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Emergence of Equality as a Constitutional Value: The First Century

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THE EMERGENCE OF EQUALITY AS A CONSTITUTIONAL VALUE: THE FIRST CENTURY*

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Equality assumed its place as a core value of the American constitutional order after World War Two—beginning in 1947 to 1949, to be precise.[1] As the ardor of the 1960s civil rights era cooled and subsided in the face of frustration, skeptics challenged the idea that equality was a meaningful substantive value, claiming that it has no normative content. They insist that its foundational principle, treat likes alike, is a mere tautology.[2] Eminent jurisprudents disagree,[3] but equality as a value remains vulnerable in a political climate hostile to its aspirations.[4] Its meaning remains disputed, disparaged, and even denied today.

At such a time, it is useful to recur to the origins of the equality norm in our constitutional system. As a guide to its meaning today, we should determine what it meant to those who placed it in the Constitution, and how it developed, or, *per contra*, how it was at first stunted or ignored by those charged with enforcing it. In this way we might at least recapture the vision of those who prescribed its meaning. Otherwise, we risk losing sight of it in abstract philosophical speculation. Equality does have a substantive content, historically defined. Moreover, that meaning is dynamic, not static,

* I draw on ideas that I first presented in *The Civil War and Equality*, given at the Library of Congress symposium, *The Civil War and American Memory* (November 2002).

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1. I explore that development in WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 621*ff.* (2006).

2. *See, e.g.*, PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE (1990); Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). The aphorism "treat likes alike" originated with Aristotle. *See* ARISTOTLE, NICOMACHEAN ETHICS 118–19 (Martin Ostwald trans., 1962).

3. *See, e.g.*, JOHN RAWLS, *Justice as Reciprocity*, *in* JOHN RAWLS: COLLECTED PAPERS 190, 190 (Samuel Freedman ed., 1999); JOHN RAWLS, *A Kantian Conception of Equality*, *in* JOHN RAWLS: COLLECTED PAPERS, *supra* at 254, 258; JOHN RAWLS, A THEORY OF JUSTICE 441–49 (rev. ed. 1999) (positing equality as a function of liberty, justice, and access to social goods); Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265 (1997).

4. On this vulnerability, see ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992). For a critique of equality, see, for example, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 232–38 (1974) (arguing that efforts to bring about equality may not be done at the expense of those claiming "entitlements").

intended by its framers to evolve to meet changes in society; in the spirit of John Marshall's *McCulloch* opinion, "a constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[5] I therefore propose to examine the origins and early (non-) development of constitutional equality.

Let me begin by defining what I mean by "constitutional equality." This phrase refers to a race-transcendent status before the law in which all people are under the law's discipline and may claim the law's protection. All individuals enjoy the same rights and opportunities as others, neither enhanced nor diminished because of the racial designation imputed to them. Such equality must be real and not merely formal or nominal. This definition is simple and almost question begging, uncomplicated by philosophical rumination, but it has the virtue that it is the value that those who placed it in our Constitution intended.

At first glance it might seem perverse to someone not familiar with America's constitutional traditions that we should even be questioning the centrality of this value. Is not human equality one of the nation's oldest and most deeply embedded public values? Was it not proclaimed by Jefferson's assertion in the Declaration of Independence that "all men are created equal" and implicitly affirmed in Lincoln's Gettysburg Address? Did not the United States Supreme Court consecrate it in the most important Supreme Court decision of the modern era, *Brown v. Board of Education I*?

No. In reality, interpersonal, race-transcendent equality as we think of it at the turn of the twenty-first century was a value unknown to the Constitution of 1787. Thus, the intentions of the framers of the original 1787 Constitution provide little guidance in parsing the meaning of equality. The American people had to endow the unprecedented ideal of equality with some prescriptive content in the nineteenth and twentieth centuries. They did not do so at first, however; the idea was too contested, to say the least. So *faute de mieux*, the Supreme Court assumed the leading institutional role in imposing a meaning on the equality value. Its performance closely tracked social evolution in the larger society: the Court validated racial oppression until around 1905, but then began to construct a doctrinal basis for the equal protection of minorities' rights thereafter.

The equality value was embodied in the Equal Protection Clause of the Fourteenth Amendment, ratified in 1868, so the doctrinal evolution of that clause became the vehicle for giving meaning and content to equality. By tracing the early history of the Clause, we will uncover the meaning of

5. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

equality to those who elevated it to constitutional status, beyond the power of later Congresses to impugn.

I. EQUALITY IN THE EARLY REPUBLIC

Americans first considered the matter of equality in the political and ideological milieu created by the American Revolution.[6] The notion of equality was almost entirely unknown to the original Federal Constitution (as well as to its predecessors, the Articles of Confederation and the Northwest Ordinance). Oscar Handlin observed, with considerable understatement, that "equality entered only tangentially into the [Federal] Constitution as ratified in 1789. This was not a subject that greatly concerned either the framers of that document or the people who ratified it."[7] In only one place did the original Federal Constitution explicitly guarantee equality, and that was in its assurance "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[8] That was itself a striking reminder of how alien the idea of interpersonal equality was at that time, since the Senate's makeup guaranteed an extensive, permanent malapportionment that was one of the many structural protections for slavery found throughout that document.

Nor was the constitutional order of the states much different. To be sure, the Virginia Declaration of Rights, a bellwether to many contemporary and later state constitutions, did declare "[t]hat all men are by nature equally free and independent," and then went on to assert the rights of life, liberty, and property.[9] But that adverbial gesture to equality wilted instantaneously when exposed to the reality of slavery, and the Virginians felt compelled to edit George Mason's draft by adding a phrase qualifying "rights": "of which, when they enter into a state of society."[10] In the dialectic peculiar to slave societies, this code language was understood to exclude slaves, native peoples, and others who did not—and by definition could not—enter into the society of free white men who were at that moment creating their political society. (Enslaved people were not members of a society. They were *in* it but not *of* it.) When states northwards, like Pennsylvania and Massachusetts, copied the Virginia model, they did not include the coded exclusion, but they did not adopt an equality principle

6. *See generally* GORDON S. WOOD & J.R. POLE, SOCIAL RADICALISM AND THE IDEA OF EQUALITY IN THE AMERICAN REVOLUTION (1976).

7. Oscar Handlin, *The Quest for Equality*, 1979 WASH. U. L.Q. 35, 35.

8. U.S. CONST. art. V.

9. VA. CONST. of 1776, Bill of Rights, § 1, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48, 49 (William F. Swindler ed., 1979).

10. 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 62 (1974).

either.[11] Surveying this process, the late Willi Paul Adams concluded that most of the new states "did not formally acknowledge the principle of equality in their first constitutional documents in the years following Independence."[12]

The framers of the eighteenth-century constitutions did aspire to *political* equality among men, as a function, or at least an inevitable consequence, of the republican forms of government that they were creating. "[T]hat constitution of civil government [is best] which admits equality in the most extensive degree," wrote Sam Adams in 1771.[13] But as J.R. Pole concedes, such equality was "open to white people only."[14] That political equality principle grew out of pre-1776 American claims for equality of political status for themselves as subjects with those they considered their fellow Englishmen who remained "at home" in the metropole. Even political equality was circumscribed. The Massachusetts Constitutional Convention of 1780, in its *Address of the Convention*, explained to the people of the commonwealth that political equality certainly did not mean one man, one vote. Each town was given one vote in the lower house, "and to prevent an advantage arising to the greater towns by their numbers," representation was mathematically diluted for places with larger populations. After all, the delegates thought, "it cannot be understood thereby that each Town in the Commonwealth shall have Weight and importance in a just proportion to its Numbers and property."[15]

After Independence, the impulse toward equality at the social level diverted into a revulsion against aristocracy. Politics moved away from the deferential nature of local polities that characterized pre-Revolutionary regimes in the individual colonies[16] toward a social ideal that extolled equality of economic opportunity for all. Debates of the Revolutionary

11. *See* MASS. CONST. of 1780, Declaration of Rights, art. 1, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 93 (William F. Swindler ed., 1975); PA. CONST. of 1790, art. IX, § 1, *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 286, 292 (William F. Swindler ed., 1979).

12. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 176 (Rita Kimber & Robert Kimber trans., 1980). *See generally* Stanley N. Katz, *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J. AM. HIST. 747 (1988).

13. Samuel Adams, Article Signed "Vindex," BOSTON GAZETTE, Jan. 21, 1771, *reprinted in* 2 THE WRITINGS OF SAMUEL ADAMS 142, 152 (Harry Alonzo Cushing ed., 1906).

