

# PERFECTING THE DECLARATION

The Text and History of the Equal Protection Clause of the  
Fourteenth Amendment

Text and History  
Narrative Series



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The Text and History of the  
Equal Protection Clause of the  
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By David H. Gans

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# Introduction

The story of the Equal Protection Clause is one of the most inspiring and compelling in all of constitutional law. After a century in which the Constitution sanctioned slavery, the American people rewrote their Constitution to guarantee equality to all persons, bringing the Constitution back in line with the Declaration of Independence. In the process, they perfected the Declaration by writing into the Constitution's text that all "person[s]" are equal, not just that "all men are created equal." Redeeming the Constitution from the sin of slavery, "We the People" made equality a binding guarantee of the Constitution and extended its protection to all persons. After the Equal Protection Clause became part of the Constitution, it was finally true that "in view of the constitution, in the eye of the law, . . . [t]here is no caste here," as Justice Harlan put it in his immortal dissent in *Plessy v. Ferguson*.<sup>1</sup> The story of this constitutional transformation is essential to the Supreme Court's many landmark rulings honoring the Constitution's promise of equality for all persons, including *Brown v. Board of Education*,<sup>2</sup> banning racial segregation, *Reed v. Reed*,<sup>3</sup> prohibiting discrimination against women, and *Romer v. Evans*,<sup>4</sup> striking down discrimination based on sexual orientation. As important, this story is critical to on-going efforts to persuade courts and, ultimately, the Supreme Court, to take the next step and strike down state laws that deny gay men and lesbians the right to marry the person of their choice, preventing them from participating in what the Supreme Court has called "the most important relation in life."<sup>5</sup>

Sadly, the conventional wisdom, all too often, is to ignore this essential moment in history. On the left, progressives worry that the Reconstruction framers' vision of equality was too cramped, and that paying heed to the Constitution's text and history will not adequately protect the rights of all persons to equality under the law.<sup>6</sup> On the right, conservatives like Justice Antonin Scalia argue that women, as well as gay men and lesbians, are outside the protection of the Equal Protection Clause, claiming that these groups were never meant to be protected from discrimination.<sup>7</sup> Neither the fears of the left or the revisions of the right can be squared with the text or the best reading of the history.

The text of the Equal Protection Clause is sweeping and universal. While the Declaration of

Independence famously declared “all men are created equal,” the Equal Protection Clause declared the equality of all “person[s].” The text of the Clause thus protects all persons from arbitrary and invidious class-based discrimination, whether African American or white, man or woman, gay, lesbian, or heterosexual, native-born or immigrant. It secures the same rights and the same protection of the law to all. It gives to all persons, as an individual right, the guarantee of the equal protection of the laws. As Akhil Amar has succinctly put it, “[t]he text calls for equal protection and equal citizenship, pure and simple.”<sup>8</sup>

Constitutional history shows that the breadth of the Equal Protection Clause was no accident. It is clear from the drafting history of the Clause that the framers were determined to prohibit more than simply discrimination on the basis of race. The framers wrote the constitutional guarantee broadly to ensure, for example, that white unionists in the South as well as Asian immigrants in the West were

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protected from arbitrary and invidious discrimination. As a result, the framers repeatedly rejected proposals that would have prohibited racial discrimination, and nothing else. Only the broader guarantee of the equal protection of the laws could protect the right of all persons to equality

before the law.

While the framers of the Fourteenth Amendment heroically fought for the broadest textual protection of equality in America’s constitutional history, these men (and they all were men) were not saints. Like Thomas Jefferson, who held slaves while writing the majestic words of the Declaration, the framers of the Fourteenth Amendment left untouched a number of odious forms of discrimination that clearly violated the letter and spirit of the Clause and are recognized today as blatant forms of inequality. In 1866, the framers tolerated racial discrimination in voting,<sup>9</sup> did not challenge miscegenation and segregation laws,<sup>10</sup> and approved of virtually all forms of discrimination against women.<sup>11</sup> Indeed, in Section 2 of the Fourteenth Amendment, which penalized states only for disenfranchising “male” voters, the framers effectively wrote sex discrimination into the Constitution, and put the Constitution’s

imprimatur on laws that denied women the right to participate as equals in our democracy. Some of these matters, like questions of voting rights, were debated at great length during the drafting of the Amendment, with compromises written into the text;<sup>12</sup> others, like the status of segregation and miscegenation laws, were peripheral issues that were briefly discussed only during debates on the scope of the Civil Rights Act of 1866, and not during debates on the Amendment itself.<sup>13</sup>

Whether central to the framers or peripheral matters, the forms of inequality tolerated by the framers present a challenge for modern interpreters of the Equal Protection Clause. Should we follow the broad text of the Clause coupled with the powerful historical evidence of its intended breadth, or should we focus more on how the framers expected the Clause to apply, judged by the historical forms of discrimination tolerated by the framers of the Clause? While most judges and scholars on the left and the right agree that it is the written text that should control, not the expectations of the framers, there is still the matter of Section 2 of the Fourteenth Amendment, which served as a textual anchor for continued discrimination against women with respect to voting. At the time of its ratification, the text of the Fourteenth Amendment was at war with itself, with Section 2 sanctioning a form of discrimination that was otherwise plainly prohibited by the sweeping terms of Section 1.

Happily, the constitutional struggle for equality did not end in 1868. In later Amendments, including the Fifteenth Amendment, ratified in 1870, and the Nineteenth Amendment, ratified in 1920, “We the People” strengthened our charter’s command of equality, while rejecting the notions that women are second-class citizens and that the right to vote is something less than a fundamental right. These Amendments built off of and added to the Equal Protection Clause’s command of equality. Most important, the Nineteenth Amendment repealed the portions of Section 2 of the Fourteenth Amendment that had sanctioned discrimination against women in voting rights. With the ratification of the Nineteenth Amendment, the sweeping text of the Equal Protection Clause stands alone, free from the stain created by Section 2.

While not neat and tidy, the history of the Equal Protection Clause and subsequent Amendments strongly supports a broad reading of the text’s command of equality for all persons. That’s what the Clause says, and our constitutional history reveals a march ever closer to the ideal of equality laid

out first in the Declaration of Independence. This text and history is the best answer to Justice Scalia's claim that the Fourteenth Amendment does not protect women or gay men and lesbians from discrimination.

