

Michigan Law Review


Volume 96 | Issue 2

1997

Equal Protection, Class Legislation, and Colorblindness

Melissa L. Saunders
University of North Carolina

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

 Part of the [Fourteenth Amendment Commons](#), [Legal History Commons](#), [Legislation Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997). Available at: <https://repository.law.umich.edu/mlr/vol96/iss2/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EQUAL PROTECTION, CLASS LEGISLATION, AND COLORBLINDNESS

Melissa L. Saunders*

Scholars and judges have long assumed that the Equal Protection Clause¹ is concerned only with state action that has the effect of singling out certain persons or groups of persons for special benefits or burdens. Under the traditional doctrinal framework, state action that has this purpose and effect bears a certain burden of justification under the clause, a burden whose stringency varies, depending on the criteria used to define the class being singled out for special treatment and the importance of the interest affected.² But state action that lacks such a “discriminatory effect” is not, on the traditional understanding, subject to equal protection challenge at all; if its rationality is to be challenged, it must be under the Due Process Clause instead.³

Over the years, the United States Supreme Court has often had difficulty deciding whether certain kinds of state action actually single out certain persons or groups of persons for special benefits or

* Associate Professor of Law, University of North Carolina. B.A. 1983, Yale; J.D. 1987, University of Virginia. — Ed. I thank Lou Bilionis, Caroline Brown, Molly McUsic, John Orth, and Bob Saunders for their comments on earlier drafts of this article; John Bowers, Kim Chapman, Ryan Guilds, Tom Johnson, and Rebecca Rogers for their research assistance; and Steve Case at the UNC Law Library for help in locating hard-to-find sources.

1. U.S. CONST. amend. XIV. Though this article focuses on the Equal Protection Clause of the Fourteenth Amendment, the interpretation advanced here is equally applicable to the equal protection guarantee said to reside in the Due Process Clause of the Fifth Amendment, *see* *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954), which the Supreme Court treats as essentially congruent to that in the Fourteenth Amendment, *see* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

2. For a summary of the traditional doctrinal framework, see 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.1-4 (2d ed. 1992). *But see* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452-53 (1985) (Stevens, J., concurring) (arguing that the Supreme Court is actually applying a single rational basis standard in all of its equal protection cases); *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (same).

3. *See* ROTUNDA & NOWAK, *supra* note 2, § 18.1, at 4, 6; *id.* § 18.4, at 41; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-10, at 1460 (2d ed. 1988); Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 106-07; *see also* Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1132 (1969) [hereinafter *Developments: Equal Protection*] (asserting that traditional equal protection analysis asks “whether it is just to disadvantage one group in comparison to another”); Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 831-42 (1978).

burdens.⁴ But all of its great equal protection battles — over racial segregation, state legislative reapportionment, gender discrimination, and affirmative action — have been fought on the assumption that such a discriminatory effect is a necessary element of an equal protection claim. On this fundamental aspect of its equal protection jurisprudence, the Court has long displayed remarkable unanimity — that is, until the racial gerrymandering cases of the last few years.⁵

In the racial gerrymandering cases, the Court has confronted state action that, though undeniably race-conscious, does not appear to single out any identifiable group of persons for special disadvantage because of their race. Though various members of the Court have argued in dissent that the action could not violate the Equal Protection Clause precisely for this reason,⁶ a consistent five-member majority has steadfastly ignored this argument. This majority has interpreted the Equal Protection Clause as giving all per-

4. For some notable examples, compare *Pace v. Alabama*, 106 U.S. 583, 585 (1883) (holding that a law imposing more severe penalties for living together “in adultery or fornication” upon interracial couples than upon intraracial couples does not single out either race for special disadvantage) with *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that a law prohibiting interracial marriage singles out interracial couples for special disadvantage) and *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964) (same); *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (holding that a law requiring racial segregation in public transportation does not single out African Americans for special disadvantage) with *Plessy*, 163 U.S. at 556-63 (Harlan, J., dissenting) (asserting that the same law does single out African Americans for special disadvantage by “put[ting] the brand of servitude and degradation” upon them and “humiliat[ing]” them) and *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that a law requiring racial segregation in the public schools singles out African-American schoolchildren for special disadvantage); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (holding that a state’s use of peremptory challenges to remove African-American members of a jury venire from the petit jury singles out the excluded jurors for special disadvantage) with 499 U.S. at 423-25 (Scalia, J., dissenting) (asserting that this same practice does not single out any particular group for special disadvantage); *Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding that a state constitutional provision forbidding state and local governments to enact statutes or regulations protecting homosexuals against discrimination singles out homosexuals for special disadvantage) with 116 S. Ct. at 1629-30 (Scalia, J., dissenting) (asserting that this same provision does not single out homosexuals for special disadvantage but simply “puts [them] in the same position as all other persons” by prohibiting their “special treatment”).

5. See *Lawyer v. Justice*, 65 U.S.L.W. 4629 (U.S. June 25, 1997); *Abrams v. Johnson*, 65 U.S.L.W. 4478 (U.S. June 19, 1997); *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) (“*Shaw II*”); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993) (“*Shaw I*”).

6. At least six different Justices — only four of whom have been on the Court at any given time — have taken this position. See *Vera*, 116 S. Ct. at 1974-96 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); 116 S. Ct. at 1997-2013 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); *Shaw II*, 116 S. Ct. at 1907-22 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); 116 S. Ct. at 1923 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); *Miller*, 515 U.S. at 929-33 (Stevens, J., dissenting); *Hays*, 515 U.S. at 750-52 (Stevens, J., concurring in the judgment); *Shaw I*, 509 U.S. at 658-75 (White, J., joined by Blackmun and Stevens, JJ., dissenting); 509 U.S. at 676 (Blackmun, J., dissenting); 509 U.S. at 676-78 (Stevens, J., dissenting); 509 U.S. at 679-87 (Souter, J., dissenting).

sons a substantive constitutional right not to be dealt with by the state on the basis of their race, whether or not this results in their being singled out for any special disadvantage because of their race.

In this article, I argue that the interpretation of the Equal Protection Clause embraced by the majority in the racial gerrymandering cases — though morally attractive, rhetorically powerful, and politically popular — is profoundly inconsistent with the original understanding of the Fourteenth Amendment.⁷ Unlike others who have attacked this “colorblind” interpretation of the Equal Protection Clause on historical grounds, however, I do not contend that the clause’s framers and ratifiers understood it to strike only at state action that tends to create or perpetuate a “caste” system, by branding a certain class of persons as inferior to all others.⁸ Nor do I take the position that they understood it to mandate equality only with respect to the “remedial” or “protective” functions of state government.⁹ Instead, I argue that they understood the Equal Protection Clause to nationalize a constitutional limitation on state action developed by the state courts in the first half of the nineteenth century: the doctrine against “partial” or “special” laws, which for-

7. Cf. Jeffrey Rosen, *The Color-Blind Court*, THE NEW REPUBLIC, July 31, 1995, at 19-20 [hereinafter Rosen, *Color-Blind Court*] (describing the interpretation of the Equal Protection Clause advanced in the racial gerrymandering cases as “flamboyantly inconsistent” with the intentions of the Reconstruction Republicans and calling upon legal scholars to do “the dark and lonely work of historical excavation” necessary to demonstrate this). Rosen’s historical argument is quite different than mine: he contends, following Justice Harlan, that the Equal Protection Clause, as originally understood, did not apply to “political” rights at all. See *id.* at 22; Jeffrey Rosen, *Conservatives v. Originalism*, 19 HARV. J.L. & PUB. POLY. 465 (1995); see also *Reynolds v. Sims*, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting). As William Van Alstyne has convincingly demonstrated, however, this argument “rests upon an extremely doubtful view of the original understanding.” William W. Van Alstyne, *The Fourteenth Amendment, The “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 85; see also WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 126-33 (1988) (observing that while “[s]ome congressmen did assert that the Fourteenth Amendment affected only civil and not political rights,” a large number “took a different view,” which conceded that the amendment did not, in and of itself, “confer the right to vote on anyone,” but argued that it “did require the states to confer that right in a nonarbitrary, equal fashion”).

8. See, e.g., Garrett Epps, *Of Constitutional Seances and Color-Blind Ghosts*, 72 N.C. L. REV. 401, 441 (1994). For more on this “anti-caste” or “anti-subordination” approach to the meaning of the Equal Protection Clause, see TRIBE, *supra* note 3, § 16-21; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. PUB. AFF. 107 (1976); Kenneth L. Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 48-53 (1977); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349-55 (1987); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

9. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 349 & n.143, 350 n.148 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433-51 (1992); Earl A. Maltz, *The Concept of Equal Protection of the Laws: A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

bade the state to single out any person or group of persons for special benefits or burdens without an adequate "public purpose" justification.¹⁰

This original understanding is, I believe, reflected in the language and structure of orthodox equal protection jurisprudence. In recent years, however, it has been forgotten, obscured by an increasing focus on abstract rhetoric about "discrimination," "suspect" criteria, and impermissible "stereotyping." The result, I contend, has been mounting confusion about the basic evil to which the clause is directed. In the racial gerrymandering cases, this confusion has reached its logical conclusion, leading the Court to embrace a vision of the Equal Protection Clause that cannot be squared with the original understanding.

In Part I of the article, I examine the antebellum state constitutional doctrine against partial or special laws, a tradition too often neglected in scholarly accounts of the origins of the Equal Protection Clause.¹¹ I first trace the development of this doctrine from its

10. I recognize, of course, that those who participated in the framing and ratification of the Equal Protection Clause did not have a completely unified vision of its meaning. See NELSON, *supra* note 7, at 61; John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 432 (revising and updating an article published under the same title at 50 COLUM. L. REV. 131 (1950)); Mark C. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1366-68 (1990) (reviewing NELSON, *supra* note 7). But I do not believe that this difficulty authorizes judges and scholars to interpret the Equal Protection Clause however they like. There is plenty of principled ground between "an oversimplified unitary theory of equal protection" and the "infinite unpredictability and chaos of complete subjectivity," *id.* at 1408, and much room for historical scholarship that seeks to ascertain the intentions of the framers and ratifiers at the level of general principle. Like Professor Nelson, I believe such scholarship is more useful to modern interpreters than that which searches the historical record for answers to specific legal questions that the framers either did not consider or did not resolve. See NELSON, *supra* note 7, at 6-12.

11. In recent years, legal historians have discovered the general antebellum hostility to the use of governmental power to advance the special interests of a particular segment of society. They have used this hostility to argue that the *Lochner*-era substantive due process jurisprudence of the Supreme Court was neither as unprincipled nor as unprecedented as its critics have maintained. See, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Robert E. Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615 (1965); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967) [hereinafter Jones, *Cooley and Laissez-Faire*]; Alan Jones, *Thomas M. Cooley and the Michigan Supreme Court*, 10 AM. J.L. HIST. 97 (1966) [hereinafter Jones, *Cooley and Michigan*]; Charles M. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism*, 61 J. AM. HIST. 970 (1975).

But the antebellum state constitutional doctrine against partial or special laws has yet to receive the attention it deserves in connection with the original understanding of the Equal Protection Clause. Some of the more thorough accounts of the clause's intellectual antecedents make brief reference to Jacksonian ideas of equality before the law, see ROBERT J. HAR-

roots in English common law, early American political thought, and the political rhetoric of Jeffersonian and Jacksonian reformers to its transformation into positive state constitutional law between 1830 and 1860.¹² I then explain how the doctrine differed from its close relative, the “vested rights” doctrine.¹³ Finally, I show how the doctrine worked its way into the ideology of the infant Republican Party at mid-century and became the linchpin of that party’s opposition to slavery and the Black Codes.¹⁴

Part II makes the case that those who framed and ratified the Fourteenth Amendment understood and intended its Equal Protection Clause to nationalize the developing state constitutional doctrine against partial or special laws. I begin by demonstrating that the framers and ratifiers did *not* understand or intend the clause to render all race-based or race-conscious state action absolutely, or even presumptively, unconstitutional; indeed, they repeatedly rejected proposals that they believed to embody such a rule.¹⁵ I then present the evidence that they *did* understand and intend the clause to write into the Constitution the doctrine against partial or special laws that was then developing in the state courts, modifying that doctrine only to make clear, as the antebellum state courts had not,

RIS, *THE QUEST FOR EQUALITY* 16-17 (1960); NELSON, *supra* note 7, at 15-16, and to the equality provisions in the early state constitutions, see HARRIS, *supra*, at 18-19; Frank & Munro, *supra* note 10, at 438 n.45. Some note the frequent references to class legislation — a mid-nineteenth century synonym for partial or special laws, see *infra* note 29 — in the congressional debates on the Fourteenth Amendment, see JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 92-93 (1983), and some assert, without explanation, that the framers intended the clause to reach certain forms of class legislation, see Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 71 MICH. L. REV. 981, 1055 (1979); see also John Harrison, *If the Eye Offend Thee, Turn Off the Color*, 91 MICH. L. REV. 1213, 1241 n.87 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)) (urging those who labor to understand the Equal Protection Clause to stop assuming that it is “an empty statement of the principle of [formal] justice” and focus on “trying to understand what the nineteenth century meant by ‘class legislation’”). Still others note that the Supreme Court’s interpretation of the Equal Protection Clause seems to be patterned on antebellum state court cases. See GILLMAN, *supra*, at 61-75; NELSON, *supra* note 7, at 176-81; Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 n.9 (1949); Note, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1472-73 (1982) [hereinafter *Developments: State Constitutions*]. Dean Yudof’s short but enormously helpful account of the connection between Jacksonian notions of “equality before the law” and the Fourteenth Amendment’s Equal Protection Clause makes brief reference to the antebellum state court doctrine against partial or special legislation. See Yudof, *supra* note 10, at 1375-76, 1379-81. To my knowledge, however, no one has attempted to demonstrate that the framers of the Equal Protection Clause actually *intended* to write the doctrine into the federal Constitution.

12. See *infra* text accompanying notes 28-70.

13. See *infra* text accompanying notes 71-79.

14. See *infra* text accompanying notes 80-97.

15. See *infra* sections II.A and II.B.

that state action singling out African Americans for special disadvantage was presumptively unconstitutional.¹⁶

Part III contends that the Supreme Court's equal protection jurisprudence has long been consistent with this original understanding. Indeed, many of the lawyers, scholars, and judges who first dealt with the Equal Protection Clause recognized that it had been patterned on the preexisting state law tradition against partial or special laws.¹⁷ This recognition, I contend, profoundly influenced the Supreme Court's early equal protection jurisprudence, explaining a number of its otherwise curious interpretive turns.¹⁸ The Court remained faithful to this original understanding for most of the twentieth century, even as the historical underpinnings of that understanding faded from its consciousness.¹⁹

Part IV argues that the racial gerrymandering cases of the 1990s adopt an interpretation of the Equal Protection Clause that deviates from the original understanding in a subtle but significant way — an interpretation that sees the clause as limiting not only the states' ability to favor one group of persons over another, but also, and perhaps more fundamentally, the states' ability to deal with people as members of racial groups, rather than as individuals.²⁰ In those cases, I contend, the Court has read the clause as giving all persons a substantive constitutional "right" not to have the state deal with them on the basis of their race, even when doing so does not result in their being singled out for any special disadvantage because of their race.²¹ I conclude that if this "right" has any constitutional foundation at all, it lies not in the Equal Protection Clause, but in the substantive aspect of the Due Process Clause.

Part V asks why a Court comprised of justices who claim to be originalists — as the members of the *Shaw-Miller* majority do — might have chosen to ground the limitation on state action recognized in the racial gerrymandering cases in the Equal Protection Clause, rather than the Due Process Clause.²² I suggest that the explanation may not be as sinister as most critics have maintained: the Court did not invoke equal protection dishonestly, as a means of disguising what it knew to be the recognition of a new substan-

16. See *infra* sections II.C and II.D.

17. See *infra* text accompanying notes 214-35.

18. See *infra* text accompanying notes 236-48.

19. See *infra* section III.B.

20. See *infra* Part IV.

21. See *infra* Part IV.

22. See *infra* Part V.

tive due process right; it genuinely believed it was being faithful to the original understanding of the Equal Protection Clause. The apparent inconsistency stems simply from the fact that the Court's memory of that understanding is no longer accurate; it has forgotten a number of critical details. I conclude with some thoughts about how the Court came to forget these details, and some suggestions on how it might recast the racial gerrymandering decisions to bring them more in line with the original understanding.

I. THE ANTEBELLUM STATE CONSTITUTIONAL TRADITION AGAINST PARTIAL OR SPECIAL LAWS

As constitutional historians have long recognized, any attempt to recover the original understanding of the Equal Protection Clause must include a careful examination of the various strands of antebellum thought from which the clause was derived, for its framers were "not original thinkers."²³ In drafting the clause and explaining it to their colleagues and constituents, its framers drew upon a number of distinct ideas that were afoot in the public discourse of the day.²⁴ The existing literature has thoroughly examined the influence of the abolitionist movement, with its theories of natural rights and racial equality,²⁵ and the antebellum concept of federalism.²⁶ But it has given very little attention to an equally important strand of that rich and diverse intellectual history: the antebellum state constitutional tradition against partial or special

23. See Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 241 (1984).

24. For general accounts of the intellectual origins of the Equal Protection Clause, see BAER, *supra* note 11; HARRIS, *supra* note 11; HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875* (1982); NELSON, *supra* note 7; JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1st ed. 1951); LOUIS WARSOFF, *EQUALITY AND THE LAW* (1938); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848* (1977); Farber & Muench, *supra* note 23; Frank & Munro, *supra* note 10; Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment* (pts. 1 & 2), 1950 WIS. L. REV. 479, 610 [hereinafter Graham, *Antislavery Backgrounds*]; Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954) [hereinafter Graham, *Declaratory*]; Kelly, *supra* note 11; Maltz, *supra* note 9; Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (1988); Yudof, *supra* note 10.

25. See, e.g., TENBROEK, *supra* note 24; WIECEK, *supra* note 24; Graham, *Antislavery Backgrounds*, *supra* note 24; see also NELSON, *supra* note 7, at 21-27, 64-71; WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY* 41-61 (1982).

26. See, e.g., HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866*, at 157-82 (1976); HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 367-90 (1975); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS: 1863-1869*, at 2-3 (1990); NELSON, *supra* note 7, at 27-39.

laws.²⁷ The oversight has obscured the significance of much of what the framers and ratifiers said about the clause, distorting our view of the original understanding and encouraging the misperception that the concept of equal protection was something invented by the antislavery movement and thus primarily racial in its focus. This Part seeks to correct that misperception, and to lay the groundwork for a more accurate understanding of the intentions of the framers and ratifiers, by exploring the link between the antebellum state constitutional tradition against partial or special laws and the ideology of the Republican Party at mid-century.

In the first half of the nineteenth century, state courts across America developed a decided hostility to laws that singled out certain persons or classes of persons for special benefits or burdens. In case after case, they invoked their state constitutions to strike down laws of this sort,²⁸ which they called partial or special laws.²⁹ As the

27. See Yudof, *supra* note 10, at 1371 (stating that “too many modern constitutionalists ignore th[is] history”).

28. See, e.g., *Reed v. Wright*, 2 Greene 15, 27-28 (Iowa 1849) (law singling out halfbreed Indians for special disadvantage as land owners); *Lewis v. Webb*, 3 Me. 326 (1825) (law granting certain person a special right to appeal); *Holden v. James*, 11 Mass. 396 (1814) (law suspending operation of the statute of limitations for claims by a certain person); *Budd v. State*, 22 Tenn. (3 Hum.) 483 (1842) (special criminal law applicable only to employees of a certain bank); *Jones’ Heirs v. Perry*, 18 Tenn. (10 Yer.) 59 (1836) (law granting guardian of certain minors a special right to sell their property); *Officer v. Young*, 13 Tenn. (5 Yer.) 320 (1833) (law granting a certain person a special right to prosecute an appeal in the name of a deceased person); *Tate’s Executors v. Bell*, 12 Tenn. (4 Yer.) 202 (1833) (law granting certain persons a special right to revive an expired judgment); *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 606-08 (1831) (law setting up a special tribunal for the disposition of suits by a certain bank); *Wally’s Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554, 556-57 (1831) (law barring suits brought on behalf of another only when they were brought to enforce claimed reservations of rights in Indian lands); *Ward v. Barnard*, 1 Aik. 121 (Vt. 1825) (law granting a certain person a special right to bail). For a discussion of some of the leading cases, see RODNEY L. MOTT, *DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE “LAW OF THE LAND”* 256-74 (1926).

29. See, e.g., *Reed*, 2 Greene at 28 (defining a special law as one “confined to a particular class of individuals”); *Lewis*, 3 Me. at 336 (defining a special law as one “granting a privilege and indulgence to one man, by way of exemption from the operation and effect of [a] general law, leaving all other persons under its operation”); *Jones’ Heirs*, 18 Tenn. (10 Yer.) at 78 (defining a partial or special law as one that is “restricted in its operation” to certain persons); *Wally’s Heirs*, 10 Tenn. (2 Yer.) at 556 (defining a partial law as one that is “limited in its operation . . . to a very few individuals”); *Vanzant v. Waddell*, 10 Tenn. (2 Yer.) 260, 269 (1829) (Peck, J.) (describing a partial law as one “which is partial in its operation, intended to affect particular individuals alone, or to deprive them of the benefit of the general laws”); 10 Tenn. (2 Yer.) at 269 (Catron, J., concurring) (describing a partial law as one that “tend[s] directly or indirectly to deprive a corporation or an individual of rights . . . to the equal benefits of the general and public laws of the land”). In the mid-nineteenth century, lawyers and judges began to use the term “class legislation” as a synonym for partial or special laws. See, e.g., *Monroe v. Collins*, 17 Ohio St. 666, 673 (1867) (argument of counsel); *Lehman v. McBride*, 15 Ohio St. 573, 606-07 (1863) (using class legislation to describe legislation in which “operation is limited to . . . certain classes of persons”). By the late nineteenth century, proponents of laissez-faire constitutionalism were using the term class legislation more broadly, to refer to *any* law — even one that was general in its operation — that was

Supreme Court of Massachusetts put it in the leading case of *Holden v. James*,³⁰

[i]t is manifestly contrary to the first principles of civil liberty and natural justice . . . that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits or actions, from which all others under like circumstances are exempted.³¹

The state courts of the antebellum era found partial or special laws offensive for two basic reasons.³² First, they thought such laws represented a perversion of the state's proper role in society. Like most early Americans, they subscribed to the Lockean view that government was created and existed primarily — and perhaps exclusively — to protect the preexisting “natural” rights of its citizens against private interference.³³ From this basic premise, it followed easily that the state should not exercise its power to benefit one citizen or group of citizens at the expense of others, but should confine itself to serving as a “neutral umpire” providing equal protection to the rights of all.³⁴

designed to advance the special interests of a certain class, rather than to benefit the public as a whole. See *Benedict*, *supra* note 11, at 305-14 (citing, inter alia, laws imposing protective tariffs and regulating conditions in the workplace).

30. 11 Mass. 396 (1814).

31. 11 Mass. at 404; *see also Cooper*, 10 Tenn. (2 Yer.) at 606-08 (Green, J.) (asserting that laws must be “general in [their] operation, affecting all alike” and “operat[ing] equally on all”); *Wally's Heirs*, 10 Tenn. (2 Yer.) at 555 (“The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law . . . is unconstitutional and void.”); *Vanzzant*, 10 Tenn. (2 Yer.) at 269 (Catron, J., concurring) (“[A] partial law, tending directly or indirectly to deprive a corporation or an individual of . . . the equal benefits of the general and public laws of the land, is unconstitutional and void . . .”).

32. In the late nineteenth century, proponents of laissez-faire constitutionalism would add a third reason, grounded in classical economic theory. See SIDNEY FINE, *LAISSEZ-FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT* 53-61 (1956); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 262-76 (1989). This economic rationale did not appear, however, in the antebellum decisions.

33. See JOHN LOCKE, *TWO TREATIES OF GOVERNMENT* §§ 123-24 (stating that “[t]he great and chief end . . . of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property,” that is, of “their Lives, Liberties, and Estates”); 1 BLACKSTONE, *COMMENTARIES* *120 (“The principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without . . . mutual assistance.”). On this view, the state and its citizens owed each other reciprocal obligations: the state to protect the natural rights of its citizens, and the citizens to submit to the state's authority. See 1 BLACKSTONE, *supra*, at *47-48, *119; *see also Maltz*, *supra* note 9, at 507-10 (discussing this “allegiance-protection” bargain). For more on these social contract theories, see J.W. GOUGH, *THE SOCIAL CONTRACT* (2d ed. 1957); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 282-91 (2d ed. 1972); *SOCIAL CONTRACT* (E. Barber ed., 1962).

34. See, e.g., *Lewis*, 3 Me. at 335-36 (holding that “it can never be within the bounds of legitimate legislation to enact a special law . . . granting a privilege and indulgence to one man” that is not granted to “all other persons,” for the laws are “prescribed for the benefit

Second, the state courts believed such laws threatened true republican government and with it, personal liberty. In their view, the state's decision to bestow a special favor upon one group would induce other groups to demand comparable favors, which would corrupt the political process and reduce it to a system of crass competition between special interest groups.³⁵ Under such a system, the rich and powerful elements of society would inevitably gain control of the government and use it to advance their own private interests at the expense of the weaker, replacing free republican

and regulation of the whole community," and all persons have "an equal right" to their "protection"); *People v. Township Bd. of Salem*, 20 Mich. 452, 486-87 (1870) (holding that "[t]he state can have no favorites," for "[i]ts business is to protect the industry of all, and to give all the benefit of equal laws," not "to make discriminations in favor of one class against another"); see also KAN. CONST. of 1859 (Wyandotte), Bill of Rights, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."), reprinted in 4 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 83 (1979); OHIO CONST. of 1851, art. I, § 2 ("Government is instituted for the[] equal protection and benefit" of "the people"), reprinted in 7 SWINDLER, *supra*, at 558; PA. CONST. of 1776, preamble ("[G]overnment ought to be instituted . . . for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights . . . without partiality for, or prejudice against any particular class, sect, or denomination of men."), reprinted in 8 SWINDLER, *supra*, at 277-78; PA. CONST. of 1776, ch. I (Decl. of Rights), § V ("[G]overnment is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community; and not for the particular emolument or advantage of any single man, family, or sett [sic] of men, who are a part only of that community."), reprinted in 8 SWINDLER, *supra*, at 278; William Leggett, Editorial, *True Functions of Government*, N.Y. EVENING POST, Nov. 21, 1834 (asserting that "[g]overnments have no right to . . . offer encouragements and grant privileges to any particular class," for the "true function of Government" is "the protection of person and property from domestic and foreign enemies," and "all men are . . . equally entitled to [its] protection"), reprinted in 1 A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT 162 (Theodore Sedgwick, Jr. ed., 1840) [hereinafter SEDGWICK]. For the argument that this principle of governmental neutrality is "the most basic organizing principle of American constitutional law," see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 2 (1993); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*]; Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1 (1992).

35. See, e.g., *Durkee v. City of Janesville*, 28 Wis. 464, 470 (1871) (asserting that such a decision would "open[] the door to the greatest corruption, partiality, and favoritism"). Andrew Jackson made the same point in his 1832 message vetoing the recharter of the Second Bank of the United States. See 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 590 (James D. Richardson ed., 1896) [hereinafter MESSAGES AND PAPERS OF THE PRESIDENTS] (arguing that the practice of enacting special or partial laws has "arrayed section against section, interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union"); see also Ward v. Barnard, 1 Aik. 121, 123 (Vt. 1825) (argument of counsel) ("If the legislature have power to select any individual, as the object of particular legislation, and exempt him from obligations to which all others are subject, it may be the instrument of the grossest favoritism; or, in times of political excitement, of the most cruel persecution."); SEDGWICK, *supra* note 34, at 163-64 (arguing that when the legislature enacts "partial" or "special" laws, it makes "almost every man's personal interests . . . become deeply involved in the result of the contest," and "give[s] to the force of political rivalry all the bitterest excitement of personal interests conflicting with each other").

government with tyranny and oppression.³⁶ The best safeguard against such oppression, these judges thought, was to insist that the laws be "general" ones that operated equally upon all persons.³⁷

The nineteenth-century judicial hostility to partial or special laws had deep roots in Anglo-American legal and political thought. Since the early seventeenth century, the English common law courts had been invalidating royal grants of monopolies and other special privileges in domestic and foreign trade, on the ground that government should use its power only to advance the general welfare of the community as a whole, rather than the special interests of a favored few.³⁸ The founding generation of Americans was well schooled in this tradition. John Locke's *Second Treatise*, which had a significant influence on early American political thought,³⁹ de-

36. See, e.g., *Salem*, 20 Mich. at 487 ("[W]hen the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger."); *Wally's Heirs*, 10 Tenn. (2 Yer.) at 557 (asserting that if "the majority, who . . . exercise the legislative power," could exempt themselves from their own laws, it would become "a many-headed tyrant, with capacity and power to oppress the minority at pleasure" by enacting "odious laws binding [only] on the latter"); *Vanzant*, 10 Tenn. (2 Yer.) at 270-71 (Catron, J., concurring) (arguing that to allow the legislature to "mak[e] laws whereby are swept away the life, liberty and property of *one* or a *few* citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name"); see also William Leggett, Editorial, *Monopolies*, N.Y. EVENING POST, Nov. 29, 1834 ("[A]ll acts of partial legislation are undemocratic, . . . and, in their final operation, [will] build up a powerful aristocracy, and overthrow the whole frame of democratic government."), reprinted in 1 SEDGWICK, *supra* note 34, at 85.

37. See, e.g., *Ervine's Appeal*, 16 Pa. 256, 268 (1851) ("[W]hen . . . general laws are enacted, which bear . . . on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal . . ."); *Budd v. State*, 22 Tenn. (3 Hum.) 483, 491 (1842); *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 606 (1831) (Green, J.) ("[T]he minority are safe, [if] the majority, who make the law, are operated on by it equally with others."); see also GILLMAN, *supra* note 11, at 54 (contrasting this equality-based approach to the preservation of individual liberty with the "preferred freedoms" approach favored by many twentieth-century constitutionalists).

38. See, e.g., *Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1614); *Darcy v. Allein (Case of Monopolies)*, 77 Eng. Rep. 1260 (K.B. 1602); *Davenant v. Hurdis*, 72 Eng. Rep. 769 (K.B. 1599). For more on the influence of this English antimonopoly tradition on American constitutional law, see Benedict, *supra* note 11, at 314-17; Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughterhouse Cases Re-Examined*, 31 EMORY L.J. 785, 792-97 (1982).

39. See, e.g., CAROL BECKER, *THE DECLARATION OF INDEPENDENCE* (1922); MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* (1978). During the 1960s and 1970s, revisionist scholars associated with the revival of civic republicanism attempted to minimize Locke's importance to the founding generation. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22-54 (1967) (arguing that Locke's work was far less influential than that of classical and Machiavellian republicans); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 506-52 (1975) (same); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 46-90 (1969) (same); see also GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 169-75 (1978) (arguing that Locke's *Second Treatise* was far less influential than the thought of David Hume and other Scottish moral philosophers); John Dunn, *The Politics of Locke in England and America in*

clared that there should be "one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough."⁴⁰ James Madison expressed the prevailing sentiment of the founding generation when he said that the state should be "neutral between different parts of the Society,"⁴¹ that "equality . . . ought to be the basis of every law," and that the law should not subject some persons to "peculiar burdens" or grant others "peculiar exemptions."⁴²

Opposition to partial or special laws quickly became a familiar refrain in American political rhetoric.⁴³ Jeffersonian Republicans attacked the Federalists for granting special privileges to business interests, arguing that government should provide "equal rights for all, special privileges for none."⁴⁴ In the 1830s, the Maine Whigs advocated "[e]qual rights, equal laws, and equal privileges for all classes of the community,"⁴⁵ and Andrew Jackson and his followers

the Eighteenth Century, in JOHN LOCKE: PROBLEMS AND PERSPECTIVES 45, 69-80 (John W. Yolton ed., 1969) (conceding that Locke's *Second Treatise* was read by the intellectual leaders of the American Revolution, but asserting that it did not have any great influence on them). More recent historical scholarship has taken a more balanced approach, which concedes that Locke's work had a significant influence on the political philosophy of the founding generation, but also acknowledges the influence of classical republican theory, the Scottish moral philosophers, and Protestant Christian thought. See, e.g., FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 78-130 (1989); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 19-56 (1995) (challenging the revisionists' assertion that Locke's work, particularly his *Second Treatise*, did not play a significant role in shaping the political thought of the founding generation).

40. LOCKE, *supra* note 33, § 142.

41. Madison to Jefferson, October 24, 1787, *quoted in* Gary J. Schmitt & Robert H. Webking, *Revolutionaries, Antifederalists, and Federalists: Comments on Gordon Wood's Understanding of the American Founding*, 9 POL. SCI. REVIEWER 195, 228 (1979).

42. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), *reprinted in* THE SUPREME COURT ON CHURCH AND STATE 20 (Robert S. Alley ed., 1988); see THE FEDERALIST No. 78, at 231 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (stating that the legislature should not enact "unjust and partial laws" which operate "to the injury of the private rights of particular classes of citizens"). For more on the framers' fear that special interest groups, or factions, would use the power of government to advance their own private interests at the expense of the general public, see GILLMAN, *supra* note 11, at 22-33; GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 193-200 (1981); WOOD, *supra* note 33, at 53-65; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1561 (1988).

43. For a general discussion of the ideology of equality in American politics between 1830 and 1860, see NELSON, *supra* note 7, at 13-20.

44. Benedict, *supra* note 11, at 317-18; see also LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 108-13 (1978); Paul Goodman, *The First American Party System, in THE AMERICAN PARTY SYSTEM: STAGES OF POLITICAL DEVELOPMENT* 78 (William N. Chambers & Walter Dean Burham eds., 1975).

45. *What the Whigs Want*, BANGOR DAILY WHIG AND COURIER, Sept. 3, 1839, at 16.

made opposition to legislative grants of monopolies and other special privileges the rallying cry of the modern Democratic party.⁴⁶

Jackson's 1832 message vetoing the recharter of the Second Bank of the United States stands as the single best expression of his party's position on partial or special legislation.⁴⁷ Jackson conceded that "[d]istinctions in society will always exist under every just government," for "[e]quality of talents, of education, or of wealth can not be produced by human institutions."⁴⁸ It was not the place of government, said he, to attempt to eradicate these natural differences in the fortunes of men, for "[i]n the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law."⁴⁹ But, he continued, "when the laws undertake to add . . . artificial distinctions" to the "natural . . . advantages" that some men enjoy over others, the other members of society "have a right to complain of the injustice of their Government."⁵⁰ Rather than imposing special benefits or burdens, government should "confine itself to *equal protection*, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor."⁵¹ It is time, he concluded, to "take a stand" against the "prostitution of our Government to the advancement of the few at the expense of the many."⁵²

During the first half of the nineteenth century, the state courts transformed this general aversion to partial or special laws, present in American political rhetoric from the founding, into positive law,

46. On the Jacksonian aversion to partial or special laws, see GILLMAN, *supra* note 11, at 33-45; WILLIAM LEGGETT, *DEMOCRATICK EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY 19-20* (Lawrence H. White ed., 1984); MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF 185-233* (1960); ROBERT REMINI, *THE AGE OF JACKSON* at xvi-xix (1972); ROBERT REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM: 1822-1832*, at 34 (1981); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 306-21 (1945); GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA* 95, 103 (1959); *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY: REPRESENTATIVE WRITINGS OF THE PERIOD 1825-1850*, at 75-76 (Joseph L. Blau ed., 1954); Benedict, *supra* note 11, at 318-21.

47. One of the principal authors of the veto message was Jackson's attorney general, Roger B. Taney, see SCHLESINGER, *supra* note 46, at 365-66, who would later serve as Chief Justice of the United States Supreme Court.

48. 3 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 1153.

49. *Id.*

50. *Id.*

51. *Id.* (emphasis added). This is the first known use of the phrase "equal protection" in American political rhetoric. See Yudof, *supra* note 10, at 1376; see also HARRIS, *supra* note 11, at 17. For another example from the same period, see Leggett, *True Functions of Government*, *supra* note 34, at 162, 163 (arguing that because "all men are equally important to the general welfare, and equally entitled to protection," government should not legislate to "elevate one class and depress another").

52. 3 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 1154.

as a state constitutional limitation on legislative power.⁵³ By the time of the Civil War, it had been incorporated into the constitutional law of nearly every state. Some states actually ratified constitutional provisions forbidding their legislatures to grant "to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."⁵⁴ In states whose constitutions were less explicit, the courts displayed considerable ingenuity in finding a constitutional basis for the prohibition against partial or special laws.⁵⁵ Some relied on provisions declaring 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,"⁵⁶ some on separation-of-powers provisions,⁵⁷ and some on "law of the land" or "due process" clauses.⁵⁸

53. The grounding of this limitation in the state constitutions, rather than their federal counterpart, was a matter of necessity: until the ratification of the Civil War amendments, the federal Constitution contained no language which could be read to impose a general prohibition against partial or special laws upon the states, though the Bill of Attainder and Contract Clauses of Article I, Section 10 could, of course, be interpreted to forbid certain *specific* kinds of partial laws.

54. See IND. CONST. of 1851, art. I, § 23, *reprinted in* 3 SWINDLER, *supra* note 34, at 379; see also IOWA CONST. of 1846, art. I, § 6, *reprinted in* 3 SWINDLER, *supra* note 34, at 435; OR. CONST. of 1857, art. I, § 21, *reprinted in* 8 SWINDLER, *supra* note 34, at 206.

55. See MOTT, *supra* note 28, at 267 (describing the state courts in this era as "groping" for some provision in their constitutions that could "serve as a prop" for this limitation).

56. *McRee v. Wilmington & Raleigh R.R. Co.*, 47 N.C. 179, 183 (1855) (relying on N.C. CONST. of 1776, Decl. of Rights, § 3, *reprinted in* 7 SWINDLER, *supra* note 34, at 402); see, e.g., *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19 (1856) (relying on CONN. CONST. of 1818, art. I, § 1, *reprinted in* 2 SWINDLER, *supra* note 34, at 144); *Hewitt v. Charier*, 33 Mass. (16 Pick.) 353 (1835) (relying on MASS. CONST. of 1780, Decl. of Rights, art. VI, *reprinted in* 5 SWINDLER, *supra* note 34, at 94); *Smith's Administrator v. Smith*, 2 Miss. (1 How.) 102 (1834) (relying on MISS. CONST. of 1832, art. I, § 1, *reprinted in* 5 SWINDLER, *supra* note 34, at 361).

57. See, e.g., *Durham v. Lewiston*, 4 Me. 140, 143-44 (1826) (relying on ME. CONST. of 1819, art. 3, §§ 1-2, *reprinted in* 4 SWINDLER, *supra* note 34, at 316); *Lewis v. Webb*, 3 Me. 326, 328-35 (1825) (same); *Ward v. Barnard*, 1 Aik. 121, 127 (Vt. 1825) (relying on VT. CONST. of 1793, chap. II, §§ 6, 9, *reprinted in* 9 SWINDLER, *supra* note 34, at 509-10). Citing the Blackstonian definition of "law," these courts argued that special laws were not really "laws" at all, but improper attempts by the legislature to exercise judicial powers. See, e.g., *Lewis*, 3 Me. at 331, 333 (arguing that a legislative resolution conferring a special right of appeal upon litigants in a particular case was not an act "of a legislative character" because it was not "general and prospective; a rule for all, and binding on all," but was instead "an act . . . of a judicial character, in the simple form of legislation" (emphasis added)); *Ward*, 1 Aik. at 127 ("An act conferring upon any one citizen, privileges to the prejudice of another, and which is not applicable to others, in like circumstances, in the language of the learned commentator upon the English law, does not enter into the idea of municipal law, having no relation to the community in general."). The reference was to Blackstone's definition of "municipal or civil law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong. . . . [N]ot a transient sudden order . . . to or concerning a particular person; but something permanent, uniform, and universal." 1 BLACKSTONE, *supra* note 33, at *44 (internal quotation marks omitted).

58. The courts of Tennessee took the lead in this respect. In a concurring opinion in a 1829 case, Justice Catron of the Tennessee Supreme Court suggested that the "law of the land" clause in that state's constitution, see TENN. CONST. of 1796, art. 11, § 8 ("That no free

The emergence of this doctrine against partial or special laws was perhaps "the chief constitutional development of pre-Civil War America,"⁵⁹ and it did not escape the notice of contemporary legal scholars. Chancellor Kent, author of a popular four-volume treatise on American law published in the 1820s, wrote that the laws should "have a general and equal application" and be "impartial in the imposition which [they] create[]."⁶⁰ Thomas Cooley's famous treatise on the limits of state legislative power, first published at mid-century, contained a long section on "unequal and partial legislation" that gathered together and organized the various state court cases invalidating such laws.⁶¹ In that section, Cooley declared it a basic "maxim" of state constitutional law that "[t]hose who make the laws 'are to govern by promulgated, established laws, not to be

man shall be . . . deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land"), *reprinted in* 9 SWINDLER, *supra* note 34, at 148, might be read to require that the laws be "equally binding upon every member of the community." *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260, 270 (1829) (Catron, J., concurring); *see also* *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 580-83 (1819) (argument of Daniel Webster) (suggesting that a law that "affect[s] only particular persons and their particular privileges" cannot be the "law[] of the land"). In two cases decided in 1831, the Tennessee court expressly relied on the "law of the land" clause to invalidate special or partial laws. *See Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 605 (1831) (Green, J.) ("By 'law of the land' is meant a general and public law, operating equally on every individual in the community." (emphasis omitted)); *Wally's Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554, 555 (1831) (The "'law of the land' means a general and public law, equally binding upon every member of the community." (emphasis omitted)). Courts in Maryland, Michigan, and Texas soon read similar limitations into the "law of the land" clauses of their state constitutions. *See Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365, 412 (Md. 1838) ("An act which only affects . . . a particular person, or his rights and privileges, and has no relation to the community in general," is not the "law of the land."); *Sears v. Cottrell*, 5 Mich. 251, 254 (1858) (stating that the "law of the land" clause requires that the laws be "general in their operation . . . affect[ing] the rights of all alike," and forbids special laws passed "to affect the rights of an individual . . . in a way in which the same rights of other persons are not affected"); *Janes v. Administrators of Reynolds*, 2 Tex. 250, 251-52 (1847) (stating that the "law of the land" clause requires that the laws be "general public laws, binding all the members of the community under similar circumstances," rather than "partial or private laws, affecting [only] the rights of private individuals, or classes of individuals"); *see also Reed v. Wright*, 2 Greene 15, 22-23 (Iowa 1849) (reading a similar limitation into the "law of the land" clause in a congressional ordinance governing the Northwest Territory). For more on the development of this branch of antebellum "law of the land" jurisprudence, *see* MOTR, *supra* note 28, at 260-74.

59. Yudof, *supra* note 10, at 1375 (citing F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 188 (1960)).

60. WILLIAM KENT, *MEMOIRS AND LETTERS OF JAMES KENT*, LL.D 163 (1898) (quoting from an opinion Kent wrote in 1816 in his capacity as a member of the Governor's Council of Revision).

61. *See* THOMAS M. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES IN THE AMERICAN UNION* 389-97 (3d ed. 1874). Though Cooley's treatise was first published just a few months after the ratification of the Fourteenth Amendment, its section on "unequal and partial legislation" did not purport to be an interpretation of the new amendment and made only passing reference to it, concentrating almost exclusively on state law prior to its adoption.

varied in particular cases, but to have one rule for rich and poor.”⁶² “Equality of rights, privileges, and capacities unquestionably should be the aim of the law,” said Cooley, for “[s]pecial privileges are always obnoxious, and discriminations against persons or classes are still more so.”⁶³

Though the antebellum state courts believed the state should have no favorites, they understood that the imposition of special benefits and burdens was often necessary to promote the general welfare,⁶⁴ and they were willing to tolerate laws singling out certain persons or classes of persons for special treatment when they could be justified on this ground. For example, state courts upheld legislative grants of exclusive rights to operate ferries, toll bridges, and the like, when they were satisfied that the legislature had awarded those rights on public grounds, rather than on the basis of mere favoritism or prejudice.⁶⁵ Similarly, they upheld laws subjecting persons engaged in certain business activities to special regulations for the general benefit.⁶⁶ On the other hand, they would not tolerate laws that singled out certain persons for special disadvantage merely because of their political opinions.⁶⁷

62. *Id.* at 392 (quoting Locke); *see also id.* (“[E]very one has a right to demand that he be governed by general rules, and a special statute which . . . singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation.”).

63. *Id.* at 393; *see also* *People v. Township Bd. of Salem*, 20 Mich. 452, 486 (1870) (Cooley, J.) (“[T]he discrimination by the State between different classes . . . and the favoring of one at the expense of the rest . . . is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in State government.”). For the influence of Jacksonian political theory on Cooley’s legal thought, *see* Jones, *Cooley and Laissez-Faire*, *supra* note 11; Jones, *Cooley and Michigan*, *supra* note 11.

64. *See, e.g.*, *Bradley v. New York & New Haven Ry.*, 21 Conn. 293, 307 (1851) (“It is universally understood to be one of the implied and necessary conditions upon which men enter into society and form governments, that sacrifices must sometimes be required of individuals for the general benefit of the community.”).

65. *See, e.g.*, *Enfield Toll Bridge Co. v. Hartford & New Haven R.R. Co.*, 17 Conn. 40 (1845) (toll bridge); *Pontchartrain R.R. Co. v. Orleans Navigation Co.*, 15 La. 404 (1840) (railroad); *Martin v. O’Brien*, 34 Miss. 21 (1857) (wharf); *see also* COOLEY, *supra* note 61, at 394-96 (asserting that “the State may grant privileges to specified individuals without violating any constitutional principle” when the existence of those privileges is “important” to the general welfare, yet their “nature” makes it “impossible” for them to “be possessed and enjoyed by all,” and citing, as an example, the privilege of operating a ferry or tollbridge).

66. *See, e.g.*, *Mayor of Mobile v. Yuille*, 3 Ala. 137, 142-43 (1841) (licensing law for bakeries); *Commonwealth v. Blackington*, 41 Mass. (24 Pick.) 352, 358 (1837) (law forbidding sale of “spiritous liquors” without a license); *Hewitt v. Charier*, 33 Mass. (16 Pick.) 353, 354-56 (1835) (law forbidding persons practicing surgery to charge for their services if they had not been licensed by the state); *see also* COOLEY, *supra* note 61, at 390 (asserting that laws imposing special regulations on common carriers and bankers are permissible, so long as the regulation is “for the general benefit”).

67. *See, e.g.*, *Mayor of Baltimore v. State ex rel. Bd. of Police*, 15 Md. 376, 484 (1860) (questioning the constitutionality of a law providing that “no *Black Republican* . . . shall be appointed to any office” within the jurisdiction of the Baltimore Board of Police); *see also*

The general principle that emerged from the cases was something like this: Courts would disfavor laws that singled out certain individuals or classes for special benefits or burdens but would uphold such laws upon a showing that the "discrimination" they worked was designed to further some legitimate "public purpose" — that is, to benefit the citizenry as a whole, as opposed to the purely "private" interests of a certain class.⁶⁸ Of course, distinguishing "discrimination" that had a legitimate "public purpose"

COOLEY, *supra* note 61, at 390-91 (asserting that a law denying certain persons the right to hold public office purely because of their political opinions would be an unconstitutional partial law).

68. See, e.g., *Blackington*, 41 Mass. (24 Pick.) at 358-59 (rejecting a partial law challenge to a law forbidding the sale of intoxicating liquors without a license on the ground that the law's "real object" was "to promote the public good," rather than to confer a special advantage on the licenseholders); *Hewitt*, 33 Mass. (16 Pick.) at 356 (rejecting a partial law challenge to a law conferring a special benefit on licensed medical practitioners on the ground that the law's "leading and sole purpose" was "to guard the public," rather than "to promote the[] private interests" of the licenseholders). The distinction was evidently between inequality as an end in itself and inequality as a means to some public end. See *Blackington*, 41 Mass. (24 Pick.) at 358-59 (holding that laws which have the "effect" of conferring special benefits upon certain persons are not invalid, so long as that effect is "collateral and incidental" to a "purpose . . . to promote the public good," rather than "one of the objects and purposes of the law"); *Hewitt*, 33 Mass. (16 Pick.) at 355-56 (stating that laws which have the "effect" of conferring special benefits on certain persons are not invalid, so long as that effect is "incidental, and not one of the purposes" of the law); see also Memorandum from Roger Taney to President Andrew Jackson (June 20, 1836), in CARL B. SWISHER, ROGER B. TANEY 366-67 (1935) ("It would be against the spirit of our free institutions . . . to grant peculiar franchises and privileges to a body of individuals merely for the purpose of enabling them more conveniently and effectually to advance their own private interests. . . . [s]uch peculiar privileges can be granted [with] the expectation and prospect of promoting thereby some public interest."); GILLMAN, *supra* note 11, at 49 (describing the standard as requiring proof that the special treatment is "really related to the welfare of the community as a whole," rather than being simply a "corrupt attempt[] to use the powers of government to advance purely 'private' interests"); *id.* at 54-58 (describing this "public purpose" standard).

As Dean Yudof points out, see Yudof, *supra* note 10, at 1385-86, this analysis bears a striking resemblance to the "public value" interpretation of orthodox equal protection jurisprudence put forth by Cass Sunstein and others. See Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 134-35 (arguing that "the essence of the equality principle that underlies the [Supreme] Court's equal protection jurisprudence" is that "[w]hen the government operates to benefit A and burden B," it must be "prepared to justify its decision by reference to a public value" — that is, to show that the discrimination represents an "attempt[] to remedy a perceived public evil," rather than merely a response "to the interests or preferences of some of its constituents"); see also Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 43-47 (1992) (illustrating that the Supreme Court's equal protection cases establish "that a state may not purposely prefer A over B for A's own sake," but only "to serve public purposes"); Richard S. Kay, *The Equal Protection Clause in the Supreme Court: 1873-1903*, 29 BUFF. L. REV. 667, 685-89, 696 (1980) (asserting that the Supreme Court's early equal protection cases established that "legislation imposing special burdens or granting special benefits" was valid only if the discrimination was shown to be merely a "means" to a "proper public justification," rather than the result of mere "favoritism" or "spite"); Tussman & TenBroek, *supra* note 11, at 358-59 (arguing that under orthodox equal protection jurisprudence, "[t]he imposition of special burdens, the granting of special benefits . . . can only be justified as being directed at the elimination of some social evil, the achievement of some public good," rather than being driven by the "proscribed motives" of "hate, prejudice, vengeance, [or] hostility" or "favoritism[] and partiality").

from that which was designed to advance only the special interests of a particular class was enormously difficult.⁶⁹ This distinction seems dubious to us today, steeped as we are in modern political theory's teaching that the democratic process is nothing but a struggle between competing interest groups and that all legislation is intended to favor one interest group at the expense of another.⁷⁰ But it was a distinction that made sense to lawyers and judges in antebellum America, and it was one with which the framers of the Fourteenth Amendment were intimately familiar.

The doctrine against partial or special laws was closely related to another limitation on state action widely recognized by the state courts in the antebellum period: the vested rights doctrine. The vested rights doctrine, which courts used to invalidate laws deemed to interfere with certain fundamental rights of liberty or property without adequate justification (or "arbitrarily"),⁷¹ has long been recognized as the progenitor of our modern law of substantive due

69. Simply distinguishing the public interest from the purely private presents enormous theoretical problems, as the U.S. Supreme Court discovered in applying a similar "public purpose" requirement in its *Lochner*-era substantive due process jurisprudence. See GILLMAN, *supra* note 11, at 10-11, 13-15, 76-103; TRIBE, *supra* note 3, §§ 8-5, 8-6. Identifying the purpose of a particular legislative act poses further difficulties, both definitional and empirical. See Robert W. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1071-77 (1979); Farrell, *supra* note 68, at 9-22. On the dangers of making the constitutional validity of a law turn on judicial inquiry into the motivation of those who enacted it, see *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); Brest, *supra* note 3, at 119-30; John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212-23 (1970).

70. Cf. NELSON, *supra* note 7, at 177 (noting that the nineteenth-century distinction between laws enacted for a public purpose and those enacted for the benefit of special interests "may not seem useful to modern political theorists who view all law as a product of interest-group conflict"); Sunstein, *supra* note 68, at 143-45 (noting the essential incompatibility between the public values standard utilized by orthodox equal protection jurisprudence and the interest group theory of legislation); Tussman & tenBroek, *supra* note 11, at 350 (same). For a summary of the literature on interest group theory and its contemporary variant, public choice theory, see Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873, 883-92 (1987).

71. See, e.g., *Wynehamer v. New York*, 13 N.Y. 378, 385-87 (1856); *Taylor v. Porter*, 4 Hill 140, 143-45 (N.Y. Sup. Ct. 1843); *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 24-26 (1833); *Trustees of the Univ. of N.C. v. Foy*, 3 N.C. (2 Hayw.) 310 (1804). A vested right was "[an] interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice." COOLEY, *supra* note 61, at 358; see also *id.* at 358-59 (asserting that vested rights are "the interests of which one cannot be deprived by the mere force of legislative enactment" but only through judicial proceedings). On the development of the vested rights doctrine, see Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914) [hereinafter Corwin, *Basic Doctrine*]; Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pts. 1 & 2), 24 HARV. L. REV. 366, 460 (1911) [hereinafter Corwin, *Due Process*]; Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures* (pt. 1), 2 TEXAS L. REV. 257, 275-90 (1924).

process.⁷² Like the doctrine against partial or special laws, the vested rights doctrine was often derived from the law of the land or due process clauses of the antebellum state constitutions.⁷³ The two doctrines overlapped a good deal in application, and many laws, particularly those that regulated economic relations, were, if skillfully characterized, vulnerable to challenge under both.⁷⁴ The two doctrines also employed a common standard of justification: courts would uphold both partial or special laws and those that interfered with vested rights upon a showing that the inequality or interference they worked served some legitimate public purpose, as opposed to merely the special interests of a particular class.⁷⁵ For these reasons, laissez-faire constitutionalists of the late nineteenth century merged them into a single doctrine forbidding legislation designed to advance the interests of a certain class, rather than the public as a whole.⁷⁶ But lawyers and judges of the antebellum period saw them as two separate limitations on legislative power: one addressed to laws that singled out certain persons or classes of persons for special benefits or burdens without adequate justification; the other to laws that, though equally applicable to all, deprived individuals of certain fundamental interests in liberty or property without adequate justification.⁷⁷ The Thirty-ninth Congress carried

72. For more on the link between the antebellum doctrine of vested rights and modern substantive due process analysis, see Haines, *supra* note 71, at 397-405; Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures* (pt. 3), 3 TEXAS L. REV. 1 (1924); Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583 (1930); Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125 (1956). See also HOWARD JAY GRAHAM, *EVERYMAN'S CONSTITUTION* 242-65 (1968); MOTT, *supra* note 28, §§ 82-83.

73. See Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures* (pt. 2), 2 TEXAS L. REV. 387, 393-96 (1924); Howe, *supra* note 72, at 596-600; Maltz, *supra* note 24, at 317; Mendelson, *supra* note 72, at 125.

74. See, e.g., *Durham v. Lewiston*, 4 Me. 140, 143-44 (1826) (challenging the same law on both grounds); *Lewis v. Webb*, 3 Me. 326, 331-37 (1825) (same); see also Corwin, *Due Process*, *supra* note 71, at 381-83 (noting that the North Carolina Supreme Court's decision in *Foy* could have been based on either doctrine). On the overlap between the vested rights doctrine and the doctrine against partial or special laws, see MOTT, *supra* note 26, §§ 100, 102.

75. See GILLMAN, *supra* note 11, at 49-50.

76. See NELSON, *supra* note 7, at 182 (observing that during the late nineteenth century, the Supreme Court "conflated" these two separate limitations on legislative power into "a single line of doctrine prohibiting unequal and unreasonable regulations").

77. See, e.g., *Bull v. Conroe*, 13 Wis. 260, 266-69 (1860); *Lewis*, 3 Me. at 331-37. The point emerges quite clearly from Cooley's treatise. His chapter on "law of the land" jurisprudence dealt with the two doctrines separately. See COOLEY, *supra* note 61, at 355-89 (vested rights doctrine); *id.* at 389-97 (doctrine against unequal and partial laws). Cooley's explanation of the vested rights doctrine made clear that he regarded it as something separate and distinct from the doctrine against partial or special laws:

this dichotomy forward in the Equal Protection and Due Process Clauses of the Fourteenth Amendment,⁷⁸ and it survives even today in the distinction drawn between equal protection and substantive due process review.⁷⁹

The antebellum state constitutional doctrine against partial or special laws, fairly applied, would have justified the invalidation of most laws subjecting African Americans to special disadvantage. But the antebellum state courts — even those in the North — were generally unwilling to invoke the doctrine to that end.⁸⁰ Nor did the Jacksonians extend their antipathy toward partial or special

[G]eneral rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled . . . to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, which condemns it as unknown to the law of the land.

Id. at 355. Modern students of the era consistently describe the two doctrines as separate limitations on legislative power. *See, e.g.,* GILLMAN, *supra* note 11, at 49-50; CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 31-32 & n.16 (1954); Corwin, *Basic Doctrine*, *supra* note 71, at 258-59; Corwin, *Due Process*, *supra* note 71, at 382-83; Haines, *supra* note 71, at 393-97; Maltz, *supra* note 24, at 317 & nn.49-52; *Developments: State Constitutions*, *supra* note 11, at 1465.

78. *Cf.* Corwin, *Basic Doctrine*, *supra* note 71, at 258-59 (suggesting the Fourteenth Amendment's Equal Protection Clause "takes its rise" from the antebellum doctrine against "partial" or "special" laws).

79. *See* 2 ROTUNDA & NOWAK, *supra* note 2, § 14.7, at 370-71, § 15.4, at 399-400 (drawing a distinction between equal protection and due process analysis); Brest, *supra* note 3, at 107 (stating that to "trigger" equal protection review, a plaintiff must demonstrate that the challenged law "operates . . . to his comparative disadvantage," whereas to trigger substantive due process review, he must only allege that it "operates to his disadvantage" (emphasis added)); Lupu, *supra* note 11, at 1001 n.98 (arguing that equal protection review "speaks to the permissibility of classification bases, and to no more," whereas substantive due process review "speaks to substantive liberties, without direct regard to the inequality of their distribution," though "inequality may enter the analysis at the level of evaluating the state's justification for restricting the liberty"); *Developments: State Constitutions*, *supra* note 11, at 1473-74 (describing the difference between equal protection and substantive due process review).

80. *See, e.g.,* Jackson v. Bulloch, 12 Conn. 38, 42-43 (1837) (rejecting the argument that the "no exclusive privileges" provision in the Connecticut Constitution outlawed slavery in the state); Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 209-10 (1849) (rejecting the argument that a law mandating racial segregation in the public schools violated the equality provision in the Massachusetts Constitution); State v. Manuel, 20 N.C. (Dev. & Bat.) 144, 163-64 (1838) (rejecting the argument that a statute singling out free Blacks for special criminal penalties violated the "law of the land" and "no exclusive privileges" clauses of the North Carolina Constitution). As J.H. Martindale, New York's Republican Attorney General, wrote to Senator John Sherman during the framing of the Fourteenth Amendment, "nearly all the precedents in the General [and] State [Governments] up to the time of the [thirteenth] amendment . . . have recognized the power to classify the inhabitants of African descent and to deprive them of political [and] civil rights." Letter from J.H. Martindale to John Sherman (May 12, 1866), quoted in NELSON, *supra* note 7, at 128 & n.67. *But see* Fisher's Negroes v. Dabbs, 14 Tenn. (6 Yer.) 119, 137-140 (1834) (invoking the doctrine against partial or special laws to invalidate a law operating to the special disadvantage of certain former slaves).

laws to these laws. Few Jacksonian Democrats believed Blacks were entitled to equality before the law, and Jackson himself most certainly did not.⁸¹ But the leaders of the youthful antislavery movement were well aware of the antebellum distaste for laws singling out certain classes of persons for special benefits or burdens, and they soon put it to use in the service of their cause. In the process, they changed the rhetoric of the movement in a way that would have profound implications for the Equal Protection Clause, by divorcing it from the notion that race had no legitimate place in governmental decisionmaking.

When the American antislavery movement first gained national prominence in the 1830s, its leadership was dominated by members of the clergy, who couched their arguments chiefly in moral terms that stressed the wrong being done the slaves themselves.⁸² In the 1840s and 1850s, however, lawyers and politicians transformed the movement from a moral crusade into a national political campaign, ultimately embodied in the Republican party, by crafting arguments with broader popular appeal.⁸³ One of their principal tactics was to characterize southern slaveholders as the kind of special interest group against which the Jacksonians had railed. This "aristocracy of slave holders," or "Slave Power," so the argument went, had seized control of the federal government and was manipulating it to advance its own interests at the expense of the rest of the country. If the "Slave Power" were not curtailed, it would soon abolish true republican government and threaten the liberty of all nonslaveholding Americans.⁸⁴

Antislavery leaders consciously designed the Slave Power argument to appeal to those who did not believe in the fundamental equality of the races, by stressing the threat slavery posed to the interests of nonslaveholding Whites, rather than the wrong it did to the slaves themselves.⁸⁵ The argument proved spectacularly suc-

81. See J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 146 (1978); Yudof, *supra* note 10, at 1379.

82. See GRAHAM, *supra* note 72, at 163-69; TENBROEK, *supra* note 24, at 94-95.

83. See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-74* (1970); GRAHAM, *supra* note 72, at 168-85.

84. For a more complete discussion of the Slave Power argument, see FONER, *supra* note 83, at 87-102. Senator Thomas Morris of Ohio, a Jacksonian Democrat with a long history of opposition to special privileges for business interests, first popularized the argument. In a widely publicized speech on the Senate floor in February of 1839, Morris equated the Slave Power with the Money Power of Jackson's day, calling it the "goliath of all monopolies," and warned that it posed an equally great threat to the liberty of ordinary Americans. See *id.* at 90-91.

85. See *id.* at 99. On the closely-related "free labor" argument, see *id.* at 40-72, 58-65.

cessful in this respect, and each of the three successive political parties that grew out of the antislavery movement made prominent use of it: the Liberty Party used it in the early 1840s, the Free Soil party in 1848, and the Republican Party in the 1850s.⁸⁶

The Slave Power argument resonated deeply with Jacksonian Democrats, and it attracted many of their number to the antislavery cause.⁸⁷ In the mid-1850s, thousands of these heirs of the Jacksonian political tradition left the Democratic Party for the Republican Party, driven by the belief that the former was "no longer the champion of popular rights that it had been in Jackson's day," but had become "the tool of a slave-holding oligarchy."⁸⁸ By 1856, former Democrats made up a substantial portion of the Republican Party's membership in the northern and western states.⁸⁹ They were disproportionately well-represented in the party's leadership ranks,⁹⁰ and they played a major role in the development of its policies and ideology.⁹¹

The former Democrats in the early Republican party shared two attributes that would prove influential in shaping the Fourteenth Amendment's Equal Protection Clause. First, unlike Republicans

86. See *id.* at 92-98; see also FREE SOIL PLATFORM OF 1848, reprinted in NATIONAL PARTY PLATFORMS 22, 22-24 (Kirk H. Porter ed., 1924); LIBERTY PLATFORM OF 1844, reprinted in NATIONAL PARTY PLATFORMS, *supra*, at 7, 10-11; REPUBLICAN PLATFORM OF 1856, reprinted in NATIONAL PARTY PLATFORMS, *supra*, at 47, 47-48; REPUBLICAN PLATFORM OF 1860, reprinted in NATIONAL PARTY PLATFORMS, *supra*, at 55, 57.

87. See CONG. GLOBE, 35th Cong., 2d Sess. 1267 (1859) (statement of Sen. James Doolittle) ("The same men who, when the United States Bank undertook to enforce its recharter, organized to put it down, are [now] organizing to put down a similar despotism which seeks to-day to control the administration of this Federal Government . . ."); FONER, *supra* note 83, at 150-75.

88. FONER, *supra* note 83, at 177 (quoting David Dudley Field). For more on the mass influx of Jacksonian Democrats into the Republican Party in the 1850s, see *id.* at 149-85.

89. See *id.* at 163-66.

90. See *id.* at 165-66. For example, Francis and Montgomery Blair, Matthew Carpenter, James Doolittle, David Dudley Field, Stephen J. Field, Hannibal Hamlin, Preston King, Lot Morrill, Lyman Trumbull, Gideon Welles, and David Wilmot were all former Democrats. See *id.* at 149 & nn.1-2; MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869, at 61 (1974); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 46 (1960).

91. See FONER, *supra* note 83, at 168-85.

who were former Conscience Whigs⁹² or Liberty Party⁹³ men, they came from a political tradition that was decidedly hostile to Black rights.⁹⁴ They based their opposition to slavery more on fear of its political, economic, and social consequences than on moral objections to the institution itself,⁹⁵ and many of them were quite openly racist.⁹⁶ On the other hand, they harbored an abiding conviction that government should not play favorites, and a corresponding distaste for all state action that singled out certain classes of persons for special benefits or burdens.⁹⁷ In the early years of Reconstruction, this distaste was often strong enough to overcome their racial prejudices, leading them to support measures — like the Civil Rights Act of 1866 and the Fourteenth Amendment — that were designed to prevent the states from subjecting African Americans to special disadvantage. But it is a mistake to conclude that they supported these measures because they saw race as irrelevant to any legitimate governmental objective, for they plainly did not hold that view. They supported the measures for a very different reason:

92. The Conscience Whigs were a radical faction of the Massachusetts Whig Party during the 1840s. Led by Charles Sumner and Henry Wilson, they devoted themselves to urging the Massachusetts Whig Party to break with the southern Whigs and adopt an antislavery position. When this effort failed, the Conscience Whigs left the Whig Party for the Free Soil Party, where they continued to agitate for adoption of an antislavery platform. By the early 1850s, most of the Conscience Whigs had become members of the Republican Party. See KINLEY J. BRAUER, *COTTON VERSUS CONSCIENCE* 17-18, 129 (1967); FONER, *supra* note 83, at 104, 113, 117-18, 124; Frank O. Gatell, *Conscience and Judgment: The Bolt of the Massachusetts Conscience Whigs*, 21 HISTORIAN 18 (Nov. 1958).