14. J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 5 (rev. ed. 1993); *see also id.* at 1–66.

15. Address of the Convention, March 1780, *in* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 438 (Oscar Handlin & Mary Handlin eds., 1966).

16. *See* CHARLES S. SYDNOR, GENTLEMEN FREEHOLDERS: POLITICAL PRACTICES IN WASHINGTON'S VIRGINIA (1952).

years resounded with indignant denunciations of aristocracy and privilege, which, in the American context after Independence, meant political power not earned by merit through republican means. But the framers of the original state constitutions had no intention of abolishing distinctions based on merit. Republican equality was "adverse to every species of subordination beside that which arises from the difference of capacity, disposition, and virtue."[17] The resulting social hierarchies would produce "the necessary subordination" that would offset "a certain degree of equality [that] is essential to human bliss."[18] Inequality was innate in the human condition. Americans understood that "nature has made them very unequal in respect to their original powers, capacities, and talents."[19] "Was there, or will there ever be, a nation, whose individuals were all equal, in natural and acquired qualities, in virtues, talents, and riches?" John Adams asked rhetorically. He answered his own question: "The answer of all mankind must be in the negative. . . . [N]o human legislator ever can eradicate" inequality.[20] Even if equality of condition could somehow be legislated, it would be undesirable: "[P]erfect equality . . . deadens the motives of industry, and places Demerit on a Footing with Virtue . . . ."[21]

The early state and federal constitutions did, to be sure, discountenance inequality among persons, but that condemnation applied only to what might be called "privileging inequality," the sort of inequality that elevated a select few above the masses in rank or opportunity.[22] Thus, the Federal Constitution twice banned titles of nobility,[23] while the Virginia Bill of Rights stipulated that "no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services . . . ."[24] During the 1829 debates on revising the 1776 constitution, a delegate to the Virginia Constitutional Convention

17. Democraticus, Loose Thoughts on Government (June 7, 1776), *reprinted in* 6 AMERICAN ARCHIVES: FOURTH SERIES 730, 730 (Peter Force ed., 1846).

18. Letter from Thomas L. Shippen to William Shippen, Jr. (Feb. 20, 1788), *in* 12 THE PAPERS OF THOMAS JEFFERSON 502, 504 (Julian P. Boyd ed., 1955) (emphasis omitted).

19. JOEL BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLES OF GOVERNMENT 17 (Cornell Univ. Press 1956) (1792), *quoted in* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 607 (1969).

20. 1 JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, *reprinted in* 4 THE WORKS OF JOHN ADAMS 272, 392 (Charles Francis Adams ed., 1851).

21. THOMAS DAWES, JR., ORATION DELIVERED JULY 4, 1787, at 10 (1787), *quoted in* WOOD, *supra* note 19, at 495 (emphasis omitted).

22. *See* BERNARD BAILYN, FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE 102, 195–206, 220–21 (1990).

23. U.S. CONST. art. I, §§ 9–10.

24. VA. CONST. of 1776, Bill of Rights, § 4, *in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 9, at 49.

interpreted the "equally free" provision to mean that "no *one* man is born with a natural right to control any *other* man [slaves as usual being the unspoken exception]; that no one man comes into the world with a mark on him, to designate him as possessing superior rights to any other man . . . ."[25] Hence, the early hostility to monopolies and other forms of special privilege that were a hobbyhorse among Jeffersonians.[26] From this source flowed the peculiar antipathy to the Society of the Cincinnati: even the earned privilege of veteran officers was suspect. Running through the rhetoric and constitutional provisions of the Revolutionary epoch was a palpable hostility to state actions that benefited political hustlers who had no merit but only connections. This mind-set of the early Republic centered on a negative vision of equality as the absence of special privilege, privilege being defined as "[t]he unequal or partial distribution of public benefits within a state"—precisely what the Virginia Bill of Rights forbade.[27]

In politics, however, the Framers anticipated an equality of rights for all citizens: "They all feel that nature has made them equal in respect to their rights . . . [possessing] an equal right to liberty, to property, and to safety . . . ."[28] But such equality was only for all those who were members of society—which, naturally, excluded enslaved persons. Even for enfranchised white males, such political equality as they came to enjoy was continuously destabilized by America's bedrock individualism, beckoning opportunity, and incipient industrialization. The egalitarian impulse was suspect, at least to elites, as leading to a dull conformity that would either discourage the natural aristocracy the Framers anticipated or lead to the Orwellian state of deadened uniformity that they dreaded.[29]

During the early years of the Republic, some inchoate egalitarian protoprinciples did begin to marble the civic values that Americans cherished. These included such things as aversion to class legislation (where one economic group secured legislative favoritism over the rest of society in the form of monopolies or other privileges) or attachment to procedural regularity (so that no individual would be treated differently from any other

25. DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820'S, at 292 (Merrill D. Peterson ed., 1966).

26. See, for example, the views of Chief Judge Spencer Roane in *Currie's Administrators v. Mutual Assurance Society*, 14 Va. (4 Hen. & M.) 315, 345–56 (1809), and of the Jeffersonian polymath THOMAS COOPER, LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY 246 (2d ed. 1830) (viewing corporations as "public nuisances"), *quoted in* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 36 (1991).

27. Quoted from Pennsylvania debates of the period in WOOD, *supra* note 19, at 401.

28. BARLOW, *supra* note 19, at 17, *quoted in* Wood, *supra* note 19, at 607.

29. *See* Philip B. Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 682 (1970).

similar person in the legislative or judicial process). These values eventually contributed to the ideal of equality as we know it today, and in their early avatars gave the appearance (or illusion) that the United States was an egalitarian society.

Jacksonian Democrats of the 1830s and '40s mined those early values for their programs, which contemporaries and later enthusiasts hailed as egalitarian. But equality as we understand it at the dawn of the twenty-first century—interpersonal and transracial—was unknown to early American law. The Revolutionary-era conception of equality sought only *intra*group equality; *inter*group equality was inconceivable in 1780, at least when the groups were racially defined.

There was also a religious dimension to Founding-era concepts of equality. To accommodate the new nation's remarkable religious diversity, Americans debated two models of equality. Philip Hamburger calls these models "equal protection," a comparatively more lax standard favored by religious establishments that would have tolerated extensive group privileges, and "equal civil rights," a view cherished by dissenters that would have enforced equality of privilege among groups defined by religious affiliation.[30] But as he concedes, these debates did not touch the multiform problems of equality among different racial groups.

To the extent (not much) that the Framers thought about universal personal equality at all, they considered it repugnant to the Constitution's authentic values and a lethal threat to the new national union so precariously established. Slavery was solidly ensconced in the constitutional order of nearly all the states, and of the federal government as well. It had been an essential component of the American legal order for over a century by the time the Federal Constitution was drafted.[31] Whether or not the Constitution was a pro-slavery compact,[32] it guaranteed the security of slavery in

30. *See* Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295.

31. *See* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711 (1996).

32. Modern neo-Garrisonians believe that it was. *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 1–33 (1996); William M. Wiecek, *"The Blessings of Liberty": Slavery in the American Constitutional Order*, *in* SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE 23, 23–40 (Robert A. Goldwin & Art Kaufman eds., 1988); William M. Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 167, 167–84 (Leonard W. Levy & Dennis J. Mahoney eds., 1987); Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423 (1999) [hereinafter Finkelman, *Affirmative Action*]; Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247. Don E. Fehrenbacher rejected the neo-Garrisonian view in THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 3–47 (Ward M. McAfee ed., 2001).

pervasive ways and thereby assured that black Americans would remain legally degraded relative to whites. The Three-Fifths, Fugitive Slave, and Slave Trade Clauses were the most visible tokens of that commitment, but they were not the only ones.[33]

Slavery was one element of a national civic identity derived from what Rogers Smith terms "ascriptive citizenship" and "civic inequality."[34] Throughout our history, Americans have created a national community in which access to political power and protection for personal liberty was determined by race, gender, ethnicity, class, and religion.[35] The master narratives of Tocquevillian egalitarian democracy and communitarian civic republicanism fail to recognize, much less incorporate, the reality of exclusion and enforced inequality that result from such ascriptive citizenship.

In contrast to the privileging inequality that had been universally condemned in the Revolutionary era, few Americans were prepared to attack the inequality of degradation that slavery represented. Aside from a handful of egregious individuals like John Woolman and Anthony Benezet, no Revolutionary-era American seriously proposed displacing slavery and racism with an ideal of equality among all people. Instead, the liberal values that extolled individualism, self-seeking, competition, and a Hurstian focus on the economy as the proper arena for realizing human creativity[36] promised that society would sort itself out into ranks spontaneously, naturally, and justly, with distinctions based on merit alone. Race-based slavery was at most a lamentable exception to that meritocracy, but inevitable, at least in the short run.