Further, there is good reason to think that the text and its drafting history may prove critical to Justice Anthony Kennedy, who holds all the cards on the Court in closely divided cases. In two important opinions, Justice Kennedy has already made the case why the Equal Protection Clause protects women and gay men and lesbians from discrimination, taking a careful look at both the drafting history of the Amendment as well as some of the oldest and most enduring precedents concerning the Equal Protection Clause.<sup>14</sup> In these opinions, Justice Kennedy stressed that the framers rejected a narrow protection of equality limited to race in favor of the text's "more comprehensive terms"<sup>15</sup> that guarantee equal protection of the laws as an individual right of all persons. Because of the text's universal guarantee of equality, "the Constitution 'neither knows nor tolerates classes among citizens.'"<sup>16</sup>

Getting the text and history of the Equal Protection Clause right is also critical in demonstrating the legal fallacy of the effort by conservatives on the Supreme Court to use the Clause to support an all-out assault on affirmative action plans designed to remedy our nation's shameful legacy of racial discrimination.<sup>17</sup> Through the

***Our constitutional history reveals a march ever closer to the ideal of equality laid out first in the Declaration of Independence.***

Freedmen's Bureau Acts and a host of other race-conscious legislation enacted during Reconstruction, the framers of the Fourteenth Amendment gave their stamp of approval to legislation needed to overcome the lingering impact of government-sanctioned discrimination and to ensure every citizen could enjoy meaningfully the Constitution's guarantees of freedom and equality. Nevertheless, in the hands of the Roberts Court, the Equal Protection Clause stands in the way of voluntary efforts by state authorities to ensure that integrated schools do not become re-segregated, turning *Brown* on its head.<sup>18</sup> In a 2009 decision, Justice Scalia went even further, strongly suggesting that the principle of colorblindness should annul longstanding statutory civil rights protections against actions that have a racially discriminatory disparate impact.<sup>19</sup> Thanks to these developments, the Equal Protection Clause, in recent

years, has been most often invoked to *limit* efforts to redress our nation’s long history of racial discrimination. No wonder some progressives pronounce that we’ve reached the “end of equality doctrine as we have known it,”<sup>20</sup> and that the Equal Protection Clause “no longer protects.”<sup>21</sup>

It’s time to restore *Brown*’s true meaning and to reclaim the Fourteenth Amendment’s guarantee of the equal protection of the laws. Cases are now moving through the lower federal courts that should give the Supreme Court the opportunity to honor, once again, our charter’s sweeping and universal guarantee of equality. In *Perry v. Schwarzenegger* (now *Perry v. Brown*) – the most prominent of these cases – Ted Olson and David Boies argue that California’s Proposition 8, which stripped gay men and lesbians of the right to marry the person of their choosing, violates the Fourteenth Amendment. The district court agreed, and that ruling is now on appeal. If *Perry* reaches the Supreme Court, the Justices will have the chance to affirm that the Fourteenth Amendment prohibits laws that discriminate against gay men and lesbians and treat them as second-class, inferior persons. The text of the Fourteenth Amendment secures the same rights and same protection under the law to all persons, including fundamental rights such as the right to marry. The Fourteenth Amendment was designed to destroy discriminatory traditions that deny persons equal rights under law, not perpetuate them in the name of the Constitution.

***The Fourteenth Amendment was designed to destroy discriminatory traditions that deny persons equal rights under law, not perpetuate them in the name of the Constitution.***

This Narrative unfolds in four parts. Part I sets the foundation by discussing the text and history of the Equal Protection Clause, demonstrating that the framers wrote the text to be a universal guarantee of equality. While the framers drafted the Equal Protection Clause against the backdrop of slavery and racial discrimination, its text guarantees equality to all persons, not just freed slaves or African Americans. The next three Parts consist of three case studies – application of the Equal Protection Clause to discrimination on the basis of race, gender, and sexual orientation. Weaving together discussion of text and history with a century of Supreme Court precedents, these sections demonstrate that the Clause secures equal rights and prohibits invidious discrimination against all persons, consistent

with its sweep, and in line with later constitutional amendments, including the Nineteenth Amendment, that strengthened the Constitution's protection of equality. A short conclusion follows. ■

# The Text and History of the Equal Protection Clause

The Equal Protection Clause is one of the great achievements of the framers of the Fourteenth Amendment, and it stands as the most universal protection of equality in our Constitution's text and history. The text of the Clause, written in universal terms, prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws."<sup>22</sup> The text guarantees equality under the law and equality of rights to all persons and ensures that no one is reduced to the status of an inferior caste or pariah.

The framers crafted this broad guarantee to bring the Constitution back in line with fundamental principles of equality as set forth in the Declaration of Independence, which had been betrayed and stunted by the institution of slavery. After nearly a century in which the Constitution sanctioned racial slavery and the Supreme Court declared that African Americans were a "subordinate and inferior class of beings, who had been subjugated by the dominant race" and "had no rights which the white man was bound to respect,"<sup>23</sup>

the Fourteenth Amendment's framers wrote the promise of equality into the Constitution. As the framers of the Amendment explained time and again, the guarantee of the equal protection of

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the laws was "essentially declared in the Declaration of Independence,"<sup>24</sup> and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness,' without 'equal protection of the laws'?" This is so self-evident and just that no man . . . can fail to see and appreciate it."<sup>25</sup> Rejecting the racist teachings of *Dred Scott* for the Declaration's principle of equality, the Amendment's framers insisted that "there was to be no 'subordinate and inferior class of beings,' no 'dominant race,' . . . Instead, all people and groups of people were to stand equal before the law . . ."<sup>26</sup>

In returning to the principle of equality stated in the Declaration, the framers extended it, by expressly promising the equal protection of the laws to all persons.<sup>27</sup> While the Declaration insisted that “all men are created equal,” the Equal Protection Clause secured equality for all persons, language that clearly covered both men and women. Under the text, there are no persons of second class status, too inferior or debased to be entitled to equal treatment under the law. All persons are entitled to the equal protection of the laws.