93. The Liberty Party was a national political party founded in 1839 by a group of New York abolitionists who had become frustrated with the persistent failure of the existing national parties — the Whigs and the Democrats — to take a stand against slavery. The party was active in the North and West throughout the 1840s. In the Northeast, it was dominated by religious abolitionists, who denounced slavery as morally and religiously abhorrent and called upon the federal government to abolish it immediately throughout the United States. In the West, the party was led by Salmon Chase of Ohio, who agreed with the eastern abolitionists that slavery was morally wrong, but believed the federal government lacked constitutional authority to abolish it in the states. Chase and his followers did, however, consistently urge the repeal of state laws that discriminated against Blacks. Many members of the Liberty Party joined the Free Soil Party in 1848 and became members of the Republican Party in the early 1850s. See FONER, *supra* note 83, at 78-82, 124-25, 281-82.

94. See *id.* at 267, 281-82; ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* 79, 92 n.38 (1980).

95. See FONER, *supra* note 83, at 60; FONER, *supra* note 94, at 81-85.

96. See FONER, *supra* note 83, at 261-62, 266-67. Of course, racial prejudice was virtually universal in the Republican Party at that time, as it was in antebellum America generally. See *id.* at 261; LEON F. LITWACK, *NORTH OF SLAVERY* 15-29 (1961); NELSON, *supra* note 7, at 96-100; V. JACQUE VOEGEL, *FREE BUT NOT EQUAL: THE MIDWEST AND THE NEGRO DURING THE CIVIL WAR* 1-9 (1967). The former Democrats, however, were the "most extreme" racists in the Republican party. See FONER, *supra* note 83, at 267. On the racial attitudes of these former Democrats, see LAWANDA COX & JOHN H. COX, *POLITICS, PRINCIPLE, AND PREJUDICE 1865-1866*, at 54-55, 214-19 (1963).

97. See FONER, *supra* note 83, at 168-69; NELSON, *supra* note 7, at 16.

because they saw the measures as logical applications of a broader principle that lay at the heart of their political philosophy — that government should not use its power to create favored or disfavored classes of citizens, but should confine itself to the “equal protection” of all.

II. THE FRAMING AND RATIFICATION OF THE EQUAL PROTECTION CLAUSE: NATIONALIZING THE ANTEBELLUM TRADITION

The legislative history of the Equal Protection Clause is rich and complex,⁹⁸ and anyone who approaches it with the hope of finding concrete answers to specific legal problems is bound to be disappointed. Those who drafted the clause and secured its ratification “did not view themselves as involved in the task of delineating a logical and coherent set of legal doctrines,” but rather of devising a plan for the reconstruction of the Union that would secure the principles for which the North had fought the Civil War.⁹⁹ Their comments on the clause were generally designed to garner support for it, rather than to shape its future interpretation,¹⁰⁰ and they often had difficulty explaining the concepts they understood it to embody. But they did understand the language of the Equal Protection Clause to mean something. While that understanding often

98. There is an extensive literature on the framing and ratification of the Fourteenth Amendment. See, e.g., CHESTER JAMES ANTIEAU, *THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT* (1981); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956) [hereinafter JAMES, FRAMING]; JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1984); MALTZ, *supra* note 26; HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* (1977); NELSON, *supra* note 7, at 41-147; TENBROEK, *supra* note 24, at 201-34; Alfred Avins, *The Equal “Protection” of the Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 29-65 (1955); Charles Fairman, *Reconstruction and Reunion 1864-88*, in 6 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1207-300 (Paul A. Freund ed., 1971); Frank & Munro, *supra* note 10; Graham, *Declaratory*, *supra* note 24; Kelly, *supra* note 11; Earl M. Maltz, *The Fourteenth Amendment as Political Compromise: Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984). All of this literature draws upon the same basic primary sources: the debates of the Reconstruction Congresses, as reported in the Congressional Globe, and the deliberations of the Joint Committee of Fifteen on Reconstruction, as recorded by the Committee’s clerk, George Mark, in THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, reprinted in BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 37-129 (1914). Some of the more recent work — like that of Chester Antieau, William Nelson, and Joseph James — also considers the state ratification debates, the private papers of key members of the Reconstruction Congresses, and newspapers accounts, judicial opinions, and legal commentary from the Reconstruction era.

99. Yudof, *supra* note 10, at 1370; see also NELSON, *supra* note 7, at 8-9, 61-62, 110-11.

100. See BAER, *supra* note 11, at 73-74.

existed only at the level of general principle,¹⁰¹ it is difficult to square with the interpretation of the clause advanced by the majority in the recent racial gerrymandering cases.

In this part, I argue that the framers and ratifiers of the Fourteenth Amendment did not understand or intend its Equal Protection Clause to call into constitutional question any and all forms of race-conscious action. Indeed, they repeatedly rejected proposals that would have done that, opting instead for one that would do nothing more than nationalize the doctrine against partial or special laws already being recognized by many state courts. They recognized, and most certainly intended, that this provision would, when coupled with the amendment's "citizenship" clause, invalidate most state laws subjecting African Americans to special disadvantage because of their race. But the rule they adopted was not confined to that narrow purpose, and the vice at which it struck was not the consideration of race per se but rather the use of governmental power to single out certain classes of persons for special benefits or burdens.¹⁰²

My discussion focuses primarily on the work of the Thirty-ninth Congress, which drafted the Fourteenth Amendment and sent it to the states for ratification.¹⁰³ As modern historians have demon-

101. See NELSON, *supra* note 7, at 7, 80.

102. Several commentators have argued that the state constitutional prohibitions against partial or special laws and the Equal Protection Clause of the Fourteenth Amendment were aimed at different evils: the former at the practice of singling out certain favored classes for special benefits, and the latter at the practice of singling out certain disfavored classes for special burdens. See Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 141-42 (1970); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEXAS L. REV. 1195, 1207-08 (1985). The problem with this argument is that the decision to extend a special benefit to one group always has the effect of imposing a relative burden on everyone else. See Correspondence between the House of Representatives of the State of Maine and the Supreme Judicial Court of Maine, 58 Me. 590, 593 (1871) (opinion of Appleton, C.J., Walton, & Danforth, JJ.) (observing that "a discrimination in favor of one . . . is a discrimination adverse to all other[s]"); *Developments: Equal Protection*, *supra* note 3, at 1086 n.47 ("[W]hen a benefit is extended to one group but refused to another, the excluded group may be seen as suffering a relative burden."); *id.* at 1110-11, 1163. Once we realize this, it becomes clear that both the Equal Protection Clause and its state constitutional predecessors were in fact aimed at the same basic evil: the practice of singling out certain classes for special benefits or burdens. Cf. *Truax v. Corrigan*, 257 U.S. 312, 332-33 (1921) (stating that the Equal Protection Clause was "aimed at undue favor and individual or class privilege on the one hand, and at hostile discrimination or the oppression of inequality, on the other").

103. In addition to the legislative history of the Fourteenth Amendment itself, my discussion considers that of several related proposals that also came before the Thirty-ninth Congress: the two Freedmen's Bureau Bills; the Civil Rights Act of 1866; a proposed constitutional amendment dealing with the representation question, drafted by James Blaine, a Maine Republican; and a proposed civil rights amendment drafted by the Ohio Republican John Bingham. I have also considered the congressional debates on the Fifteenth Amendment and the various civil rights bills of the early 1870s, all of which provoked extensive

strated, the Republican majority in the Thirty-ninth Congress was dominated not by radicals like Thaddeus Stevens and Charles Sumner but by a coalition of moderates and conservatives, many of whom were former Jacksonian Democrats.¹⁰⁴ Like their more radical brethren, these Republicans, led by Bingham and Blaine in the House and Trumbull and Fessenden in the Senate, believed the federal government should take some action to protect the rights of the newly emancipated slaves. But they parted company with the radicals on how far the federal government should go in taking such action; while they agreed that it should guarantee Blacks the same "civil" rights as everyone else, few believed it should guarantee them the same "political" rights, and fewer still that it should guarantee them full "social" equality.¹⁰⁵ Their more cautious approach to Black rights stemmed in part from their sense of political expediency,¹⁰⁶ in part from their own racial prejudices,¹⁰⁷ and in part from their deeply held concern for states' rights, which gave them a corresponding fear of any move to expand the power of the federal government.¹⁰⁸

discussion of the meaning of the Equal Protection Clause by those who either participated in or were present at its framing and ratification.

104. See BENEDICT, *supra* note 90, at 21-58; WILLIAM R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-67, at 153-211 (1963); COX & COX, *supra* note 96, at 172-232; DAVID DONALD, THE POLITICS OF RECONSTRUCTION, 1863-1867, at 53-82 (1965); JAMES M. MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION 341-56 (1964); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877, at 84 (1965); Fairman, *supra* note 98, at 253-364.

105. See FONER, *supra* note 83, at 290-95; MALTZ, *supra* note 98, at 935-36. To these Republicans, "civil" rights included the rights to make and enforce contracts; to buy, lease, inherit, hold, and convey property; and to sue, be sued, and give evidence in court. By contrast, they considered the rights to vote, to hold office, and to serve on juries to be "political" rights. For more on the distinction between civil, political, and social rights, see BERGER, *supra* note 98, at 27-36; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 41-54 (1986); K.C. Cerny, *Appendix to the Opinion of the Court*, 6 HASTINGS CONST. L.Q. 455, 460-61 (1979); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1023-29 (1995).

106. As these Republicans were well aware, most American voters of that era — even those who favored abolition of slavery — were hostile to the position that Blacks were entitled to full social and political equality. See FONER, *supra* note 83, at 262-67; MALTZ, *supra* note 26, at 2, 5, 10. Most of the free states still had laws singling Blacks out for special disadvantage, and a number of them — Illinois, Indiana, and Oregon — had recently adopted measures prohibiting the immigration of free Blacks. See EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY (1967); LITWACK, *supra* note 96, at 64-112.

107. See FONER, *supra* note 83, at 266-67; MALTZ, *supra* note 26, at 2. For more on the racial attitudes of the Reconstruction Republicans, see FONER, *supra* note 83, at 261-300; C. VANN WOODWARD, AMERICAN COUNTERPOINT: SLAVERY AND RACISM IN THE NORTH-SOUTH DIALOGUE 163-71 (1971); MALTZ, *supra* note 24, at 306-07; MALTZ, *supra* note 98, at 935-37.

108. See MALTZ, *supra* note 26, at 29-36, 52-60, 90-91; HYMAN & WIECEK, *supra* note 26, at 394-96.

A. *The Vice of the Black Codes*

Those who read the Equal Protection Clause as rendering all race-based state action presumptively unconstitutional rely primarily on the specific historical events that precipitated its addition to the Constitution. They note that the Thirty-ninth Congress's most immediate concern was the Black Codes, which singled out the newly emancipated slaves for a wide variety of special disadvantages based on their race.¹⁰⁹ Because the framers of the Equal Protection Clause intended it to invalidate these race-based laws, they reason, the framers must have intended the clause to repudiate the whole enterprise of regulating people by race. The Equal Protection Clause, they conclude, must therefore render all race-based state action presumptively unconstitutional.¹¹⁰

Examination of the record of the Thirty-ninth Congress, however, reveals that few of the members who objected to the Black Codes did so on the ground that race had no proper place in governmental decisionmaking.¹¹¹ Some found the Codes offensive because they reduced the freedmen to a condition approaching involuntary servitude, thereby undermining the command of the Emancipation Proclamation and the Thirteenth Amendment.¹¹²

109. The Black Codes of the South, which the states of the former Confederacy were passing as the Thirty-ninth Congress gathered in December of 1865, responded to the Emancipation Proclamation and the Thirteenth Amendment. But the Codes were not unique to the South: many of the free states already had similar laws in place. See LITWACK, *supra* note 96, at 15-20, 64-112. Most of the Black Codes were explicitly race-based; others, such as vagrancy and apprenticeship laws, were facially race-neutral, but had the purpose and effect of keeping the newly emancipated slaves in a system of "virtual peonage." See Paul R. Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 472-77 (1982). For more on the Black Codes, see 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (1960); ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 48-73 (1983); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 199-201 (1988); EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 29-44 (1871); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965); Fairman, *supra* note 98, at 110-17.

110. See, e.g., William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

111. See BAER, *supra* note 11, at 83 (noting that "for most speakers, what made the [Black Codes] so odious was not that [they] based classification on race as opposed to some other characteristic"). Indeed, as Eric Schnapper has pointed out, the Thirty-ninth Congress actually passed a number of pieces of legislation that were explicitly race-based. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 753-88 (1985).

112. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1621-22 (1866) (statement of Rep. Myers (R-Penn.)) (suggesting that Black Codes "impose by indirection a servitude which the Constitution now forbids"); CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer (R-Penn.)) (arguing that Black Codes are being used to "reduce this class of people to the condition of bondmen"); CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866)

Others complained that they denied the freedmen rights that were inherent in their citizenship¹¹³ or belonged to all free men as a matter of natural law.¹¹⁴ Still others opposed the Codes because they “discriminated against” the freedmen by singling them out for special disadvantage.¹¹⁵

This last objection enjoyed considerable currency with the moderate to conservative Republicans who controlled the Thirty-ninth Congress. Senator Lyman Trumbull of Illinois, who “virtually defined the conservative edge of the Republican mainstream,”¹¹⁶ attacked the Codes for “depriv[ing] [some] citizen[s] of civil rights which are secured to other citizens.”¹¹⁷ Senator William Pitt Fessenden of Maine, the conservative leader of the Republican majority in the Senate, called them impermissible “class legislation.”¹¹⁸

(statement of Rep. Cook (R-Ill.)) (arguing that the Black Codes “practically reduc[e] these men to the condition of slavery”); CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866) (statement of Sen. Wilson (R-Mass.)) (arguing that Black Codes “make slaves of men whom we have made free”); CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard (R-Mich.)) (stating that Black Codes reduce the freedmen “to a condition infinitely worse than that of actual slavery”); CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (statement of Sen. Wilson) (stating that Black Codes “practically make the freedman a peon or a serf”); CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865) (statement of Sen. Wilson (R-Mass.)) (arguing that Black Codes “practically make slaves of men we have declared to be free”).

113. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. S. app. 217 (1866) (statement of Sen. Howe (R-Wis.)) (stating that Black Codes deny “the plainest and most necessary rights of citizenship”); CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer (R-Penn.)) (stating that Black Codes withhold “the fundamental rights of citizenship”).

114. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull (R-Ill.)) (arguing that Black Codes deny “privileges which are essential to freemen”); CONG. GLOBE, 39th Cong., 1st Sess. 3034 (1866) (statement of Sen. Henderson (R-Mo.)) (stating that Black Codes deny the freedmen “the commonest rights of human nature”). To Americans of this generation, the “natural rights of men” were the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (1826).

115. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3034 (1866) (statement of Sen. Henderson (R-Mo.)) (arguing that Black Codes subject the freedmen to “unequal burdens”); CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton (R-Ill.)) (arguing that Black Codes “discriminat[e] against” the freedmen, by subjecting them to restrictions that “do not operate against the white men”).

116. MALTZ, *supra* note 26, at 48.

117. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (asserting additionally that the Codes violated Blackstone’s admonition that “ ‘the restraints introduced by the law should be equal to all’ ”). Trumbull was referring to a passage in Blackstone’s *Commentaries* that attempted to define political or civil liberty. *See* 1 BLACKSTONE, *supra* note 33, at *126-27. The phrase Trumbull quoted, however, was not written by Blackstone himself, but by one of his many editors: it appears in an editorial footnote in most editions of the *Commentaries* published in America in the first half of the nineteenth century. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90-91 n.5 (J.B. Lippincott & Co., Philadelphia, 1855); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122-23 n.3 (Robert H. Small, Philadelphia, 1825).

118. CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866); *see also* CONG. GLOBE, 39th Cong., 1st Sess. H. app. 156 (1866) (statement of Rep. Delano (R-Ohio)) (referring to “unequal” and “discriminating” laws); CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (statement of

Even President Andrew Johnson suggested that he found the Codes objectionable for this reason: in his December 1865 State of the Union address, he declared that “there is no room for favored classes or monopolies,” for “the principle of our Government is that of equal laws,” which “accord ‘equal and exact justice to all men,’ special privileges to none.”¹¹⁹

The initial package of legislation the Republican leadership in the Thirty-ninth Congress offered to deal with the Black Codes — comprised of a Freedmen’s Bureau Bill and a Civil Rights Bill, both drafted by Trumbull — strongly suggests that its members did not find the Codes offensive simply because they were race based. Neither of these bills actually forbade the states to take race into account in governing. Instead, they forbade the states to “discriminate against” certain persons because of their race — that is, to single them out for certain kinds of special disadvantages. The Freedmen’s Bureau Bill, for example, made it a federal criminal offense for persons acting “under color of any State or local law” to “discriminate[] against” any “negro, mulatto, freedman, refugee, or other person” because of their “race or color,” by subjecting them “to the deprivation of any civil right secured to white persons, or to any other or different punishment than white persons are subject to for the commission of like acts or offenses.”¹²⁰ Along the same lines, the Civil Rights Bill declared that “there shall be no *discrimination* in civil rights or immunities . . . on account of race . . . but the

Sen. Poland (R-Vt.) (referring to “partial legislation”); *The Proposed Amendment to the Constitution*, N.Y. COM. ADVERTISER, Jan. 23, 1866, at 2 (referring to “class legislation”).

119. 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 361-62 (Dec. 4, 1865). Johnson continued to proclaim his opposition to laws that singled out the freedmen for special disadvantage even as he vetoed the Civil Rights Act of 1866. His veto message asserted that he was still willing to “cooperate with Congress in any measure that may be necessary for the protection of the civil rights of the freedmen, as well as those of all other classes of persons throughout the United States, by judicial process, under equal and impartial laws.” 5 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 413 (Mar. 27, 1866).

120. Freedmen’s Bureau Bill, S. 60, 39th Cong., *reprinted in* CONG. GLOBE, 39th Cong., 1st Sess. 209-10 (1866) (emphasis added). The bill also contained provisions that would have extended the life and jurisdiction of the Freedmen’s Bureau and authorized it to provide special assistance to Blacks and refugees. *See* Freedmen’s Bureau Bill, S. 60, 39th Cong., *reprinted in* CONG. GLOBE, 39th Cong., 1st Sess. 209-10 (1866); *see also* Schnapper, *supra* note 111, at 762-63. The bill passed both houses of Congress, *see* CONG. GLOBE, 39th Cong., 1st Sess. 688 (1866) (House vote); CONG. GLOBE, 39th Cong., 1st Sess. 421 (1866) (Senate vote), but President Johnson vetoed it, *see* 5 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 398-405 (Feb. 19, 1866). An attempt to override the veto failed by a narrow margin in the Senate. *See* CONG. GLOBE, 39th Cong., 1st Sess. 943 (1866). After sending the Fourteenth Amendment to the states, the Thirty-ninth Congress passed another Freedmen’s Bureau Bill, H.R. 613 — considerably narrower than S. 60 — over the veto of President Johnson. *See* Act of July 16, 1866, ch. 200, 14 Stat. 173; CONG. GLOBE, 39th Cong., 1st Sess. 3850 (1866) (House vote); CONG. GLOBE, 39th Cong., 1st Sess. 3842 (1866) (Senate vote).

inhabitants of every race and color . . . shall have the same right[s] . . . and . . . be subject to like punishment, pains, and penalties."¹²¹

Time and again, supporters of the Civil Rights Bill assured their colleagues that its antidiscrimination provision was aimed only at state action that singled out certain persons for special disadvantages. Trumbull said the provision would "have no operation in any State where the laws are equal."¹²² Representative James Wilson, the Iowa Republican who sponsored the bill in the House, said it would mean only that

[w]hatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another. One class shall not be required to support alone the burdens which should rest on all classes alike. This is the spirit and scope of the bill, and it goes not one step beyond.¹²³

Representative Shellabarger, an Ohio Republican, said it would mean that

whatever rights . . . the States may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive [citizens] of the right to sue or contract or testify . . . [b]ut if you do so . . . as to one race, you shall treat the other likewise.¹²⁴

Perhaps the best evidence that the Republican leadership in the Thirty-ninth Congress did not find governmental consideration of race offensive, in and of itself, lies in its responses to the suggestion, made repeatedly by members of the Democratic opposition, that Trumbull's bills would invalidate laws forbidding interracial marriage.¹²⁵ The leadership's response was a simple one: The bills

121. Civil Rights Bill, S. 61, 39th Cong., *reprinted in* CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (emphasis added). This bill, as modified, would become the Civil Rights Act of 1866, passed by the Thirty-ninth Congress over President Johnson's veto. *See* Act of April 9, 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981, 1982 (1994)). The final version of the bill omitted the broad "antidiscrimination" clause which had appeared in its original version, *see* CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866), because Democrats and moderate Republicans voiced concern that it could be interpreted to outlaw racial discrimination in suffrage, jury service, and education. *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham (R-Ohio)); CONG. GLOBE, 39th Cong., 1st Sess. 1270-71 (1866) (statement of Rep. Kerr (D-Ind.)).

122. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (statement of Sen. Trumbull (R-Ill.)) (this bill "simply declares that in civil rights there shall be an equality among all classes of citizens," that "all alike shall be subject to the same punishment," and that the "laws shall be impartial").

123. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson (R-Iowa)).

124. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger (R-Ohio)); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard (R-Mich.)) (stating that the bill "simply gives to persons who are of different races or colors the same civil rights").

125. *See, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. S. app. 182 (1866) (statement of Sen. Davis (D-Ky.)); CONG. GLOBE, 39th Cong., 1st Sess. 1121 (1866) (statement of Rep. Rogers

would not affect antimiscegenation laws at all, because antimiscegenation laws did not “discriminate against” anyone because of their race.¹²⁶ The explanation given for this conclusion varied: Trumbull reasoned that both members of the interracial couple were subject to the same punishment;¹²⁷ Fessenden and others that members of both races were equally forbidden to marry outside their own race.¹²⁸ Of course, as Democratic Senator Reverdy Johnson of Maryland pointed out at the time,¹²⁹ and the United States Supreme Court would recognize a century later,¹³⁰ both lines of reasoning are faulty; laws forbidding interracial marriage *do* single out certain people for special disadvantage because of their race.¹³¹ Faulty though the reasoning was, it was the reasoning of the moderate to conservative Republicans who crafted the Thirty-ninth Congress’s response to the Black Codes. It tells us that they did not find governmental consideration of race offensive in and of itself, so long as it did not have the *effect* of singling out certain persons for special disadvantage because of their race.

B. *The Rejection of Proposals Aimed Specifically at Race-Based State Action*

Before it took up the Fourteenth Amendment itself, the Thirty-ninth Congress considered — and rejected — a number of proposals for constitutional amendments that would have specifically outlawed some or all kinds of race-based state action. These proposed amendments were of two types: those that forbade certain “distinct

(D-N.J.)); CONG. GLOBE, 39th Cong., 1st Sess. 604 (1866) (statement of Sen. Cowan (R-Penn.)); CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Johnson (D-Md.)); CONG. GLOBE, 39th Cong., 1st Sess. 417-18 (1866) (statement of Sen. Davis (D-Ky.)).

126. See CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statements of Sen. Fessenden (R-Me.) and Sen. Trumbull (R-Ill.)).

127. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 420 (1866) (statement of Sen. Trumbull (R-Ill.)); CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull).

128. See CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton (R-Ill.)); CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Fessenden (R-Me.)).

129. CONG. GLOBE, 39th Cong., 1st Sess. 505-06 (1866) (statement of Sen. Johnson (D-Md.)).

130. See *Loving v. Virginia*, 388 U.S. 1, 7-9 (1967).

131. As Senator Reverdy Johnson explained, the law “says to the black man, ‘You shall not marry a white woman,’ and says to the white man, ‘You may.’ There is therefore . . . one law in relation to this question for the white man, and another law for the black man.” CONG. GLOBE, 39th Cong., 1st Sess. 505-06 (1866). In addition, such laws, viewed in social context, operated to single out a particular racial group — African Americans — for a special stigmatic burden, by implying that they were not fit to mix with other races. Cf. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (stating that “to separate [one group of persons] from [all] others . . . because of their race generates a feeling of inferiority”); see also *infra* note 266.

tions" based on race, and those that forbade certain forms of "discrimination" because of race.

The proposals outlawing certain "distinctions" based on race were the first to be considered. In January of 1866, Thaddeus Stevens of Pennsylvania, one of the most radical Republicans in the House, gave the Joint Committee on Reconstruction a proposed amendment providing that "[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color."¹³² A subcommittee on which Stevens sat rewrote this proposal to explicitly outlaw all laws drawing racial "distinctions" in political and civil rights.¹³³ Read literally, this proposal would have prohibited all laws that used race as the basis for distinguishing between citizens in assigning civil and political rights, whether or not those distinctions resulted in actual inequalities in benefits and burdens.¹³⁴

The Joint Committee rejected this "no racial distinctions" proposal¹³⁵ in favor of a proposed amendment dealing with apportion-

132. THADDEUS STEVENS, Proposed Constitutional Amendment (Jan. 12, 1866), reprinted in KENDRICK, *supra* note 98, at 46.

133. *See id.* at 50 (Jan. 20, 1866) ("[A]ll provisions in the Constitution or laws of any state, whereby any distinction is made in political or civil rights or privileges, on account of race, creed, or color, shall be inoperative and void."). The "no racial distinctions" language was already familiar to the Thirty-ninth Congress: in December of 1865, Senator Henry Wilson of Massachusetts had proposed several statutes using it, none of which was ever put to a vote. *See* S. 55, 39th Cong., reprinted in CONG. GLOBE, 39th Cong., 1st Sess. 108, 111 (1865); S. 9, 39th Cong., reprinted in CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865); *see also* Frank & Munro, *supra* note 10, at 439. For a general history of the "no racial distinctions" language, *see* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 22-66 (1992) (tracing the language back to petitions that antislavery activists submitted to the legislatures of the free states in the 1830s).

134. The subcommittee patterned the "no racial distinctions" proposal on an amendment which the Massachusetts abolitionist Wendell Phillips had been promoting since 1863. *See* KULL, *supra* note 133, at 58. Phillips almost certainly intended his proposed amendment to invalidate all race-based state action, for he said publicly that he thought the government should be "color-blind," *see* NATL. ANTISLAVERY STANDARD, Feb. 11, 1865, at 2 (printing speech of Jan. 26, 1865), that there should "be no recognition of race by the United States or by state law," NATL. ANTISLAVERY STANDARD, June 8, 1867, at 1 (printing speech of May 29, 1867), and that he hoped America would one day be "a nation that does not know Black from white," NATL. ANTISLAVERY STANDARD, May 22, 1869, at 1 (printing speech of May 11, 1869). Since Stevens was certainly familiar with Phillips's position on race, it is very likely that he intended his "no racial distinctions" proposal to have the same basic meaning.

135. *See* KENDRICK, *supra* note 98, at 50-51. During the Senate debates on the Joint Committee's representation amendment, Senator Richard Yates of Illinois made a last-minute attempt to revive the "no racial distinctions" proposal, introducing a resolution that the Constitution be amended to provide:

That no State . . . shall, by any constitution, law, or other regulation whatever . . . make or enforce in any way, or in any manner recognize any distinction between citizens . . . on account of race or color or previous condition of slavery; and that hereafter all citizens, without distinction of race, color, or previous condition of slavery, shall be protected in the full and equal enjoyment and exercise of all their civil and political rights, including the right of suffrage.

ment of representation in Congress — a proposal that explicitly countenanced denial or abridgement of the franchise on the basis of race, though it penalized states that did this by reducing their representation accordingly¹³⁶ — and a proposed civil rights amendment, drafted by the conservative Republican John Bingham of Ohio, that did not mention race at all.¹³⁷ The Joint Committee's records do not tell us why it rejected the "no racial distinctions" proposal.¹³⁸ The Committee's chairmen later said it was because they did not believe the proposal could be ratified. Stevens, the House chair, said that while he preferred his "no racial distinctions" proposal, he had been persuaded, "after comparing ideas with others," that it could not be ratified.¹³⁹ Fessenden, the Senate chair, said that he would have preferred an amendment "doing away at once with all distinctions on account of race or color in all of the States of this Union so far as regards civil and political rights, privileges, and immunities," but that the Committee did not believe such an amendment could be ratified, because of "existing prejudices and existing institutions."¹⁴⁰ As he explained, most of the states in the North and West still had laws that denied or limited the right to vote on the basis of race,¹⁴¹ and Connecticut had recently "reject[ed] a proposition which proposed to do away with all distinctions be-

CONG. GLOBE, 39th Cong., 1st Sess. 1287 (1866). The resolution failed by a vote of 7-38; only Senator Yates, Senator Sumner of Massachusetts, and five other Radicals voted for it. See CONG. GLOBE, 39th Cong., 1st Sess. 1287 (1866).

136. See KENDRICK, *supra* note 98, at 53 ("Representatives and direct taxes shall be apportioned among the several States [of] this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; provided that whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation."). The House approved this proposed amendment, but the Senate postponed it indefinitely, see CONG. GLOBE, 39th Cong., 1st Sess. 1258 (1866), after Senator Charles Sumner lambasted it for bringing "Oligarchy, Aristocracy, Caste, and Monopoly, founded on color, under the sanction of the Constitution," CONG. GLOBE, 39th Cong., 1st Sess. 1227 (1866).

137. See KENDRICK, *supra* note 98, at 60-62. This proposal was never put to a vote. See *infra* note 160.

138. The journal records the proposals the Joint Committee considered, and the votes of its members on those proposals, but not the Joint Committee's discussions. See KENDRICK, *supra* note 98, at 37-129.

139. CONG. GLOBE, 39th Cong., 1st Sess. 537 (1866).

140. CONG. GLOBE, 39th Cong., 1st Sess. 703-05 (1866); see also CONG. GLOBE, 40th Cong., 3d Sess. 1033 (1869) (statement of Sen. Fessenden (R-Me.)) (recalling that the Committee had rejected Stevens's "no racial distinctions" proposal because the Committee thought "it would be impossible at that time to carry it through Congress or to obtain for it the support of the requisite number of States").

141. See CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866). On these Black Laws of the free states, see BERWANGER, *supra* note 106, at 123-41; LITWACK, *supra* note 96, at 15-29, 64-112; VOEGELI, *supra* note 96, at 160-82; Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights and the Antebellum North*, 17 RUTGERS L.J. 415, 417 (1986).

tween men on account of color."¹⁴² In such a climate, said Fessenden, the Committee thought it foolish to waste the nation's time with a proposal to abolish all legal distinctions based on race.¹⁴³

When it became clear that the "no racial distinctions" proposal was going nowhere, radical Republicans began suggesting proposed amendments that would outlaw certain forms of "racial discrimination" instead.¹⁴⁴ In March of 1866, Senator William Stewart, a Nevada Republican, suggested a constitutional amendment prohibiting "[a]ll discriminations among the people because of race, color, or previous condition of servitude, either in civil rights or the right of suffrage."¹⁴⁵ In April, Stevens gave the Joint Committee a proposed amendment, drafted by Robert Dale Owen, whose first section would have provided that "[n]o discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."¹⁴⁶ Section 2 of the proposal outlawed all "discrimination," after July 4, 1876, "as to the enjoyment by classes of persons of the

142. CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866). In the fall of 1865, voters in Connecticut had rejected a referendum proposal that would have replaced a state constitutional provision denying the vote to "colored persons, except those who were citizens of the State at the time of the adoption of the Constitution, in 1811," with one giving the vote to "[e]very male citizen of the United States who shall have attained the age of twenty-one years." THE AMERICAN ANNUAL CYCLOPEDIA AND REGISTER OF IMPORTANT EVENTS OF THE YEAR 1865, at 304 (1870).

143. See CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866).

144. The proponents of these "no racial discrimination" proposals probably saw them as being somewhat narrower than the "no racial distinctions" proposals. As noted earlier, the latter were probably intended to abolish all laws that used race as the basis for drawing distinctions between citizens in assigning civil and political rights, whether or not those distinctions resulted in actual inequalities in benefits and burdens. See *supra* notes 132-34 and accompanying text. But, as the debates over the Freedmen's Bureau Bill and the Civil Rights Bill reveal, the members of the Thirty-ninth Congress used the term "discrimination" to refer to the practice of singling out for special benefits or burdens, as opposed to merely sorting into groups. See *supra* notes 120-31 and accompanying text. Given this usage, and the fact that the "no racial discriminations" proposals surfaced after the rejection of the "no racial distinctions" proposals, it seems reasonable to assume that the former were intended to be somewhat narrower than the latter.