Both Thomas Jefferson and, later, the Jacksonian Democrats proclaimed the goal of a more egalitarian society, but their visions were fatally compromised by their racist hostility to black Americans. Jefferson's ideal republic of yeoman farmers would have been possible only by the expulsion of all blacks, slave and free alike (which in fact he demanded), while

33. *See* U.S. CONST. art. I, § 2, cl. 3 (Three-Fifths Clause); U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause); U.S. CONST. art. I, § 9, cl. 1 (Slave Trade Clause). Paul Finkelman finds eighteen pro-slavery clauses in the original Constitution. *See* Finkelman, *Affirmative Action*, *supra* note 32, at 428–31. I found ten in WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 62–83 (1977).

34. *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

35. On the gendered dimensions of this inequality, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998).

36. *See generally* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

Jacksonian equality, tiresomely extolled for so long,[37] was only for the "Herrenvolk Democracy," an equality of all whites achieved by the permanent subjugation of all blacks.[38] The Jacksonian program had northern and southern sectional variants, but both rested explicitly on black subordination, which was part of the equality "creed's cultural and socioeconomic groundwork . . . ."[39] Jacksonian equality was social and political equality for white men only, the *Herrenmänner*. (It is one of history's ironies, therefore, that it was none other than Andrew Jackson who first used the phrase "equal protection" in constitutional argument.[40])

Not surprisingly, such an environment shriveled any proposal to extend legal equality to blacks, even those who were free. Chief Justice Lemuel Shaw, giant of the antebellum judiciary, provided the leading judicial exposition of equality under law for black Americans in *Roberts v. City of Boston*, where he upheld racial segregation in Boston's public schools. To Charles Sumner's argument for the equality of all people before the law, Shaw replied that, while that was sound "as a broad general principle," it could not mean equality of all people when "applied to the actual and various conditions of persons in society." It could mean

> only that the rights of all, as they are settled and regulated by law, are equally entitled to the . . . protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.[41]

Under that vision, blacks were not entitled to be treated like whites, but only like other blacks. In this Shavian interpretation, equality pertained only *within* legally-specified groups, not *among* them. Anyone who could legitimately claim a particular right was legally equal to all others who could claim that same right, but this did not mean that different groups, not so entitled, could claim the same right. To illustrate, if white males could vote, each white man's vote had to be roughly equal to every other's, but that did not entitle black men to vote. Shaw thus anticipated a difference

37. Jacksonian self-promotion was raised to canonical status by ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON (1945), and more modestly affirmed by SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN (2005).

38. The phrase is George M. Fredrickson's. *See* GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY, at xi–xii, 154–55, 166 (1981). *Herrenvolk* is German for "master race."

39. William E. Forbath, *Caste, Class, and Equal Citizenship*, *in* MORAL PROBLEMS IN AMERICAN LIFE: NEW PERSPECTIVES ON CULTURAL HISTORY 167, 168 (Karen Halttunen & Lewis Perry eds., 1998).

40. *See* Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576, 590 (James D. Richardson ed., 1898).

41. 59 Mass. (5 Cush.) 198, 206 (1849).

identified more than a century later, between "equality of treatment" and "treatment as an equal."[42] After the Civil War, the Supreme Court affirmed this principle in a nonracial context, demanding that the constraint of a law apply equally to "all who . . . [were] embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same [activities]."[43]

What George Fredrickson has called "Herrenvolk egalitarianism"[44]—equality for and among white men only—was the conception of equality that informed Roger B. Taney's *Dred Scott* opinion. The Declaration of Independence and the political communities formed under its aegis "would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery."

> They [Africans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . .
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> . . . .
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> . . . [A] perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power . . . .

As for the equality claim of the Declaration of Independence, Taney resolved that one simply by insisting that people of African descent "were not intended to be included, and formed no part of the people who framed and adopted this declaration . . . ."[45] The opinion is irradiated with this sense of equality as for and among whites only. That is exactly what Taney's contemporaries, the abolitionists he feared and despised, were determined to uproot.

A line of scholarly authority regards the Fourteenth Amendment as the capstone of antebellum abolitionist constitutional thought.[46] "[T]his abolitionist understanding of equal protection, and of the Fourteenth Amendment, is truer to both the plain language and the history of the Amendment"

42. Ronald Dworkin, *Social Sciences and Constitutional Rights: The Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 10 (1977).

43. Powell v. Pennsylvania, 127 U.S. 678, 687 (1888).

44. FREDRICKSON, *supra* note 38, at 166.

45. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407–10 (1857).

46. *See, e.g.*, DWIGHT LOWELL DUMOND, ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA (1961); HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM (1968); JACOBUS TENBROEK, EQUAL UNDER LAW (rev. ed., Collier Books 1965) (1951); WIECEK, *supra* note 33.

than rival modern theories.[47] Abolitionists were the first to think about race-transcendent equality in a serious and positive way, and they were the first to give the aspirational idea substantive content.

Embedded in Sections 1 and 5 of the Fourteenth Amendment were ideas propounded by innovative abolitionist lawyers and publicists before the war, including equality before the law. Abolitionists demanded this not as some abstract ideal, not as a vague statement or aspiration of antebellum social conditions, but as the actual realization of the promise of the Declaration of Independence for *all* people. Dismissed in its time (and after) as impractical, utopian,[48] otherworldly, radical, or unreal, abolitionist thought truly was the stone rejected by the builders that became the cornerstone,[49] not least in its vision of equality.

Early opponents of slavery, aside from a few idealistic Quakers like John Woolman and Anthony Benezet, had not embraced egalitarian principles. At most, they sought to protect free blacks from kidnapping in the border states (both slave and free) and to provide social-welfare assistance, in the form of jobs and schooling, for free blacks. Not until 1832 did William Lloyd Garrison broach the topic of authentic civil and political equality among white abolitionists. In the Constitution of the New-England Anti-Slavery Society, Garrison insisted that "a mere difference of complexion is no reason why any man should be deprived of any of his natural rights, or subjected to any political disability."[50] Other nodes of immediatist antislavery formed at the same time in New York City, Philadelphia, and the Western Reserve in northern Ohio. While that was going on, the prosecution and mobbing of Prudence Crandall because she had begun a "High School for young colored Ladies and Misses" in eastern Connecticut opened white abolitionists' eyes to the virulence of racial prejudice around them in the North. That drove them to an uncompromising egalitarianism when they formed the first national antislavery group, the American Anti-Slavery Society, in 1833.

Representatives of the antislavery nodes, including Garrison for New England, Lucretia Mott and James McCrummel of Philadelphia, Beriah Green from Ohio, and Lewis Tappan of the New York group, among others, gathered in Philadelphia for the founding of the AA-SS. Garrison com-

47. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 11 (1994).

48. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 154 (1975).

49. *Psalm* 118:22.

50. CONSTITUTION OF THE NEW-ENGLAND ANTI-SLAVERY SOCIETY, WITH AN ADDRESS TO THE PUBLIC 3 (1832).

posed its *Declaration of Sentiments and Constitution*, which uncompromisingly demanded that African Americans should "according to their intellectual and moral worth, share an equality with the whites, of civil and religious privileges."[51]

The rhetorical unity of the AA-SS's convention and "Declaration of Sentiments" masked an underlying split on the nature of equality between Euro-American and African American abolitionists. At the first annual Convention of the Free People of Color in Philadelphia in 1831, attitudinal differences separated white and black abolitionists. Whites, including Lewis Tappan, Garrison, and Simeon Jocelyn, assumed the reality of racial differences. They thought of equality in terms of making opportunities for blacks equal to those for whites, but they never abandoned their unquestioned belief in distinct racial categories. Though not racists themselves, they nevertheless assumed not only the reality, but the centrality, of race. In contrast, black leaders like James Forten, Richard Allen, and Samuel Cornish considered race irrelevant, and instead emphasized individual opportunity unbounded by racial categorizing.[52] To oversimplify, Forten and the others were anti-racist, while Tappan and his white colleagues continued to see the social world as divided into black and white groupings, and may have implicitly assumed superiority in the latter. This basic difference in assumptions continued to distinguish white and black abolitionists through the Civil War and contributed to divisions over the meaning of constitutional equality. Ultimately, the whites' view prevailed, and equality was cast in terms of providing blacks with the same benefits and burdens as whites, rather than envisioning a society that had gotten beyond race to see people as individuals, not as blacks or whites. Thus, for example, the crucial catchall equality provision of the 1866 Civil Rights Act provided that "such citizens, of every race and color, . . . [shall be entitled to the] full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ."[53]

In the seven-year period of unity that followed the founding of the AA-SS, abolitionists of all ideological (and skin) shades worked together harmoniously to promote a constitutional program that attacked slavery peripherally, as by abolishing it in the territories and the District of Columbia. In time, though, as they split over political, ideological, and religious

51. AMERICAN ANTI-SLAVERY SOCIETY, THE DECLARATION OF SENTIMENTS AND CONSTITUTION OF THE AMERICAN ANTI-SLAVERY SOCIETY 8 (1835).