Conditions in the South made this universal protection of equality for all persons vital. Immediately after the Civil War, Southern states stripped African Americans of many of their basic rights through the Black Codes, a set of laws designed to force the newly freed slaves to keep working on the plantations. Many of these laws were explicitly race-based; others “made no reference to race;

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instead their oppressive racial impact depended on selective enforcement, customary caste relations, and private discrimination against blacks.”<sup>28</sup> All aimed to deny the newly freed slaves equal rights under the law and reduce them to a subordinate status. In addition to

enacting Black Codes, Southern states refused to enforce the law to protect African Americans and their white Unionist allies from violations of their legal rights and from violent reprisals at the hands of white terrorist groups. These dire conditions, painstakingly documented in the report of the Joint Committee on Reconstruction that drafted the Fourteenth Amendment, made it essential to guarantee the equal protection of the laws to all persons, African American or white.<sup>29</sup>

In its report, the Joint Committee concluded that a “deep-seated prejudice against color . . . leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish,” and that the Southern people flat out refused “to place the colored race . . . upon terms of even civil equality” or “tolerat[e] . . . any class of people friendly to the Union, be they white or black.”<sup>30</sup> As the extensive testimony taken by the Joint Committee showed, the newly freed slaves and their Unionist allies had as much chance of having their equal rights respected as “a rabbit would in a den of lions.”<sup>31</sup>

Thus, the framers of the Fourteenth Amendment recognized that the guarantee of the equal protection of the laws was “essential to the protection” of both the newly freed slaves as well as “the Union men” who “will have no security in the future except by force of national laws giving them protection against those who have been in arms against them.”<sup>32</sup>

In drafting the text, the framers determined that a guarantee of the equal protection of the laws was necessary to prevent discrimination against both the newly freed slaves and white Unionists. The framers made it clear that the guarantee of the equal protection of the laws not only prohibited racial discrimination and subordination, but it also prohibited a wide array of arbitrary and invidious discrimination, including the pervasive discrimination white Unionists faced in retaliation for their service to the Union during the War. Thus, from the very beginning, the Equal Protection Clause was understood as a broad prohibition on invidious discrimination, not merely a guarantee against racial discrimination.

The framers also recognized that the guarantee of the equal protection of the laws was necessary to prohibit invidious discrimination against non-citizens, who faced pervasive discrimination and prejudice in the western United States. In states such as Oregon and California, Chinese immigrants faced a barrage of discriminatory laws that stripped them of a host of basic rights and imposed unequal taxes.<sup>33</sup> John Bingham, one of the framers

responsible for drafting the Fourteenth Amendment, demanded that “all persons, whether citizens, or strangers within this land . . . have equal protection in every State in this Union in the rights of life and liberty and property.”<sup>34</sup> In guaranteeing the

equal protection of the laws not just to citizens, but to all persons, the framers secured equal rights for both citizens and aliens residing on American soil. As the framers understood it, the use of the broader term “person” “demanded the security and protection of the law for *all* . . . no matter whether citizen or strangers,”<sup>35</sup> and demonstrated that the “Constitution has the same care for the rights of the stranger within your gates as for the rights of the citizen.”<sup>36</sup> The framers recognized that “immigrants” were

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“persons within the express words” of the Fourteenth Amendment “entitled to the equal protection of the laws.”<sup>37</sup>

Aiming to ensure equality under the law for all persons in America, the framers of the Equal Protection Clause chose broad language specifically intended to prohibit arbitrary and invidious discrimination and secure equal rights under the law for all. “[S]ection One pointedly spoke not of race but of more general . . . equality.”<sup>38</sup> Indeed, the Joint Committee that drafted the Fourteenth Amendment rejected numerous proposals that would have limited the Fourteenth Amendment’s equality guarantee to a prohibition on laws that discriminated on account of race.

In December 1865, before the Joint Committee’s deliberations began, Rep. Thaddeus Stevens proposed a constitutional provision that “[a]ll national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color.”<sup>39</sup> In January 1866, Stevens proposed to the Joint Committee a similar ban on racial discrimination, this time providing that “[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color.”<sup>40</sup> Thaddeus Stevens’ January amendment was later rewritten by a sub-committee of the Joint Committee to provide that “all 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.”<sup>41</sup> In April 1866, Stevens proposed a narrower version, providing 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.”<sup>42</sup>

Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the framers consistently rejected limiting the Fourteenth Amendment’s equality guarantee to racial discrimination, preferring the universal guarantee of equal protection, which secured equal rights to all persons, to a race-specific guarantee of equality that proscribed racial discrimination and nothing else. Only the broader guarantee of the equal protection of the laws could secure equality under the law and equality of rights to all persons, and eliminate the full range of discriminatory practices the framers saw as violations of equality.

The debates over passage and ratification of the Equal Protection Clause confirm what the

text makes clear: that equality under the law and equality of rights apply broadly to any and all persons within the United States. Under the Amendment, there are no persons of second-class status, no persons relegated to a subordinate caste. The Fourteenth Amendment’s framers’ own explanations of the Equal Protection Clause during the debates on the Fourteenth Amendment, as well as press coverage of the Amendment, all affirm this basic understanding.<sup>43</sup>

Introducing the Fourteenth Amendment in the Senate, Jacob Howard explained that the Equal Protection Clause “establishes equality before the law, and . . . gives to the humblest, the poorest, and 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.”<sup>44</sup> The Clause, he went on, “abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.”<sup>45</sup> Senator Timothy Howe emphasized that the Clause prevented states from “deny[ing] to all classes of its citizens the protection of equal laws,”<sup>46</sup> while Senator Luke Poland noted

that the Equal Protection Clause aimed to “uproot and destroy . . . partial State legislation.”<sup>47</sup> In the House, too, the framers emphasized this broad understanding of the equal protection guarantee. The plain meaning of equal protection, framer after framer explained, was that the “law that operates upon one man shall operate equally upon all,”<sup>48</sup> thereby “securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction.”<sup>49</sup>

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Newspaper coverage of the debates over the ratification of the Fourteenth Amendment affirmed the same basic understanding of the equal protection guarantee.<sup>50</sup> In an article entitled “The Constitutional Amendment,” published shortly after Congress sent the Fourteenth Amendment to the states for ratification, the *Cincinnati Commercial* explained that the Fourteenth Amendment wrote into the Constitution “the great Democratic principle of equality before the law,” invalidating all “legislation

hostile to any class.”<sup>51</sup> “With this section engrafted upon the Constitution, it will be impossible for any Legislature to enact special codes for one class of its citizens . . . .”<sup>52</sup> Press coverage of speeches urging ratification explained that the Amendment “put in the fundamental law the declaration that all citizens were entitled to equal rights in this Republic,”<sup>53</sup> placing all “throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation . . . .”<sup>54</sup> In short, the Amendment provided that “every body – man, woman, and child – without regard to color, should have equal rights before the law,”<sup>55</sup> writing the protection of equality affirmed in the Declaration explicitly into the Constitution. ■

# Equal Protection and Racial Equality

## *THE EQUAL PROTECTION CLAUSE IN CONGRESS, 1866-1875*

While the Equal Protection Clause prohibits invidious discrimination against all persons, it is universally recognized that the framers were particularly concerned with eradicating racial discrimination against the newly freed slaves. The debates on the Amendment, and the enforcement legislation enacted during the years after ratification, are replete with evidence that the Equal Protection Clause annulled racial discrimination against African Americans.

