretation, and application of law. As Allan stresses, '[i]t is not sufficient for laws or government policies to be accurately applied to particular persons, in accordance with their true meaning or proper interpretation; the associated distinctions made between persons, or groups of persons, must also be capable of justification'.[71]

Equals Before the Law

The principle of legal equality is informed by notions of democracy, the separation of powers, and the rule of law which limit the ability of legal officials to exempt themselves from their own laws and enact non-general laws such as bills of attainder. However, as has been argued above, equality before the law, properly understood, also requires limitations to be placed on the way in which the state draws distinctions

[69] *A v. Secretary of State for the Home Dept* (n 62), para 97

[70] ibid para 237-238.

[71] Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, p. 2.

between persons or groups of persons, requiring non-discrimination in some form or another.

Acceptance of these conclusions would signify a notable shift in understanding not only of the principle of equality before the law but also of the rule of law itself. Requirements of generality ensure that all are subject to the same laws of justice, preventing lawmakers from enacting legislation which singles out particular individuals or groups for adverse treatment. This guarantees some basic degree of equality as between citizens and lawmakers as well as between individual citizens themselves. Principles of non-discrimination build upon and deepen this notion of equal citizenship. Legal decisions pertaining to the proper exercise of constituted authority must be informed by a conception of likeness that provides guidance as to the correct understanding of equality before the law; one which allows a court to place substantive limitations on the content of specific laws in accordance not only with the principle of equality but also with the rule of law, of which equal citizenship is a foundational tenet.[72] This conception is premised on an understanding of equality before the law as guaranteeing "the protection of *equal laws*, not merely the equal application of the laws".[73]

Even the doctrine of precedent, informed by the principle that like cases should be treated alike, while not necessarily informed by a conception of equal citizenship in its determination of like cases, is premised upon a commitment to respecting the equal legal status of legal subjects as all being subject to the same body of laws consistently applied. Similarly, the principle of equal subjection to law establishes and vindicates the principle that both ruler and ruled are sufficiently alike that requiring one set of laws for one and another for the other would amount to an infringement of basic justice.

This conception of likeness has only recently come to the fore. We need only cast our gaze back one hundred years to encounter a much more restricted understanding of who counts as a moral equal. Constitutional and common law jurisprudence has all too often been used to deny the equal moral status of persons. Examples abound, but two will suffice to establish the point. Firstly, the historic exclusion of women and certain classes of men from many of the aspects of full citizenship throughout the common law world.[74] Secondly, the legal status of non-

[72] See generally; Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*; Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*; Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*.
[73] Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, p. 163.
[74] See; S. Fredman, *Women and Law* (Oxford University Press, 1997) chap. 2.

whites, particularly blacks, in the United States. The case of *Dred Scott v Sandford* represents one of the most stringent denials of moral equality one can imagine: the complete denial of equal legal status to an ethnic group.[75] The Court ruled that blacks:

> are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at the time considered as a subordinate and inferior class of beings…[76]

Contemporary judicial analysis of the principle of equality before the law is wise to reject such reasoning. Legal equality means very little if it does not entail a commitment to viewing persons as *equals* before the law. Modern understandings of this principle deepen and extend our conception of likeness, forcing us to cast our gaze into the social domain and explore how the state distinguishes between persons or groups of persons. Ronald Dworkin provides us with a clear exemplification of this conception of equal moral status when he insists that government must show equal concern and respect for all legal subjects.[77] This conception has clearly informed the judgement of Baroness Hale in the Belmarsh case and is the normative core which grounds the principle of equality before the law. There will inevitably be times when the organs of state fail to live up to this ideal, just as there will always be failures to properly respect the separation of powers or the right to access to courts. But this should not be reason to abandon our commitment to the moral equality of persons, just as instances of injustice should not be reason to stop striving for justice.

The notion of equal concern and respect is seen as embodying a "deeper conception of equality than the superficial conception of equalising material benefits or burdens".[78] Here Dworkin draws a distinction between what has been described as superficial 'equal treatment' and deeper 'equal concern' or 'treatment as an equal'. Using the example of a father with two children, one of whom is dying from a disease that is only making the other uncomfortable, he argues that one does not show equal concern for both children if they flip a coin to decide which child shall receive the

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[75] 60 U.S. 393 (1857).

[76] ibid p. 404-405.

[77] Dworkin (n 6) 227–228. See also; Simons (n 3) 720–721; Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (n 6) 140; Waldron (n 6).