52. *See* James Brewer Stewart, *The New Haven Negro College and the Meanings of Race in New England, 1776–1870*, 76 NEW ENG. Q. 323 (2003).

53. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27.

agendas,[54] abolitionist factions were forced to confront the issue of what equality would really mean in a post-emancipation America. Politically-oriented abolitionists, when they formed the Liberty Party in 1844, demanded "the restoration of equality of rights, among men, in every State where the [Liberty] Party exists," condemned all racially discriminatory laws, and adopted the slogan of "Equal Rights."[55] The Liberty group soon backslid on the equality issue, though, in the direction of an implicitly racist Free Soil position.

Not so their radical opponents, personified by Alvan Stewart,[56] William Goodell,[57] Gerrit Smith,[58] Lysander Spooner,[59] Joel Tiffany,[60] and, after 1851, by Frederick Douglass.[61] These men, of all the various (white) abolitionist groups, faced the equality question most forthrightly and explicitly. In taking up the challenge of what was to become of enslaved Americans after universal emancipation, they explored the possibilities of the original Constitution's Privileges and Immunities Clause;[62] the Fifth Amendment's Due Process Clause; and various other, less likely, textual possibilities to work out the legal status of the freedpeople. Two common themes ran through much of their writing in this project: equality before the law and protection by law for a person's rights. Equality for them meant that the law must treat a black person exactly as it treated a white, no worse, no better.

As abolitionist ideas infiltrated into the political mainstream in the two decades preceding the Civil War, they found a home in the new Republican

54. *See* WIECEK, *supra* note 33, at 150–275.

55. 1 NATIONAL PARTY PLATFORMS 1840–1956, at 4–8 (Donald Bruce Johnson ed., rev. ed. 1978).

56. *See* Alvan Stewart, Argument, on the Question Whether the New [New Jersey] Constitution of 1844 Abolished Slavery in New Jersey, *in* WRITINGS AND SPEECHES OF ALVAN STEWART, ON SLAVERY 272–367 (Luther Rawson Marsh ed., 1860). The New Jersey Supreme Court disappointed Stewart, holding that it did not. *See* State v. Post, 20 N.J.L. 368 (Sup. Ct. 1845).

57. *See* WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY (2d ed. 1845).

58. *See* LETTER OF GERRIT SMITH TO S.P. CHASE, ON THE UNCONSTITUTIONALITY OF EVERY PART OF AMERICAN SLAVERY (1847).

59. *See* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1860); Lysander Spooner, *Has Slavery in the United States a Legal Basis?*, 2 MASS. Q. REV. 145, 145–68, 274–93 (1848). These articles, published anonymously, have also been attributed to Richard Hildreth.

60. *See* JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849).

61. Douglass converted sometime between 1850 and 1851 from a Garrisonian negativism to the radical position. *Compare* Frederick Douglass, Is the Constitution Pro-Slavery? (Jan. 31, 1850), *in* 2 THE FREDERICK DOUGLASS PAPERS 217 (John W. Blassingame ed., 1982) (answering yes), *with* Frederick Douglass, What to the Slave is the Fourth of July? (July 5, 1852), *in* 2 THE FREDERICK DOUGLASS PAPERS, *supra*, at 359, 384–86 (answering on second thought, no). *See generally* JAMES A. COLAIACO, FREDERICK DOUGLASS AND THE FOURTH OF JULY 73–107 (2006).

62. U.S. CONST. art. IV, § 2, cl. 1.

Party after 1854. But the issue of equality fractured the Republicans as it had the abolitionists. At this juncture, equality's potential diverged. In the half decade before the Civil War, some members of the new party carried forward their Free Soil heritage, but with a distinctly racist emphasis. They demanded that slavery be kept out of the territories, but principally or entirely for the purpose of preserving the West as a domain of white migration.[63] Egalitarian Republicans like Joshua Giddings, Salmon P. Chase, Charles Sumner, John A. Bingham,[64] and Thaddeus Stevens were distinctly a minority in the party. But pressures of the war, followed by southern recalcitrance and presidential intransigence after Appomattox, diverted the Republican non-abolitionist mainstream in their direction. Republicans who did not have abolitionist antecedents, or for whom antislavery values had ranked low in priority—like the influential Ohio Representative Samuel Shellabarger or Maine's William Pitt Fessenden in the Senate—came around to accepting some measure of equality when it became apparent that nothing less could preserve the Union.

The old Revolutionary-era concept of equality had posed an easy challenge for Americans: majorities had to protect themselves from numerically small (though economically powerful) minorities. The new abolitionist egalitarianism took on a vastly more difficult task: to protect racially-defined minorities against a majority driven by inveterate prejudice and self-interest to exploit those minorities. Under that new order, what kind of mechanisms had to be built into the Constitution to assure so utopian a project? And how would "majority" be defined? A majority of the people of the nation? Majorities in sections? In states? Americans after emancipation had to invent a whole new substantive content for the vision of equality.

II. THE FOURTEENTH AMENDMENT AND ITS FRAMERS' INTENTS

The Civil War and Reconstruction provided an opportunity for doing just that. The original Constitution had established a political order in which a "People" constituted themselves as such by rigidly excluding from full civil status in the polity and from the law's full protection more than three-quarters of the people inhabiting the territory of the new nation: all those racially distinct from Euro-Americans, women, minors, resident aliens, and those others who were shut out by criteria of class and religion.

63. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 261–300 (1970).

64. On Bingham's egalitarianism and commitment to abolition, see ERVING E. BEAUREGARD, BINGHAM OF THE HILLS: POLITICIAN AND DIPLOMAT EXTRAORDINARY 17–26, 93–101 (1989).

The supreme value of this exclusive and ascriptive People was liberty, defined as negative liberty—being left alone by government. This was to be realized in a confederation of republican states.

The Civil War and the abortive revolution of Reconstruction created a much different order, in which the source of national self-identity became the republican nation, rather than that abstract collective, "the People." The supreme value of liberty, along with its implicit qualification, for white men only, morphed into something radically different: the sibling values of freedom and equality, to be realized through a national democracy.[65] This idea had ancient roots: Cicero considered liberty and equality to be necessary complements to each other in a free society of equal citizens.[66]

The revolutionary outcome of the war was followed by a counterrevolution, however, which for the better part of a century triumphed. The value of equality in the Fourteenth Amendment was entirely new, incompatible with the preferences of the vast majority of white Americans who wielded political power, violently resisted in the states of the former Confederacy, and posed a direct challenge to universally prevalent racist assumptions held by Euro-Americans. It was the program for a new social order that nearly all white Americans could scarcely imagine and, to the extent that they could, flatly rejected.

Because the equality value was so incompatible with what had gone before, its appearance in the Fourteenth Amendment marked a revolutionary change.[67] Its content and contours were unknown, unmapped, and even unimagined. Certainly a majority of white Americans at the time would have spurned its fullest implications: social equality, erasure of race lines, and a completely equitable and impartial distribution of society's opportunities, without any race favoritism.

To some critics, then as now,[68] equality is incompatible with liberty, or with the idea of rights. It comports uncomfortably with the values of classical liberalism—individualism and competition—and is reconciled with them, if at all, only through the slogan of "equality of opportunity,"

65. *See* GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2001). Take special note of the table in FLETCHER, *supra*, at 55.

66. *See* MARCUS TULLIUS CICERO, DE RE PUBLICA 1.32, at 57 (Clinton Walker Keyes trans., 1928).

67. Henry Steele Commager, *Equal Protection as an Instrument of Revolution*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA 467 (Ronald K. L. Collins ed., 1980).