Professor Kull, however, apparently sees no difference between these "no racial discrimination" proposals and the earlier "no racial distinctions" proposal. See KULL, *supra* note 133, at 67-87 (assuming that both were intended to invalidate all laws that used race as a basis for distinguishing among people in assigning civil and political rights, whether or not those distinctions resulted in actual inequalities in benefits or burdens). Indeed, Kull often uses the term "discriminate" as if it meant simply "distinguish between" or "sort," without regard to the effect of that sorting on the distribution of benefits and burdens. Cf. Epps, *supra* note 8, at 441 (noting that Kull often fails to distinguish between four different kinds of governmental uses of race: to "classify," to "distinguish," to "discriminate," and to "separate or segregate"). Perhaps this is the source of Justice O'Connor's curious use of the term "discriminate" in *Shaw I*: Kull's book was drawing considerable attention in legal circles in 1993. See *infra* notes 313-25 and accompanying text.

145. CONG. GLOBE, 39th Cong., 1st Sess. 1906 (1866).

146. KENDRICK, *supra* note 98, at 83.

right of suffrage, because of race, color, or previous condition of servitude," and Section 3 provided that any state that engaged in this sort of racial "discrimination" before July 4, 1876 would face a corresponding reduction in its representation.¹⁴⁷

These "no racial discrimination" proposals fared no better than their "no racial distinctions" predecessor. The Joint Committee rejected Stewart's "no discrimination" amendment rather quickly.¹⁴⁸ It gave the "no discrimination" provision in the Owen proposal more serious consideration, and in fact initially approved it.¹⁴⁹ One week later, however, the committee replaced the "no racial discrimination" provision in the Owen proposal with the following language proposed by Representative Bingham:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.¹⁵⁰

At the same time, the Committee deleted the provision forbidding racial "discrimination" in suffrage after 1876¹⁵¹ and removed the references to race from the proposal's representation-reduction provision.¹⁵² As a result, by the time the Committee reported out the Owen proposal, it contained no mention of race whatsoever.

Again, the Joint Committee's journal does not tell us precisely why it made these changes. But there is compelling evidence that it was because the moderate and conservative Republicans who con-

147. *Id.* at 83-84. The remaining sections of the Owen proposal dealt with the confederate debt and congressional enforcement power. *See id.* at 84.

148. *See* JAMES, FRAMING, *supra* note 98, at 102.

149. *See* KENDRICK, *supra* note 98, at 85 (approving a motion to adopt the first section of the original Owen proposal).

150. *Id.* at 106-07. This language would eventually become the second sentence of section 1 of the Fourteenth Amendment. For accounts of the complicated set of procedural maneuvers through which Bingham managed to get the "no racial discrimination" provision in the original Owen proposal replaced with this new tripartite formulation, see JAMES, FRAMING, *supra* note 98, at 113-14; KENDRICK, *supra* note 98, at 85-120; MALTZ, *supra* note 26, at 82-92; Bickel, *supra* note 98, at 42-44.

151. *See* KENDRICK, *supra* note 98, at 101 (approving the motion to strike section 2 of the proposal).

152. *See* KENDRICK, *supra* note 98, at 102 (approving the motion to replace the original section 3 with new language). Thus revised, the third section of the proposal read as follows: Representatives shall be apportioned among the several states . . . according to their respective numbers, counting the whole number of persons in each state excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

Id. at 102. This language would eventually become section 2 of the Fourteenth Amendment.

trolled the Committee became persuaded, after consulting with the Republican delegations of various states, that their endorsement of a constitutional amendment that would forbid the states to deny African Americans the right to vote, and perhaps to maintain racially segregated public schools and restrict interracial marriage as well, would doom their party to certain defeat in the fall elections.¹⁵³ As Earl Maltz reminds us, the Fourteenth Amendment “was in large measure a campaign document, designed to outline the Republican program of Reconstruction for the upcoming elections in 1866,” and its provisions “were carefully drafted to appeal [to] swing voters.”¹⁵⁴

The Joint Committee’s consistent rejection of proposals explicitly forbidding racial distinctions and racial discrimination — even in access to basic civil rights — casts considerable doubt on the assertion that the framers intended the language of the Equal Protection Clause to strike at all race-based or race-conscious state action.¹⁵⁵ Instead, the strong inference is that they intended the

153. During the week of April 21-27, 1866, the Republican congressional delegations of various states met in caucuses to discuss the upcoming elections. See JAMES, FRAMING, *supra* note 98, at 109-10. Many of these delegations informed the Joint Committee that they did not want to have to run on a platform of Black rights. See Robert Dale Owen, *Political Results From the Varioloid*, 35 ATLANTIC MONTHLY, June 1875, at 660, 666; see also CONG. GLOBE, 39th Cong., 1st Sess. 2948 (1866) (statement of Rep. Wilson (R-Iowa)) (“[T]he fall elections lie between us and posterity, and some fear the result of the former more than they consider the welfare of the latter.”); 2 FRANCIS FESSENDEN, LIFE AND PUBLIC SERVICES OF WILLIAM PITT FESSENDEN 21-24 (1907). For more on the influence these state caucuses exerted on the Joint Committee, see BENEDICT, *supra* note 90, at 185-87; BERGER, *supra* note 98, at 529; KULL, *supra* note 133, at 85-86; MALTZ, *supra* note 26, at 87-92.

154. Earl M. Maltz, *A Dissenting Opinion to Brown*, 20 S. ILL. U. L.J. 93, 94 (1995); see also BENEDICT, *supra* note 90, at 198-202; MCKITRICK, *supra* note 90, at 349, 355-56.

155. Cf. BAER, *supra* note 11, at 87 (stating that the framers of the Equal Protection Clause “had little concern with race as an abstract category”); *id.* at 116 (“[T]he debates . . . refute the contention that the goal was to eliminate all legislation based on race.”); KULL, *supra* note 133, at vii (arguing that the historical evidence “tends strongly to refute” the argument that the framers intended the clause “to require color blindness on the part of government”); Nelson Lund, *The Constitution, The Supreme Court, and Racial Politics*, 12 GA. ST. U. L. REV. 1129, 1148-50 (1996) (expressing doubt that the Equal Protection Clause was intended to impose a general rule of colorblindness on the states); McConnell, *supra* note 105, at 1016 (asserting that the Reconstruction Republicans did not view racial discrimination “as a general moral evil”); Schnapper, *supra* note 111 (arguing that the framers of the Equal Protection Clause did not intend it to prohibit all race-based affirmative action, because they passed several such programs themselves); Rodney A. Smolla, *The Ghosts of Homer Plessy*, 12 GA. ST. U. L. REV. 1037, 1080 (1996) (maintaining that “the Framers of the Fourteenth Amendment did not understand the law they were enacting as turning the Constitution color-blind,” because they did not understand it to abolish racially segregated public schools); Sunstein, *supra* note 8, at 2439 (explaining that the framers of the Equal Protection Clause “emphatically” did not understand it as “excis[ing] all use of race in [governmental] decisionmaking,” but simply as “an effort to eliminate racial caste”); Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Color Blind?*, 20 JOHN MARSHALL L. REV. 201, 204 (1986) (stating that “we know, with as much certainty as such matters ever permit, that the Framers of the Fourteenth Amendment did not think ‘equal protection of the laws’ made all racial distinctions in law unconstitutional,” because they did not understand it to

clause to aim at some evil other than the bare consideration of race. Some believe that evil was the state's failure to provide some or all of its citizens with the means necessary to protect and enforce certain rights derived from other sources.¹⁵⁶ But, as traditional equal protection jurisprudence has long recognized, the evil was in fact something quite different: the practice of singling out certain persons or groups of persons for special benefits or burdens — that is, of “discriminating” either in favor or against them — without adequate justification. We see this becoming clear as Congress considers the Joint Committee's next effort, the Bingham amendment.

C. *The Bingham Amendment: Shifting the Focus from
Consideration of Race to Inequality of Benefits and
Burdens*

The “equal protection” language in section one of the Fourteenth Amendment first came before the Thirty-ninth Congress in a proposed amendment suggested by Representative John Bingham in December of 1865, which would have given Congress the 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.”¹⁵⁷ Bingham's proposal was referred to the Joint Committee, which revised it several times, before finally reporting it out in the following form:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States, equal protection in the rights of life, liberty, and property.¹⁵⁸

outlaw racially segregated public schools). *But see* Reynolds, *supra* note 110, at 997 (“History faithfully records that the purpose of the[] [Civil War] Amendments was to end forever a system which determined legal rights, measured status, and allocated opportunities on the basis of race, and to erect in its place a regime of race neutrality.”); Van Alstyne, *supra* note 110, at 776-77 (asserting that the legislative history of the Fourteenth Amendment “permit[s] us” to read the Equal Protection Clause “as repudiating the propriety of regulating people by race,” though it “do[es] not compel that conclusion”).

156. *See, e.g.*, TENBROEK, *supra* note 24, at 207, 221; Avins, *supra* note 98, at 427-28; Harrison, *supra* note 9, at 1433-51; Maltz, *supra* note 9, at 510-13.

157. CONG. GLOBE, 39th Cong., 1st Sess. 14 (1865). While Bingham was the first to include the phrase “equal protection” in a proposed constitutional amendment submitted to the Thirty-ninth Congress, he did not invent it. Nor was it invented by the antislavery movement, as many scholars have assumed; the first known use of the phrase in American political rhetoric was in Andrew Jackson's 1832 message vetoing the Second Bank Bill. *See supra* note 51.

158. KENDRICK, *supra* note 98, at 61 (citations omitted).

This proposal was introduced in both houses of Congress,¹⁵⁹ and the House debated it for several days, though it ultimately took no action on it.¹⁶⁰ The debates, which focused on the proposal's equal protection language, cast considerable light on the intended meaning of the strikingly similar language in section one of the Fourteenth Amendment.

The debates strongly suggest that Bingham himself did not intend his equal protection proposal to call into question all race-based state action. Of course, as any student of the Reconstruction debates can attest, attempting to divine Bingham's intentions from his remarks on the floor is a risky business, for he was not known for clarity of thought or speech.¹⁶¹ In speaking about his proposal on the House floor, Bingham gave conflicting accounts of its precise purpose: at times, he said it was designed to guarantee all citizens an absolute — and only incidentally equal — right to have their "natural" or "personal" rights of life, liberty, and property protected by the states;¹⁶² at others, that it was designed to guarantee all persons a general right to equal treatment at the hands of the

159. See H.R. Res. 63, 39th Cong. (1866), reprinted in CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866); S. Res. 30, 39th Cong. (1866), reprinted in CONG. GLOBE, 39th Cong., 1st Sess. 806 (1866). The proposal was never formally debated in the Senate.

160. See CONG. GLOBE, 39th Cong., 1st Sess. 1033-35, 1054-67, 1083-95 (1866). On February 28, 1866, the House voted to postpone consideration of the proposal indefinitely, after moderate Republicans like Hale and Hotchkiss expressed concern that it would give Congress too much power to legislate in areas traditionally reserved to the states. See CONG. GLOBE, 39th Cong., 1st Sess. 1094-95 (1866). It was never mentioned again in the House.

161. See MALTZ, *supra* note 26, at 53 (noting that Bingham was not known for "the trenchance of his argument" or "the force of his logic," but for his "style"); Fairman, *supra* note 98, at 462, 1289 (stating that Bingham was "not a man of exact knowledge or clear conceptions or accurate language," and that "his utterances cannot be accepted as serious propositions"); Frank & Munro, *supra* note 10, at 470 n.181 (concluding that Bingham was a "windbag," and "as a legal thinker he was not in the same class with the top notch minds of his time"); Harrison, *supra* note 9, at 1404 n.61 (expressing the view that Bingham's "analytical powers were [either] mediocre or he was too lazy to use them"); see also HARRIS, *supra* note 11, at 39-40 (accusing Bingham of frequent "confusion").

162. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (stating "that . . . every man in every State of the Union . . . may, by the national law, be secured in the equal protection of his personal rights"); CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (describing the "great wrong" against which his proposal was directed as the states' practice of "denying to citizens therein equal protection or any protection in the rights of life, liberty, and property"); CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (arguing that the amendment would "provide for the efficient enforcement . . . of the[] 'equal rights of every man,' " which he defined, borrowing from President Johnson, as the rights "to life, liberty, and the pursuit of happiness; to freedom of conscience, to the culture and exercise of all his faculties' "); CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (stating that the amendment would give Congress "the power to pass all laws necessary and proper to secure to all persons . . . their equal personal rights"). Those who favor a natural rights reading of the Equal Protection Clause place heavy emphasis on these comments. See, e.g., TENBROEK, *supra* note 24, at 125-28; Graham, *Antislavery Backgrounds*, *supra* note 24, at 483-84, 499; Graham, *Declaratory*, *supra* note 24, at 18-24.

law.¹⁶³ But it does seem clear that Bingham intended his proposal to strike at some evil other than the bare consideration of race. In his first major speech on the proposal, delivered when it consisted solely of the equal protection language, he said he had introduced it because the Constitution's guarantee of "equal and exact justice to all men" had been "flagrantly violated" by many of the states, "in respect of white men as well as Black men."¹⁶⁴ The example he gave — the South Carolina legislature's passage of a law expelling a White abolitionist, Samuel Hoar, from the state — did not involve a race-based distinction.¹⁶⁵ In later speeches, he assured his colleagues that his equal protection language was not aimed solely at protecting the newly emancipated slaves, but would also give Congress the power to protect "loyal white citizens of the United States" in the South, who were then being persecuted for their political views, rather than for their race.¹⁶⁶ Bingham's steadfast insistence that his equal protection language would protect Southern Whites who were loyal to the Union is compelling evidence that

163. Bingham's speeches about the proposal are shot through with references to the notion of "equality before the law." At one point, Bingham argued that:

Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born . . . no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law — law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice.

CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (stating that "the divinest feature of your Constitution is the recognition of the absolute equality before the law of all persons"); CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866) (stating that the Constitution's "foundation principle" is "the absolute equality of all men before the law").

164. CONG. GLOBE, 39th Cong., 1st Sess. 157, 158 (1866). Bingham was referring to his original proposal, which was then before the Joint Committee. As noted above, that proposal contained only the equal protection language; the privileges and immunities language was added by the Committee several weeks later. *See supra* text accompanying note 157.

165. *See* CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866). In 1844, the Massachusetts legislature commissioned Hoar, a prominent Boston lawyer and judge, to go to South Carolina and file a lawsuit challenging that state's treatment of free Blacks. *See* Resolve of March 16, 1844, ch. 111, 1844 MASS. ACTS 330. When Hoar arrived in Charleston, the South Carolina legislature ordered him expelled from the state. *See* H. Res. of Dec. 5, 1844, 1844 S.C. HOUSE J. 65-66, *reprinted in* 67 NILES NATL. REG., Dec. 14, 1844, at 226-227.

166. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866). At this point, the proposal contained both the equal protection language and the privileges or immunities language. Bingham made this statement, however, in response to questions from Representative Hale of New York. Hale expressly had directed his questions only to the proposal's equal protection clause. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale (R-N.Y.)) ("[M]y argument is directed exclusively to the consideration of the final clause of the amendment proposed [the Equal Protection Clause] . . . without refer[ence] at all to the other clause [the Privileges and Immunities Clause]."). Bingham made the same basic point again the following day. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (arguing that his proposal would give Congress the power to protect both "the loyal white minority" and the "disenfranchised colored" in the Southern states).

he did not view the evil to which the language was directed as the use of race to distinguish between persons.¹⁶⁷

Other participants in the debate indicated that they understood Bingham's equal protection language to be aimed only at laws that singled out certain classes of persons for special benefits or burdens. Thaddeus Stevens, who voted for the Bingham proposal in the Joint Committee and defended it actively on the floor of the House, assured his colleagues that its equal protection language would permit Congress to override state legislation only when it was "unequal."¹⁶⁸ According to him, it would not entitle Congress to interfere when "the legislation of a State was equal, impartial to all."¹⁶⁹ Representative Hotchkiss of New York, a moderate Republican who spoke in opposition to the proposal, said its equal protection language was designed to forbid a state to "discriminate between its citizens and give one class of citizens greater rights than it confers upon another."¹⁷⁰ Although he found that goal a worthy one, he refused to support the proposal because it left protection against such unequal legislation "to the caprice of Congress."¹⁷¹ In his view, it would be better to enact an amendment directly outlawing all such legislation by providing that "no State shall discriminate against any class of its citizens."¹⁷²

The Joint Committee took Hotchkiss's advice to heart. When the equal protection proposal re-emerged from the Committee as part of section one of the omnibus amendment that would become the Fourteenth Amendment, it had been changed from a grant of authority to Congress to a limitation on state legislative authority, and its sponsors were explaining it as an attempt to constitutional-

167. See Maltz, *supra* note 9, at 519 ("Bingham did not view the proposed constitutional amendment as being race-focused."). This is not to say, of course, that Bingham did not intend the amendment to give Congress the power to legislate against the Black Codes; he plainly did. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (stating specifically that his proposal aimed its equal protection language at laws like the provision of the Oregon Constitution that denied African Americans access to the courts to enforce their rights).

168. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1063, 1064 (1866). While Stevens spoke after the privileges or immunities language had been added to the proposal, he did so in response to criticisms directed solely to its equal protection clause. See CONG. GLOBE, 39th Cong., 1st Sess. 1063-64 (1866) (criticism of Rep. Hale (R-N.Y.)).

169. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).

170. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866). Like Stevens, Hotchkiss spoke after the privileges or immunities language had been added to the proposal. But he stated explicitly that his comments were directed to the proposal's Equal Protection Clause, rather than to its Privileges and Immunities Clause. See CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

171. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

172. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

ize the doctrine against partial or special laws already recognized by many state courts.¹⁷³

D. *The Joint Committee's Final Proposal: Nationalizing the Developing State Constitutional Tradition Against Partial or Special Laws*

The congressional debates on the final version of the Fourteenth Amendment do not contain a great deal of discussion of the Equal Protection Clause. The debates focused primarily on the representation and disenfranchisement provisions in the amendment's second and third sections, not on section one. When speakers did mention section one, they tended to speak of it as a unified whole, without differentiating between its various clauses.¹⁷⁴ Despite these difficulties, the debates, read with an understanding of the constitutional language developed by the state courts in the antebellum era, contain some useful information about the intended meaning of the Equal Protection Clause. Indeed, they strongly suggest that many of the Republicans who participated in the drafting and ratification process understood it to do nothing more than nationalize the antebellum state constitutional principle against partial or special laws, which they called, in the legal vernacular of the day, "class legislation."¹⁷⁵

When Thaddeus Stevens officially presented the Fourteenth Amendment to the House, he characterized its first section as allowing "Congress to correct the unjust legislation of the States, so . . . that the law which operates upon one man shall operate *equally*

173. See *infra* section II.D.

174. See Karst, *supra* note 8, at 15.

175. For more on the way in which the members of the Reconstruction Congresses used the term "class legislation," see *infra* note 198. It is not difficult to understand why the framers of the Fourteenth Amendment felt the need to write a broad general prohibition against partial or special legislation into the federal Constitution, though similar prohibitions already existed in the constitutional law of many states. As noted earlier, the state courts had been largely unwilling to invoke the existing state law prohibitions to invalidate laws singling out Blacks for special disadvantage. See *supra* notes 80-81 and accompanying text. By adding a similar provision to the federal Constitution — one that was clearly applicable to Blacks as well as to Whites — the framers hoped to overcome this problem. See Morr, *supra* note 28, at 275-76 (asserting that the Joint Committee proposed the Equal Protection Clause "to prevent a repetition of" decisions like *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849) (holding that under the constitution and laws of the Commonwealth, the general school committee of the city of Boston had the power to provide for the instruction of Black children in separate schools and to prohibit their attendance at other schools)). In addition, the existing prohibitions — couched as prohibitions against partial or special laws — were generally applied only to discrimination by *legislatures*. The framers also believed discrimination in the *administration* of facially equal laws to be a serious problem, requiring a broader provision like the Equal Protection Clause.

upon all.”¹⁷⁶ This would, he said, be a great improvement over the “present codes” of the states, under which “different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin,” and “color disqualifies a [Black] man from testifying in courts, or being tried in the same way as white men.”¹⁷⁷ Section one would mean, he continued, that

[w]hatever 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.¹⁷⁸

Stevens did not indicate, however, which particular clause of section one would accomplish this; indeed, he seems to have assumed that the three clauses were essentially three different ways of saying the same thing.

The speech presenting the amendment to the Senate,¹⁷⁹ delivered by Senator Jacob Howard, a Michigan Republican, was considerably more precise. Howard’s speech contains the most thorough explanation of section one found in the debates, and it deserves special attention, for it was carefully prepared as the Joint Committee’s official explanation of its proposal.¹⁸⁰ Unlike most speakers, Howard did not run the three clauses of section one’s second sentence together. He spoke first about the Privileges and Immunities Clause, which he said would absolutely guarantee certain “fundamental” rights against state interference.¹⁸¹ He turned then to the Equal Protection Clause, which he said would “abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.”¹⁸² This suggests that Howard viewed the Equal Protection Clause as

176. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

177. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (referring to such laws as “partial” laws).

178. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

179. See CONG. GLOBE, 39th Cong., 1st Sess. 2764-67 (1866).

180. See JAMES, FRAMING, *supra* note 98, at 137.

181. See CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

182. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Howard’s language suggests he may have thought the Due Process Clause would also offer some protection against class legislation. See CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (speaking of the “last two clauses” of section 1 as “abolish[ing] all class legislation in the States”). This is not surprising, for a number of the antebellum state courts had located their state constitutional prohibitions against partial or class legislation in “law of the land” or “due process” provisions, for want of a better foundation. See *supra* note 58 and accompanying text.

servicing a function quite different from that of the Privileges and Immunities Clause: specifically, as nationalizing the existing state-law doctrine against partial or special laws, which he knew as class legislation.¹⁸³ This is confirmed by his later statement that section one would not only prevent the states from interfering with “those fundamental rights and privileges which pertain to citizens of the United States,” but also “establish[] equality before the law . . . giv[ing] to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.”¹⁸⁴ Echoing the antebellum state courts, Howard concluded by saying that this principle of “equality before the law” was essential to the preservation of republican government.¹⁸⁵

Throughout the ratification process, Republicans consistently took the position that section one would do nothing but nationalize the preexisting state constitutional tradition against partial or special laws.¹⁸⁶ Senator Timothy Howe of Wisconsin said it was designed to prevent the states from “deny[ing] to all classes of [their] citizens the protection of equal laws”¹⁸⁷ and to give the federal government “the power to protect classes against class legislation.”¹⁸⁸ Representative Thomas Eliot of Massachusetts said it would “prohibit State legislation discriminating against classes of citizens.”¹⁸⁹ Representative Thaddeus Stevens of Pennsylvania said

183. Howard did not expressly define the term “class legislation”; he apparently thought its meaning would be clear to his audience (as indeed it would have been to anyone familiar with the legal language of the day). He did, however, use it to refer to legislation “subjecting one caste of persons to a code not applicable to another.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Also, he cited as examples laws which authorize “the hanging of a black man for a crime for which the white man is not to be hanged” and laws under which “one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). For further discussion of what the term “class legislation” meant to the members of the Thirty-ninth Congress, see *infra* note 198.

184. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

185. See CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Other members of the Thirty-ninth Congress expressed similar sentiments. See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866) (statement of Sen. Lot Morrill (R-Me.)) (“The republican guarantee is that all laws shall bear upon all alike in what they enjoin and forbid, grant and enforce.”); CONG. GLOBE, 39th Cong., 1st Sess. 174 (1866) (statement of Rep. James Wilson (R-Iowa)) (stating that in a true republican government there is “no class legislation, no class privileges” and no laws that “legislate against [one class] for the purpose of advancing the interests of [another]”).

186. Cf. NELSON, *supra* note 7, at 115 (observing that Republicans frequently said that section 1’s “only effect” would be to forbid the states to “discriminat[e] arbitrarily between different classes of citizens” and require them to “treat[] [their] citizens equally, distinguishing between them only when there was a basis in reason for doing so”).

187. CONG. GLOBE, 39th Cong., 1st Sess. S. app. 219 (1866).

188. CONG. GLOBE, 40th Cong., 2d Sess. 883 (1868).

189. CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

it would mean only that "the same laws must and shall apply to every mortal, American, Irishman, African, German or Turk"¹⁹⁰ and that "the same law which punishes one man shall punish any other for the same offense . . . the law which gives a verdict to one man shall render the same verdict to another, whether he is Dutch, Irish, or [N]egro."¹⁹¹ Senator Lyman Trumbull of Illinois said it would "constitutionalize" the Civil Rights Bill of 1866, which had outlawed the most egregious partial or special legislation of the day: the Black Codes.¹⁹²

One of the most influential Republican newspapers, the *Cincinnati Commercial*, also saw section one as writing into the Constitution the antebellum doctrine against partial or special laws. Section one, said the *Commercial*, was designed to enforce "the great Democratic principle of equality before the law" and to invalidate all "legislation hostile to any class."¹⁹³ The *Commercial* continued:

With this section engrafted upon the Constitution it will be impossible for any Legislature to enact special codes for one class of its citizens, as several of the reconstructed States have done, subjecting them to penalties from which citizens of another class are excepted if convicted of the same grade of offense, or confer privileges upon one class that it denies to another.¹⁹⁴

Though many Republicans in 1866 understood section one to constitutionalize the antebellum doctrine against partial or special laws, few bothered to explain which part of it would accomplish that purpose. In the early 1870s, however, congressional Republicans began to specifically identify the Equal Protection Clause as the source of that limitation. One of the first to do this was Representative James Garfield of Ohio, who told his colleagues in 1871

190. Thaddeus Stevens, The Pending Canvass, Speech Delivered at Bedford, Pa. (Sept. 4, 1866), in THADDEUS STEVENS PAPERS 11 (Beverly Wilson Palmer ed., 1993).

191. Thaddeus Stevens, Speech at Lancaster, Pa. (Sept. 27, 1866), in N.Y. HERALD (Sept. 29, 1866). Another noted Radical, Senator Charles Sumner of Massachusetts, has been quoted as stating that section 1 abolished "oligarchy, aristocracy, caste, or monopoly with peculiar privileges and powers." See *Adamson v. California*, 332 U.S. 46, 51-52 n.8 (1947) (emphasis and internal quotation marks omitted) (quoting from Brief for Plaintiffs on Reargument at 21, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), reprinted in 6 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES 714 (Philip B. Kurland & Gerhard Casper eds., 1975)); Fairman, *supra* note 98, at 1348 (same).

192. See, e.g., Senator Lyman Trumbull, Speech at the Chicago Opera House (Aug. 1, 1866), in CHI. TRIB., Aug. 2, 1866, at 4; see also CONG. GLOBE, 39th Cong., 1st Sess. 2512-13 (1866) (statement of Rep. Raymond (R-N.Y.)); CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement of Rep. Eliot (R-Mass.)); CONG. GLOBE, 39th Cong., 1st Sess. 2505 (1866) (statement of Rep. McKee (R-Ky.)); CONG. GLOBE, 39th Cong., 1st Sess. 2498 (1866) (statement of Rep. Broomall (R-Penn.)); CONG. GLOBE, 39th Cong., 1st Sess. 2464 (1866) (statement of Rep. Thayer (R-Penn.)).

193. *The Constitutional Amendment*, CINCINNATI COM., June 21, 1866, at 4.

194. *Id.*

that the Equal Protection Clause forbade the states to “mak[e] or enforc[e] laws which are not on their face and in their provisions of equal application to all the citizens of the State . . . like the air of heaven, covering all and resting upon all with equal weight.”¹⁹⁵ The following year, Senator Oliver Morton of Indiana said the Equal Protection Clause means “that no person shall be deprived by a State of the equal *benefit* of the laws.”¹⁹⁶ The clause was added to the Constitution, he said, because “[t]here was class legislation in some of the States,” and “it was intended to strike at all class legislation, to provide that the laws must be general *in their effects*.”¹⁹⁷ “If we read the history of this amendment,” said Morton, “we shall understand . . . that it was intended to promote equality in the States, and to take from the States the power to make class legislation and to create inequality among their people.”¹⁹⁸ According to

195. CONG. GLOBE, 42d Cong., 1st Sess. H. app. 153 (1871). Note the striking similarity between Garfield’s “air of Heaven” metaphor and the “rains of heaven” image used by Andrew Jackson in his 1832 veto message. See *supra* note 51 and accompanying text.

196. CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (emphasis added).

197. CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (emphasis added); see also CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (asserting that the clause “provides that whatever law a State may have, the protection and the benefit of that law shall extend to all classes . . . in other words, the States cannot create inequality by their own legislation”).

198. CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872). Like Howard before him, Morton did not expressly define the term “class legislation.” But he consistently used it as a synonym for partial or special legislation. See CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (using “class legislation” to describe laws that are not “general in their effects,” but are “confined to a class”).

Members of the Reconstruction Congresses consistently used the term “class legislation” to refer to legislation that antebellum state courts had called partial or special laws. See, e.g., CONG. GLOBE, 40th Cong., 2d Sess. 2608-09 (1868) (statement of Sen. Sherman (R-Ohio)) (using “class legislation” to mean “a provision applying to a particular class,” rather than “to all classes”); CONG. GLOBE, 40th Cong., 1st Sess. 79 (1867) (statement of Sen. Grimes (R-Iowa)) (using “class legislation” to refer to legislation that “single[s] out one class and confer[s] upon them a consequence which [it does] not confer upon another class”); CONG. GLOBE, 39th Cong., 1st Sess. 2780 (1866) (statement of Rep. LeBlond (D-Ohio)) (using “class legislation” to refer to legislation which “do[es] for [one] class of persons what you do not propose to do for the [rest]”); CONG. GLOBE, 39th Cong., 1st Sess. 544 (1866) (statement of Rep. Taylor (D-Tenn.)) (using “class legislation,” “partial legislation,” and “special and discriminating legislation” to refer to legislation which “discriminates and favors one class at the expense of another”); CONG. GLOBE, 39th Cong., 1st Sess. at H. app. 298 (1866) (statement of Rep. Bingham (R-Ohio)) (using “class legislation” to describe legislation which is not “general . . . in its character,” but “operate[s] injuriously upon” only a certain class of persons); see also 5 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 425 (July 16, 1866) (reprinting President Johnson’s message vetoing the second Freedmen’s Bureau Bill passed by the Thirty-ninth Congress, H.R. 613) (using “class legislation” to describe legislation which singles out “a particular class of citizens” for a special benefit).

The Reconstruction Republicans certainly believed caste legislation — that is, legislation that singles out a certain class of persons for special disadvantage, so as to reduce them to (or maintain them in) a state of subordination — to be a form of class legislation. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard (R-Mich.)) (asserting that the Equal Protection Clause “abolishes all *class legislation* and does away with the injustice of subjecting one *caste* of persons to a code not applicable to another” (emphasis added)). But they did not use the terms “caste legislation” and “class legislation” synony-

Morton, “the word ‘protection,’ ” as used in the clause, “means not simply the protection of the person from violence, the protection of his property from destruction, but . . . the equal benefit of the law.”¹⁹⁹ Morton and others continued to advance this view throughout the Reconstruction era.²⁰⁰

Professor Harrison dismisses the Garfield-Morton interpretation of the Equal Protection Clause as revisionist history.²⁰¹ While he agrees that the framers of section one intended it to embody a broad requirement of “equality or impartiality in [state] lawmaking,”²⁰² he believes they understood that requirement to lie in the Privileges and Immunities Clause.²⁰³ Further, he believes that they intended the Equal Protection Clause to mandate equality only with respect to the “remedial” or “protective” functions of state government — that is, the mechanisms by which government secures individual rights against private invasion.²⁰⁴ According to

mously, as modern commentators often seem to assume. See, e.g., Harrison, *supra* note 9, at 1413; Kelly, *supra* note 11, at 1049; Sunstein, *supra* note 8, at 2435-36. Instead, as demonstrated above, the framers of the Fourteenth Amendment used “class legislation” more broadly, to refer to *any* law that singled out a certain class for special benefits or burdens, whether or not it had a subordinating effect on a particular class. For this reason, while the historical evidence supports the assertion that the framers and ratifiers intended the Equal Protection Clause to abolish all caste legislation, it does not support the further assertion, frequently made by modern caste theorists, that this was *all* the framers and ratifiers intended the clause to do.

199. CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872).

200. See, e.g., CONG. GLOBE, 43d Cong., 2d Sess. 1793 (1875) (stating that the clause means “that all men shall be equals before the law” and “that no State shall deny to any man the equal advantage of the law, the equal benefit of the law, the equal protection of the law”); CONG. GLOBE, 43d Cong., 1st Sess. S. app. 360 (1874) (stating that the clause “prevents any State from making any odious discrimination against any class of people”); CONG. GLOBE, 43d Cong., 1st Sess. S. app. 359 (1874) (stating that the clause “denies to any State the power to make a discrimination against any class of men as a class”); CONG. GLOBE, 43d Cong., 1st Sess. S. app. 358 (1874) (“[W]hen the fourteenth amendment declares that every person shall be entitled to the equal protection of the laws, it means to the equal benefit of the laws of the land.”); see also CONG. GLOBE, 43d Cong., 1st Sess. 3454 (1874) (statement of Sen. Frelinghuysen (R-N.J.)) (stating that the Equal Protection Clause is “a provision against all discrimination and in favor of perfect equality before the law”); CONG. GLOBE, 43d Cong., 1st Sess. 412 (1874) (statement of Rep. Lawrence (R-Ohio)) (arguing the word “protection” in the Equal Protection Clause refers to “every benefit to be derived from laws”).

201. See Harrison, *supra* note 9, at 1430, 1440-41.

202. *Id.* at 1411; see also *id.* at 1410-13.

203. See *id.* at 1410-32. Professor Currie first advanced the theory that the Privileges and Immunities Clause was intended to be a general antidiscrimination provision. See CURRIE, *supra* note 9, at 342-51.

204. See Harrison, *supra* note 9, at 1433-51. Earl Maltz was the first to suggest this narrow reading of the Equal Protection Clause. See Maltz, *supra* note 9, at 499 (“[T]he main thrust of the equal protection clause was to guarantee to all persons equality in a discrete right — the right to protection of the laws.”); see also CURRIE, *supra* note 9, at 349-50 (suggesting a similar interpretation). Other students of the original understanding have advanced a related, though subtly different, interpretation of the Equal Protection Clause, arguing that it was intended to impose upon the states an affirmative obligation to provide all persons with “full” protection of their natural rights. See, e.g., TENBROEK, *supra* note 24, at 26-29, 96-

him, the notion that "equal protection of the laws" meant "the protection of equal laws" did not occur to Reconstruction Republicans until the Supreme Court's decision in the *Slaughter-House Cases*²⁰⁵ made clear that the Privileges and Immunities Clause could not support the legislation that became the Civil Rights Act of 1875, as its sponsors originally had assumed.²⁰⁶

Professor Harrison does not cast his historical net back far enough. It may be true that the sponsors of the Civil Rights Act of 1875 did not rest it on the Equal Protection Clause until after the Supreme Court's decision in the *Slaughter-House Cases*. But Senator Morton first advanced his theory that the Equal Protection Clause was a general prohibition against unequal laws in February of 1872, more than a year before the Supreme Court handed down that decision in April of 1873. The theory that the "equal protection of the laws" means "the protection of equal laws" did not, in any event, originate with Morton; it was deeply embedded in American legal and political thought long before he spoke.²⁰⁷ Like "too many modern constitutionalists," Professor Harrison makes the mistake of "ignor[ing] the history of the Jacksonian concept of

98, 175-80, 194-99, 206-07, 221-22; Avins, *supra* note 98, at 427; Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 702-05 (1979). On this view, unlike the Maltz-Harrison view, the denial of protection to all persons on an equal basis would violate the clause. See TENBROEK, *supra* note 24, at 221 (arguing that because "[p]rotection of men in their fundamental or natural rights was the basic idea of the clause," the "[e]qual denial of protection . . . is . . . a denial of equal protection").

205. 83 U.S. (16 Wall.) 36 (1872).

206. See Harrison, *supra* note 9, at 1440-41, 1425-33; see also Avins, *supra* note 98, at 424. The 1875 Act provided that "all persons" were entitled to "full and equal enjoyment" of inns, common carriers, and places of public amusement, "subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color," and forbade the states to deny any person the right to serve on a jury because of his race. Act of Mar. 1, 1875, ch. 114, §§ 1, 4, 18 Stat. 336-37.

207. In 1832, for example, Andrew Jackson equated the equal protection of the laws with the equal benefit of the laws. 3 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 1153 (stating that the government should "confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor"). The Ohio Constitution of 1851 declared that "[g]overnment is instituted for the [] equal protection and benefit" of the people. OHIO CONST. of 1851, art. I, § 2, reprinted in 7 SWINDLER, *supra* note 34, at 558. In 1866, Senator Timothy Howe told the Thirty-ninth Congress that the Equal Protection Clause would prevent the states from "deny[ing] to all classes of [their] citizens the protection of equal laws." CONG. GLOBE, 39th Cong., 1st Sess. S. app. 219 (1866). In 1871, the Supreme Court of Maine wrote that "[t]he State is equally to protect all, giving no undue advantages or special and exclusive preferences to any," Correspondence between the House of Representatives of the State of Maine and the Supreme Judicial Court, 58 Me. 590, 593 (1871) (opinion of Appleton, Walton, and Danforth, JJ.), and "giv[ing] all alike the benefit of equal laws without favoritism or partiality," 58 Me. at 609 (opinion of Barrows, J.). In short, the conventional wisdom that the phrase "equal protection" had no significant history prior to its incorporation into the Fourteenth Amendment, see Frank & Munro, *supra* note 10, at 438-40; Kelly, *supra* note 11, at 1052; *Developments: Equal Protection*, *supra* note 3, at 1069, is simply incorrect.

equal protection before it was transformed by the abolitionists and embodied in the fourteenth amendment."²⁰⁸

In short, there is considerable evidence that a majority of the Republicans who participated in the framing and ratification of the Fourteenth Amendment understood its Equal Protection Clause to do nothing more than nationalize the antebellum doctrine against partial or special laws. In their view, the clause modified that doctrine only to make clear, as the antebellum state courts had not, that state action that singled out African Americans for special disadvantage was presumptively unconstitutional.²⁰⁹ As such, the clause represented a carefully forged compromise between the abolitionists in the Republican Party's radical wing, who would have liked to prevent the states from ever taking race into consideration in governing, and the former Democrats in its moderate wing, who were not prepared to concede that race should be completely excised from governmental decisionmaking but were firmly committed to the idea that the states should not be allowed to single out certain groups for special benefits or burdens without adequate justification.²¹⁰ Each gave up some ground to the other: the abolition-

208. Yudof, *supra* note 10, at 1371.

209. I do not contend, of course, that this was the *only* reading of the clause held by those who participated in its framing and ratification; there were certainly those who saw it differently. My argument is simply that the *dominant* understanding among the framers and ratifiers was that the clause wrote this developing state law doctrine into the federal Constitution, with the modification noted.

210. The depth of the Thirty-ninth Congress's consensus on this proposition can be seen in its debates over the two Freedmen's Bureau Bills that came before it: S. 60 and H.R. 613. Both of those bills contained provisions that singled out those of African descent for special benefits on a temporary basis. See Schnapper, *supra* note 111, at 762 (S. 60); *id.* at 771-73 (H.R. 613). Opponents of the bills charged that these provisions were impermissible class, partial, or special legislation. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2780 (1866) (statement of Rep. LeBlond (D-Ohio)) (calling the race-conscious relief measures in H.R. 613 "class legislation," which "do[es] for that class of persons what you do not propose to do for [everyone else]"); CONG. GLOBE, 39th Cong., 1st Sess. 544 (1866) (statement of Rep. Taylor (D-Tenn.)) (complaining that the race-conscious relief measures in S. 60 were "class legislation," "partial legislation," and "special and discriminating legislation," because they "discriminate[] and favor[] one class at the expense of another" and do not "in [their] operation affect all alike"); see also CONG. GLOBE, 39th Cong., 1st Sess. 3840 (1866) (statement of Sen. Saulsbury (D-Del.)) (complaining that H.R. 613 provides public support to only "a portion of the people, discriminating against all others"); CONG. GLOBE, 39th Cong., 1st Sess. 401 (1866) (statement of Sen. McDougall (D-Cal.)) (complaining that S. 60 "gives [Blacks] favors the poor white boy in the North cannot get"). President Johnson raised the same objection in vetoing the bills. See 8 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 3599 (Feb. 19, 1866) (veto message for S. 60) (voicing concern about the propriety of Congress passing legislation that singles out "one class . . . of our people" for special benefits not provided everyone else); *id.* at 3623 (veto message for H.R. 613) (criticizing the bill for singling out "a favored class of citizens" for special treatment and warning Congress about "the danger of [such] class legislation").

When confronted with this objection, those who supported these race-conscious relief measures did not take issue with its central premise that government should not single out certain classes of citizens for special benefits without an adequate public purpose justifica-

ists agreed to accept a rule that tolerated some consideration of race, and the former Democrats to accept a rule that forbade some racial distinctions. The result was a rule that called into constitutional question all state action that singled out *any* class of persons of *any* race for special benefits or burdens.²¹¹ The Court's famous dictum that "the equal protection of the laws is a pledge of the protection of equal laws"²¹² is thus not a "textual sleight of hand," as Professor Harrison alleges,²¹³ but an accurate translation of what the clause meant to those who framed and ratified it.

III. ORTHODOX EQUAL PROTECTION JURISPRUDENCE: FIDELITY TO THE TRADITION

In this part, I argue that the Supreme Court's traditional equal protection jurisprudence reflects the understanding that the framers and ratifiers intended the Equal Protection Clause to nationalize the preexisting state constitutional doctrine against partial or special laws. Several Justices made this point explicitly in early equal protection cases. As time wore on, the explicit references to the original understanding became less frequent. But the understanding itself lived on in the language and structure of the Court's equal protection doctrine.

tion. Instead, they argued that the discrimination worked by these bills was permissible, even under that rule, because it served a legitimate public purpose. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 939 (1866) (statement of Sen. Trumbull (R-Ill.)) (arguing that the race-conscious relief measures in S. 60 would make Blacks financially self-sufficient, so they would not require public assistance in the future); CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton (R-Ill.)) (arguing that the race-conscious relief measures in S. 60 would "break down the discrimination between whites and blacks" and "ameliorat[e] . . . the condition of the colored people"); CONG. GLOBE, 39th Cong., 1st Sess. 590 (1866) (statement of Rep. Donnelly (R-Minn.)) (arguing that the race-conscious relief measures in S. 60 would bring "industry, prosperity, morality, and religion" to the nation).

211. Unlike the rejected "no racial distinctions" and "no racial discrimination" alternatives, this rule would not necessarily forbid the states to deny or abridge the right to vote on the basis of race. While this rule would not permit states to single out Blacks for special disadvantage in the franchise for no reason other than racial prejudice or animus, it might be construed to permit race-based distinctions in access to the franchise that were said to serve some more legitimate public purpose, though laws like this would of course trigger the representation-reduction provision in section 2 of the Amendment. Nor would this rule necessarily invalidate laws mandating racial segregation in the public schools and forbidding interracial marriage. Such laws might be upheld on either of two possible grounds: that they did not discriminate against any particular group because of their race, *see supra* notes 126-28 and accompanying text, or that any discrimination they worked served some legitimate public purpose.

212. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

213. *See* Harrison, *supra* note 9, at 1390.

A. *Early Interpretations: The Insight of Cooley, Field, and Bradley*

Many of the lawyers, judges, and scholars who first grappled with the meaning of the Equal Protection Clause in the years following its ratification recognized that it was designed to nationalize the antebellum state constitutional doctrine against partial or special laws, modifying that doctrine only to make clear that it was fully applicable to laws singling out African Americans for special disadvantage. Thomas Cooley — state court judge, law professor, and the most influential constitutional scholar of the Reconstruction era — was one of these. The first edition of his famous treatise, published just a few months after the ratification of the Fourteenth Amendment, included a brief discussion of the Equal Protection Clause in its section on “unequal and partial legislation.”²¹⁴ Cooley wrote:

It was not within the power of the States before the adoption of the Fourteenth Amendment to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship, and some state laws were in force which established discriminations against them. To settle doubts and preclude such laws, the Fourteenth Amendment was adopted; and the same securities which one citizen may demand, all others are entitled to.²¹⁵

When Cooley said the states had not been permitted to deny their citizens “the equal protection of the laws” even before the Fourteenth Amendment, he was referring to the doctrine against partial or special laws, which forbade states to do so as a matter of *state* constitutional law.²¹⁶

Justices Stephen Field and Joseph Bradley of the United States Supreme Court also recognized the connection between the Equal Protection Clause and the antebellum doctrine against partial or special laws.²¹⁷ We can see them beginning to make this connection in the Court’s very first encounter with the Equal Protection Clause, the *Slaughter-House Cases* of 1872. In those cases, a group

214. See COOLEY, *supra* note 61, at 397.

215. *Id.*

216. See Yudof, *supra* note 10, at 1376; *id.* at 1373 (noting that Cooley saw the Equal Protection Clause as “only clarif[ying] the application of [this] older principle of law to the newly emancipated slaves”); cf. GILLMAN, *supra* note 11, at 59 (arguing that Cooley understood the Equal Protection Clause as “just a formalization of what [he] had already considered the singular aim of the law, which was the protection of equality of rights and privileges”).

217. As a former Jacksonian and state court judge, see Loren P. Beth, *Stephen Johnson Field*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 289, 290 (Kermit Hall et al. eds., 1992), Field was intimately familiar with that doctrine.

of butchers argued that a state law granting a partial monopoly in the slaughtering business to a single corporation denied them “the equal protection of the laws” because it was “an act of legislative partiality” that “enriches seventeen persons” at the expense of “nearly a thousand others of the same class, and as upright and competent as the seventeen.”²¹⁸ The majority gave this claim short shrift,²¹⁹ but Justices Field and Bradley, in dissent, paid close attention to it. In the process, they began to sketch out the link between the clause and the antebellum case law.

Justice Field’s dissent in the *Slaughter-House Cases* is best remembered for its suggestion that the Privileges and Immunities Clause protects certain “fundamental” rights belonging to all free men — including the right to pursue any lawful trade or calling —

218. 83 U.S. (16 Wall.) at 56 (argument of John A. Campbell and J.Q.A. Fellows for plaintiffs). Plaintiffs also argued that the law violated their rights under the Privileges and Immunities Clause of the Fourteenth Amendment. The Court’s opinion is best known for its disposition of that claim, which rendered the Privileges and Immunities Clause virtually inconsequential. See 83 U.S. (16 Wall.) at 73-75 (holding that the “privileges and immunities of citizens of the United States” are limited to a narrow category of rights uniquely associated with the relationship between the individual citizen and the federal government).

219. See 83 U.S. (16 Wall.) at 81. Justice Miller’s majority opinion, which spanned 26 pages in the *United States Reports*, devoted only two paragraphs to the plaintiffs’ equal protection claim, and the explanation it gave for the Court’s rejection of that claim was somewhat curious. Miller began by asserting that the historical events leading up to the enactment of the Fourteenth Amendment indicated that “the evil to be remedied by” the Equal Protection Clause was “[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class.” 83 U.S. (16 Wall.) at 81. He therefore expressed “doubt . . . whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.” 83 U.S. (16 Wall.) at 81. But he expressly reserved judgment on that issue. See 83 U.S. (16 Wall.) at 81 (asserting that “we may safely leave that matter” for another day). He then went on to reject the plaintiffs’ equal protection claim on a very different ground: that the clause applied only to “case[s] of State oppression, by denial of equal justice in its courts,” which was not the situation in the case before the Court. 83 U.S. (16 Wall.) at 81.

At this early stage, Justice Miller apparently did not see the connection between the Equal Protection Clause and the antebellum tradition against unequal or partial laws. But I do not believe Miller’s offhand remarks here are entitled to much weight in any effort to reconstruct the original understanding of the Equal Protection Clause. In the first place, his assertion that the clause was intended only to reach discrimination against Blacks is impossible to reconcile with the actual historical record, which leaves no doubt that the framers and ratifiers meant it to protect White Unionists in the South as well. See *supra* text accompanying notes 163-67; see also NELSON, *supra* note 7, at 163 (calling Miller’s assertion “flatly inconsistent with the history of its framing in Congress and its ratification by the state legislatures”); Yudof, *supra* note 10, at 1396-97 (calling it “in complete disregard of history”). In the second place, Miller himself later denied that he had intended his *Slaughter-House* dictum to suggest that the clause applied only to discrimination against Blacks. See CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 186-87 (1939) (quoting Miller’s comments during oral argument in a subsequent equal protection case). Under these circumstances, I believe the best explanation for Miller’s *Slaughter-House* dictum is that it was simply wrong, and that he and the rest of the Court quickly came to this realization.

against state interference.²²⁰ But a careful reading of the dissent reveals that Field also objected to the law at issue because it violated a principle of equality before the law that he believed to be embodied in the Fourteenth Amendment.²²¹ He repeatedly characterized the law as one that singled out a small group of persons for a special privilege without adequate justification.²²² Such a law, he said, ran afoul of the Fourteenth Amendment because the latter “inhibit[s] any legislation which confers special and exclusive privileges”²²³ and gives every citizen the right “to pursue his happiness . . . unrestrained, except by just, equal, and impartial laws.”²²⁴ Field did not specifically identify the Equal Protection Clause as the source of this limitation, and much of his language suggests that he found it in the Privileges and Immunities Clause instead.²²⁵ Justice Bradley’s dissent was more specific: “[A] law which prohibits a large class of citizens from adopting a lawful employment,” wrote Bradley, “deprives those citizens of the equal protection of the laws.”²²⁶

220. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 96-100 (Field, J., dissenting) (citing the rights listed in Justice Washington’s opinion in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230)). This portion of Field’s dissent is often cited as the first suggestion of what would become the substantive due process jurisprudence of the *Lochner* era. See, e.g., BERNARD SCHWARTZ, *THE LAW IN AMERICA* 104 (1974); Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 479 (1909).

221. Other commentators have also noted the strong emphasis on equality in Field’s opinion. See GILLMAN, *supra* note 11, at 66; NELSON, *supra* note 7, at 156-58; Harrison, *supra* note 9, at 1466-67; Kay, *supra* note 68, at 676; Yudof, *supra* note 10, at 1397.

222. See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 87 (Field, J., dissenting) (calling the statute “a mere grant . . . of special and exclusive privileges by which the health of the city is in no way promoted”); 83 U.S. (16 Wall.) at 88-89 (Field, J., dissenting) (describing the law as “the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling . . . is . . . vested exclusively for twenty-five years . . . in a single corporation”).

223. 83 U.S. (16 Wall.) at 93 (Field, J., dissenting).

224. 83 U.S. (16 Wall.) at 111 (Field, J., dissenting). To support his assertion that the right “to be free from disparaging and unequal enactments” was a “fundamental” one, Field cited three state court cases. See 83 U.S. at 106-09 (citing *City of Chicago v. Rumpff*, 45 Ill. 90 (1867); *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 18 (1856); *Mayor of Hudson v. Thorne*, 7 Paige Ch. 261 (N.Y. 1838)).

225. For example, Field wrote that “equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life . . . is the distinguishing privilege of citizens of the United States.” *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 109-10 (Field, J., dissenting). For an argument that Field originally understood the Privileges and Immunities Clause to serve as a general antidiscrimination provision, see CURRIE, *supra* note 9, at 346-51. *But see* Kay, *supra* note 68, at 676 n.33 (suggesting that Field saw the three clauses of section 1 as together comprising a single guarantee against state interference with certain fundamental rights of free men, one of which was the right to equality before the law).

226. *The Slaughter-House Cases*, 83 U.S. (Wall.) at 122 (Bradley, J., dissenting). As Justice Bradley further explained in a related case 10 years later, it is a “denial of the equal protection of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others.” *Butchers’ Union Slaughter-*

By the early 1880s, Justices Field and Bradley were describing the Equal Protection Clause as a general prohibition against partial or special laws. In 1882, Field wrote that the clause "stands in the constitution as a perpetual shield against all unequal and partial legislation by the states,"²²⁷ ensuring "that the law which operates upon one man shall operate equally upon all."²²⁸ In 1882, Field declared that the clause was designed "to prevent hostile and discriminating State legislation against any person or class of persons."²²⁹ In 1883, Justice Bradley said that "[w]hat is called class legislation" is "obnoxious to the prohibitions of" the Equal Protection Clause.²³⁰ In 1888, Field said the clause "prohibit[s] discriminating and partial legislation by any State in favor of particular persons as against others in like condition."²³¹

Field's opinion for the Court in *Barbier v. Connolly*,²³² which upheld against equal protection challenge a municipal ordinance subjecting laundries in certain designated areas of San Francisco to special restrictions, reads like a classic statement of the antebellum doctrine against partial or special laws.²³³ The Equal Protection Clause, said Field, prohibits "[c]lass legislation, discriminating

House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746, 766 (1884) (Bradley, J., concurring).

227. *County of San Mateo v. Southern Pac. R.R.*, 13 F. 722, 741 (C.C.D. Cal. 1882) (Field, J.).

228. *Southern Pac. R.R.*, 13 F. at 739 (Field, J.) (quoting Thaddeus Stevens presenting the Fourteenth Amendment to the House, see CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866)). Like the antebellum state courts, Field stressed that equal laws were essential to the preservation of liberty:

When burdens are placed upon particular classes or individuals, while the majority of the people are exempted, little heed may be paid to the complaints of those affected. Oppression thus becomes possible and lasting. But a burdensome law operating equally upon all will soon create a movement for its repeal. With the amendment enforced, a bad or oppressive state law will not long be left on any statute book.

Southern Pac. R.R., 13 F. at 741. At this time, however, Field apparently believed that the clause mandated equality only with respect to civil, as opposed to political, rights. See *Ex parte Virginia*, 100 U.S. 339, 367-68 (1879) (Field, J., dissenting).

229. *Pace v. Alabama*, 106 U.S. 583, 584 (1882).

230. The Civil Rights Cases, 109 U.S. 3, 24 (1883). As an example of such class legislation, Justice Bradley cited a law "denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others," 109 U.S. at 23-24, an obvious reference to the law at issue in *The Slaughter-House Cases*.

231. *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 28-29 (1889); see also 129 U.S. at 29 ("Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind.").

232. 113 U.S. 27 (1885).

233. Indeed, in several opinions from this period, the Court actually cited antebellum state cases to explain its equal protection holding. See, e.g., *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 156 (1897) (quoting *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 230, 270 (1829) ("[E]very partial or private law . . . is unconstitutional and void")); *Cotting v. Kansas City Stock Yards*, 183 U.S. 79, 105 (1901) (same).

against some and favoring others,” but not “legislation which, in carrying out a public purpose, is limited in its application” to certain individuals or groups.²³⁴ Because “[s]pecial burdens are often necessary for general benefits,” he reasoned, the clause tolerates laws that “press with more or less weight upon one than upon another,” so long as they “are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good.”²³⁵

That the Supreme Court recognized early on that the Equal Protection Clause was designed to constitutionalize the antebellum doctrine against partial or special laws helps to explain many of the unexplained — and otherwise puzzling — conclusions that it reached in its early equal protection cases.²³⁶ First, it explains why the Court held, early on, that the clause was concerned not just with state action discriminating against African Americans, but with state action singling out *any* group of persons for special benefits or burdens.²³⁷ Modern constitutionalists often accuse the Court of failing adequately to explain this holding.²³⁸ Once the Court had indicated that the clause constitutionalized the antebellum doctrine against partial or special laws, though, it had no need to explain why the clause was not limited to discrimination against African Americans, for the antebellum doctrine had not been so limited.

Second, it explains why the Court assumed that the clause applies only to state action that singled out a particular group of persons for special benefits or burdens, an assumption that, though not obvious from the constitutional text itself, was a constant — if often unarticulated — theme in its early race cases, from *Strauder v. West*

234. See *Barbier*, 113 U.S. at 32.

235. 113 U.S. at 31-32.

236. Cf. Yudof, *supra* note 10, at 1383 (noting that “one should not underestimate the impact of the historical roots of equality under law on modern equal protection theory”).

237. While the Court hinted in its first Equal Protection Clause case that the clause might apply only to discrimination against African Americans, see *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (dictum) (“We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class . . . on account of their race, will ever be held to come within [its] purview.”), it soon repudiated that view, see *Holden v. Hardy*, 169 U.S. 366, 382 (1898).

238. See, e.g., CURRIE, *supra* note 9, at 390; DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 41 (1990).

*Virginia*²³⁹ and *Pace v. Alabama*²⁴⁰ through *Yick Wo v. Hopkins*²⁴¹ and *Plessy v. Ferguson*.²⁴² The assumption makes perfect sense if the clause was patterned on the antebellum doctrine, for the use of governmental power to single out certain persons for special benefits or burdens was the evil with which that doctrine had been concerned.²⁴³

Third, it explains why the Court did not interpret the clause as altogether forbidding the state to single out certain groups for special benefits and burdens, but as merely forbidding it to do so without adequate justification.²⁴⁴ Modern commentators often assume that the Court did this for no reason other than practical necessity, "to avoid the absurd conclusion that there could be no classifications at all."²⁴⁵ But if, as I have asserted, the Court understood the clause to nationalize the antebellum tradition, then its decision to incorporate this most basic aspect of that tradition is perfectly un-

239. 100 U.S. 303, 308-10 (1879) (explaining that a law implicated the Equal Protection Clause because it singled out African Americans as a class for the special disadvantage of being tried by a jury from which members of their own race had been excluded).

240. 106 U.S. 583, 585 (1882) (holding that a law did not implicate the Equal Protection Clause because it did not "discriminat[e] against" any class of persons but applied equally to all).

241. 118 U.S. 356, 373-74 (1886) (explaining that a law which was "fair" and "impartial" on its face could yet implicate the Equal Protection Clause if it was "applied and administered by public authority with . . . an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances").

242. 163 U.S. 537, 543-52 (1896) (rejecting an equal protection challenge to a state law requiring segregation of the races on passenger trains on the ground that it did not subject any class of persons to unequal treatment).

243. Most of the antebellum cases condemning partial or special laws defined those laws solely by reference to their discriminatory operation or effect. See, e.g., *Lewis v. Webb*, 3 Me. 326, 336 (1825) (defining a special law as one "granting a privilege and indulgence to one man, by way of exemption from the operation and effect of [a] general law, leaving all other persons under its operation" (emphasis added)); *Lehman v. McBride*, 15 Ohio St. 593, 606-07 (1863) (using "class legislation" to describe a law whose "operation is limited to . . . certain classes of persons" (emphasis added)); *Jones' Heirs v. Perry*, 18 Tenn. (10 Yer.) 58, 77-78 (1836) (defining a partial or special law as one which is "restricted in its operation" to certain persons (emphasis added)); *Bank of Tenn. v. Cooper*, 10 Tenn. (2 Yer.) 599, 606-08 (1831) (Green, J.) (defining a partial law as one that is not "general in its operation, affecting all alike" and "operating equally on all" (emphasis added)); *Wally's Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554, 556 (1831) (defining a partial law as one which is "limited in its operation . . . to a very few individuals" (emphasis added)). Occasionally, a court would also make reference to the fact that the discriminatory effect had been intended. See, e.g., *Vanzant v. Waddell*, 10 Tenn. (2 Yer.) 259, 269 (Peck, J.) (describing a partial law as one "which is partial in its operation, intended to affect particular individuals alone" (emphasis added)). But none of the antebellum cases contain any suggestion that discriminatory intent, standing alone — that is, without discriminatory effect — would raise constitutional concerns.

244. See, e.g., *Missouri Pac. Ry. v. Mackey*, 127 U.S. 205, 210 (1888); *Soon Hing v. Crowley*, 113 U.S. 703, 708 (1885); *Barbier v. Connolly*, 113 U.S. 27, 30-31 (1885).

245. CURRIE, *supra* note 9, at 392; see also Robert G. Dixon, Jr., *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494, 499-500 (1977); Tussman & tenBroek, *supra* note 11, at 343-44.

derstandable. Equally understandable is the standard the Court adopted for deciding when state action singling out certain groups for different treatment is permissible and when it is not. Modern commentators often describe this standard as a general “reasonableness” test, which confers “unconstrained discretion” upon judges, allowing them to decide cases on the basis of nothing more than their own “ad hoc policy preferences.”²⁴⁶ In truth, however, the standard is a good deal more principled than that: like its antebellum predecessor, it requires the state to justify decisions to single out particular individuals for special benefits or burdens as advancing the interests of the public as a whole, rather than the special interests of a particular group.²⁴⁷

In short, many of the foundational principles of orthodox equal protection jurisprudence can be traced to nineteenth-century jurists’ recognition that the framers and ratifiers of the clause intended merely to nationalize, with some modifications, the antebellum state constitutional doctrine against partial or special laws. Of course, understanding that the Equal Protection Clause was patterned on this preexisting doctrine does not answer many of the hard questions that plague modern equal protection jurisprudence.²⁴⁸ The doctrine had been in existence less than half a century when it was incorporated into the federal Constitution, and many of its details had yet to be worked out. But on the question of the basic evil at which the Equal Protection Clause was aimed, its state-law background offers solid guidance: the clause was aimed at state action that had the *effect* of singling out certain classes of persons for special benefits or burdens and not at state action that was

246. KULL, *supra* note 133, at 5; *see also id.* at 115-18, 130, 210 (discussing the standard as a “reasonableness” test); Dixon, *supra* note 245, at 533 & n.208 (asserting that the standard gives the Court “unprincipled discretion” and “an uninformed power to play god with the politics of the people”); Van Alstyne, *supra* note 110, at 797 (calling the standard “a sieve”).

247. *See* Bennett, *supra* note 69, at 1077-88; Kay, *supra* note 68, at 685-86; Sunstein, *Naked Preferences*, *supra* note 34, at 1712-13; Sunstein, *supra* note 68, at 131, 134-35, 164-65; Tussman & tenBroek, *supra* note 11, at 365. In the Court’s language, discrimination which cannot be justified in this manner is labelled “invidious,” “arbitrary,” or “irrational.” *See* Sunstein, *supra* note 68, at 135, 165. Even the Court’s recent affirmative action decisions — *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) — can be explained as efforts to implement this public values standard. *See* David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1 (1995).

248. For example, the antebellum case law does not tell us when, if ever, the need to compensate for the effects of past official discrimination can justify so-called “reverse discrimination.” While the antebellum state courts made clear that discrimination cannot be justified on the grounds of simple favoritism or hostility, they never addressed the question whether compensating for past discrimination was a legitimate public purpose justification.

somehow "infected" by consideration of race or other illegitimate personal characteristics.

B. *The Middle Years: Lost But Not Forgotten*

In the early twentieth century, the Equal Protection Clause fell into disuse, becoming the "last resort of constitutional arguments."²⁴⁹ When the clause finally emerged from this period of relative dormancy in 1938, Cooley, Field, and Bradley were being vilified for their role in the development of economic substantive due process,²⁵⁰ their aversion to partial or class legislation was associated with the worst excesses of the *Lochner* era,²⁵¹ and their insight about the intended meaning of the Equal Protection Clause had been forgotten. As a result, this important aspect of the clause's background has been lost to modern interpreters.

Until the racial gerrymandering cases of the 1990s, however, this loss did not result in any serious distortion of the Court's equal protection jurisprudence. The cornerstones of that jurisprudence, laid in the nineteenth century, reflected the original understanding. The elaborate doctrinal structure that the Court built upon those cornerstones in the middle years of the twentieth century was also fully, though perhaps not always consciously, consistent with that understanding.²⁵² During this period, the Court expanded the definition of "state action,"²⁵³ introduced the concept of "suspect" classifications,²⁵⁴ announced the requirement of discriminatory "intent" or "purpose,"²⁵⁵ and settled into a rigid multi-tiered stan-

249. *Buck v. Bell*, 274 U.S. 200, 208 (1927); see CURRIE, *supra* note 238, at 136.

250. See, e.g., JACOBS, *supra* note 77; ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 496-520 (1st ed. 1948); CARL B. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 520-21 (1st ed. 1943); BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT* (1942).

251. See, e.g., sources cited *supra* note 250.

252. For a general summary of the Court's equal protection work between 1938 and 1990, see Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

253. See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177-79 (1972); *Reitman v. Mulkey*, 387 U.S. 369, 378-81 (1967); *Evans v. Newton*, 382 U.S. 296, 301 (1966); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961); *Terry v. Adams*, 345 U.S. 461, 469-70 (1953); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944).

254. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

255. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239-42 (1976).

dard of review.²⁵⁶ Throughout this period, however, the Court remained faithful to the framers' understanding that the Equal Protection Clause, like the state constitutional doctrine on which it was patterned, was concerned only with state action that had the *effect* of singling out certain persons for special benefits or burdens. We can see this most clearly in two types of equal protection cases: those involving challenges to electoral redistricting laws and those involving challenges to race-based state action that has the superficial appearance of treating the races equally.