During the debates, for example, Senator Howard explained that the Equal Protection Clause “prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.”<sup>56</sup> When Howard explained that the Clause “does away with the injustice of subjecting one caste of persons to a code not applicable to another,”<sup>57</sup> he was primarily concerned with the continued efforts to deny equal rights under the law to the newly freed slaves. In the House, the framers too emphasized the Fourteenth Amendment’s protection of racial equality. Rep. Thaddeus Stevens observed that “[w]hatever 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,”<sup>58</sup> while future President James Garfield explained that the Clause “h[e]ld over every American citizen, without regard to color, the protecting shield of the law.”<sup>59</sup>

After the ratification of the Fourteenth Amendment, the framers and their Republican allies invoked the Amendment’s Enforcement Clause to enact legislation prohibiting racial discrimination by the states. In passing enforcement legislation, the framers made clear that the Fourteenth Amendment prohibited laws that denied African Americans equal rights and treated them as subordinate, inferior persons.

During Reconstruction, the most comprehensive debates over the meaning of the Equal Protec-

tion Clause in the context of enforcement legislation occurred during consideration of the Civil Rights Act of 1875, a five-year effort by Sen. Charles Sumner to enact legislation barring racial discrimination in a wide range of public accommodations and institutions, including trains, hotels, theaters, schools, and juries. While the schools provision was stripped from the bill in 1875 in the wake of devastating Republican losses in the 1874 congressional elections, the Act was an important milestone, banning racial discrimination in places of public accommodation and guaranteeing African American citizens the right to serve on a jury free from discrimination on account of race or color. In these debates, Congress determined that racial segregation, mandated by law, was a violation of the Fourteenth Amendment’s textual guarantee of the equal protection of the laws.

Equality under the law for all persons, without regard to race or color, was the touchstone of the legislation. Under the text of the Fourteenth Amendment, Sen. Sumner explained in 1872, “[t]he precise rule is Equality before the Law; nor more nor less; that is, that condition before the Law in which all are alike – being entitled without any discrimination to the equal enjoyment of all institutions, privileges,

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advantages, and conveniences created or regulated by law . . . .”<sup>62</sup> “Separate hotels, separate conveyances, separate theaters, separate schools . . . , separate cemeteries – these are the artificial

substitutes for Equality; and this is the contrivance by which a transcendent right . . . is evaded. . . .

Every such attempt [at separation] is an indignity to the colored man, instinct with the spirit of Slavery . . . [H]ere is caste not unlike that which separates the Sudra from the Brahmin.”<sup>63</sup>

During the debates on the Act, speaker after speaker stressed that the Equal Protection Clause 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.”<sup>64</sup> “[I]t was intended to destroy caste, to put all races on an equality,”<sup>65</sup> ensuring that “when any institution or privilege is created or regulated by law, it shall be equally free to all, without regard to race or color.”<sup>66</sup> Proponents of the bill argued that the

guarantee of the equal protection of the laws prohibited enforced racial segregation. As one member of the House put it, “whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made . . . to foster a concomitant of slavery and to degrade him. . . . There is no equality in that.”<sup>67</sup> Others denounced segregation as a “caste system”<sup>68</sup> and an “enactment of personal degradation.”<sup>69</sup>

The defeat of the schools provision of the proposed Act is one of the sad stories of Reconstruction. In 1872 and again in 1874, majorities in both the House and Senate supported banning racial segregation in schools, only to have repeated filibusters in the House, and other procedural maneuvers dash their efforts to pass the Act.<sup>70</sup> Economic hardship, combined with growing Northern apathy toward the project of Reconstruction, led to massive Republican defeats in the 1874 elections,<sup>71</sup> and when Congress returned, Republicans no longer had the votes to sustain the schools provision.<sup>72</sup> Still, Republicans fought against legalizing school segregation laws. Indeed, in 1875, Republicans defeated a revised schools provision that would have permitted separate but equal facilities, preferring no schools provision to one that “separate[s] a people by class legislation, which, under the Constitution, are united and equal.”<sup>73</sup> Even to the end, they maintained that the “Government owes its protection to every citizen. . . . Our theory of government knows no privileged class or race to be set above all others; it knows nothing of the barbarism of caste, nor of degrading . . . men because of their color or race, their birthplace, or ancestry.”<sup>74</sup> As African-American Congressman Richard Cain exclaimed, “[w]e want no invidious discrimination in the laws of this country. Either give us th[e schools] provision in its entirety or leave it out altogether . . . .”<sup>75</sup> Republicans preferred to take their “chances under the Constitution and its amendments” and “original principles of constitutional law,” expecting that “chances for good schools will be better under the Constitution with the protection of the courts . . . .”<sup>76</sup> Their hopes that the courts would be faithful guardians of the Equal Protection Clause at first seemed justified, but then were sorely dashed.

## EQUAL PROTECTION IN THE SUPREME COURT

### The Early Cases

The Reconstruction Supreme Court is rightly reviled for decisions that drained much of the force out of the Fourteenth Amendment. In the 1870s and 1880s, the Supreme Court essentially wrote the Privileges or Immunities Clause out of our nation’s charter – nullifying what was to be the centerpiece of the Amendment<sup>77</sup> – and gave a very stingy, narrow construction to Congress’ authority to enforce the Fourteenth Amendment’s guarantees of citizenship, liberty, and equality.<sup>78</sup> These rulings are indefensible, but what is remarkable is that even as the Reconstruction Court was gutting much of the Fourteenth Amendment, the Court basically got the Equal Protection Clause right. The Court’s earliest cases affirmed that the Equal Protection Clause prohibited laws that subordinated African Americans as inferiors.