68. *See, e.g.*, Jean Baechler, *Liberty, Property, and Equality*, *in* 22 NOMOS: PROPERTY 269 (J. Roland Pennock & John W. Chapman eds., 1980); Lester J. Mazor, *The Exhaustion of the Ideals of Freedom and Equality in the United States*, *in* 1 EQUALITY AND FREEDOM: INTERNATIONAL AND COMPARATIVE JURISPRUDENCE 175 (Gray Dorsey ed., 1977) [hereinafter EQUALITY AND FREEDOM]; Stuart S. Nagel, *Issues Regarding Tensions Between Goals of Equality and Freedom*, *in* 2 EQUALITY AND FREEDOM, *supra*, at 603.

often contrasted with "equality of results," a false dichotomy that has paralyzed the vision of the modern Court. Similarly, some see equality as dissonant with the ideal of distributive justice, captured in the maxim of Roman law, give to each his due.[69] Little wonder, then, that debates on equality values have been so contentious—and continue to be.

What, then, did the Framers have in mind for the Equal Protection Clause? To start with, they explicitly and deliberately meant to reject the constitutional order described in Chief Justice Taney's *Dred Scott* opinion and replace it with one that was in all respects its opposite, at least as far as the status of black Americans was concerned.[70] In that execrable opinion, Taney had written that blacks had not been included in "We the People of the United States"[71] because they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority . . . ." Blacks were "a class of beings whom [the white people of the states] had thus stigmatized; . . . and upon whom they had impressed such deep and enduring marks of inferiority and degradation . . . ."[72] In reaction to that claim, the framers of the Fourteenth Amendment insisted that in the new postwar order, there was to be no "subordinate and inferior class of beings," no "dominant race," no people marked by law and custom with "such deep and enduring marks of inferiority and degradation." Instead, all people and groups of people were to stand equal before the laws of the states and the nation. John Bingham, the father of the Fourteenth Amendment's Section 1, summed up the concept pithily: "the absolute equality before the law of all persons . . . ."[73] Whatever rights the states conferred or disabilities they imposed on whites had to apply in the same measure to blacks. Thus the centrality of the Fourteenth Amendment's Privileges and Immunities Clause, which was the capstone of Section 1 in the Republican Framers' minds.

This "anti-*Dred Scott*" reading of Section 1 of the Fourteenth Amendment derives from the Section's structure. All four of its provisions enforce the same equality ideal, but in four different ways. The first sentence

69. "Suum cuique tribuere," which Ulpian defined as one of the three basic principles of right. 1 THE DIGEST OF JUSTINIAN 10 (Alan Watson ed., 1985).

70. *See generally* Kenneth L. Karst, Foreword, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 12–16 (1977). *But see* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 40–63 (1988) (arguing that Section 1 of the Fourteenth Amendment was ambiguous, the product of the Framers' political compromises, and that its specific legal meaning and impact was only emergent).

71. U.S. CONST. pmbl.

72. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05, 416 (1857).

73. CONG. GLOBE, 39th Cong., 1st Sess., 158 (1865).

tence confers federal and state citizenship on "all persons born or naturalized in the United States." The content and meaning of the three provisions in the second sentence follow from that recognition of citizenship, seen as formal embodiment in the polity. The next clause provides that the states may not abridge the "privileges or immunities" of the "citizens of the United States" who had been created in the preceding sentence. This reversed the citizenship part of Taney's *Dred Scott* holding by constitutional amendment. The third and fourth components extend "due process of law" and "the equal protection of the laws" to any "person." These provisions brought within the ambit of law those people whom Taney had declared outside its protections. The second sentence was more in the nature of a single package of related rights than a catalogue of three distinct, freestanding rights. Thus, due process was to be more an aspect of equal protection than an alternative to it. And similarly the other way around: equal protection would be an aspect of due process, justifying the result in *Bolling v. Sharpe*.[74]

In Section 5 the Framers explicitly empowered Congress "to enforce . . . the provisions of this article." Although the potential scope of this power was not clear then (or now, for that matter[75]), it was certainly beyond quibble that Congress now had enforcement powers over the citizenship, privileges and immunities, due process, and equal protection rights affirmed in Section 1.

A second unquestionable purpose of the Fourteenth Amendment was to validate the Civil Rights Act of 1866,[76] whose constitutional validity had been challenged by Andrew Johnson in his veto message and by conservatives of both parties in Congress. Contemporary concepts of equality before the law, understood in the privileges and immunities context, were most fully captured in the 1866 Civil Rights Act.[77] That measure, enacted as its title proclaimed "to protect all Persons in the United States in their Civil Rights," first conferred national citizenship. It then affirmed that all citizens "shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property" as whites. The Act protected the rights of contract, property, and juridical capacity (as witness and party) of those citizens. Its concluding passage codified the antebellum ideal of equality

74. 347 U.S. 497 (1954).

75. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

76. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

77. *See id.*; John P. Frank & Robert F. Munro, *The Original Understanding of the "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421. This article is a revised version of an article of the same title published at 50 COLUM. L. REV. 131 (1950).

before the law in comprehensive, lawyerly language by extending to those citizens the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and [they] shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[78] The Fourteenth Amendment affirmed all those rights and equalities.

Finally, the Thirty-Ninth Congress was determined to use national authority if necessary to suppress the crimes and disorders documented by Carl Schurz and others in their travels through the ex-Confederacy, and summarized in the Report of the Joint Committee on Reconstruction.[79] These included the escalating terrorism of white counterrevolutionaries, the murderous mob violence directed at freedpeople in Memphis and New Orleans in 1866, and, above all, the Black Codes that had attempted to reinstate the two essentials of slavery: race control and labor coercion.

The Framers' intentions with respect to the Equal Protection Clause have been debated endlessly and inconclusively since 1868, as Chief Justice Earl Warren noted in *Brown I*.[80] Whatever the Clause might mean, require, or forbid, though, a consensus holds that its framers at a minimum meant it to prohibit the states from enacting or enforcing laws that treated the freedpeople more opprobriously than similar laws treated others of European descent. Even the most minimalist reading of the Clause concedes that it was meant to secure the status, fundamental liberties, and legal capacity of all citizens, black and white, against state oppression. Justices of the Supreme Court who were contemporaries of the Framers repeatedly confirmed that reading. Thus, Samuel Miller in the *Slaughter-House Cases* wrote,

> In the light of the history of these amendments, and the pervading purpose of them, . . . it is not difficult to give a meaning to [the Equal Protection] clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause . . . .[81]

Justice William Strong wrote in *Strauder v. West Virginia* that the "common purpose" of the Civil War Amendments was to "secur[e] to a race recently emancipated . . . all the civil rights the superior race enjoy." "What is [equal protection]," he went on, "but declaring . . . in regard to the col-

78. Act of Apr. 9, 1866 § 1, 14 Stat. at 27.

79. *See* H.R. REP. NO. 39-30 (1866); CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH (Arno Press 1969) (1867).

80. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 489 (1954); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

81. 83 U.S. (16 Wall.) 36, 81 (1873). Miller was referring to the Black Codes of 1865–66.

ored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"[82] The modern Court has reconfirmed this. "The clear and central purpose of the Fourteenth Amendment," Chief Justice Warren declared in *Loving v. Virginia*, "was to eliminate all official state sources of invidious racial discrimination in the States."[83] In *McLaughlin v. Florida*, the Court held that "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States."[84]

However, that is a minimal reading, and its state-action emphasis constricts the potential of the Clause. The Framers contemplated two different approaches to the problems they faced in 1867. The first would have been a simple but limited ban on state discrimination on the basis of race.[85] Thaddeus Stevens proposed such a formulation in the earliest debates on what became the Fourteenth Amendment: "All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."[86] He later elaborated:

> [The proposed equal protection amendment] allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.[87]

Such an ideal was alien to antebellum society.

The Thirty-Ninth Congress, however, rejected Stevens's proposal in favor of a broader equality principle. (Non-discrimination and equality are not the same thing, then or now.) John A. Bingham urged this broader approach the day after Stevens spoke. He would give Congress power "to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property . . . ."[88] As the debates wore on through the winter of 1865–66, the Joint Committee on Reconstruction adopted the Bingham approach over that proffered by Stevens and began tacking onto it the notion of privileges, immunities (both of which survived), and "equal political rights" (which did not).

82. 100 U.S. 303, 306–07 (1880).
83. 388 U.S. 1, 10 (1967).
84. 379 U.S. 184, 192 (1964).
85. ANDREW KULL, THE COLOR-BLIND CONSTITUTION 67–87 (1992).
86. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865).
87. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Statement of Rep. Stevens).
88. CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865).

Though Stevens continued to push the weaker non-discrimination formula, he also added the critical provision that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Finally, the Joint Committee melded these various formulations, adding the ineffectual reduced-representation provision of Section 2, the disfranchisement provision of Section 3, and the debt provisions of Section 4. In that version, representing the triumph of the Bingham broad approach, the Fourteenth Amendment was adopted and sent to the states for ratification.