In the Court's early cases applying the clause in the context of electoral districting, the notion that the Equal Protection Clause applies only to state action that has the *effect* of singling out a particular group for special benefits or burdens was a consistent theme. When the Court first held a malapportionment claim cognizable under the Equal Protection Clause, it explained that the challenged apportionment statute was a "classification disfavor[ing] voters in [certain] counties," by "placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in [the] favored counties."²⁵⁷ When it announced that the Equal Protection Clause required state legislatures to be apportioned on the basis of population, the Court reasoned that an apportionment plan "which give[s] the same number of representatives to unequal numbers of constituents . . . discriminat[es] against" individual voters living in certain "disfavored areas."²⁵⁸ Such a plan "dilut[es]" the weight of their votes vis-à-vis those of voters in other parts of the state.²⁵⁹ When

256. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). See generally Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1 (1972) (discussing development of equal protection doctrine under the Burger Court); *Developments: Equal Protection*, *supra* note 3 (discussing development of equal protection doctrine between 1949 and 1969). During this period, the Court also experimented with the notion that the Equal Protection Clause offered special protection to certain "fundamental" rights or interests. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 633-38 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666-70 (1966); *Griffin v. Illinois*, 351 U.S. 12, 16-26 (1956). The Burger Court sharply curtailed this strand of equal protection doctrine. See *Rodriguez*, 411 U.S. at 33-55; *Dandridge v. Williams*, 397 U.S. 471, 483-87 (1970). As others have explained, *Shapiro*, *Harper*, *Griffin*, and the other so-called fundamental rights cases are not really equal protection cases at all. See *Rodriguez*, 411 U.S. at 59-62 (Stewart, J., concurring); Edward L. Barrett, Jr., *Judicial Supervision of Legislative Classifications — A More Modest Role for Equal Protection?*, 1976 BYU L. REV. 89, 108-21; Lupu, *supra* note 11, at 1060-75; Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1024, 1074-83 (1979).

257. *Baker v. Carr*, 369 U.S. 186, 207-08 (1962).

258. *Reynolds v. Sims*, 377 U.S. 533, 563 (1964).

259. See 377 U.S. 533, 563-68; see also *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963) (holding that the Equal Protection Clause requires that "all who participate in [an] election are to have an equal vote," for it "visualizes no preferred class of voters but equality among those who meet the basic qualifications"). While *Reynolds* is often described as a fundamental

the Court held that a multi-member districting scheme that gave substantially equal weight to the votes of all individuals could violate the Equal Protection Clause by “diluting” the voting strength of certain racial groups, it demanded proof that the scheme would give those groups “less opportunity than . . . other [voters] . . . to participate in the political processes and to elect legislators of their choice.”²⁶⁰ Finally, when it found claims of political gerrymandering cognizable under the Equal Protection Clause, the Court made clear that such a claim required proof of “an actual discriminatory effect” upon “an identifiable political group” — specifically, a showing that the electoral system “substantially disadvantage[d]” the members of that group in their ability to influence the political process.²⁶¹ Only then, said the Court, did the districting plan “discriminate” against those voters in the sense required to implicate the Equal Protection Clause.²⁶²

In the Court’s cases involving facially symmetrical racial discrimination, the notion that the Equal Protection Clause applies only to state action that has the *effect* of singling out a particular group of persons for special disadvantage was also a consistent theme. It was, for example, a prominent feature of the Court’s opinion in *Brown v. Board of Education*.²⁶³ Indeed, the very purpose of that opinion’s reliance on social science data was to demonstrate that the segregation of African American schoolchildren had the effect of singling out those children for special disadvantage,

rights case, *see, e.g.*, *Hall v. Beals*, 396 U.S. 45, 50 (1969) (Brennan, J., dissenting) (citing *Reynolds* for the proposition that the right to vote is “fundamental”); *McDonald v. Board of Elections*, 394 U.S. 802, 806 (1969) (same), its analysis falls more into the traditional classification model. *See Developments: Equal Protection, supra* note 3, at 1182.

260. *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *see also White v. Regester*, 412 U.S. 755, 766 (1973) (relying on *Whitcomb* in stating that plaintiff must prove that the scheme “discriminate[s] against” a certain group of voters by making “the political processes leading to nomination and election . . . not equally open to participation by th[at] group” and giving its members “less opportunity than . . . other [voters] in the district to participate in the political processes and to elect legislators of their choice”); *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (stating that a plaintiff must prove that the scheme “minimize[s] or cancel[s] out the voting strength of [certain] racial or political elements of the voting population” (internal quotation marks omitted) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))).

261. *Davis v. Bandemer*, 478 U.S. 109, 127, 133 (1986) (White, J., plurality opinion).

262. *See* 478 U.S. at 127-34. Even those who would recast *Gomillion v. Lightfoot* as an equal protection case, rather than a Fifteenth Amendment case, have focused on the fact that the challenged act had the *effect* of singling out Black residents of the Tuskegee area for special disadvantage vis-à-vis their White counterparts by denying them the benefits of residence in the City of Tuskegee. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring) (arguing that the act raised equal protection problems because it “fenc[ed] Negro citizens out of” the City of Tuskegee (internal quotation marks omitted) (quoting language of majority opinion, *see* 364 U.S. at 341)). *See generally Shaw v. Reno*, 509 U.S. 630, 658-75 (1993) (“*Shaw P*”) (White, J., dissenting).

263. 347 U.S. 483 (1954).

even when the education provided them was equal in all tangible respects to that provided to White children.²⁶⁴ The post-*Brown* per curiam decisions, which invalidated racial segregation in other public facilities, temporarily obscured this aspect of *Brown*, for they did not make any effort to explain why segregation had a similar effect on African Americans in these different contexts.²⁶⁵ But a rationale for those decisions soon emerged that was fully consistent with the original understanding: the system of racial segregation then being practiced, viewed in social and historical context, singled out African Americans for the special burden of stigmatization by implying that they were not fit to mix with the White majority.²⁶⁶ Most modern constitutionalists now understand this to be the unspoken theory behind *Brown* itself.²⁶⁷ On this view, *Brown* and its progeny did not reject *Plessy v. Ferguson*'s understanding of the basic concept embodied in the Equal Protection Clause — that it applies only to state action that singles out a certain class for special disadvantage — but only its understanding of the actual effect that racial segregation had on African Americans.²⁶⁸

264. See 347 U.S. at 494-95 & n.11 (citing various social science studies to support its endorsement of a lower court finding that racial segregation in the public schools has "a detrimental effect" upon African American children, for it gives them "a sense of inferiority" which "has a tendency to [retard] the[ir] education and mental development"). *Brown*'s reliance on social science data has been widely criticized. See generally *Bandemer*, 478 U.S. at 127-34.

265. See, e.g., *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (courtrooms); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam) (municipal airport restaurant); *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54 (1958) (per curiam) (public parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (city buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (municipal golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public beaches and bathhouses).

266. Compare Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 429-30 & n.25 (1960) with *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (asserting that laws requiring the "separation" of the races "do not necessarily imply the inferiority of either race to the other") and 163 U.S. at 551 (asserting that state-mandated segregation does not "stamp[] the colored race with a badge of inferiority").

267. See, e.g., BAER, *supra* note 11, at 114; CURRIE, *supra* note 238, at 377-78; TRIBE, *supra* note 3, § 16-15, at 1477-78; Paul Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Anti-Discrimination Principle*, 90 *HARV. L. REV.* 1, 9-10 (1976); Lawrence, *supra* note 8, at 350; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 33 (1959); *Developments: Equal Protection, supra* note 3, at 1090. But see *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) ("*Jenkins III*") (Thomas, J., concurring) (rejecting the "stigma" explanation for *Brown* by asserting that "[s]egregation was not unconstitutional because it might have caused psychological feelings of inferiority," but because "the State classified students based on their race").

268. See TRIBE, *supra* note 3, § 16-15, at 1477 ("It was not the concept embodied in the equal protection clause that changed between 1896 and 1954, but only our relevant perceptions and understandings," for "the Court in 1954 understood, as the *Plessy* Court in 1896 did not, that racial segregation in public schools and other public facilities in fact subjugates blacks, despite its appearance of symmetry, because it stands for and reinforces white supremacy . . ."); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 836 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (explaining the Court's decision to overrule

The Court's decisions in *McLaughlin v. Florida*²⁶⁹ and *Loving v. Virginia*²⁷⁰ also reflect the understanding that the Equal Protection Clause applies only to state action that has the *effect* of singling out a particular group for special disadvantage. In *McLaughlin*, the Court invoked the clause to strike down a state law that forbade cohabitation by unmarried couples of different races. To be sure, the Court refused to hold that the law could not raise equal protection concerns because it subjected both members of the interracial couple to the same penalty.²⁷¹ But the Court's holding that the law actually did violate the clause turned on the fact that it singled out a certain class of persons — interracial couples — for special disadvantage because of their race,²⁷² and that the State had not justified this "discrimination" as "necessary . . . to the accomplishment of a permissible state policy."²⁷³ In *Loving*, the Court invoked the clause to strike down a state law criminalizing interracial marriage.²⁷⁴ Again, the Court rejected the argument that the law could not raise equal protection concerns because it subjected both parties to an interracial marriage to the same punishment.²⁷⁵ Once

Plessy in *Brown* as based on its changed understanding of the implications of segregation); RONALD DWORKIN, *LAW'S EMPIRE* 387-89 (1986).

269. 379 U.S. 184 (1964).

270. 388 U.S. 1 (1967).

271. See *McLaughlin*, 379 U.S. at 188-91.

272. See 379 U.S. at 188 (stating that the statute "treats the interracial couple . . . differently than it does any other couple"); 379 U.S. at 190 (noting that under the statute, "different treatment [is] accorded interracial and intraracial couples"); 379 U.S. at 192 (stating that the statute "proscri[bes] . . . the specified conduct when engaged in by a white person and a Negro, but not otherwise"); 379 U.S. at 193 (arguing that the statute "punish[es] [the] promiscuity of one racial group and not that of another," and subjects "the interracial couple" to "separate or different treatment" than "the white or the Negro couple"); 379 U.S. at 194 (stating that the statute "lays an unequal hand on those who have committed intrinsically the same quality of offense" (citations omitted)); 379 U.S. at 196 (noting that the statute "singles out the promiscuous interracial couple for special statutory treatment"); 379 U.S. at 198 (Stewart, J., concurring) (arguing that the statute "discriminat[es]" by race, in violation of the Equal Protection Clause, because it "makes the criminality of an act depend upon the race of the actor"); see also KULL, *supra* note 133, at 264 n.16 (conceding that the Court's opinion in *McLaughlin* rested on the "[u]nequal treatment" of "members of racially determined classes").

273. *McLaughlin*, 379 U.S. at 196.

274. See *Loving*, 388 U.S. at 11-12. The Court also found the statute invalid under the Due Process Clause, as an unconstitutional interference with the fundamental right to marry. See 388 U.S. at 12.

275. See 388 U.S. at 8-10. In so doing, the Court declared that "the mere 'equal application' of a statute containing racial classifications is [not] enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations," and that "the fact of equal application does not immunize [a] statute" which "contain[s] racial classifications" from "the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." 388 U.S. at 8-9. Modern advocates of colorblindness often read these comments as standing for the proposition that a race-based law implicates the Equal Protection Clause even if it does not have the

again, however, the Court's holding that the law violated the clause turned on the fact that it singled out a certain class of persons — interracial couples — for special disadvantage because of their race, with no justification other than an illegitimate desire “to maintain White Supremacy.”²⁷⁶ The Court did not labor long to explain how the statute did this, but it had no need to do so, for it had given the explanation just one Term earlier in *McLaughlin*.²⁷⁷

*Anderson v. Martin*²⁷⁸ also reveals the Court's understanding that a showing of discriminatory effect is required to establish an equal protection violation. In that case, African-American candidates for office in Louisiana brought an equal protection challenge to a state statute that required designation of every candidate's race on the ballot in all state or local elections for public office. The Court held that the statute violated the Equal Protection Clause, even though it applied to candidates of all races, because it actually “operate[d] as a discrimination against” African American candidates.²⁷⁹ As the Court explained, “by placing a racial label on a candidate at the most crucial stage in the electoral process,” the state “indicates that a candidate's race or color is an important — perhaps paramount — consideration in the citizen's choice, which may . . . influence the citizen to cast his ballot along racial lines.”²⁸⁰

effect of singling out a particular group for special disadvantage because of their race. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (Kennedy, J.) (citing *Loving* for the proposition that “racial classifications do not become legitimate [because] all persons suffer them in equal degree”). But *Loving* itself was not such a case; as the Court noted several times, the law in question there, like the one invalidated in *McLaughlin*, did in fact single out a certain class of persons for special disadvantage because of their race: a class comprised of interracial couples. See *Loving*, 388 U.S. at 10 (stating that the law “defin[es] offenses based on racial classifications”); 388 U.S. at 11 (noting that the law “proscribe[s] generally accepted conduct if engaged in by members of different races”); 388 U.S. at 13 (Stewart, J., concurring) (noting that the law “makes the criminality of an act depend upon the race of the actor” (citing his dissent in *McLaughlin*, 379 U.S. at 198)).

276. *Loving*, 388 U.S. at 11; see also *KULL*, *supra* note 133, at 171 (conceding that *Loving* does not stand for the proposition that the Equal Protection Clause forbids all race-based state action).

277. *Palmore v. Sidoti*, 466 U.S. 429 (1984), exhibits the same reasoning. The Court held that a state violated the equal protection rights of a divorcee when it stripped her of custody over her child solely because of her remarriage to a man of a different race. The Court explained that the state's action “discriminat[ed]” against the woman “based on [her] race,” by singling her out for a special disadvantage — denial of custody, even though she satisfied the normal requirements for custody — because she was of a different race than her new husband. See 466 U.S. at 432 (stating that “it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability”). But see *KULL*, *supra* note 133, at 264 n.16 (asserting that the holding in *Palmore* “resists conventional equal protection analysis” because of the “logical awkwardness” of identifying the “racially determined classes” that are being “den[ied] equal treatment”).

278. 375 U.S. 399 (1964).

279. 375 U.S. at 402.

280. 375 U.S. at 402.

Such a system is “likely,” given “private attitudes and pressures towards Negroes,” to result in candidates of the majority race — the White race — being “favored” or “preferred” over their Black counterparts.²⁸¹ The Court concluded that the statute accomplished “by indirection,” through “ ‘the interplay of governmental and private action,’ ” that which the state could not do directly: singling out African Americans for special disadvantage in running for public office.²⁸² While *Anderson* goes a step beyond *McLaughlin* and *Loving* in suggesting that discriminatory effect can be found in the interplay between state action and private prejudice, it does not deviate from the fundamental assumption that a showing of discriminatory effect is necessary to make out an equal protection violation.

The Court’s “suspect classification” doctrine can also be seen as consistent with the understanding that the Equal Protection Clause was intended to reach only state action that has the *effect* of singling out a particular group of persons for special benefits or burdens.²⁸³ The Court first introduced the “suspect classification” language in a case where the governmental action under challenge obviously *did* have such a discriminatory effect.²⁸⁴ As others have explained, the heightened scrutiny this language mandates is in reality nothing but an evidentiary device, designed to facilitate judicial identification of instances of special treatment that lack an adequate public purpose justification.²⁸⁵ Proof that the state has used a “suspect” or “quasi-

281. See 375 U.S. at 402-03 (internal quotation marks omitted); see also *Palmore*, 466 U.S. at 433 (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

282. See *Anderson*, 375 U.S. at 403-04 (quoting *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)).

283. The term “suspect classification” derives from *Korematsu v. United States*, 323 U.S. 214 (1944), in which the Court declared in dictum that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” and that “courts must subject them to the most rigid scrutiny.” 323 U.S. at 216; see also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (citing *Korematsu* for the proposition that racial classifications are “constitutionally suspect”). While the Court decided *Korematsu* and *Bolling* under the Fifth Amendment, the Court soon transposed their suspect classification language to the Fourteenth Amendment context. See *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (stating that under the Fourteenth Amendment’s Equal Protection Clause, any “classification based upon . . . race” is “constitutionally suspect, and subject to the most rigid scrutiny” (internal quotation marks and citations omitted)); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (citing *Korematsu* for the proposition that “the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny” (internal quotation marks omitted)).

284. See *Korematsu*, 323 U.S. 214 (addressing the practice of excluding Japanese Americans from certain areas).

285. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 147 (1980); Bennett, *supra* note 69, at 1077; Perry, *supra* note 256, at 1033-36; Sunstein, *supra* note 68, at 140-43; Tussman & tenBroek, *supra* note 11, at 356.

suspect” criterion to identify a group of persons being singled out for special benefits or burdens triggers a presumption that the discrimination does *not* have an adequate public purpose justification, a presumption that the state can then rebut by demonstrating that the discrimination does in fact serve a “compelling” or “important” state interest.²⁸⁶ Courts apply the presumption in these situations because our common experience tells us that they are situations in which the special treatment is particularly likely to be motivated by prejudice or favoritism rather than by a legitimate desire to further the overall public good.²⁸⁷ But what is “suspected” is that the state has chosen to single out the persons in question for special benefits or burdens without an adequate public purpose justification, not that the state has dealt with them as members of racial, ethnic, or other “suspect” classes rather than as individuals.

Nor are *Washington v. Davis*²⁸⁸ and its progeny necessarily inconsistent with the traditional understanding that only state action that has the *effect* of singling out a particular class for special disadvantage implicates the Equal Protection Clause.²⁸⁹ In the *Davis* line, the Court held that a person cannot make out an equal protection claim simply by alleging such a discriminatory effect; an allegation of discriminatory “intent” or “purpose” is also required.²⁹⁰ But the Court did not say that an allegation of discriminatory effect was not *necessary* to state an equal protection claim, only that such an allegation was not *sufficient*, standing alone, to do so.²⁹¹ To read

286. See Bennett, *supra* note 69, at 1077 (arguing that “[t]he ‘suspicion’ of suspect classifications in two-tiered equal protection [analysis] . . . acts as a kind of presumption of forbidden purpose,” and that “[t]he requirement that a compelling state interest be shown is mainly an opportunity to rebut the presumed illegitimate purpose”); Sunstein, *supra* note 68, at 140-43.

287. See Sunstein, *supra* note 68, at 140 (arguing that the Court’s doctrine requires the application of heightened scrutiny when there is “an unusual likelihood” that the discrimination in question is “not [] an attempt to promote a public value”); *id.* at 143 (arguing that “the device of heightened scrutiny reflects skepticism that a public value is in fact being served and represents a presumption that the public justification is a facade, serving to conceal the actual basis for the classification”).

288. 426 U.S. 229 (1976).

289. While the narrow holding of *Davis* — that discriminatory effect alone is not actionable, absent a showing of discriminatory intent, see 426 U.S. 229 — was not compelled by the antebellum case law, neither was it inconsistent with it. As noted earlier, the antebellum courts did not squarely address the question of whether a law that had the *effect* of singling out a certain class for special benefits or burdens would raise constitutional concerns even if that effect had not been intended by its drafters. See *supra* note 243.

290. See *Personnel Admin. v. Feeney*, 442 U.S. 256, 273-74 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Davis*, 426 U.S. at 239-40. While *Davis* actually involved the equal protection component of the Fifth Amendment’s Due Process Clause, see 426 U.S. at 239, its successors were Fourteenth Amendment cases.

291. See *Davis*, 426 U.S. at 239 (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory pur-

this language as suggesting that a discriminatory effect is also not *necessary* is to commit a basic logical error by ignoring the difference between “necessary” and “sufficient” conditions.²⁹²

Washington v. Davis and its progeny did, however, mark the beginning of a new era in the Court’s equal protection jurisprudence — an era characterized by an increasing tendency to forget that the basic evil at which the clause aims is the practice of singling out certain persons for special benefits or burdens without adequate justification, and to see it instead as aimed at purging governmental decisionmaking of certain illegitimate considerations.²⁹³ This tendency first manifested itself in the gender discrimination cases of the late 1970s and early 1980s, which contain repeated assertions that a state cannot justify its decision to single out a particular group of persons for special benefits or burdens by reference to “stereotypical” assumptions about the characteristics and abilities of individual members of that group.²⁹⁴ In the jury selection and

pose, is unconstitutional *solely* because it has a racially disproportionate impact.”); 426 U.S. at 242 (“Disproportionate impact . . . is not the *sole* touchstone of an invidious racial discrimination forbidden by the Constitution. Standing *alone*, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny.” (emphasis added and citation omitted)); *Arlington Heights*, 429 U.S. at 264-65 (stating that under *Davis*, “official action will not be held unconstitutional *solely* because it results in a racially disproportionate impact,” for “[p]roof of racially discriminatory intent or purpose is required” (emphasis added)); *Feeney*, 442 U.S. at 260 (citing *Davis* for holding “that a neutral law does not violate the Equal Protection Clause *solely* because it results in a racially disproportionate impact, but that instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race” (emphasis added)).

292. See ROBERT BAUM, LOGIC 498-501 (2d ed. 1981). Indeed, later cases in the *Davis* line seemed to assume that a showing of discriminatory effect remained an essential element of an equal protection claim. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (stating that an equal protection claim requires proof “that the purposeful discrimination ‘had a discriminatory effect’ ” (emphasis added)); *Feeney*, 442 U.S. at 279 (stating that the discriminatory purpose requirement needs proof “that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its *adverse effects* upon an identifiable group” (emphasis added)).

293. *Davis* touched off a flurry of academic commentary suggesting that the Equal Protection Clause should be read to invalidate any governmental action shown to have been infected by racial prejudice or some other illegitimate motivation, whether or not it had the effect of singling out any identifiable class or persons for special disadvantage. See, e.g., Larry G. Simon, *Racially Prejudiced Governmental Action: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978). Michael Klarman calls this the “legislative inputs” approach to the Equal Protection Clause. Klarman argues that this explains both the Burger Court’s gender discrimination cases and the Rehnquist Court’s affirmative action cases. See Klarman, *supra* note 252, at 284-85, 295-318.

294. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (noting that a state may not justify gender discrimination by reference to “archaic and overbroad assumptions about the relative needs and capacities of the sexes”); *Lehr v. Robertson*, 463 U.S. 248, 266 n.24 (1983) (noting that a state may not justify gender discrimination based on “an invidious and indefensible stereotype”); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (disallowing a state’s justification of gender discrimination based on “archaic and stereotypic notions” about the proper roles of the sexes); *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (arguing that a state may not defend gender discrimina-

affirmative action cases of the late 1980s and early 1990s, certain members of the Court transformed it into the broader assertion that the Equal Protection Clause forbids the state to deal with people on the basis of "stereotypical" assumptions predicated on their membership in certain racial, sexual, or other groups.²⁹⁵ This theme went largely unnoticed when it first appeared, for it was introduced in cases challenging state action that obviously *did* have the effect of singling out an identifiable group of persons for special benefits or burdens.²⁹⁶ In the racial gerrymandering cases of the last few Terms, however, this misguided notion that the Equal Protection Clause was designed to require the state to treat people as individuals, rather than as members of groups defined by certain "immutable" characteristics, has worked serious mischief. It is to those cases that I now turn.

tion based on "stereotyped assumptions about the proper roles and the relative capabilities of men and women," even when "the generalizations they reflect may be true of the majority of the members of the class").

295. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994) ("[P]otential jurors . . . have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual, or national class." (internal quotation marks omitted)); 497 U.S. at 604 (O'Connor, J., dissenting) (arguing that the equal protection component of the Fifth Amendment's Due Process Clause forbids the Government to "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts — their very worth as citizens — according to [that] criterion"); 497 U.S. at 609 (O'Connor, J., dissenting) ("The right to equal protection . . . secur[es] to *each* individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 514-15 (1989) (Stevens, J., concurring in part and concurring in the judgment) (stating that the "hallmark" of an equal protection violation is "stereotypical analysis"); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (Marshall, J., concurring) ("[T]he Equal Protection Clause prohibits a State from taking *any* actions based on crude, inaccurate racial stereotypes . . ." (emphasis added)).

296. *Batson*, for example, involved an Equal Protection challenge to the use of peremptory strikes to exclude otherwise-qualified members of a particular racial group from a particular petit jury. See 476 U.S. 469. This practice obviously had the effect of singling out those persons for special disadvantage. *Croson* involved an equal protection challenge to a city's practice of setting aside a certain percentage of its contracting work for minority-owned businesses. See 488 U.S. 469. The practice subjected White contractors to special disadvantage by denying them an opportunity to compete for business which was granted to others. See *Shaw v. Reno*, 509 U.S. 630, 681 (1993) ("*Shaw I*") (Souter, J., dissenting). *Metro Broadcasting* involved an equal protection challenge to the FCC's policy of giving minorities special preferences in awarding broadcast licenses. See 497 U.S. 547. This policy again subjected White applicants to a special disadvantage, by denying them the right to compete for licenses on an equal footing with other applicants. Cf. *Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 657 (1993) (explaining that race-based preference programs single out the class of persons not entitled to the preference for special disadvantage by denying them the ability "to compete on an equal footing" with other candidates).

IV. THE RACIAL GERRYMANDERING CASES OF THE 1990s: THE TRADITION ABANDONED

In this part, I argue that the Court's decisions in the recent racial gerrymandering cases adopt an interpretation of the Equal Protection Clause that deviates from the original understanding in a subtle but significant fashion. In these cases, the Court has read the clause as giving all persons a substantive constitutional right not to have the state deal with them on the basis of their race, even when doing so does not result in their being singled out for any special disadvantage because of their race. If this right has any constitutional foundation at all, I argue, it lies not in the Equal Protection Clause, but in the substantive aspect of the Due Process Clause.

The racial gerrymandering cases came to the Court at the height of the post-*Croson* enthusiasm for equal protection challenges to race-based preference programs. Unlike *Croson* and the other affirmative action cases, however, these cases presented equal protection challenges to state action that, though clearly race-conscious, did not appear to single out any identifiable class of persons for special benefits or burdens.²⁹⁷ The dissenting Justices sensed this difficulty from the outset but were unable to articulate it very precisely, arguing variously that the plaintiffs had not stated a valid equal protection claim because they had not alleged a "cognizable injury,"²⁹⁸ a "cognizable harm,"²⁹⁹ the requisite "discriminatory effect,"³⁰⁰ or that the laws in question "discriminated against" any

297. Appearances can, of course, be deceptive: it is entirely possible that the electoral redistricting plans at issue in these cases, viewed in proper perspective, did in fact have such a discriminatory effect. I do not attempt to deal with that question here. For my purposes, it is sufficient to note that the laws did not *appear* to have a discriminatory effect, and that the majority made no effort to demonstrate that they did. See *The Supreme Court, 1992 Term — Leading Cases*, 107 HARV. L. REV. 144, 195 (1993) [hereinafter *1992 Term*] (stating that the *Shaw I* majority "did not contend that the state plan treated anyone unequally"); *id.* at 202 (stating that the *Shaw I* majority "did not contend that the North Carolina reapportionment plan used race to single some people out for disadvantageous treatment"). For the argument that this appearance is consistent with reality, see *Bush v. Vera*, 116 S. Ct. 1941, 2000-03 (1996) (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); *Shaw v. Hunt*, 116 S. Ct. 1894, 1907-12 (1996) ("*Shaw II*") (Stevens, J., dissenting).

298. See *United States v. Hays*, 515 U.S. 737, 750-52 (1995) (Stevens, J., concurring in the judgment) (asserting that the plaintiffs have not alleged a "cognizable injury"); *Miller v. Johnson*, 515 U.S. 900, 929 (1995) (Stevens, J., dissenting) (same); *Shaw I*, 509 U.S. at 659 (White, J., dissenting) (same).

299. See *Shaw I*, 509 U.S. at 684 (Souter, J., dissenting) (asserting that the plaintiffs have not alleged a "cognizable harm").

300. See *Shaw I*, 509 U.S. at 663 (White, J., dissenting) (arguing that the plaintiffs have not shown the "discriminatory effects" which are "a 'threshold requirement' " for an equal protection claim); 509 U.S. at 666 (White, J., dissenting) (arguing that the plaintiffs have not alleged "the requisite discriminatory effects"); 509 U.S. at 682 (Souter, J., dissenting) (arguing that the plaintiffs have not alleged the "coincidence of disadvantageous effect and illegitimate purpose" that is "characteristic" of an equal protection violation).

identifiable person or group.³⁰¹ Early scholarly criticism tended to describe the problem as one of the plaintiffs' "standing."³⁰² But this description obscured as much as it illuminated, for it suggested that the problem was not with the *nature* of the claim, but simply with *who* was asserting it, and that it could be cured by doing nothing more than substituting a different plaintiff.³⁰³

By last Term, however, Justices Stevens and Souter — joined by Justices Ginsburg and Breyer — were explicitly arguing that the challenged laws did not implicate the Equal Protection Clause at all because they did not single out any identifiable group of persons for special disadvantage.³⁰⁴ Justice Stevens made the point quite clearly in his dissent in *Shaw II*: "Even if an objection to a State's decision to forego color-blind districting is cognizable under some constitutional provision," wrote Stevens, "I do not understand why that provision should be the Equal Protection Clause," for "that Clause protects against wrongs which by definition burden some persons but not others," and "it appears that no individual has been burdened more than any other" here.³⁰⁵ "[T]he claimed violation of a shared right to a color-blind districting process would not seem to implicate the Equal Protection Clause at all," he continued, "precisely because it rests neither on a challenge to the State's decision

301. See *Shaw I*, 509 U.S. at 663-64 (White, J., dissenting) (arguing that "[t]he classification based on race [does not] discriminate[] against anyone"); 509 U.S. at 666-67 (White, J., dissenting) (arguing that the plaintiffs "cannot complain of discriminatory treatment"); see also *Hays*, 515 U.S. at 750 (Stevens, J., concurring in the judgment) (stating that "[t]he majority fails to explain coherently how a State discriminates invidiously by deliberately joining members of different races in the same district"); *Shaw I*, 509 U.S. at 681 (Souter, J., dissenting) (arguing that this plan does not "use . . . race to the advantage of one person . . . at the obvious expense of a member of a different race").

302. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 641-43 (1993); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 278 [hereinafter Karlan, *All Over the Map*]; Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 289-91 (1995-96) [hereinafter Karlan, *Still Hazy*]; Brian R. Markley, Comment, *Constitutional Provisions in Conflict: Article III Standing and Equal Protection After Shaw v. Reno*, 43 KAN. L. REV. 449 (1995); see also Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 54-58 (1996).

303. The Supreme Court continues to insist that the standing inquiry is analytically distinct from the question of the validity of the plaintiff's cause of action. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 500 (1975). But see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (arguing that standing "should simply be a question of the merits of plaintiff's claim"); Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 51-62 (arguing that standing analysis should be linked to the underlying cause of action).

304. See *Bush v. Vera*, 116 S. Ct. 1941, 1977-78 (1996) (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); 116 S. Ct. at 1997-2006 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); *Shaw v. Hunt*, 116 S. Ct. 1894, 1908-12 (1996) ("*Shaw II*") (Stevens, J., dissenting); 116 S. Ct. at 1923 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

305. *Shaw II*, 116 S. Ct. at 1909 (Stevens, J., dissenting).

to distribute burdens and benefits unequally, nor on a claim that the State's formally equal treatment of its citizens in fact stamps persons of one race with a badge of inferiority."³⁰⁶

Justice Souter made a similar point in his dissent in *Bush v. Vera*.³⁰⁷ *Shaw I*, he wrote, "broke abruptly" with the long-standing understanding that the Equal Protection Clause is "a practical guarantee against harm to some class singled out for disparate treatment."³⁰⁸ The claim recognized in *Shaw I*, he said, did not "address[] any injury to members of a class subjected to differential treatment, the standard presupposition of an equal protection violation," but "a putative harm subject to complaint by any voter objecting to an untoward consideration of race in the political process."³⁰⁹ If this "harm is identifiable at all," he continued, it is harm that "fall[s] on every citizen and every representative alike."³¹⁰

The majority has never responded directly to this criticism. Instead, it has insisted that whenever a state legislature uses race as "the dominant and controlling rationale" in drawing the lines of electoral districts, "subordinat[ing] traditional race-neutral districting principles . . . to racial considerations," the resulting plan is subject to strict scrutiny under the Equal Protection Clause, even if it does not single out any identifiable group of voters for special disadvantage because of their race.³¹¹ In so holding, the majority has reasoned as follows: The Equal Protection Clause forbids the state to "classify" persons on the basis of their race, at least in the absence of compelling justification. When a state assigns voters to electoral districts, it is "classifying" them for purposes of voting. If

306. 116 S. Ct. at 1909; *see also Vera*, 116 S. Ct. at 1977 (Stevens, J., dissenting) ("Racial gerrymandering of the sort being addressed in these cases is 'discrimination' only in the sense that the lines are drawn based on race, not in the sense that harm is imposed on any specific persons on account of their race.").

307. 116 S. Ct. 1941 (1996).

308. 116 S. Ct. at 2001 (Souter, J., dissenting).

309. 116 S. Ct. at 1998; *see* 116 S. Ct. at 2003, 2006 (stating that *Shaw* claims do not involve "equal protection injury in the usual sense," for there is "no separably injured class").

310. 116 S. Ct. at 2002.