In 1880, in *Strauder v. West Virginia*,<sup>79</sup> the Court, by a 7-2 vote, held that the Equal Protection Clause prohibited a state from denying African Americans the right to serve on a jury in criminal cases. Justice Strong’s opinion for the Court explained that the Fourteenth Amendment “makes no attempt to

*The Court’s earliest cases affirmed that the Equal Protection Clause prohibited laws that subordinated African Americans as inferiors.*

enumerate the rights it designed to protect. It speaks in general terms, and those are comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immuni-

ties, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property.”<sup>80</sup> “What is this,” the Court continued, “but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white shall stand equal before the law of the States, and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them because of their color.”<sup>81</sup> In holding

the West Virginia statute a violation of equal protection, Justice Strong explained that the Fourteenth Amendment prohibited a state from subordinating African Americans as second-class citizens. “The very fact that colored people are singled out and expressly denied . . . all right to participate in the administration of the law . . . is practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”<sup>82</sup>

In 1886, in *Yick Wo v. Hopkins*,<sup>83</sup> the Court unanimously overturned convictions under a licensing law aimed at and discriminatorily enforced against laundries operated by Chinese immigrants in San Francisco. Noting that the Fourteenth Amendment’s broad coverage is “not confined to the protection of citizens,” the Court observed that “the equal protection of the laws is a pledge of the protection of equal laws,” applying to “all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality . . . .”<sup>84</sup> In view of the broad sweep of the text, Justice Matthews explained “these cases . . . are to be treated as involving the rights of every citizen of the United States equally with those of strangers and aliens who now invoke the jurisdiction of the court.”<sup>85</sup> Finding that the law had been enforced “with a mind so unequal and oppressive,” for no reason other than “hostility to the race and nationality to which petitioners belong,”<sup>86</sup> the Court condemned the city’s actions as a violation of the Equal Protection Clause.

Even cases that gave a very narrow reading to congressional power to enforce the Fourteenth Amendment, such as the 1883 decision in the *Civil Rights Cases*,<sup>87</sup> took a broad view of the Equal Protection Clause’s prohibition on discrimination. Justice Bradley’s opinion for the Court explained that “[t]he fourteenth amendment extends its protections to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.”<sup>88</sup> In short, the Equal Protection Clause protected all persons from arbitrary and invidious discrimination; no one was outside its scope. “Class legislation,” no matter against whom it was directed, “would be obnoxious to the prohibitions of the fourteenth amendment . . . .”<sup>89</sup>

## ***Plessy and the Jim Crow Era***

**T**ragedically, in 1896, the Supreme Court would cast aside both text and history, as well as the precedents beginning with *Strauder*, in its infamous decision in *Plessy v. Ferguson*.<sup>90</sup> In *Plessy*, the Court – now under the leadership of Chief Justice Melville Fuller – upheld by a 7-1 vote a Louisiana statute that mandated segregation of African Americans and whites riding in railroad cars, essentially reading racial equality out of the Equal Protection Clause. *Plessy* is infamous for being one of the Supreme Court’s worst decisions, and for good reason. *Plessy* wrote prejudice and discrimination into the text of an Amendment designed to make equality a universal constitutional right and prohibit any persons from being treated as an inferior caste. Time and again, the *Plessy* Court substituted its own racist suppositions and assumptions in place of the text and history of the Equal Protection Clause.

Decided a mere thirty years after the framing of the Fourteenth Amendment, *Plessy* starkly rejected basic principles at the core of the Equal Protection Clause’s text and history. While the Equal Protection Clause guaranteed equality under the law, Justice Brown’s opinion for the Court began with the proposition that laws that discriminate on account of race and color are natural and inevitable, and do not offend constitutional safeguards

for equality. “A statute which implies a legal distinction between the white and colored races – a distinction which is founded in the color of the two races and which must always exist so long as the white men are distinguished from

***Plessy wrote prejudice and discrimination into the text of an Amendment designed to make equality a universal constitutional right and prohibit any persons from being treated as an inferior caste.***

the other race by color – has no tendency to destroy the legal equality of the two races . . . .”<sup>91</sup> “[I]n the nature of things,” Justice Brown argued, the Fourteenth Amendment “could not have been intended to abolish distinctions based on color, or to enforce . . . a commingling of the two races upon terms unsatisfactory to either.”<sup>92</sup> Consequently, the Court found, “the case reduces itself to the question whether the

statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.”<sup>93</sup> Underscoring its dim view of the Fourteenth Amendment’s guarantee of equality, the Court concluded its opinion with the pointed observation that “[i]f one race be inferior to the other socially, the [C]onstitution of the United States cannot put themselves on the same plane.”<sup>94</sup>

It fell to Justice John Marshall Harlan to be the lonely voice setting forth the text and history of the Fourteenth Amendment’s Equal Protection Clause. In one of the most famous dissenting opinions authored in Supreme Court history, Justice Harlan explained why enforced racial segregation violated the Fourteenth Amendment’s guarantee of equality under the law and equality of rights. “[I]n the eye of the law,” Justice Harlan wrote, “there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . The law regards man as man, and takes no account of his surroundings or his color when his civil rights guaranteed by the supreme law of the land are involved.”<sup>95</sup>

In this famous and oft-quoted passage, Justice Harlan highlighted two central points about the meaning of the Equal Protection Clause, invoking many of the same points made by Sen. Jacob Howard and others during the debates on the Fourteenth Amendment, and echoed in the debates on Reconstruction-era enforcement legislation. First, like Sen. Howard, Justice Harlan explained that equal protection principles outlaw caste legislation, i.e., enactments designed to subordinate a group and treat its members as inferior, second-class persons: “There is no caste here.”<sup>96</sup> Second, the Equal Protection Clause secures equality of rights, ensuring that all enjoy the same rights and the same protection under the law. Throughout his *Plessy* dissent, Justice Harlan repeatedly made clear that a state may not “regulate the enjoyment by citizens of their civil rights solely upon the basis of race.”<sup>97</sup> Indeed, Justice Harlan returned to these two guiding principles time and again in explaining why forcing whites and African Americans to sit in separate railway cars violated the Fourteenth Amendment. Louisiana’s segregation law was both caste legislation, “put[ting] the brand of servitude and degradation upon a large class of our fellow citizens,”<sup>98</sup> and a denial of equal rights under the law, infringing on basic civil liberties

of freedom of movement and association. As Justice Harlan explained, “[i]f a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.”<sup>99</sup>

Justice Harlan’s dissent is often invoked today for the principle of absolute colorblindness – the idea that the Equal Protection Clause bars all laws that classify based on race, whether the law is designed to subordinate African Americans, as segregation and other Jim Crow laws did, or whether the enactment in question is designed to redress our nation’s long and shameful history of discrimination, and failure to live up to the text and history of the Equal Protection Clause.<sup>100</sup> But Justice Harlan’s dissent did not go that far. Justice Harlan’s focus was not on how a law classified persons; he condemned enforced segregation because it was caste legislation and a denial of equal rights. There is little basis for suggesting that Justice Harlan would have viewed efforts to remediate the lingering effects of state-sponsored discrimination as either caste legislation or a denial of equal rights.