The Bingham equality principle was less clear than non-discrimination. It was more amorphous, less infused with identifiable content. Despite—or because of—that, though, it was more potent. Courts, and if necessary Congress itself, would have the responsibility of giving it legal definition and content. It contained a greater potential for growth than the simple, negative non-discrimination principle. Both those features, however, had a dark side. In an inhospitable climate, such as that which descended after 1875, equality could be construed away to meaninglessness, and form could be exalted over substance. Equality would work only if there was a broad popular commitment to its ideal, and that never existed at any time in the nineteenth century.

The language of the Clause, read in light of the circumstances of 1868 and Chief Justice John Marshall's command in *McCulloch v. Maryland* that the Constitution be read to allow for the growth of principle to accommodate social change,[89] suggests more interpretive possibilities. A well-developed state common law tradition provided at least four principles of equal protection by 1868.[90] These were the "equality principle": all persons are moral equals before the law; the "reasonableness principle": laws must not be arbitrary or unreasonable; the "impartiality principle": laws must be administered impartially, allocating society's burdens and benefits fairly; and the "protection principle": laws must protect individuals' fundamental rights. A half century of modern development has winnowed these into something quite different: a two-category organization of "suspect classifications" and "fundamental rights." But that current configuration of doc-

89. The Chief Justice commanded,

> [W]e must never forget, that it is a *constitution* we are expounding. . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. . . . It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407–15 (1819).

90. John Marquez Lundin, *The Law of Equality Before Equality Was Law*, 49 SYRACUSE L. REV. 1137 (1999).

trine does not fully realize the scope of the equality principle at the time it was written into the Constitution.

"[T]he Fourteenth Amendment guarantees equal laws, not equal results," wrote Justice Potter Stewart in 1979.[91] But of course it guarantees neither: it guarantees the equal *protection* of the laws.[92] This mandated that the state provide the protection of law to all its citizens, which would comply with John Marshall's command in *Marbury v. Madison* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[93]

That raises one of the earliest and most important questions to come up under the new Equal Protection Clause: Does a state violate the Clause by failing to act when one of its citizens was injured by private violence? Does inaction—failure to remedy a wrong retrospectively or provide a remedy prospectively—constitute such state action? This was yet another manifestation of the still-unresolved question about the nature of the American Constitution: Does it guarantee only negative liberties, freedom from overt, proactive oppression by the state? Or, does it go further, assuring all people that the state will protect them against deprivation of rights from whatever source of oppression? Chief Judge Richard Posner has recently framed that issue this way: is the Constitution "a charter of negative rather than positive liberties"? Even if it is, as he thinks, the former, "where the liberty asserted is . . . the right to equal treatment irrespective of race or sex, the analysis is more complex." "The central purpose of the equal protection clause, made clear by its wording," he maintained, "is to prevent states from withdrawing legal protection from minorities, thereby making the members of minority groups outlaws in the literal sense."[94] The jurist for whom Posner once clerked, Justice William Brennan, thought that state "inaction can be every bit as abusive of power as action . . . ."[95] The Supreme Court had to take up these issues even before the ink was dry on the parchment of the Amendment.

In an 1871 circuit court case, *United States v. Hall*, Judge William Woods, later to be appointed to the United States Supreme Court, claimed

91. Pers. Adm'r v. Feeney, 442 U.S. 256, 273 (1979).

92. Compare WEST, *supra* note 47, at 11, with the vastly narrower (and inadequate) understanding of protection in Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y. L.F. 385 (1966).

93. 5 U.S. (1 Cranch) 137, 163 (1803).

94. Bohen v. City of E. Chicago, 799 F.2d 1180, 1189–90 (7th Cir. 1986) (Posner, J., concurring).

95. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 212 (1989) (Brennan, J., dissenting); *accord* Roger Paul Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959).

that the Amendment did in fact reach state inaction. He stated in dictum that Congress could protect the privileges and immunities secured by the Fourteenth Amendment against "unfriendly or insufficient state legislation . . . ." A state could violate the Equal Protection Clause by "the omission to protect, as well as the omission to pass laws for protection."[96] For that brief moment, one prominent American jurist acknowledged a state's affirmative duty to protect all of its people. Even in a decision otherwise disastrous for black liberties, the *Civil Rights Cases*, Justice Joseph Bradley suggested in dictum that "if [state] laws are adverse to [the freedman's] rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws . . . ."[97] But there was a fatal slippage in Bradley's formulation, compared with Woods's. Woods implied that a state must provide protection; Bradley bypassed that issue and said merely that Congress "may" enact corrective laws where the state defaulted.

Aside from text, the "architecture" of Section 1 of the Fourteenth Amendment suggests an affirmative content for the Equal Protection Clause. Section 1 consists of four guarantees, packaged in two sentences. The first sentence confers citizenship, the foundational right, establishing an individual civic identity and status for all members of the republic. This citizenship secures an equality of participation by all people in public affairs.[98] Read against the first sentence of Section 1, the three rights affirmed in the succeeding sentence—privileges and immunities, equal protection, and due process—can be understood as the effective realization of that citizenship, the ways in which the Framers saw fit to achieve the equal citizenship they had just proclaimed. We may therefore look to the nature of citizenship to get an idea of the meaning of equality and equal protection.

The equality component of equal citizenship secures at least two things: state protection of the individual's status as a citizen and a human being, an attribute best summed up in the idea of *dignity*, and the individual's participation in the life of the polity as a fully-empowered citizen-member. As Justice William Strong expressed the idea in 1880, the Equal Protection Clause bars state actions "implying inferiority in civil society . . . ."[99] At a minimum, the citizenship/equality right assures that neither the individual nor the group will be excluded from the polity. In recent

96. 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282).

97. The Civil Rights Cases, 109 U.S. 3, 24 (1883).

98. *See generally* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

99. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

times, Justice Sandra Day O'Connor has recurred to this notion of civic standing and inclusion in Establishment Clause cases,[100] but the value is more obviously and compellingly grounded in Section 1 of the Fourteenth Amendment. In this sense, *Brown v. Board of Education I* was fully justified in terms of the Framers' intent, as it secured the two core values of equal citizenship: dignity and participation. There is a danger today that the dignity component may be demoted from its constitutional status as a right under the aegis of the Equal Protection Clause to a mere interest protected by tort laws protecting privacy.[101]

III. CIVIL RIGHTS LITIGATION, 1873–1905[102]

Scholars agree that the Equal Protection Clause fared badly before the United States Supreme Court as soon as it became the subject of appellate litigation. Justice Lewis Powell was merely reiterating received wisdom when he noted in 1978 that the Equal Protection Clause "was virtually strangled in its infancy by post-civil-war judicial reactionism. It was relegated to decades of relative desuetude while the Due Process Clause . . . flourished . . . ."[103] There is much truth in that view, particularly for the leading civil rights cases of the first generation. In the *Civil Rights Cases*, *Plessy v. Ferguson*, and *Williams v. Mississippi*, the Supreme Court connived at the assaults of Jim Crow and disfranchisement.[104] It embraced a formalistic approach to the Clause that left the guarantee of equality devoid of meaning. In its debilitated state, the Clause almost merited the scorn of Justice Holmes in 1927 as "the usual last resort of constitutional arguments . . . ."[105]

In these late-nineteenth-century cases, the Court fabricated an engine of law that gutted the substance of the Civil War Amendments, and particularly the Equal Protection Clause, as far as the freedpeople were concerned, while preserving the Amendment's façade as a sort of Potemkin village of

100. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 626 (1989) (O'Connor, J., concurring) (contrasting those "not full members of the political community" with "favored members of the political community"); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (affirming "a person's standing in the political community").

101. *See generally* JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA (2000).

102. Much of this section is also discussed in my previous article William M. Wiecek, *Civil Rights: Looking Back—Looking Forward*, 4 BARRY L. REV. 21 (2003).

103. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (internal quotations and footnote omitted).

104. Michael J. Klarman surveys these cases authoritatively in FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8–60 (2004).

105. Buck v. Bell, 274 U.S. 200, 208 (1927).

human decency. In this way the Court supported the destruction of blacks' rights and the imposition of apartheid maintained by the forms of law, which in turn were backed by legal and extra-legal violence. Scholars refer to the Court's performance in these cases as the "retreat from Reconstruction."[106] These decisions were in synch with the dominant social and attitudinal trends of the era in matters of race. One way of thinking about American social and political history in the last quarter of the nineteenth century is to see it as the birth (or rebirth) of a "Jim Crow republic," a nation dedicated to apartheid.[107] The results of the Court's decisions were congruent with that result.