311. *Miller v. Johnson*, 515 U.S. 900, 913, 916 (1995); *see Vera*, 116 S. Ct. at 1951-52 (O'Connor, J.) (plurality opinion) (requiring the plaintiff to show that the state "subordinate[s]" "other, legitimate districting principles . . . to race" in drawing districts); 116 S. Ct. at 1969 (O'Connor, J., concurring) (asserting that the plaintiff should have to show that the state "subordinate[s] traditional districting criteria to the use of race"); *Shaw II*, 116 S. Ct. at 1900-02 (arguing that harm arises when a state uses race as "the 'dominant and controlling' consideration" in "assigning voters to districts"); *Miller*, 515 U.S. at 928 (O'Connor, J., concurring) (explaining that the plaintiff must show that the state "relie[s] on race in substantial disregard of customary and traditional districting practices"); *cf. Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) ("*Shaw I*").

the state takes race into account in making those assignments, it is therefore “classifying” — or “discriminating” — by race, a practice that violates the Equal Protection Clause unless shown to be necessary to a compelling state interest.³¹²

The Court’s logic seems, at first blush, to be unassailable; indeed, it seems so obvious that one wonders why no one thought to challenge race-conscious redistricting under the Voting Rights Act on this ground earlier. But the Court’s argument depends on a subtle misuse of the terms “classify” and “discriminate,” which are terms of art in equal protection jurisprudence. In common parlance, to “classify” means to arrange, sort, or divide into groups or categories (called “classes”),³¹³ and to “discriminate” means to discern or perceive a difference between.³¹⁴ In traditional equal protection jurisprudence, however, the terms “classify” and “discriminate” have much more specialized meanings. To “classify” means to sort people into groups for differing benefits or burdens

312. See *Vera*, 116 S. Ct. at 1951, 1960, 1963-64 (O’Connor, J.) (plurality opinion); 116 S. Ct. at 1972-74 (Thomas, J., joined by Scalia, J., concurring in the judgment); *Shaw II*, 116 S. Ct. at 1900-02; *Miller*, 515 U.S. at 904, 910-15; *Shaw I*, 509 U.S. at 642-52; see also *United States v. Hays*, 515 U.S. 737, 744 (1995).

313. See, e.g., WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 417 (1976) [hereinafter WEBSTER’S] (defining the term as “to group or segregate in classes” or “sort” or “put into a class, classification, or category”); 3 THE OXFORD ENGLISH DICTIONARY 283 (2d ed. 1989) (“To arrange or distribute in classes according to a method or system.”). Similarly, a “classification” is “the act or a method of classifying . . . of distributing into groups, classes, or families: an assigning to a proper class: sorting.” WEBSTER’S, *supra*, at 417; see 3 THE OXFORD ENGLISH DICTIONARY, *supra*, at 283 (“The action of classifying or arranging in classes, according to common characteristics or affinities; assignment to the proper class.”).

314. See, e.g., WEBSTER’S, *supra* note 313, at 647-48 (“[T]o mark or perceive the distinguishing or peculiar features of: recognize as being different from others . . . : distinguish between or among.”); 4 THE OXFORD ENGLISH DICTIONARY, *supra* note 313, at 757-58 (“To make or constitute a difference in or between; to distinguish [or] differentiate”). Similarly, “discrimination” is “the act or an instance of . . . making or perceiving of a distinction or difference.” WEBSTER’S, *supra* note 313, at 648; see also 4 THE OXFORD ENGLISH DICTIONARY, *supra* note 313, at 758 (defining “discrimination” as “the action of . . . perceiving, noting, or making a distinction or difference between things”); George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 127-28 (1995) (defining “discrimination” as “a process of noticing or marking a difference,” of “recognizing, discerning, appreciating, or identifying a difference”).

under the law,³¹⁵ and to “discriminate” means to single out for special benefits or burdens not accorded others.³¹⁶

315. See, e.g., Barrett, *supra* note 256, at 90 (defining “classify” as “to treat different classes of people in different ways”); Sunstein, *supra* note 68, at 147-48 (defining “classify” as to “treat[] one group differently from another” or to “single[] out for special treatment”); Tussman & tenBroek, *supra* note 11, at 343-44 (defining “classify” as to “impose special burdens upon or grant special benefits to special groups or classes of individuals”); *Developments: Equal Protection*, *supra* note 3, at 1069 (defining “classify” as to “treat some differently from others”). For examples in the cases, see *Atchison, Topeka & Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96, 103 (1899) (defining “classify” as “to impose special duties or liabilities upon individuals and corporations, or classes of them”); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (defining “classify” as to “single[] out” certain “defined classes” for “special burdens”); *Reed v. Reed*, 404 U.S. 71, 75 (1971) (defining “classify” as to “treat[] different classes of persons in different ways”).

In the language of traditional equal protection jurisprudence, a “classification” is an act or practice of government which has the effect of sorting people into groups for differing benefits or burdens under the law. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 553 (1980) (Stevens, J., dissenting) (defining a “classification” as “[w]hen [the state] creates a special preference, or a special disability, for a class of persons”); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (defining a “classification” as state action which “affect[s] some groups of citizens differently than others”); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 429 (1936) (defining a “classification” as state action which “subject[s] . . . one and not the other to a particular form of disadvantage”); *Atchison, Topeka & Santa Fe*, 174 U.S. at 106 (“It is the essence of a classification that upon the class are cast . . . burdens different from those resting upon the general public,” for “the very idea of classification is that of inequality”); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 153-59 (1897) (defining a “classification” as state action which “singles out a certain class” of persons for “special burdens” not imposed upon everyone else).

316. See, e.g., Barrett, *supra* note 256, at 93 (defining “discriminate” as to “single[] out for special treatment”); Epps, *supra* note 8, at 441 (defining “discriminate” as to “target[] some . . . group or groups for unequal treatment”). For examples in the cases, see *Metro Broad, Inc. v. FCC*, 497 U.S. 547, 637 (1990) (Kennedy, J., dissenting) (defining “discriminate” as “to disfavor some citizens and favor others”); *Carter v. Jury Commn. of Greene County*, 396 U.S. 320, 330 (1970) (defining “discriminate” as to extend “a right, a privilege, or a duty” to “some . . . citizens and deny it to others”).

In orthodox equal protection jurisprudence, a “discrimination” is an act or practice of government which has the effect of singling out certain persons for special benefits or burdens not accorded others. See, e.g., *Brest, supra* note 267, at 6 (defining “discrimination” as state action which “selectively disadvantage[s] the members of a [certain] group”); Tussman & tenBroek, *supra* note 11, at 358 (defining “discrimination” as “[t]he imposition of special burdens, the granting of special benefits”). For examples in the cases, see *Powers v. Ohio*, 499 U.S. 400, 423-24 (1991) (Scalia, J., dissenting) (defining “discrimination” as “singl[ing] out” a “particular group” for special disadvantage, “in the sense of being deprived of any benefit or subjected to any slight or obloquy”); *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (defining “discrimination” as “singl[ing] out” a particular class “for differential treatment”); *Wayte v. United States*, 470 U.S. 598, 608-09 n.10 (1985) (defining “discrimination” as “singl[ing] out” a particular class “for different treatment under the laws, as written or as applied” (internal quotation marks omitted) (quoting *Castaneda v. Partida*, 430 U.S. 482, 494 (1977))); *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954) (defining “discrimination” as when a “distinct class” is “single[d] out . . . for different treatment” by “the laws, as written or as applied”); *Oyama v. California*, 332 U.S. 633, 663 (1948) (Murphy, J., concurring) (defining “discrimination” as “singl[ing] out a class of persons . . . for distinctive treatment”); *Atchison, Topeka & Santa Fe*, 174 U.S. at 105 (defining “discrimination” as “mak[ing] a classification of individuals or corporations . . . and impos[ing] upon such class special burdens and liabilities”); *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 759 (1884) (Field, J., concurring) (defining “discrimination” as “favoring some to the impairment of the rights of others”); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (defining “discrimination” as “singl[ing] out” a particular class for special disadvantage); see also *Rutherglen, supra* note

The distinction between the legal and lay usages of these two terms is seldom of any practical importance in equal protection litigation, for most state action *does* have the effect of singling out certain persons or groups of persons for special benefits or burdens.³¹⁷ But a state *can* classify persons in the lay sense — that is, divide, sort, or arrange them into classes — without subjecting those classes to differing benefits or burdens. For example, it can sort persons into classes for informational purposes, as it does when it gathers and organizes census or other demographic data. Such a classification does not, in and of itself, implicate the Equal Protection Clause, for it does not single out any class of persons for special benefits or burdens.³¹⁸ Similarly, a state can sort persons into classes for administrative convenience in the distribution of a uniform benefit or burden, as it does when it assigns schoolchildren to different classrooms. Again, such a classification has not been thought to raise equal protection concerns, unless its *effect* is to single out one or more of those classes for special disadvantage relative to the others.³¹⁹

The electoral redistricting plans at issue in these cases plainly classify and discriminate by race in the lay sense, for they sort voters into electoral districts based, at least in part, upon their race. But they do not classify or discriminate by race in the traditional equal protection sense unless they can be shown to single out an

314, at 128 (noting that the “technical legal” meaning of “discrimination” is different than its “common” meaning).

Legal scholars and judges sometimes use the term “discrimination” in a more restrictive sense, to describe the particular *kind* of special treatment which has been held to violate the Equal Protection Clause: treatment which is based on impermissible or otherwise inadequate grounds. See, e.g., TRIBE, *supra* note 3, § 16-21, at 1515 (defining “discrimination” as “an act based on prejudice”); Tussman & tenBroek, *supra* note 11, at 358 n.35 (describing a “discriminatory” act as one which is “biased, prejudiced, [or] unfair”).

317. See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (“[M]ost legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”); Tussman & tenBroek, *supra* note 11, at 343 (“The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals.”); *Developments: Equal Protection*, *supra* note 3, at 1075 (“[A] state cannot function without classifying its citizens for various purposes and treating some differently from others.”).

318. Cf. *Tancil v. Woolls*, 379 U.S. 19 (1964) (per curiam) (rejecting an equal protection challenge to a state statute requiring the parties’ races to be recited in divorce decrees, on the ground that “the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege”), *affg.* *Hamm v. Virginia State Bd. of Elections*, 230 F. Supp. 156 (E.D. Va. 1964).

319. See *Missouri v. Lewis*, 101 U.S. 22, 30-33 (1879) (rejecting an equal protection challenge to a state law requiring residents of St. Louis to take appeals to a different appellate court than residents of the rest of the state, because there was no evidence that the justice dispensed by that special appellate court was inferior to that dispensed by the general appellate court, and hence no showing that the law “injuriously affect[ed]” or “discriminated against” a particular class of persons).

identifiable class of persons for special benefits or burdens because of their race. In short, in its haste to find some conceptual peg on which to hang its distaste for these laws, the Court seems to have forgotten the first lesson learned by most law students: that the language of the law is often quite different from that of the layman.³²⁰

At bottom, the majority's position, though couched in the language of traditional equal protection jurisprudence, rests upon a premise quite foreign to that jurisprudence. It is, simply put, that the Equal Protection Clause confers upon every person a substantive constitutional right not to be classified by the state on the basis of their race — in the literal sense of being arranged, sorted, or divided into groups or categories, whether or not that classification has the *effect* of singling them out for any special disadvantage because of their race.³²¹

This premise was lurking beneath the surface in Justice O'Connor's initial opinion in *Shaw I*. The "central purpose" of the Equal Protection Clause, she wrote, is "to prevent the States from purposefully discriminating *between* individuals on the basis of race."³²² An electoral redistricting plan that "purposefully distinguishes *between* voters on the basis of race" in assigning them to districts is therefore subject to strict scrutiny under the clause because it is a form of "state legislation classifying citizens by race."³²³ Significantly, Justice O'Connor spoke of the Equal Protection Clause as limiting the state's ability to discriminate "between" or "among" individuals on the basis of race, in the sense of sorting them on that basis, rather than its ability to discriminate either "in

320. Cf. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 3 (1990) ("[L]egal language often differs from lay language."). Professor Kull makes the same mistake. See, e.g., KULL, *supra* note 133, at 1-6, 166 (using "classify" in the lay sense, to mean sort into groups, regardless of whether or not those groups are then subjected to different treatment); *id.* at 117, 220-21 (using "classify" in the more specialized equal protection sense, to mean to sort into groups for differing benefits and burdens); *id.* at 69 (using "discriminate" in the lay sense, to mean "distinguish between"); *id.* at 49, 182, 223 (using "discriminate" in the more specialized equal protection sense, to mean to "subject to different treatment"). For further discussion of Kull's sloppiness with language, see *supra* note 144.

321. See James F. Blumstein, *Shaw v. Reno and Miller v. Johnson: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. 503, 504 (1996) (arguing that *Shaw I* and *Miller* establish that all "purposeful discrimination by government based on race" is subject to strict scrutiny, whether or not it results in any "racial disadvantage"); see also Issacharoff & Goldstein, *supra* note 302, at 49 (arguing that *Shaw I* and *Miller* suggest that the Court views the mere fact of sorting by race to be "inherently injurious"); Robert A. Curtis, Note, *Race-Based Equal Protection Claims After Shaw v. Reno*, 44 DUKE L.J. 298, 312 (1994) (arguing that the constitutional injury suffered by the plaintiffs in *Shaw I* was "the mere fact of racial classification").

322. *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("*Shaw I*") (emphasis added).

323. 509 U.S. at 646 (emphasis added).

favor of” or “against” them on that basis, in the sense of subjecting them to special benefits or burdens.³²⁴ In her mind, the North Carolina redistricting plan evidently raised equal protection concerns simply because it dealt with voters as members of particular racial groups in assigning them to districts, rather than as individuals, whether or not it actually resulted in any group of voters being singled out for special disadvantage because of their race.³²⁵

That this sorting by race was the real vice Justice O’Connor saw in the North Carolina plan was obscured somewhat by her frequent references to “segregation” by race.³²⁶ These references gave the impression that she thought the plan actually “segregated” voters by race, in the sense forbidden by *Brown* and its progeny. But the districts produced by the North Carolina plan — at least those under challenge in *Shaw I* and *Shaw II* — were not “segregated” districts in the *Brown* sense, for they were not entirely, or even

324. For further examples, see 509 U.S. at 642 (Laws that “explicitly distinguish *between* individuals on racial grounds fall within the core of [the Equal Protection Clause’s] prohibition.” (emphasis added)); 509 U.S. at 643 (“[T]he Fourteenth Amendment requires state legislation that distinguishes *among* citizens because of their race to be narrowly tailored to further a compelling governmental interest.” (emphasis added)). Other commentators have also noticed Justice O’Connor’s use of “discriminate *between*,” rather than “discriminate *against*.” See, e.g., J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 641, 643 (1995); Jonathan M. Sperling, *Equal Protection and Race-Conscious Reapportionment: Shaw v. Reno*, 17 HARV. J.L. & PUB. POLY. 283, 291 (1996); Thomas C. Goldstein, Note, *Unpacking and Applying Shaw v. Reno*, 43 AM. U. L. REV. 1136, 1154 (1994); 1992 Term, *supra* note 297, at 200-04 (1993). Other members of the *Shaw I* majority have also described the Equal Protection Clause as limiting the state’s ability to discriminate “among” or “between” its citizens on the basis of race. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 120 (1995) (“*Jenkins III*”) (Thomas, J., concurring) (“[T]he government cannot discriminate *among* its citizens on the basis of race.” (emphasis added)); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 633 (1990) (Kennedy, J., dissenting) (“I cannot agree with the Court that the Constitution permits the Government to discriminat[e] *among* citizens on the basis of race in order to serve interests so trivial as ‘broadcast diversity.’ ” (emphasis added)).

325. See *Shaw I*, 509 U.S. at 647 (holding that when a state assigns voters to districts on the basis of race, it relies on “impermissible racial stereotypes”); see also 509 U.S. at 643 (discussing the dangers of “an explicit policy of assignment by race” (internal quotation marks omitted)).

326. See, e.g., 509 U.S. at 642 (characterizing the plaintiff’s claim as an allegation that the plan “*segregate[d]* the races for purposes of voting” (emphasis added)); 509 U.S. at 645 (holding that redistricting legislation which “*segregate[s]* eligible voters by race” is presumptively unconstitutional under the Equal Protection Clause (emphasis added and internal quotation marks omitted)); 509 U.S. at 646-47 (“[A] reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to ‘*segregate*’ . . . voters’ on the basis of race.” (emphasis added)); 509 U.S. at 651-52 (distinguishing *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), on the ground that the plaintiffs in *Shaw I* are asserting an “analytically distinct claim” that the plan is “an effort to *segregate* citizens into separate voting districts on the basis of race” (emphasis added)); see also 509 U.S. at 647 (“A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries . . . bears an uncomfortable resemblance to *political apartheid*.” (emphasis added)).

predominantly, of one race.³²⁷ A careful reading of Justice O'Connor's opinion, however, reveals that she was not using the term "segregate" in the conventional sense, to mean "set apart" or

327. The issue of how much racial separation is required to constitute "segregation" was presented in the school desegregation cases of the 1970s. In those cases, the Court made clear that it would not consider a school in a district of mixed-population to be "segregated" merely because its racial composition deviated somewhat from that of the district as a whole. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-24 (1971). The Court refused to adopt a hard-and-fast rule about the degree of racial concentration required to make a school "segregated," saying it would vary, "depend[ing] on the facts of each particular case." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 195-98 (1973). But the Court indicated repeatedly that the school would have to be "virtually all" or "predominantly" of one race. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 529 & n.1 (1979) ("*Dayton II*") ("virtually all" one race); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977) ("*Dayton I*") ("predominantly" one race); *Keyes*, 413 U.S. at 193 ("predominantly" one race); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 491-92 (1972) (Burger, C.J., concurring) ("virtually all" one race); *Swann*, 402 U.S. 1, 25-26 (1971) ("all or predominantly of one race" and "one-race, or virtually one-race"). A race-based assignment policy can be said to subject one racial group to the kind of "stigmatization" to which *Brown* referred — suggesting that one group is not fit to mix with the rest of humanity — only when the policy separates that group from everyone else to such a radical degree.

Neither of the districts challenged in *Shaw I* was "virtually all" or "predominantly" of one race: District 1 was 45.5% White and 53.4% African American in voting-age population, District 12 45.2% White and 53.3% African American in voting-age population. See CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL DISTRICTS IN THE 1990s, at 549 (1993). Compare the districts under challenge in *Wright v. Rockefeller*, 376 U.S. 52 (1964), which the *Shaw I* Court cited for the proposition that the deliberate "segregation" of voters by race can violate the Equal Protection Clause: District 17 was 94.9% White and 5.1% non-White, and District 18 was 13.7% White and 86.3% non-White. See 376 U.S. at 54, 59 (Douglas, J., dissenting); 376 U.S. at 71-72 n.1 (Goldberg, J., dissenting); see also *Washington v. Davis*, 426 U.S. 229, 240 (1976) (describing the districts at issue in *Wright* as "predominantly" of one race).

Four of the districts created by the North Carolina plan and challenged in *Shaw I* had voting-age populations which were "predominantly" of one race: District 6 was 91.9% White and 7.1% African American, District 9 was 90.2% White and 8% African American, District 10 was 94.3% White and 4.9% African American, District 11 was 92% White and 6.4% African American. See CONGRESSIONAL QUARTERLY, INC., *supra*, at 549. The racial composition of these four "predominantly White" districts was substantially out of line with that of the state as a whole, which was 77.7% White and 20.1% African American in voting-age population. See *id.* Under the analysis set forth in the school desegregation cases, these four districts might well be considered segregated districts. But the plaintiffs in *Shaw I*, all of whom were White, did not challenge the four predominantly White districts before the Supreme Court. A *Shaw I* challenge to these districts would, in any event, be likely to fail at the threshold, on the ground that the districts are not "racial gerrymanders" under the *Miller-Vera* "predominance" test.

This is perhaps the greatest irony of the *Shaw I* decision: it purports to be based on concern about segregation of the races, yet it has resulted in the approval of four districts which are among the most racially segregated in the country and the invalidation of two which are among the most racially integrated. Cf. *Bush v. Vera*, 116 S. Ct. 1941, 2002 (1996) (Souter, J., dissenting) ("Whatever [the districts challenged in *Shaw I*] may have symbolized, it was not 'apartheid.'"); *Shaw I*, 509 U.S. at 671 n.7 (White, J., dissenting) (criticizing Justice O'Connor's suggestion that the North Carolina plan "segregates" voters by race as not "a particularly accurate description of what has occurred"); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 94 (calling the districts challenged in *Shaw I* "among the most integrated districts in the country"); Karlan, *Still Hazy*, *supra* note 299, at 293 (same).

“isolate” from the masses,³²⁸ but instead to mean “separate”³²⁹ — and not “separate” in the sense of “setting or keeping apart,” but “separate” in the sense of “sorting into groups.”³³⁰ In her view, the state can “separate” by race without actually “separating” the races.³³¹

Justice Kennedy’s majority opinion in *Miller* was much more explicit. He began by declaring that the “central mandate” of the Equal Protection Clause is “racial neutrality in governmental decisionmaking.”³³² He conceded that the redistricting plan before him did not “disadvantag[e] voters of a particular race,” but said it merited equal protection scrutiny nonetheless, because it “used race as a basis for separating voters into districts.”³³³ Like Justice

328. See WEBSTER’S, *supra* note 313, at 2056-57 (defining “segregate” as to “set apart” or “isolate”); 14 THE OXFORD ENGLISH DICTIONARY, *supra* note 313, at 889 (defining “segregate” as to “separate . . . from the general body, or from some particular class; to set apart, isolate, seclude”).

329. Throughout her opinion, Justice O’Connor used the words “segregate” and “separate” interchangeably. See, e.g., *Shaw I*, 509 U.S. at 658 (holding that the plaintiffs “have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification” (emphasis added)). She described the claim that she was recognizing both as a claim that the state has segregated voters by race, see *supra* note 326, and as a claim that it has separated voters by race, see *Shaw I*, 509 U.S. at 645, 649.

330. See WEBSTER’S, *supra* note 313, at 2069 (listing two different usages of the verb “separate”: “to set or keep apart,” and to “sort,” as in “separate mail”). This curious usage of the term “segregate” also appears in Justice Thomas’s concurrence in *Holder v. Hall*, decided during the same term as *Shaw I*. See *Holder v. Hall*, 512 U.S. 874, 894 (1994) (Thomas, J., concurring in the judgment) (stating that the Voting Rights Act “encourages federal courts to segregate voters into racially designated districts”); 512 U.S. at 905 (stating that the Voting Rights Act, as currently applied, requires courts to “segregat[e] the races into political homelands,” producing “a system of ‘political apartheid’ ”). It is worth noting that the “segregation” rhetoric does not appear in Justice O’Connor’s later opinion in *United States v. Hays*. See *United States v. Hays*, 515 U.S. 737 (1995).

331. On this reasoning, any electoral redistricting plan that uses race as a basis for assigning voters to districts is state action segregating or separating by race, without regard to the actual racial composition of the districts it produces. A race-based plan which makes the racial composition of each district exactly the same as that of the state as a whole is just as suspect as a race-based plan which concentrates voters of certain races in certain districts.

332. *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954)); cf. *City of Richmond v. Croson*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment) (“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”); 488 U.S. at 519 (referring to “the principle of race neutrality found in the Equal Protection Clause”); 488 U.S. at 519 (referring to “the imperative of race neutrality”). To Justice Kennedy, this “principle of race neutrality” apparently requires the government not only to remain “neutral” between the races, in the sense of not favoring one over another, but also not to consider race in dealing with people.

333. *Miller*, 515 U.S. at 911; *Abrams v. Johnson*, 117 S. Ct. 1925, 1931 (1997) (Kennedy, J.) (“[T]he essence of the equal protection claim recognized in *Shaw [I]* is that the state has used race as a basis for separating voters into districts.” (internal quotation marks omitted)).

O'Connor before him, Justice Kennedy used "separate by race" to mean sort or divide into groups on the basis of race, without regard to the ultimate racial composition of those groups.³³⁴ A state's use of race "as a basis for separating voters into districts" implicates the Equal Protection Clause, he asserted, because it violates "the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class," a command that Justice Kennedy found implicit in *Brown* and its progeny.³³⁵ "When the State assigns voters on the basis of race," he explained, it "engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" ³³⁶ The Equal Protection Clause, said Justice Kennedy, forbids such "racial stereotyping."³³⁷

Justice O'Connor's opinion for the Court in *United States v. Hays*³³⁸ ultimately rests on the same premise. In *Hays*, the Court was asked to decide who has standing to assert a *Shaw I* challenge to a race-based redistricting plan. In other contexts, the Court had held that only those persons who have been "personally denied equal treatment" by allegedly discriminatory state action have standing to challenge it under the Equal Protection Clause.³³⁹ The lower federal courts had difficulty applying this rule in the *Shaw I*

334. See 515 U.S. at 915 (describing a *Shaw I* claim variously as a claim "that the State has separated voters on the basis of race" and as a claim "that [the] State has assigned voters on the basis of race" (emphasis added)).

335. 515 U.S. at 911 (internal quotation marks omitted); see also *Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) ("*Jenkins III*") (Thomas, J., concurring) ("At the heart of . . . the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic or religious groups.").

336. *Miller*, 515 U.S. at 911-12 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)); see *Miller*, 515 U.S. at 912 (stating that race-based assignment relies upon "'stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts — their very worth as citizens — according to a criterion barred to the Government by history and the Constitution'" (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting))).

337. See *Miller*, 515 U.S. at 928; see also 515 U.S. at 914 (asserting that the Equal Protection Clause "forbids" the state to act on the basis of "stereotypical assumptions"); *Johnson v. De Grandy*, 512 U.S. at 997, 1029 (Kennedy, J., concurring) (describing the Equal Protection Clause as being "set against" racial "stereotypes"). For further discussion of Justice Kennedy's "stereotyping" theory, see Issacharoff & Goldstein, *supra* note 302, at 58-61.

338. 515 U.S. 737 (1995).

339. See *Allen v. Wright*, 468 U.S. 737, 755 (1984); *Heckler v. Mathews*, 465 U.S. 728, 740 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489-90 n.26 (1982); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978) (opinion of Powell, J.); *Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972). Of course, persons who have not been "personally denied equal treatment" by a particular act of government are occasionally allowed to assert an equal protection claim on behalf of those who have, when they meet the rigid requirements of the third-party stand-

context,³⁴⁰ and the Court attempted to provide some guidance in *Hays*.

Writing for the Court, Justice O'Connor said that to have standing to challenge a race-based redistricting plan, a voter must either reside in a district that has been "racially gerrymandered" by the plan, or produce some other "specific evidence tending to support th[e] inference" that he too has "personally been subjected to a racial classification" by the plan.³⁴¹ She did not explain why a voter who resides in a "racially gerrymandered" district has necessarily been "denied equal treatment" by the plan that created that district, other than to say it was "because of the legislature's reliance on racial criteria."³⁴² Nor did she explain what kind of "specific evidence" a voter who does not reside in a "racially gerrymandered" district must produce to establish that he too has been "personally subjected to a racial classification" by the plan. For this reason, critics have charged that the *Hays* line is a completely arbi-

ing doctrine. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 410-15 (1991). *Hays* dealt only with traditional "first party" standing. See *Hays*, 515 U.S. 737.

340. See, e.g., *Johnson v. Miller*, 864 F. Supp. 1354, 1370-71 (S.D. Ga. 1994), *affd.*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 861 F. Supp. 408, 423-27 (E.D.N.C. 1994), *affd.*, *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Vera v. Richards*, 861 F. Supp. 1304, 1331 n.38 (S.D. Tex. 1994), *affd.*, *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Hays v. Louisiana*, 839 F. Supp. 1188, 1192 (W.D. La. 1993), *judgment vacated by Louisiana v. Hays*, 512 U.S. 1230 (1994). See generally Markley, *supra* note 302, at 463-67.

341. See *Hays*, 515 U.S. at 745. The Court applied this rule, without further explanation, in *Miller*, *Shaw II*, and *Vera*. See *Bush v. Vera*, 116 S. Ct. 1941, 1951 (1996) (O'Connor, J., for plurality); *Shaw v. Hunt*, 116 S. Ct. 1894, 1900 (1996) ("*Shaw II*"); *Miller*, 515 U.S. at 909.

342. 515 U.S. at 745. To be fair, Justice O'Connor also said that voters in racially gerrymandered districts "may" suffer "special representational harms," because the officials elected from those districts "are more likely to believe that their primary obligation is to represent only the members of th[e] [particular racial] group" whose interests the district was "created . . . to effectuate." 515 U.S. at 744 (internal quotation marks omitted). As Justice Stevens has explained, however, a voter who resides in a racially gerrymandered district will suffer this alleged "representational harm" — which is evidently a euphemism for inadequate representation — only if (i) he is not a member of the race for whose "special benefit" the district was created, and (ii) voters in that district vote along racial lines, and (iii) the candidate elected by the majority race chooses to ignore the interests of her constituents of other races. See *Miller*, 515 U.S. at 930 (Stevens, J., dissenting); *Shaw II*, 116 S. Ct. at 1911 (Stevens, J., dissenting). In assuming that every voter in a racially gerrymandered district will suffer such representational harm, then, the Court is not only engaging in undue speculation, but also relying on "the very premise [it] purports to abhor: that voters of a particular race 'think alike, share the same political interests, and . . . prefer the same candidates at the polls.'" *Miller*, 515 U.S. at 930 (Stevens, J., dissenting) (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993) ("*Shaw I*")); see also *Shaw II*, 116 S. Ct. at 1911 (Stevens, J., dissenting) (noting that "[t]here is no necessary correlation between race-based districting assignments and inadequate representation," and "any assumption that such a correlation exists could only be based on a stereotypical assumption about the kind of representation that politicians elected by minority voters are capable of providing"). This assumption is also difficult to square with the majority's insistence that African-American voters placed in majority-White districts have no reason to question the adequacy of their representation. See Issacharoff & Goldstein, *supra* note 302, at 55, 63; Karlan, *supra* note 327, at 95.

trary one, driven purely by the need to avoid the assertion that the claim recognized in *Shaw I* was a “generalized grievance” beyond the jurisdiction of the federal courts under Article III.³⁴³

The apparently arbitrary standing line drawn in *Hays* makes more sense, however, if we assume that the State denies a person “equal treatment” whenever it deals with that person as a member of a particular racial group rather than as an individual. If so, then any voter who can prove that he was assigned to a particular district because of his race has been “personally denied equal treatment” by the plan and should have standing to challenge it.³⁴⁴ Add an unarticulated evidentiary presumption, and the line becomes clear. If a voter resides in a “racially gerrymandered” district — a district that the legislature used race as “the dominant and controlling rationale” in drawing³⁴⁵ — the court will presume that the legislature assigned him to that district because of his race.³⁴⁶ If a voter resides in a district that has not been “racially gerrymandered,” however,

343. See, e.g., *Shaw II*, 116 S. Ct. at 1908-09 (Stevens, J., dissenting); *Hays*, 515 U.S. at 750-52 (Stevens, J., concurring in the judgment); Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 61 (calling the *Hays* line “bizarre”); Issacharoff & Goldstein, *supra* note 302, at 63 (calling the *Hays* line “peculiar” and asserting that it “does not elucidate a coherent view of harm”); see also Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1894-98 (1996) (arguing that the *Hays* decision is impossible to reconcile with traditional standing analysis).

344. This is precisely how Chief Justice Rehnquist described the *Hays* principle in his majority opinion in *Shaw II*. See *Shaw II*, 116 S. Ct. at 1900 (dismissing the claims of plaintiffs who resided outside the challenged voting districts under *Hays*, on the ground that they had “not provided specific evidence that they personally were assigned to their voting districts on the basis of race”); see also Thomas C. Berg, *Religion, Race, Segregation, and Districting: Comparing Kiryas Joel with Shaw/Miller*, 26 CUMB. L. REV. 365, 370 (1995-96) (suggesting that the most “coherent” explanation for the *Hays* standing principle is that “any individual who has been subjected to racial ‘sorting’ ” has standing to sue).

345. See *Miller*, 515 U.S. at 915-20.

346. Justice O’Connor’s opinion did not explain her per se rule of standing for voters who reside in racially gerrymandered districts in these terms. But she used the language of evidentiary presumptions when she wrote that voters who do not reside in racially gerrymandered districts must produce “specific evidence tending to support th[e] inference” that they have “personally been subjected to a racial classification.” *Hays*, 515 U.S. at 745. The obvious implication is that evidence that a voter lives in a racially gerrymandered district will also “support [an] inference” — or, more accurately, a mandatory presumption — that he has “personally been subjected to a racial classification.” In other words, if a voter establishes that the state used race as the “dominant and controlling rationale” in constructing the district to which it assigned him, the court will presume that the state assigned *him* to that district because of his race. Cf. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 207-13 (1973) (adopting an analogous evidentiary presumption to facilitate proof that racial segregation in a public school system was the product of intentional state action). As is generally true with evidentiary presumptions, the fit between Justice O’Connor’s “basic fact” (residence in a racially gerrymandered district) and her “presumed fact” (assignment by race) is not perfect. Cf. Karlan, *Still Hazy*, *supra* note 302, at 292 (challenging the accuracy of *Hays*’s assumption that all voters who live in racially gerrymandered districts have been placed there because of their race).

the court will *not* presume that the legislature assigned him to that district because of his race. He therefore lacks standing to challenge the plan unless he can produce some other "specific evidence" showing that the state assigned him to his district because of his race.