*Justice Harlan’s focus was not on how a law classified persons; he condemned enforced segregation because it was caste legislation and a denial of equal rights.*

*Plessy* cast a long shadow over the Fourteenth Amendment’s protection of racial equality, signaling to the South and the rest of

the nation that the Supreme Court would not stand in the way of the South’s campaign to strip African Americans of the hard-won rights secured during Reconstruction. The ruling ushered in the Jim Crow era, a six-decade period during which state laws and customs arose to deny African Americans the equal rights the Fourteenth Amendment had promised them.

## ***Brown* and the Rebirth of the Equal Protection Clause**

**S**tarting in the 1930s, Charles Hamilton Houston and his former student, a young Maryland lawyer named Thurgood Marshall, began in earnest a campaign to restore the Equal Protection Clause's guarantee of equality under the law and equality of rights, taking aim at *Plessy v. Ferguson*'s holding that the Constitution permits racial segregation designed to subordinate African Americans as inferiors. Through a series of well-chosen cases, Marshall and other attorneys at the NAACP slowly chipped away at *Plessy*'s foundation, moving the law one case at a time toward harmony with the original meaning of the Fourteenth Amendment.<sup>101</sup> In 1954, Marshall engineered an incredible victory in *Brown v. Board of Education*,<sup>102</sup> which overruled *Plessy* and restored to the Fourteenth Amendment the principle of equality under the law and equality of rights without regard to race or color.

***Half a century after Plessy had perverted the Equal Protection Clause, Brown restored the Constitution's promise of equality.***

In *Brown*, the Supreme Court unanimously held that “separate educational facilities are inherently unequal” and that “segregation is a denial of the equal protection of the laws.”<sup>103</sup> *Brown* is without a doubt one of the most important and justly celebrated opinions in Supreme Court history, ending *Plessy*'s shameful reign and vindicating Justice Harlan's monumental dissenting opinion in the case. It is a tribute to Chief Justice Earl Warren's leadership that he was able to craft an opinion in *Brown* that all of the Court's Justices would join. While the Court in *Brown* carefully limited its holding to public education, *per curiam* opinions issued in the wake of *Brown* left no doubt that enforced racial segregation was unconstitutional in all aspects of life.<sup>104</sup> Half a century after *Plessy* had perverted the Equal Protection Clause, *Brown* restored the Constitution's promise of equality.

To keep the Court from splintering, Chief Justice Warren's opinion in *Brown* focused upon the specific facts of the case, reasoning that enforced segregation of African Americans in schools was unconstitutional because it “generates a feeling of inferiority as to their status in the community . . . in a way unlikely ever to be undone.”<sup>105</sup> The Court in *Brown* “refused to turn back the clock to 1868 when

the Amendment was adopted,”<sup>106</sup> finding that the history of the adoption of the Fourteenth Amendment did not conclusively answer the question of the constitutionality of state-mandated racial segregation in education. According to Chief Justice Warren, “[t]he most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States.’ Their opponents just as certainly, were antagonistic to the letter and spirit of the Amendments and wished them to have the most limited effect. What others . . . had in mind cannot be determined with any degree of certainty.”<sup>107</sup> Further, the Chief Justice emphasized, public education was at a skeletal state in 1868, particularly in the South.<sup>108</sup>

While the Justices were undoubtedly correct to “consider public education in the light of its full development and its present place in American life throughout the Nation,”<sup>109</sup> the refusal to “turn back the clock to 1868” proved problematic, leading to the mistaken impression that the Court’s ruling was not rooted in the text and history of the Fourteenth Amendment. In the “Southern Manifesto,” Southern members of Congress called for massive resistance to *Brown*, principally on the ground that the Court had acted politically, and had ignored the original meaning of the Fourteenth Amendment.<sup>110</sup> Northern skeptics, like Columbia Law Professor Herbert Wechsler, also questioned the ruling, asking whether it could be justified by any neutral constitutional principles.<sup>111</sup> More recently, conservatives have seized on the text of the Fourteenth Amendment to make the claim that efforts to remediate state-sponsored discrimination should be treated identically to discrimination itself, claims easily rebutted by Reconstruction-era history.<sup>112</sup>

The text and history of the Fourteenth Amendment are far more supportive of *Brown* than Chief Justice Warren’s opinion made it seem. *Brown*, perhaps more than any other Supreme Court opinion, moved the Fourteenth Amendment back in line with its first principles. State-enforced racial segregation was a blatant violation of the text’s guarantee of the equal protection of the laws. During the debates on the Fourteenth Amendment, Sen. Jacob Howard explained that the Equal Protection Clause “does away with the injustice of subjecting one caste of persons to a code not applicable to another,”<sup>113</sup> and segregation was a textbook example of exactly such caste legislation. As Charles Black wrote in his famous and appropriately celebrated defense of *Brown*, “segregation is a massive intentional disadvantaging of the

Negro race . . . by state law,” and “history puts it entirely out of doubt that the chief and all dominating purpose was to ensure equal protection for the Negro. . . . All possible arguments . . . for discriminating against the Negro were finally rejected by the fourteenth amendment.”<sup>114</sup> In all essential respects, Jim Crow segregation was a form of racial subjugation little different than the Black Codes that the framers meant to abolish.<sup>115</sup> “Laughter,” Black wrote, was the proper response to *Plessy*’s claim that Jim Crow segregation afforded to African Americans the equal protection of the laws.<sup>116</sup>

The language the framers of the Fourteenth Amendment drafted and the American people ratified secured equality under the law and equality of rights for all persons, without exception. Under the text, segregation laws designed to treat African

Americans as an inferior caste are at war with the Constitution. As Akhil Amar has observed, “[t]he text calls for equal protection and equal citizenship, pure and simple. There is no textual exception for segregation, no clause that says

*Under the text, segregation laws designed to treat African Americans as an inferior caste are at war with the Constitution.*

‘segregation is permissible even if unequal.’ . . . A law whose preamble explicitly proclaims that ‘blacks are hereby declared inferior’ surely violates the Constitution; and so does a vast apartheid regime that proclaims this message in deed rather than word.”<sup>117</sup>