We should not, however, be surprised that judges betrayed the expectations of the Clause's drafters. Rather, it is remarkable that the betrayal was as moderate as it was. Given the incompatibility, to put it mildly, of abolitionist ideals with the social realities of postwar America, the Court's original interpretation of the Clause appears more a compromise between those who would render it an absolute nullity and those who sought some measure of legal protection for the freedpeople.

The cases of this period displayed four characteristics fatal to equality for black Americans:

1. They conceded only a formal, minimalist interpretation of the constitutional text provided by the Reconstruction Amendments, leaving the door wide open for subterfuge and subversion.
2. They gave only a grudging, narrow reading to statutes enacted to protect blacks' rights.
3. The Court invented the state-action doctrine.
4. It applied the same constitutional standard, such as the Commerce Clause, inerrantly in a differential, results-oriented way to achieve results destructive of blacks' rights.

These decisions comprised a corpus of law that ratified Jim Crow, disfranchisement, and economic subordination.

The Court disappointed the Reconstruction Framers' hopes for African Americans in nearly all the cases that came before it in the last third of the nineteenth century, beginning with the first time it construed the Fourteenth Amendment in the *Slaughterhouse Cases*. Though Justice Samuel F. Miller repeatedly emphasized that "the one pervading purpose" of the Civil War Amendments was "the freedom of the slave race, the security and firm

106. FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE *passim* (2000).

107. *See* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115 *passim* (1994).

establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him," his conservative understanding of the revolution in federalism wrought by the war betrayed the freedpeople. For both the definition of their fundamental liberties and the protection of those liberties, *Slaughterhouse* consigned the flock to the care of the wolves, the racist Democratic Redeemer regimes then coming into power. "[T]he entire domain of civil rights heretofore belonging exclusively to the States" would continue to be a state responsibility, with the federal government excluded from an effective role in policing them. The Supreme Court was not to become "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens . . . ."[108]

The Court did not perpetrate this betrayal of black Americans solely on its own initiative. The entire apparatus of Miller's opinion rested upon, and at the same time affirmed, a cluster of assumptions or ideological preferences about the related issues of race, federalism, and Reconstruction.[109] Based on northern Democratic beliefs about the causes of the Civil War, the *Slaughterhouse* majority assumed that the abolition of slavery by 1865 had resolved all problems related to the peculiar institution; that slavery had no consequences beyond the status of its immediate victims, the freedpeople; that the antebellum federal system should be disturbed as little as possible by postwar adjustments; and that states retained exclusive sovereign authority over all internal matters, including the rights of their citizens. Each of these assumptions is contestable or just downright wrong,[110] but the Supreme Court's version of historical "truth," once imposed, controls subsequent constitutional development, no matter how false or partial it may be.

Slaughterhouse takes on meaning only in the context of what was happening to the freedpeople as Miller wrote. The White Supremacist regimes that took control of the southern state governments after 1876 created an elaborate net of statutory law that ensnared blacks in labor regimes

108. 83 U.S. (16 Wall.) 36, 71, 77–78 (1873); *see also* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 154–221 (2003).

109. *See* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 1–95 (1999).

110. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1988); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 232–515 (1982); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughterhouse Cases, 70 CHI.-KENT L. REV. 627 (1994).

of de facto servitude.[111] At the same time, they and local governments codified the racial etiquette of Jim Crow in endless and demeaning petty regulations that trumpeted white domination and black subservience, forcing everyone to conform to a ritual of behavior that reinforced those social roles.[112]

Following *Slaughterhouse*, the Court handed down a line of decisions that were hostile to black Americans' rights under the Civil War Amendments. This was due in part to the Court's conformity to the attitudes of the era, above all with the racist assumptions that were reasserting themselves triumphantly over short-lived Republican/abolitionist idealism.

In *United States v. Reese*, the Court unanimously held unconstitutional two sections of one of the 1870 Force Acts[113] on the grounds that the ban on wrongful interference by state officials with voting was not limited to racially-motivated actions and thus was overbroad. "The Fifteenth Amendment does not confer the right of suffrage upon any one," Chief Justice Waite then proclaimed gratuitously.[114] (That same year, he repeated the point in a different sort of civil rights case, *Minor v. Happersett*,[115] upholding the power of a state to deny the ballot to women, despite the Fourteenth Amendment.) On the other hand, the Court sustained convictions under another section of the 1870 Force Act for denying a black voter the opportunity to vote in a congressional election, but only on Article I grounds, not the Fourteenth Amendment.[116] In that same year, the Court overturned indictments against white rioters who had terrorized a black political rally on the *Reese* grounds that the indictments did not specify the necessary racial animus.[117]

The Court also promoted Jim Crow in railway transportation. *Hall v. DeCuir*[118] voided a state statute prohibiting segregation on public conveyances (in this case, a riverboat) on the grounds that this would constitute a

111. WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861–1915 *passim* (1991).

112. On the vexed question of the origins of Jim Crow, compare the classic studies of C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974), and C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877–1913 (1951), with later critics, especially JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION (1984), and HOWARD N. RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH 1865–1890 (1980).

113. Act of May 31, 1870, ch. 114, 16 Stat. 140.

114. 92 U.S. 214, 217 (1875).

115. 88 U.S. (21 Wall.) 162, 178 (1874) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one . . . .").

116. *Ex parte* Yarbrough, 110 U.S. 651 (1884); *accord Ex parte* Siebold, 100 U.S. 371 (1880) (non-racial context).

117. United States v. Cruikshank, 92 U.S. 542 (1875).

118. 95 U.S. 485 (1877).

direct burden on interstate commerce and an interference with Congress's powers to regulate it. Yet perversely, in *Louisville, New Orleans & Texas Railway Co. v. Mississippi*,[119] the Justices upheld a state Jim Crow railway ordinance against a Commerce Clause challenge on the grounds that the statute had only an intrastate operation, despite the obvious interruption of interstate travel as trains had to stop at state lines to herd black passengers into Jim Crow cars. Such incongruities made it plain that the Court was deciding cases involving the rights of African Americans by a double standard, sustaining measures that contributed to degradation of blacks' status, while striking down those that attempted to deliver on the promises of equality in the Civil War Amendments.

In a quartet of 1880 jury cases, the Court appeared to vindicate the rights of blacks as parties and jurors, yet it undercut these advances in a self-defeating manner.[120] *Strauder v. West Virginia*, the best known of the jury cases, is conventionally cited for its encouraging dictum that "[w]hat is [equal protection] but declaring . . . in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" On that basis, the Justices struck down a state statute limiting jury service to whites. But in a gratuitous dictum, Justice William Strong, who wrote for the Court in all these cases, affirmed the power of states to prescribe juror qualifications, "and in so doing make discriminations" on the basis of sex, property ownership, age, and education.[121] It would be a dull sheriff indeed who could not exclude all blacks under that gaping concession.

In *Ex parte Virginia*,[122] the Court upheld the conviction of a state judge under an 1875 federal statute barring racial discrimination in the selection of jurors[123] for systematically excluding blacks from grand and petty juries. Yet in *Virginia v. Rives*,[124] it declined to overturn a conviction of two black defendants who claimed that blacks had been excluded from all juries in their county. In dicta, the Court held that no one had a right to have members of their race serve on a petty jury and that the fact that no blacks had ever served on a local jury was not evidence that they had been systematically excluded.

119. 133 U.S. 587 (1890).

120. *See generally* Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401 (1983).

121. 100 U.S. 303, 307, 309–10 (1880).

122. 100 U.S. 339 (1880).

123. Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 335, 336.

124. 100 U.S. 313 (1880). The next year, however, the Court did concede that such a record constituted prima facie proof that blacks had been deliberately excluded. *See* Neal v. Delaware, 103 U.S. 370, 397 (1881).

The Court was prey to a vitiating formalism in the black-rights cases of the late nineteenth century. *Pace v. Alabama*[125] was typical. There the Court unanimously upheld the constitutionality of Alabama statutes that imposed higher penalties for fornication and adultery when committed by a biracial couple than when done by a same-race couple. Justice Stephen J. Field, a Democrat and no friend of African Americans, held that the statutes treated all alike, working no discrimination in any single offense between blacks and whites. In his brief opinion, he saw no need to explain why the differential between the statutes was not invidious. In *Pace*, the substance of equality shriveled to a nominal, formal impartiality that belied Jim Crow reality.