[78] Simons, 'The Logic of Egalitarian Norms', 721.

remaining dose of medicine.[79] To Dworkin, this shows that "the right to treatment as an equal is fundamental, and the right to equal treatment, derivative".[80] On this reading, the principle of equality before the law requires the state to recognise and respect the fact that all citizens are *equals* before the law, not simply that they should be *treated* equally before the law.[81]

This analysis is illuminating; however, it also presents us with a new problem, namely, how one is to determine what 'treatment as an equal' requires. Considerable confusion and uncertainty abounds within this area of law as a result of a failure to adequately answer that question. If two or more things share equal moral status, certain actions may be required to adequately respect that fact, and certain actions may be prohibited. The idea of treatment as equals commits us to the position that legal subjects have equal moral status, but how we respect that equality does not manifest itself as a matter of logic.[82] Multiple ways of treating individuals as equals exist. It is a matter of value which conception is chosen. This means that equality is not empty, but, just like notions of justice or legality, it is considerably more complex than scholars sympathetic to the Westen critique presume. This being said, it is not necessarily open to us to interpret this principle in whatever way we wish. As an interpretative concept operating within a legal system, conceptions of equality before the law must adequately fit with the jurisdictional context within which they operate and maintain a degree of internal coherency such that requirements are non-contradictory. The values which are to be incorporated to substantiate the meaning of this principle must arise from or at least not contradict those which have been elucidated through the jurisdictional history of a given legal system.

The correct interpretation of the principle of equality before the law is so often confused and unclear precisely because there is no single principle of equality. Rather, there are multiple principles of equality which are themselves informed by divergent political ideologies and conceptions of justice.[83] Following from this, we can conclude that the concept of equality in abstract, and the principle of equality before the law specifically rest on 'multiple normative foundations'.[84] Thus, while Fredman

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[79] Dworkin, *Taking Rights Seriously*, p. 227.

[80] Dworkin, *Taking Rights Seriously*, p. 227.

[81] See also Waldron's analysis of the importance of moral equality for modern political and legal theory; Waldron, *One Another's Equals: The Basis of Human Equality*.

[82] Fredman, *Discrimination law*, p. 2.

[83] See; P. Shin, 'Is There a Unitary Concept of Discrimination?' in D. Hellman, S. Moreau (eds.), Philosophical Foundations of Discrimination Law, (Oxford University Press, 2013); C. O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 *International Journal of Discrimination and the Law* 7–28.

[84] Khaitan, *A Theory of Discrimination Law*, p. 8. Indeed, many scholars working within discrimination law theory reject any connection between non-discrimination and equality, preferring a liberty-based account. See; Holmes,

recognises that "[t]he choice between different conceptions of equality is not one of logic but of values or policy",[85] this still leaves us with the difficult task of presenting a coherent theory given that the law is routinely informed by a number of contradictory conceptions of equality.

This being said, the principle of equality before the law should not be confused with the broader concept or value of equality. The scope of this principle concerns the relationship between the state and its legal subjects. As such, equality before the law has little to say about interactions between private individuals. Such concerns must be dealt with through the common law and the ordinary legislative process.[86] Nevertheless, as this paper has shown, the principle of equality before the law has quite a lot to say about the products of the legislative process and manifests both procedural and substantive restrictions on law. This is in direct contrast with the approach taken by Thomsen and other scholars sympathetic to the Westen critique. Thomsen explicitly draws a distinction between what he refers to as equality *in* the law and equality *before* the law. Equality *in* the law is described as entailing rights and duties contained within positive law "i.e. the *content* of the law, and mandates something like the absence of certain distinctions in the distribution of these".[87] In contrast, equality *before* the law is seen as pertaining to the practices of legal officials, what he describes as "the *process* of the law, and mandates something like the absence of certain distinctions in its application".[88]

To Thomsen, a violation of equality *in* the law occurs when a state enshrines racial distinctions in law and a violation of equality *before* the law occurs when a judge "wittingly or unwittingly" allows racial prejudice to cloud her judgement in the application of racially neutral law. This distinction is ultimately untenable. These are not two neatly separable and alternative conceptions; they are two requirements of the same principle, each unintelligible without the other. The prohibition of racial prejudice in the administration and application of law is evidently informed by a principle of non-discrimination and non-arbitrariness. However, once we accept that equality before the law entails respect for such a principle, it would be completely arbitrary to not also prohibit discriminatory or arbitrary legal content. Why should equality before the law prohibit *unconscious* racial discrimination if it does not prohibit

'Anti-Discrimination Rights without Equality'; Moreau, 'In Defense of a Liberty-based Account of Discrimination'; Khaitan, *A Theory of Discrimination Law*, pp. 130–34.

[85] Fredman, *Discrimination law*, p. 2.

[86] See; *Equality Act* (2010); B. Hepple, *Equality: The Legal Framework* , 2nd ed. (Hart, 2014).

[87] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 3.

[88] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 3.

deliberate racial discrimination? Equally, is there not an internal contradiction in a principle which prohibits discrimination in the content of law, but which does not also prohibit discriminatory application of facially neutral law? If we are to agree with Thomsen's dichotomy, we are faced with the task of explaining why equality before the law mandates non-arbitrariness or non-discrimination in the application of law but not in the creation of law, as if the problem with discriminatory application has nothing to do with the discriminatory nature of the treatment and everything to do with a lack of congruence between law as enacted and as applied. If part of the problem (from the perspective of legal equality) is indeed the discriminatory nature of the treatment, then this must surely view discriminatory legal content as also a threat to equality before the law.