Even on the narrowest of inquiries into the intent of the framers of the Fourteenth Amendment on the specific question of the constitutionality of school segregation – an inquiry that should never be dispositive in constitutional interpretation<sup>118</sup> – the evidence, on balance, points to the correctness of *Brown*. Certainly, the opponents of the Fourteenth Amendment (and even some supporters) favored school segregation,<sup>119</sup> and in 1866, the same year the Amendment was sent to the states for ratification, Congress continued to provide federal funding for segregated schools in the District of Columbia.<sup>120</sup> But, on the other hand, as Professor Michael McConnell has painstakingly demonstrated, during the course of the debates over the legislation that became the Civil Rights Act of 1875, majorities in both houses of Congress, comprised of many of the same members of Congress who drafted the Fourteenth Amendment, lined up in support for the proposition that school segregation should be outlawed. In

McConnell’s words, “a very substantial portion of the Congress, including leading framers of the Amendment, subscribed to the view that school segregation violates the Fourteenth Amendment.”<sup>121</sup>

*Brown* is manifestly correct under both the text and the first principles of the Fourteenth Amendment: the Equal Protection Clause prohibits caste legislation, and segregation is undeniably a form of racial caste legislation. The evidence from the debates over the Civil Rights Act of 1875 marshaled by Professor McConnell – that many of the Amendment’s framers understood the text in exactly this way and denounced segregation as an “odious discrimination,”<sup>122</sup> a “caste system,”<sup>123</sup> and “an enactment of personal degradation,”<sup>124</sup> – is icing on the *Brown* cake.

Writing in 1960 at a time when *Brown* was very much under attack, Charles Black opined that the Court’s judgment “is right if the equal protection clause . . . is to be taken as stating . . . a broad principle of practical equality for the Negro race, inconsistent with any device that relegates the Negro race to a position of inferiority. . . . [I]n the end the decisions will be accepted by the profession on just that basis.”<sup>125</sup> In the years that followed, Black’s reading was adopted as the correct one. In 1967, in *Loving v. Virginia*,<sup>126</sup> the Court held unconstitutional the laws of Virginia and 15 other states forbidding marriages between African Americans and white persons, holding that states could not “restrict the rights of citizens on account of race” and treat them as inferiors in order to “maintain White Supremacy.”<sup>127</sup> As in *Brown*, it did not matter that the framers of the Fourteenth Amendment did not clearly intend to prohibit miscegenation laws in the Civil Rights Act of 1866. As it did in *Brown*, the Court in *Loving* correctly held that the text’s command of equality under the law and equality of rights without regard to race is controlling: “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”<sup>128</sup>

## The Retreat From *Brown*

While *Brown* is still the “crown jewel of the U.S. Reports,”<sup>129</sup> for the last quarter-century the Supreme Court has been continuously retreating from *Brown*’s promise of equality. The Justices have imposed a high threshold on African American plaintiffs seeking to prove intentional discrimination designed to harm them, while invoking the Equal Protection Clause, and even *Brown* itself, to invalidate a wide array of affirmative action plans enacted to remedy our nation’s long history of discrimination and failure to live up to the promises made in the Fourteenth Amendment. In the hands of the Rehnquist and Roberts Courts, the Equal Protection Clause’s main office has been to prevent the government from remedying the pernicious effects of more than a century of slavery and Jim Crow segregation.

The shift began in 1976 in *Washington v. Davis*,<sup>130</sup> in which the Court held that a law, neutral on its face, did not violate the Equal Protection Clause absent proof that the law was enacted for a racially discriminatory purpose. Observing that “[t]he central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating based on race,” the Court concluded that the “invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”<sup>131</sup> While *Davis* foreclosed a constitutional claim based on disparate impact

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alone, the Court’s opinion properly took a broad, contextual view of the evidence bearing on discriminatory intent, specifically recognizing that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including

the fact . . . that the law bears more heavily on one race than another” and that, in some cases, “discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”<sup>132</sup> After

all, the Black Codes, which the framers of the Fourteenth Amendment targeted for extinction, not only included laws that contained racial classifications, they also included neutrally-drawn laws that had a discriminatory racial impact. Following *Davis*, the Court routinely devised burden-shifting rules in cases involving racial discrimination in jury selection,<sup>133</sup> education,<sup>134</sup> and voting<sup>135</sup> that made evidence of racially discriminatory impact highly probative, and made it possible for plaintiffs to make out a case of purposeful racial discrimination without producing a smoking gun.<sup>136</sup> The “line between discriminatory purpose and discriminatory impact,” as Justice Stevens noted in his separate concurring opinion in *Davis*, should not be a “bright” one.<sup>137</sup>

Over the course of the next decade, the Supreme Court tightened the discriminatory intent requirement applicable to neutrally-drawn government action, turning it into an onerous burden few could meet.<sup>138</sup> “Discriminatory purpose,” the Court explained in a 1979 ruling, “implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a course of action at least in part ‘because of’ not merely ‘in spite of’ its adverse effects upon an identifiable group.”<sup>139</sup> In other words, to challenge a neutrally-drawn statute or policy, a plaintiff had to produce evidence that the particular government policymaker harmed African Americans or other groups out of malice. While *Davis* had taken a broad, contextual view of the evidence bearing on the question of discriminatory purpose, later cases viewed the inquiry narrowly, dismissing “‘historical and social factors’” bearing on discriminatory purpose as merely “gauzy sociological considerations that have no constitutional basis.”<sup>140</sup> To succeed, a plaintiff would have to prove the subjective, malicious intent of the relevant decision-maker in the plaintiff’s own case.<sup>141</sup>

The Court’s new approach to the discriminatory intent standard placed a very high burden on plaintiffs to prove racial discrimination. For example, in 1987, in *McCleskey v. Kemp*,<sup>142</sup> a sharply divided Court rejected Warren McCleskey’s equal protection challenge to the administration of the death penalty in Georgia, turning a blind eye to statistics that showed the sad reality that capital sentencing all too often was plagued by racial discrimination. McCleskey’s case relied on a rigorous and comprehensive study of the effect of race on capital sentencing. Analyzing 2000 murder cases over a six-year period, the study found a stark pattern of racial discrimination: the odds that a death sentence

would be imposed were 4.3 times greater in the case of persons who had killed whites than in the case of persons who had killed African Americans, even after accounting for 230 different nonracial factors. As past cases made clear, well-supported statistical evidence was highly probative of discrimination. Nevertheless, the Court's five-justice majority rejected McCleskey's claim, emphasizing that "[h]e offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."<sup>143</sup> Despite the study's finding that "few of the details of the crime or of McCleskey's past criminal conduct was more important than the fact that his victim was white,"<sup>144</sup> the Court's five conservatives blithely dismissed racial disparities that actually occurred as simply "an inevitable part of our criminal justice system."<sup>145</sup> As Justice Blackmun noted in a powerful dissent, the Court's callous rejection of McCleskey's evidence was hard to square with the text and history of the Fourteenth Amendment, which showed that "discriminatory enforcement of States' criminal laws was a matter of great concern to the drafters."<sup>146</sup>