In 1883, the Court struck a staggering blow to the possibility of blacks' full participation in American life in the *Civil Rights Cases*. Voiding the public accommodations sections of the 1875 Civil Rights Act,[126] Justice Joseph Bradley affirmed earlier hints of the state-action doctrine, limiting Congress's remedial and regulatory authority under the Fourteenth and Fifteenth Amendments to actions "by State authority in the shape of laws, customs, or judicial or executive proceedings."[127] Bradley added to the damage by also holding that racial discrimination was not a badge or incident of slavery. He vented impatient annoyance at the continuing efforts to realize the promise of the Thirteenth and Fourteenth Amendments: "When a man has emerged from slavery, . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws," a taunting mockery of the freedpeople's increasingly dire plight in the Jim Crow South.[128] Bradley's opinion assumed the answer to the question whether state *in*action could be reached under the Fourteenth Amendment (certainly not), rather than confronting it forthrightly. Justice John M. Harlan's lone dissent, like his later dissent in *Plessy*, is widely taken to be the more authentic and valid reading of the Civil War Amendments, but Bradley's state-action doctrine has displayed stubborn staying power, coming back after ceaseless critiques whenever conservative jurists feel a need to insulate racially discriminatory acts from federal regulatory or remedial power.[129] The Court repeated the

125. 106 U.S. 583 (1883), *overruled by* McLaughlin v. Florida, 379 U.S. 184 (1964).

126. Act of Mar. 1, 1875, ch. 114, §§ 1–2, 18 Stat. 335, 336.

127. Numerous scholarly authorities have criticized the state-action doctrine as anomalous, unfounded, and unnecessary. The most thorough is LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688–1719 (2d ed. 1988). *See also* HYMAN & WIECEK, *supra* note 109, at 497–500; Frank & Munro, *supra* note 77.

128. 109 U.S. 3, 17, 25 (1883).

129. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (opinion by Rehnquist, J.).

state-action doctrine in *United States v. Harris*,[130] overturning convictions for the lynching of a black man on the ground that there was no state action involved. *Harris* signaled that federal authority would be powerless to protect African Americans from the wave of terror then underway.

Three years later the Court inconsistently rendered one of its few nineteenth-century opinions succoring the cause of minority rights, but significantly in a case that did not involve African Americans. (The victims of this discrimination were Chinese launderers.) In *Yick Wo v. Hopkins*, Justice Stanley Matthews went behind a facially non-discriminatory San Francisco ordinance interpreted to forbid laundries in wood-frame buildings, to find that it was "administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . ." Cryptically, Matthews observed in dictum that "the equal protection of the laws is a pledge of the protection of equal laws."[131] *Yick Wo* became the ancestor of a long line of cases condemning as-applied discrimination and raised the issue, still vexed, of inferences to be drawn about intent from effects. However, in the short term it did black Americans little good. Its principle would not be applied to relieve blacks from the onus of facially neutral statutes for another fifty years.

Having made this promising concession to the realities of race, the Court then snatched it away from African Americans when it returned to the perennial exclusion of blacks from juries. In 1896 (an *annus horribilis* for blacks), given the choice between *Yick Wo* and *Rives*, Chief Justice Melville Weston Fuller refused to go behind facially neutral juror-selection processes to root out racial disqualification.[132]

> [W]hether such [racial] discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by [Texas courts] was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed . . . .[133]

Plessy v. Ferguson[134] has been so often quoted and condemned[135] that it is neither possible nor necessary to find something new to denounce in its

130. 106 U.S. 629 (1883).

131. 118 U.S. 356, 369, 373–74 (1886).

132. *See* Smith v. Mississippi, 162 U.S. 592 (1896); Murray v. Louisiana, 163 U.S. 101 (1896).

133. Thomas v. Texas, 212 U.S. 278, 282 (1909).

134. 163 U.S. 537 (1896).

135. The modern Court is unanimous in its denunciation. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (O'Connor, Kennedy, and Souter, JJ., joint opinion; Rehnquist, J., dissenting).

constitutionalization of Jim Crow.[136] Lower federal courts had confronted two different interpretations of the meaning of equality. Did it mean access for all, irrespective of race, to the same accommodation, or provision of what whites claimed to be separate but "equal" facilities? For a generation, judges consistently affirmed the latter meaning,[137] and the Supreme Court ratified that view in *Plessy*. On mature reflection later, Justice Henry Brown concluded that he had erred in his majority opinion,[138] but the profound and long-lasting damage had been done. *Plessy*'s basic doctrine, that states may make "reasonable" racial classifications, was destined for a long career. Not until *McLaughlin v. Florida* did the Court repudiate it and replace it with a universal presumption against the validity of all racial classifications.[139]

Andrew Kull makes this arresting observation about *Plessy*, however: "[N]o subsequent decision by the United States Supreme Court ever referred to *Plessy v. Ferguson* as a guide to the meaning of the Fourteenth Amendment."[140] He suggests that, in its first decades at least, *Plessy* had not become the formidable barrier to racial equality that it seemed to be after World War II. It did not mandate precise equality as the price for segregation; rather, it allowed state legislatures broad leeway in determining what measure of equality was reasonable, so that any gesture, however nominal, of pretextual equality would suffice.

The Court closed out the century with *Williams v. Mississippi*,[141] an exercise in pure formalism that sustained the so-called Mississippi Plan that disfranchised most black men in the southern states by imposing an ingenious array of facially neutral voting qualifications that had the practical and intended effect of eliminating the black voter.[142] That it also had the effect

136. On the case, see 8 OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 352–67 (1993), and CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

137. *See* Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate But Equal" Doctrine, 1865–1896*, 28 AM. J. LEGAL HIST. 17 (1984).

138. Joel Goldfarb, *Henry Billings Brown*, *in* 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 1553, 1562 (Leon Friedman & Fred L. Israel eds., 1969).

139. *See* 379 U.S. 184 (1964).

140. Andrew Kull, *Post*-Plessy, *Pre*-Brown: *"Logical Exactness" in Enforcing Equal Rights*, 24 J. SUP. CT. HIST. 155, 164 (1999) (emphasis omitted). He notes two minor exceptions, both involving transportation: *Chesapeake & Ohio Railway Co. v. Kentucky*, 179 U.S. 388 (1900), and *Chiles v. Chesapeake & Ohio Railway Co.*, 218 U.S. 71 (1910).

141. 170 U.S. 213 (1898).

142. *See* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE SHAPING OF THE ONE-PARTY SOUTH, 1880–1910 (1974). Kousser provides a melancholy update of this study, demonstrating a similar and parallel formalism on the modern Court that diminishes black electoral influence, in COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999).

of disfranchising many a poor white was a welcome side effect as far as the Bourbon sponsors of the measure were concerned. The Court, speaking through Justice Oliver Wendell Holmes, compounded the damage of *Williams* five years later in *Giles v. Harris*,[143] denying equitable relief to a black voter disfranchised under an Alabama variant of the Mississippi Plan. In a cynical and disingenuous opinion,[144] Holmes insisted that federal courts could do nothing about racial disfranchisement, no matter how obvious, and consigned them to Congress and the President[145] for political remedies.

The Court gave the lie to the nominal evenhandedness of separate-but-equal in *Cumming v. Richmond County Board of Education*.[146] A Georgia county operating one high school for whites and another for blacks shuttered the latter, citing fiscal exigency. It thus provided a high school education for whites, but nothing beyond primary grades for blacks. The Court found no violation of equal protection in this arrangement. Justice Harlan (!) for a unanimous Court reasoned that compelling the county to close the white school as well would do blacks no good, as specious a specimen of judicial logic as can be found in the *United States Reports*. In *Berea College v. Commonwealth of Kentucky*,[147] the Court upheld the power of a state to impose Jim Crow on private schools, which had the effect of expelling the black students from that progressive school.

CONCLUSION

At the turn of the twentieth century, the equality value remained in the textual Constitution, but it was a dead letter; metaphorically, it was a missive sent but not delivered for lack of a recipient, reposing unclaimed but available for delivery when interest in it should revive. The Supreme Court had preserved it by accommodating the text and its implicit ideal with the prevalent racism of the era. Its day was still a half century away.

143. 189 U.S. 475 (1903).

144. Owen Fiss more charitably attributes the opinion to Holmes's fatalism and a sense of impotence. *See* FISS, *supra* note 135, at 372–79.

145. A useless recourse: the president at the time, Theodore Roosevelt, in three years would disgrace his administration by sustaining the army's conduct in the Brownsville, Texas incident. In racial matters, blacks could hope for little from that avid exponent of fin-de-siècle racialism.

146. 175 U.S. 528 (1899).

147. 211 U.S. 45 (1908) (Harlan & Day, JJ., dissenting).