The "unequal treatment" of which Justice O'Connor speaks in *Hays* seems to be utterly divorced from any notion of comparative disadvantage in the distribution of the benefits and burdens of government. Indeed, O'Connor's right to "equal treatment" bears a closer resemblance to Dworkin's right to "treatment as an equal" than to the right to "equal treatment" of traditional equal protection jurisprudence: it is a right to be treated "with equal dignity and respect," not a right to receive an equal distribution of the benefits and burdens of the state.³⁴⁷ In O'Connor's view, the state fails to treat a person with "equal dignity and respect," and hence triggers equal protection scrutiny, whenever it deals with him as a component of a particular racial group, rather than as an individual.³⁴⁸ The word "equal" is apparently mere window dressing, which does no real work in her analysis: her concern is not with the failure to treat persons with *equal* dignity and respect, but with the failure to treat them with *appropriate* dignity and respect. She would find a state law that deals with *all* persons as members of particular racial groups just as offensive as one that deals only with *certain* persons in that way.³⁴⁹ Her notion of the "right" being recognized in the

347. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 226-29 (1977) (drawing a distinction between the "right to *equal treatment*," defined as "the right to an equal distribution of some opportunity or resource or burden," and the "right to *treatment as an equal*," defined as "the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else"). Note the striking resemblance between Dworkin's language and the language Justice O'Connor used in her plurality opinion in *Croson*. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (stating that the Equal Protection Clause gives every person the right "to be treated with equal dignity and respect").

348. At times, Justice O'Connor's language suggests that she thinks a state denies a person equal treatment whenever it deals with him as a member of *any* group, rather than as an individual. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals' . . ."). If so, then virtually all statutes are subject to challenge under the Equal Protection Clause, for virtually all deal with people as members of groups, rather than on an individualized basis; indeed, that is the essence of a legislative rule. See David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 *COLUM. L. REV.* 790, 798 (1991). Of course, only those statutes that deal with people as members of certain suspect groups would be subject to strict scrutiny; the rest would be analyzed, and virtually always upheld, under the very tolerant rational basis test. See *id.* at 798 & n.31.

349. See *Shaw I*, 509 U.S. at 651 (stating that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally"). In this respect, Justice O'Connor's "right to treatment as an equal" is quite different from Dworkin's, which is clearly comparative in nature. See DWORKIN, *supra* note 347, at 227 (describing the "right to

racial gerrymandering cases is not significantly different from Justice Kennedy's.³⁵⁰ She couches it in the more familiar language of "equal treatment," and adorns it with vague references to special "representative" and "stigmatic" harms. But it is the same basic right: a right not to be dealt with by the state as a member of a particular racial group rather than as an individual, without regard to the way in which others are being treated.³⁵¹

The vision of the Equal Protection Clause embraced by the majority in the racial gerrymandering cases, which does not require a showing of comparative disadvantage in governmental benefits and burdens, clearly draws its inspiration from prior rhetoric declaring classifications based on race to be inherently suspect.³⁵² It finds further support in the gender discrimination cases of the 1980s, which established that a state cannot justify its decision to single out a particular group for special benefits or burdens by reference to "stereotypical" assumptions about the characteristics and abilities of individual members of that group.³⁵³ And it represents the final maturation of a subtle variation on that theme, first introduced in separate opinions in the jury selection and affirmative action cases of the late 1980s: the notion that the Equal Protection Clause is concerned not only with the practice of singling out certain groups for special benefits or burdens on the basis of mere prejudice or

treatment as an equal" as the right "to be treated with the same respect and concern as anyone else" (emphasis added)).

350. *But see* Issacharoff & Goldstein, *supra* note 302 (arguing that Justice O'Connor's idea of the "right" being recognized here differs substantially from that of the other four members of the majority). Of course, Justice O'Connor claims to be more willing than the other members of the *Shaw I* majority to tolerate interferences with that right which are designed to remedy the effects of past discrimination. Compare her opinions in *Bush v. Vera*, 116 S. Ct. 1941, 1960-63 (1996) (O'Connor, J., plurality opinion) and 116 S. Ct. at 1968-70 (O'Connor, J., concurring) with those of Justice Kennedy 116 S. Ct. at 1971-72 (Kennedy, J., concurring) and Justices Thomas and Scalia 116 S. Ct. at 1972-73 (Thomas, J., joined by Scalia, J., concurring in the judgment). Compare also *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring) with 515 U.S. at 920-28 (Kennedy, J.). On the difference between Justice O'Connor's position and that of the four other members of the *Shaw-Miller-Vera* majority, see Issacharoff, *supra* note 343, at 63-64; Rosen, *supra* note 7, at 19-20.

351. Justice O'Connor continued to adhere to this view of the Equal Protection Clause in last term's racial gerrymandering cases. See *Vera*, 116 S. Ct. at 1964 (O'Connor, J., plurality opinion) ("Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes."); 116 S. Ct. at 1963 (O'Connor J., plurality opinion) ("[W]e subject racial classifications to strict scrutiny . . . because that scrutiny is necessary to determine whether they . . . misuse race and foster harmful and divisive stereotypes without a compelling justification."); 116 S. Ct. at 1969 (O'Connor, J., concurring) ("[O]ur national commitment to racial equality . . . can and must be reconciled with the complementary commitment of our Fourteenth Amendment jurisprudence to eliminate the unjustified use of racial stereotypes.").

352. See *supra* note 283.

353. See *supra* note 294.

favoritism, but also, and more fundamentally, with the very practice of dealing with people as members of groups defined by certain immutable personal characteristics rather than as individuals.³⁵⁴

This new vision of the Equal Protection Clause has much to commend it, in raw normative terms. Generalizations based on race — like those based on gender and other immutable personal characteristics — are often inaccurate, at one level or another.³⁵⁵ When the government deals with people on the basis of such generalizations, it undermines our cultural commitment to the notion that individuals should be judged on the basis of their individual merit.³⁵⁶ In addition, as various members of the *Shaw-Miller* majority have pointed out, there is good reason to suspect that the government's use of racial generalizations can cause serious harm to the nation's social fabric — even when it does not have the effect of singling out any identifiable group of persons for special disadvantage — by fanning the flames of racial hostility and encouraging racial separatism.³⁵⁷

For all its moral attractiveness, though, the notion that the Equal Protection Clause gives every person a substantive right not to be dealt with by the state on the basis of race remains flatly inconsistent with the original understanding. Those who framed and ratified the Equal Protection Clause certainly intended it to prevent the states from using racial generalizations as a basis for singling out anyone for special disadvantage, except perhaps in very compelling circumstances. But the suggestion that the clause was also intended to render presumptively unconstitutional all race-based state action, whether or not it has such a discriminatory effect,

354. See *supra* note 295.

355. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995).

356. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting).

357. See *Shaw v. Reno*, 509 U.S. 630, 643 (1993) ("*Shaw I*") (asserting that classifying based on race "incite[s] racial hostility" and "stimulate[s] our society's latent race consciousness"); 509 U.S. at 648 (classifying based on race serves as "a divisive force in a community, emphasizing differences between [people] . . . that are irrelevant in the constitutional sense" (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1963) (Douglas, J., dissenting))); 509 U.S. at 657 (asserting that classifying based on race "reinforce[s] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin"); 509 U.S. at 657 (asserting that classifying based on race "may balkanize us into competing racial factions"); *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting) (asserting that classifying based on race "endorse[s] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., plurality opinion) (asserting that classifying based on race "promote[s] notions of racial inferiority and lead[s] to a politics of racial hostility").

would have absolutely astounded them. The Thirty-ninth Congress specifically rejected a number of proposals that would have done this.³⁵⁸ Even its most radical members understood that the Equal Protection Clause it finally passed did no such thing.³⁵⁹

If the limitation on state action recognized in *Shaw I* and its progeny has any constitutional foundation at all, then, it lies not in the Fourteenth Amendment's Equal Protection Clause, but in its Due Process Clause.³⁶⁰ Moreover, it must lie in the substantive aspect of the Due Process Clause, for its concern is not with lack of procedural fairness, but with the essential irrationality of dealing with individuals on the basis of group stereotypes that may not accurately reflect their individual characteristics.³⁶¹ In essence, the Court has declared that every person has a fundamental right not to be dealt with by the state on the basis of race, a right that the Due Process Clause forbids the state to infringe without compelling justification, even when it does so even-handedly. Like the much-

358. See *supra* section II.B.

359. This seems clear from the congressional debates on the desegregation bills of the early 1870s. In those debates, Radical Republicans argued that state-mandated racial segregation violated the newly ratified Equal Protection Clause because it singled out African Americans for the special burden of social stigmatization. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 384 (1872) (statement of Sen. Sumner) (calling segregation "an ill-disguised violation of the principle of Equality"); see also 2 THE WORKS OF CHARLES SUMNER 350, 357 (1875) (asserting that segregation is "in the nature of Caste," and "[w]here Caste is, there cannot be Equality"). In so arguing, the Radicals indicated their understanding that the clause did not apply to *all* race-based state action, but only to that which had the effect of singling out certain persons for special benefits or burdens. Further evidence that the Radicals did not understand the Equal Protection Clause to reach all race-based state action lies in Thaddeus Stevens' speech to the House just before the final vote on the final version of the Fourteenth Amendment. In that speech, Stevens expressed his disappointment at the narrow scope of that version, as compared to the rejected "no racial distinctions" alternatives:

I had fondly dreamed that . . . the intelligent, pure and just men of this Republic . . . would have so remodeled all our institutions . . . that no distinction would be tolerated . . . but what arose from merit and conduct. This bright dream has vanished "like the baseless fabric of a vision." I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice.

CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866). Stevens declared, however, that he would accept this "imperfect" amendment, "because I live among men and not among angels." CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866).

360. See *Bush v. Vera*, 116 S. Ct. 1941, 2001-02 (1996) (Souter, J., dissenting); *Shaw v. Hunt*, 116 S. Ct. 1894, 1909-10 (1996) ("*Shaw II*") (Stevens, J., dissenting); see also Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1162-63 (1992) (suggesting that the state's act of dealing with persons on the basis of their race might be seen as presenting a due process problem "if we assume that the [racial] categorization is being used as a substitute for individuated judgment").

361. A procedural due process challenge to an electoral redistricting plan would, in any event, appear to be foreclosed by *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445-46 (1915) (holding that procedural due process does not require the state to grant affected persons a hearing before enacting a rule of general applicability). See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-33 (1982) ("[T]he legislative determination provides all the process that is due."); TRIBE, *supra* note 3, § 10-1.

maligned fundamental rights line of equal protection cases,³⁶² then, *Shaw I* and its progeny are, at bottom, nothing but substantive due process decisions “decked out in the trappings of Equal Protection.”³⁶³

CONCLUSION

Why did the Court ground the limitation on state action recognized in *Shaw I* in the Equal Protection Clause, given its inconsistency with the original understanding? The answer cannot be simply that the Court does not care about original intent. Unlike some of its predecessors, this is not a Court that is comfortable with the notion of a “living Constitution”;³⁶⁴ to the contrary, many of its members are committed to originalism.³⁶⁵ Why, then, was the

362. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

363. *Developments: Equal Protection*, *supra* note 3, at 1132 (referring to the “fundamental rights” line of Equal Protection cases); see also *Shaw II*, 116 S. Ct. at 1910 (Stevens, J., dissenting) (accusing the majority of basing its decision on the “unarticulated recognition of a new substantive due process right to ‘color-blind’ districting itself”); *Vera*, 116 S. Ct. at 2001-02 (Souter, J., dissenting) (same); 1992 *Term*, *supra* note 297, at 199-200 n.49 (1993) (“[O]ne is tempted to dismiss [*Shaw I*] as a case of substantive due process masquerading as equal protection analysis.”). Commentators have long noted that heightened scrutiny under the Equal Protection Clause has the potential to serve as a substitute for substantive due process review. See, e.g., Dixon, *supra* note 245, at 516-17, 529-30; Gunther, *supra* note 256, at 41-43; Tussman & tenBroek, *supra* note 11, at 361-65.

364. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 695 (1976) (using the term “Living Constitution” to refer to the idea that judges are free to invoke the Constitution to impose upon the elected branches of government “values [other than] those which may be derived from the language and intent of [its] framers”). For early uses of the term, see HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* (1927); Charles A. Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 133 (S. Strickland ed., 1967).

365. Three of the five members of the *Shaw-Miller* majority — Chief Justice Rehnquist and Justices Scalia and Thomas — have repeatedly declared themselves to be originalists. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845-926 (1995) (Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ., dissenting); *United States v. Lopez*, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring) (arguing that the Court must remain “faithful to the original understanding” in interpreting the Constitution); *McIntyre v. Ohio Elections Commn.*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (noting that in interpreting the Constitution, the “original meaning” of the text should control, for “[it] is a written instrument” and “[t]hat which it meant when adopted, it means now” (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905))); *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (Scalia, J., concurring) (stating that it is “a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification”); Rehnquist, *supra* note 364; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Justices O'Connor and Kennedy have shown strong originalist tendencies as well, see, e.g., *New York v. United States*, 505 U.S. 144 (1992) (O'Connor, J.), although they have been willing to depart from a strict originalist stance in their substantive due process jurisprudence, see, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 847-50 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 287-89 (1990) (O'Connor, J., concurring). See generally Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 717-18 (1994) (arguing that Justices O'Connor and Kennedy are

Court willing to ignore the original understanding of the Equal Protection Clause in the racial gerrymandering cases? Why did it not rely on substantive due process instead?

One explanation comes immediately to mind: reliance on substantive due process would have presented considerable difficulties for certain members of the *Shaw-Miller* majority. Two members of that majority, Justices Scalia and Thomas, have recently committed themselves to the position that the Due Process Clause of the Fourteenth Amendment confers no substantive rights other than those mentioned in the incorporated provisions of the Bill of Rights.³⁶⁶ To cast *Shaw I* as a substantive due process decision, they would have had to renounce this position. Even if they had been prepared to do that, other difficulties remained. To decide whether a particular unenumerated right is encompassed within the liberty protected by the Due Process Clause, the Court has previously asked first and foremost whether it is “deeply rooted in this Nation’s history and tradition.”³⁶⁷ Regardless of the level of generality with which the right being recognized in *Shaw I* had been framed — as a general right not to be dealt with by the government on the basis of race or a more specific right not to have one’s voting rights assigned on the basis of race — it would not have satisfied this test, for the states were broadly abridging it at the time the Fourteenth Amendment was ratified.³⁶⁸ So the majority would have had to rely on the argu-

not strict originalists, but rather advocates of “common-law constitutionalism”); David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O’Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 *FORD. L. REV.* 895, 915-21 (1993) (arguing that Justice O’Connor has “abandoned her originalist approach” in substantive due process cases). *But see* Lawrence Lessig, *Fidelity in Translation*, 71 *TEXAS L. REV.* 1165, 1264-65 (1993) (arguing that Justices O’Connor and Kennedy are in fact “dynamic” originalists, who attempt to “accommodate changes in context so as to preserve meaning across contexts”).

366. *See, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) (accepting the proposition that the Due Process Clause of the Fourteenth Amendment includes “certain explicit substantive protections of the Bill of Rights” but rejecting the proposition that it “guarantees certain (unspecified) liberties”); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., joined by Thomas, J., concurring in the judgment) (conceding that the Due Process Clause of the Fourteenth Amendment “incorporates certain substantive guarantees specified in the Bill of Rights” but denying “that it is the secret repository of all sorts of other, unenumerated, substantive rights”).

367. *Washington v. Glucksberg*, 65 U.S.L.W. 4669, 4674-75 (U.S. June 26, 1997); *see also* *Michael H. v. Gerald D.*, 491 U.S. 110, 121-30 (1989) (plurality opinion) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)); *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (same).

368. *See Michael H.*, 491 U.S. at 122 n.2 (opinion of Scalia, J., joined in relevant part by Rehnquist, C.J., and O’Connor and Kennedy, JJ.) (asserting that an interest cannot be considered “fundamental” for substantive due process purposes if there is “a societal tradition of enacting laws denying [it]”); *see also Bowers*, 478 U.S. at 192-94 & n.6 (justifying the Court’s refusal to find a right to engage in homosexual sodomy in the Due Process Clause on the ground that many states had laws criminalizing that conduct at the time the Fourteenth

ment that the concept of “liberty” is not static, but can evolve over time.³⁶⁹ But that would have had significant implications for the privacy cases, implications that at least three members of the *Shaw-Miller* majority could not have tolerated.³⁷⁰ The majority could not have avoided those implications by hiding behind the doctrine of *stare decisis*, for the right being recognized did not resemble any right the Court had previously found to be part of the “liberty” protected against state interference by the Due Process Clause.³⁷¹

Given these obvious difficulties with the substantive due process route, one is tempted to see the Court’s decision to rely on equal protection instead as an act of conscious duplicity. On this view, the Court knew full well that it was creating a new constitutional right out of whole cloth and made a calculated decision to couch that right in the language of equal protection, as opposed to substantive due process, to insulate itself from charges of judicial activism. The Court saw the Equal Protection Clause as an attractive means of disguising its project, so the argument would go, because that clause carries little of the historical baggage of the *Lochner* era, and the basic value it sounds — that of equality — is one with which virtually everyone can agree. By invoking the rhetoric of equality, rather than openly relying on substantive due process, the

Amendment was ratified). For a critique of this historical approach to the substantive due process question, see L. Benjamin Young, Jr., *Justice Scalia’s History and Tradition: The Chief Nightmare in Professor Tribe’s Anxiety Closet*, 78 VA. L. REV. 581 (1991).

369. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 500-02 (1965) (Harlan, J., concurring) (arguing that the “liberty” protected by the Due Process Clause should not be confined to those rights that were recognized at the time the clause was ratified); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that . . . it has represented the balance which our Nation . . . has struck between th[e] liberty [of the individual] and the demands of organized society.”). In *Casey*, Justices O’Connor, Kennedy, and Souter firmly rejected the argument that the “liberty” protected by the Due Process Clause includes only those interests that were already protected against state interference at the time the Fourteenth Amendment was ratified. See *Planned Parenthood v. Casey*, 505 U.S. 833, 847-50 (1992). Chief Justice Rehnquist and Justices Scalia and Thomas, however, refuse to accept this proposition. See 505 U.S. at 979-81 (Scalia, J., joined by Rehnquist, C.J., White J., and Thomas, J., concurring in part and dissenting in part); see also *Michael H.*, 491 U.S. at 122 n.2 (plurality opinion) (asserting that the purpose of substantive due process “is to prevent future generations from lightly casting aside important traditional values — not to enable this Court to invent new ones”). For more on the differences between the substantive due process jurisprudence of Justices O’Connor and Kennedy and that of Justice Scalia, see Anders, *supra* note 365.

370. For example, this argument would have strongly suggested that *Roe v. Wade*, 410 U.S. 113 (1973), and *Casey* were rightly decided and that *Bowers* was not.

371. It is not expressly recognized in the Bill of Rights; nor does it involve the freedom to engage in a particular activity, like the fundamental rights of free association, interstate travel, and voting; nor does it resemble the fundamental right to privacy in marital, sexual, and family matters. For a discussion of the rights the Court has previously declared to be fundamental, see 2 ROTUNDA & NOWAK, *supra* note 2, § 15.7.

Court hoped to cloak in credibility what it knew in its heart to be an act of judicial strong-arming equivalent to that foisted upon the nation in *Roe v. Wade*.³⁷²

I believe the explanation is a bit more complicated, and a good deal less sinister: the Court is trying to be faithful to the original understanding of the Fourteenth Amendment, but is no longer able to remember that original understanding very accurately. The Court's memory of the original understanding is incomplete in a number of critical ways. It remembers that the Fourteenth Amendment was largely a reaction to the Black Codes, but it no longer remembers precisely why the framers and ratifiers found the Codes offensive. It remembers that some members of the Thirty-ninth Congress lobbied fiercely for a constitutional amendment that would forbid all governmental consideration of race, but it no longer remembers that the Thirty-ninth Congress rejected each and every one of those proposals. It remembers that the amendment the Thirty-ninth Congress ultimately passed and sent to the states for ratification was the result of some sort of compromise, but it no longer remembers the exact nature of that compromise. Finally, it remembers that the Equal Protection Clause was originally understood to strike at class legislation and discrimination, but it no longer remembers what those terms meant to the Reconstruction generation.

How exactly did the Court come to forget these things? Was it merely the passage of time? Once again, the explanation is a bit more complicated. In the last thirty years, the Court has often felt compelled to adjust its equal protection jurisprudence to invalidate forms of discrimination that seemed perfectly acceptable to the framers and ratifiers of the Fourteenth Amendment but now seem intolerable to us. It did so in the mid-1960s, when it rejected the assumption, held by many of those who participated in the framing and ratification of the Fourteenth Amendment, that a desire to maintain the purity of the White race was sufficient to justify the discrimination worked by laws forbidding interracial marriage.³⁷³ The Court did so again in the 1970s, when it rejected the assumption, held by many of the framers and ratifiers of the Fourteenth Amendment and endorsed by its own prior case law, that a paternalistic desire to protect women from moral and emotional "hazards" was sufficient to justify discriminating against them in

372. Cf. Rosen, *supra* note 7, at 20 (accusing the Court of "unabashed opportunism").

373. See *Loving v. Virginia*, 388 U.S. 1, 11 (1966).

various ways.³⁷⁴ And the Court did so once again in the late 1980s, when it rejected the assumption, held by many members of the Thirty-ninth Congress³⁷⁵ and endorsed by many prominent twentieth-century jurists, that a desire to remedy the effects of past discrimination is generally sufficient to justify wide-ranging discrimination in favor of African Americans.³⁷⁶

In each of these situations, the Court's change of course can be seen as a legitimate exercise of the discretion the framers and ratifiers of the Equal Protection Clause understood that provision to confer upon the courts. The antebellum doctrine against partial or special legislation left the courts with wide-ranging discretion to decide what public purposes could justify discrimination in the distribution of benefits and burdens.³⁷⁷ When the framers of the Fourteenth Amendment drafted an Equal Protection Clause patterned on that developing state law doctrine, they were similarly vague: they declared that state action singling out certain groups for special benefits or burdens was unconstitutional unless supported by an adequate public purpose justification, but they made no effort to list the public purposes that would suffice — other than to indicate that sheer favoritism or prejudice, racial or otherwise, would not. Instead, recognizing that the list of acceptable public purposes might change over time, they chose to confer broad discretion on the courts — and Congress, through its section five en-

374. Compare *Reed v. Reed*, 404 U.S. 71 (1971) (invoking the Equal Protection Clause to strike down a state law giving men a preference over women as administrators of estates) with *Hoyt v. Florida*, 368 U.S. 57 (1961) (rejecting an equal protection challenge to a state's practice of automatically entering all men on jury lists, but excluding women unless they expressed an affirmative desire to serve) and *Goesaert v. Cleary*, 335 U.S. 464 (1948) (rejecting an equal protection challenge to a state law denying most women a right to be licensed as bartenders that was freely available to any man).

375. See Schnapper, *supra* note 111, at 758.

376. Compare *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218-35 (1995) (holding that all race-based preference programs adopted by governmental actors are presumptively unconstitutional, even when they are designed to benefit groups that have been the victims of past discrimination) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989) (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) and 488 U.S. at 520 (Scalia, J., concurring in the judgment) with *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (arguing that race-based preference programs designed to benefit groups that have been the target of pervasive discrimination in the past should be upheld more readily than those designed to burden such groups) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301-02 (1986) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (arguing that intermediate scrutiny should apply to race-based preference programs that are designed to eliminate the vestiges of past discrimination) and *Fullilove v. Klutznick*, 448 U.S. 448, 518-19 (1980) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment) (making the same argument with respect to race-based affirmative action programs enacted by Congress).

377. See *supra* notes 64-70 and accompanying text.

forcement power — to deal with that question, in accordance with changing perceptions of the public good.³⁷⁸ In holding that the discrimination worked by laws forbidding interracial marriage, laws denying women various economic and civic opportunities, and laws awarding African Americans special preferences *did* violate the Equal Protection Clause now, even though it had not been thought to do so in earlier times, the Court was acting well within the scope of that discretion, simply adjusting its “public purpose” analysis to reflect changing notions of the public good.³⁷⁹

The difficulty is that the Court did not explain the about-faces it made in these cases in these terms. Why not? Because its memory was again incomplete: while it recalled that the framers and ratifiers of the Equal Protection Clause understood it to give the Court some discretion to adjust its equal protection jurisprudence to meet the demands of changing times, it no longer remembered the precise nature of that discretion. Unwilling to rely on the notion of a “living Constitution,” the Court fell back instead on vague platitudes about discrimination,³⁸⁰ suspect classifications,³⁸¹ and impermissible stereotypes.³⁸² In the process, the Court lost its bearings a bit, losing sight of the fact that the Equal Protection Clause was actually designed to prevent the states from singling out certain classes of people for special benefits or burdens without sufficient justification, not to prevent it from dealing with people on the basis of race, gender, or other immutable personal characteristics. The

378. Cf. Sunstein, *Naked Preferences*, *supra* note 34, at 1702 (conceding that his “public values” approach to the Equal Protection Clause “may allow constitutional prohibitions to change dramatically over time as the category of public values expands and contracts”).

379. Cf. David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 3-4, 25-43 (arguing that the Court’s recent about-face on affirmative action should be understood as an effort “to revive . . . one of the noble dreams of American public law — that courts should try to ensure that legislation does not just benefit narrow interest groups but instead serves a public interest”).

380. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971) (asserting that the Equal Protection Clause was designed to eliminate all forms of “arbitrary discrimination”); *Loving v. Virginia*, 388 U.S. 1, 10 (1966) (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination . . .”).

381. See, e.g., *Loving*, 388 U.S. at 11 (asserting that all “racial classifications” are “suspect” under the Equal Protection Clause).

382. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604, 617-19, 626 (1990) (O’Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting); 497 U.S. at 632, 636 (Kennedy, J., dissenting); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 510 (1989) (plurality opinion); 488 U.S. at 515 (Stevens, J., concurring in part and concurring in the judgment); see also *Croson*, 488 U.S. at 495 (plurality opinion) (asserting that the “ultimate goal” of the Equal Protection Clause was to “eliminat[e] entirely from governmental decisionmaking such irrelevant factors as a human being’s race” (internal quotation marks omitted) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting))).

peculiar vision of the Equal Protection Clause embraced in the racial gerrymandering cases of the 1990s is but the logical conclusion of that earlier misstep. It is also a powerful illustration of the mischief that abstract doctrinal and rhetorical constructs like “discrimination,” “suspect classification,” and “stereotyping” can work when they become unmoored from their historical and theoretical foundations.

The Court has yet to cross the Rubicon of originalism, for it has yet to declare explicitly that a showing of discriminatory effect, as traditionally understood, is no longer an essential element of an equal protection claim. Indeed, the Court does not appear to recognize that this is the logical implication of its decisions in the racial gerrymandering cases. There is still time for the Court to provide an explanation for these decisions that would bring them more in line with original intent. How might it do that? Two possibilities suggest themselves.

First, the Court could explain precisely who these race-based redistricting plans single out for special disadvantage and exactly what that disadvantage is.³⁸³ For example, it might explain that while race-based redistricting designed to give effect to existing minority voting strength has no *immediate* discriminatory effect on an identifiable group of voters, its *long-term* effect is to subject minority voters to special disadvantages by reinforcing negative racial stereotypes and increasing racial-bloc voting.³⁸⁴ Such an explanation might follow rather logically from *Anderson v. Martin*, which established that discriminatory effect can be found in the interaction of state action and private prejudice.³⁸⁵

Alternatively, the Court could explain the decisions as announcing some sort of overbroad prophylactic rule designed to ensure adequate enforcement of equal protection rights. The argument would be something like this: While the essence of an Equal Protection Clause violation is the singling out of certain persons for special benefits or burdens without adequate justification, rather than the consideration of race per se, the likelihood that governmental consideration of race will produce such a discriminatory effect is so strong, and the difficulty of proving that effect so great,

383. This is essentially what the Court did when it developed the “stigma” theory to explain its decision in *Brown*. See *supra* notes 264-68 and accompanying text.

384. Cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring in part and concurring in the judgment) (making a similar argument with respect to race-based affirmative action).

385. See *supra* notes 278-82 and accompanying text.

that a rule declaring all race-based state action presumptively unconstitutional is necessary to ensure adequate enforcement of equal protection rights.

Should the Court bother to craft an explanation of its decisions in the racial gerrymandering cases that would bring them more in line with the original understanding of the Equal Protection Clause? Does it really matter that those decisions, as currently explicated, are inconsistent with the original understanding? The inconsistency may, of course, mean that the Equal Protection Clause is invoked to invalidate certain kinds of state action that should raise no equal protection concerns: race-based actions that do not have the effect of singling out any identifiable group of persons for special benefits or burdens because of their race. But the number of race-based practices that fall into that category are few and far between, for most race-based state action *does* have such a discriminatory effect.³⁸⁶ If the Due Process Clause might be interpreted — at least under the more elastic Harlan approach — to invalidate those same practices, why should the Court care that it is the Equal Protection Clause that has been invoked instead? Does it really make any difference?

I think so, for several reasons. In the first place, by invoking the Equal Protection Clause to strike down laws that do not appear to have any discriminatory effect, the Court sends misleading signals to the lower courts about the basic evil at which the clause aims, further muddying conceptual and doctrinal waters that are already less than clear. As the historical evidence indicates, that evil is the practice of discriminating in favor or against any class of persons — in the sense of singling them out for special benefits or burdens not accorded everyone else — without an adequate public purpose justification, not the practice of dealing with persons on the basis of race, gender, or other immutable personal characteristics. By obscuring that fact, the Court blurs the already fuzzy line between equal protection and substantive due process. We cannot predict the exact consequences of that blurring for future cases, but we can be fairly certain that it will lead to incorrect results in some cases.³⁸⁷

386. Other than racial gerrymandering of electoral districts, the only practice that comes immediately to mind is that of taking race into account in assigning children to public schools, and perhaps to individual classrooms within those schools, in order to maintain a modicum of racial balance in each school and each classroom.

387. Cf. McConnell, *supra* note 360, at 1163 (“[T]he equation of due process with equal protection obscures important differences between the issues of rights and equality.”); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CH. L. REV. 1161 (1988) (arguing that substantive due process and equal protection serve different purposes and should sometimes lead to dif-

In addition, it may further encourage courts entertaining equal protection claims to shirk the difficult "public purpose" inquiry envisioned by the framers and ratifiers, by falling back on abstract rhetoric about discrimination, suspect criteria, and impermissible stereotyping.

Second, and perhaps more important, the Court's reliance on the Equal Protection Clause to support what appears to be the creation of a new substantive right leaves it open to charges of hypocrisy, given its recent declarations that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."³⁸⁸ The damage to the Court's credibility is magnified by the fact that certain members of the *Shaw-Miller* majority have been so strident in their insistence that original intent must always be the lodestar of constitutional interpretation³⁸⁹ and that judges should not rely upon their own personal values to strike down political choices made by the people through their duly-elected representatives.³⁹⁰ We are thus left with the disturbing sense that this is a Court utterly without shame, willing to throw principle to the wind in order to reach its desired results.³⁹¹ Unless the Court takes action to correct that perception, the decisions in the racial gerrymandering cases stand poised to go

ferent results); Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 67-68 (1996) (same).

388. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973); see also *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 484-86 (1970).

389. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) (castigating the majority of the Court for subscribing to the "original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence").

390. See, e.g., *United States v. Virginia*, 116 S. Ct. 2264, 2292 (1996) (Scalia, J., dissenting) (accusing the majority of destroying the democratic system by writing into the Constitution "the counter-majoritarian preferences of the society's law-trained elite"); *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (asserting that when "the Constitution . . . says nothing about" a particular issue, the Court must leave its resolution to "normal democratic means," for "[t]his Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected"); *Planned Parenthood v. Casey*, 505 U.S. 833, 979-80 (1992) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring in part and dissenting in part); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452-53 (1983) (O'Connor, J., joined by Rehnquist, J., dissenting) ("Irrespective of what we may believe is wise or prudent policy . . . the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy." (internal quotation marks omitted)); Rehnquist, *supra* note 364, at 699; Scalia, *supra* note 365, at 854, 863-64.

391. Cf. *Rosen*, *supra* note 7, at 19-20 (arguing that the *Shaw-Miller* majority's interpretation of the Equal Protection Clause reveals its members to be fundamentally "unprincipled," given its prior commitment to "the conservative rhetoric of judicial restraint, strict constructionism and devotion to the original understanding of the Constitution").

down in history as the *Lochner* of this generation, rather than the *Brown*.