In his description of the principle of equal treatment, Thomsen relies on an example of a court sentencing individuals disparately by virtue of their parentage.[89] It is clear that the issue which arises here is not with the fact that legal rules are not being applied; in this example, sentencing decisions are left to the discretion of the judge. No, the problem with treating individuals differently on the basis of parentage arises because a distinction is being drawn on the basis of a normatively irrelevant characteristic. It is clear that the point of contention here is the distinction itself, not the lack of congruence between legislative pronouncement and official action. If this reading is correct and Thomsen's requirement of non-discrimination within the definition of equal treatment excludes specific kinds of distinctions that may be drawn by legal officials, it seems completely arbitrary to conclude that a breach of the principle of equality before the law occurs when a *court* draws such distinctions (Thomsen's equality before the law) but not when a *legislature* does (his equality in the law). It simply cannot be the case that the principle of equality before the law prohibits the drawing of arbitrary or discriminatory distinctions by a court but has nothing to say about those exact same distinctions being drawn by a legislature or an administrative body. Ultimately, if the principle of equality before the law is entirely procedural and pertains only to principles of rule application then it cannot entail a requirement of non-arbitrariness or non-discrimination. If it does entail such a requirement, that requirement must apply to all organs of state, including the legislature.

From the perspective of the legal subject, it makes little difference if discrimination comes in the form of a faithfully applied discriminatory statute or the arbitrary (mis)use of official discretion. It is almost senseless to have a right not to be

[89] Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered', 5–6.

racially discriminated overtly but no right to have legal rules applied without racial bias or vice versa. Equality before the law, properly understood, cannot entail one of these requirements without also entailing the other. Once we see these principles as derivative of this broader principle of equal citizenship, it becomes easier to interpret Thomsen's analysis in its proper context. His mistake lies in the location of the requirement of non-discrimination: it does not arise by virtue of a requirement of equal treatment; it is grounded in a commitment to treating legal subjects as legal and moral equals, as all viable equality principles are.

Conclusion

The principle of equality before the law is best conceived of as a substantive constitutional principle which demands more than simply that like cases should be treated alike. It is neither empty nor is it entirely procedural. However, this being the case, the principle could manifest substantive restrictions on lawmaking power or government use of discretion which do not only prohibit discriminatory conduct. Other substantive limitations focus on ensuring that the ruler and the ruled are equally subject to the same laws of justice and that legal enactments are general in scope such that specified individuals or groups are not singled out for praise or punishment. While these latter two limitations are often characterised as procedural in nature, this paper has shown that they manifest substantive limitations on the content of law, rather than focusing solely on the procedures by which these laws come into being.

The best way to account for the divergent requirements that have come be associated with equality before the law is to recognise that this constitutional principle is informed by conceptions of likeness that relate to the moral status of individuals or groups within the legal sphere. Drawing upon the work of Ronald Dworkin and his notion of treatment as equals, I argue that the principle of equality before the law must be informed by this conception of equality which ensures that all are *equals* before the law not simply that they be treated equally. This raises a considerable difficulty relating to how one is to respect this equal moral status. While it is clear that determinations as to the best way to 'treat equals as equals' is a matter of values, not logic, it is not immediately clear which values should inform interpretations of the principle of equality before the law nor which conceptions of equality are best for this purpose. What *is* clear is that, whichever conceptions are chosen, they must be harmonious and cannot contradict one another. This does nothing to assist judges in their choice of conception except in the crucial respect that it prevents them from

interpreting the principle of equality before the law in a manner which is self-contradictory. Whichever decision is made must be made consistent with what has come before it or must be willing to depart from and abandon those principles.

The fact that much of these requirements can be described by reference to the rule of law as much as to equality before the law indicates that there is a close and intimate connection between the rule of law and the notion of equal citizenship; perhaps not a necessary connection but a connection, nonetheless. Equality before the law, when viewed in this manner results in us shifting our focus from determining likeness by reference to existing legal rules towards a conception of likeness which can inform and affect the content of those very rules. At a minimum, equality before the law tempers the doctrine of precedent and the notion that like cases should be treated alike by demanding that conclusions regarding the differential treatment afforded to particular cases be justified. As Allan notes;

> The demand for justice is an appeal to fundamental equality, insisting that the differential treatment of different persons or groups be justified - consistent with the principles that we espouse as the appropriate criteria to determine the legitimate exercise of governmental authority.[90]

Equality before the law, like any constitutional principle, is informed by and intimately connected to other constitutional principles such as the separation of powers, the rule of law, and the doctrine of precedent. Nevertheless, it is a free-standing pillar of the British constitutional order, in many ways doing a significant amount of normative work to underpin and inform a number of other constitutional principles. Equality before the law is, at its core, the foundation of equal citizenship; any theory of the common law constitution must adequately account for and give proper recognition to the importance of this fundamental principle.

[90] Allan, 'Principle, Practice, and Precedent: Vindicating Justice, According to Law', 271.