At the same time the Rehnquist Court was making it harder for African Americans and other racial or ethnic minorities to invoke the Equal Protection Clause's promise of equal opportunity for all under the law,<sup>147</sup> the Court's conservatives launched an all-out assault on affirmative action plans designed to redress racial discrimination. In 1989, in *City of Richmond v. J.A. Croson Co.*,<sup>148</sup> the Court struck down a Richmond affirmative action plan to redress racial discrimination in the local construction industry. *Croson*, of course, was not the first case to consider the constitutionality of affirmative action programs,<sup>149</sup> but it settled that strict scrutiny – the highest standard of judicial review and usually "fatal in fact"<sup>150</sup> – applies to all state and local affirmative action plans. According to the Court, "racial classifications are suspect" and without strict scrutiny, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority . . . ."<sup>151</sup> *Croson* suggested that Congress possessed greater power, pursuant to Section 5 of the Fourteenth Amendment, to formulate affirmative action plans than do state or local governments,<sup>152</sup> but in 1995, in *Adarand Constructors, Inc. v. Peña*,<sup>153</sup> the Court ruled that strict scrutiny also applies to federal affirmative action plans. By a 5-4 vote, the Court in *Adarand* held that "any person, of whatever race, has the right to demand that any governmental actor subject to the

Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”<sup>154</sup> Since then, strict scrutiny has proved the death knell of virtually all the affirmative action programs and other race conscious measures the Court has reviewed.<sup>155</sup>

The notion of a color-blind Constitution is an undeniably powerful equal protection principle, invoked in Justice Harlan’s dissent in *Plessy* and reflected in the understanding of all the Justices since *Brown*. There has never been any disagreement that affirmative action plans that use race in order to

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redress discrimination deserve heightened constitutional scrutiny to ensure that they are consistent with the Fourteenth Amendment’s guarantee of equality under the law. No Justice has dissented from that proposition.<sup>156</sup> Instead, the debate is whether affirmative action plans deserve the same

harsh condemnation as the Black Codes, Jim Crow segregation, and other measures designed to subordinate African Americans, or whether legislatures should have some authority to use race to ensure that the Constitution’s promise of equality of opportunity is, in fact, a reality for all.

By insisting that “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized,”<sup>157</sup> and applying strict scrutiny rigorously to invalidate affirmative action plans, the Court’s conservatives have treated “oppression and assistance”<sup>158</sup> identically, erasing the history that makes affirmative action plans a necessary corrective to our nation’s tragic history of treating African Americans as an inferior caste. As Justice Stevens made the case in a powerful dissenting opinion in *Adarand*, “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression . . . . Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government’s constitutional obligation to ‘govern impartially’ should ignore this distinction.”<sup>159</sup> It makes little sense to treat policies of

inclusion and exclusion by the same unforgiving strict standard, to “disregard the difference between a ‘No Trespassing’ sign and a welcome mat,”<sup>160</sup> particularly in light of our nation’s long history of flouting the Fourteenth Amendment’s guarantees of equality.<sup>161</sup> As Justice Ginsburg put it, legislatures should have the authority to remedy the lingering effects of “a system of racial caste only recently ended,” in order to “help to realize, finally, the ‘equal protection of the laws’ the Fourteenth Amendment has promised since 1868.”<sup>162</sup>

Indeed, the fundamental differences between “oppression and assistance,” between a “No Trespassing sign and a welcome mat,” go all the way back to the framing of the Fourteenth Amendment. The framers of the Fourteenth Amendment enacted race-conscious legislation designed to help ensure that the Amendment’s promise of equality would become a reality for African Americans seeking to make the transformation from slavery to citizenship. The Freedmen’s Bureau Acts, as well as a host of other race-conscious legislation enacted during Reconstruction, gave financial and educational benefits to African Americans, who needed the affirmative assistance of the federal government to enjoy meaningfully the Constitution’s new guarantees of freedom and equality.<sup>163</sup> This history weighs powerfully in favor Justice Stevens’ pragmatic approach, which recognizes that carefully tailored affirmative action plans can be an

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important tool to advance the Constitution’s command of equality. While some affirmative action plans may properly be invalidated for lack of tailoring,<sup>164</sup> race-conscious governmental actions should not all be treated as presumptively unconstitutional.

Unfortunately, the Roberts Court has picked up right where the Rehnquist Court left off, insisting that the fundamental principles set out in Justice Harlan’s dissent in *Plessy* and in the Court’s decision in *Brown* preclude any use of race, even to ensure that African Americans and whites attend school together. In 2007, in *Parents Involved in Community Schools v. Seattle School District*,<sup>165</sup> Chief

Justice Roberts invoked *Brown* to prevent state and local governments from using race, even in minimal ways, to prevent the re-segregation of public schools. Reaffirming that all racial classifications must be subject to strict scrutiny, without exception, the Chief Justice drew on *Brown* to explain why school districts could not consider race to prevent racial isolation of African Americans and other minorities in public schools around the nation. “[W]hen it comes to using race to assign children to schools, history will be heard”<sup>166</sup>: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts . . . have not carried the heavy burden of demonstrating that we should allow this once again . . . . The way to stop discriminating on the basis of race is to stop discriminating on the basis of race.”<sup>167</sup> While Justice Kennedy, who cast the deciding vote in the 5-4 ruling, refused to sign on to some of the opinion’s broadest language and rejected Chief Justice Roberts’ principle of absolute colorblindness as a constitutional rule,<sup>168</sup> he agreed with the plurality that school districts could not, absent a showing of compelling necessity, use racial classifications to ensure that white and African American children attend school together.<sup>169</sup>

*Brown* remains one of the most important and canonical decisions of the Supreme Court, the case that brought Fourteenth Amendment precedent back in line with the Constitution after *Plessy* betrayed our nation’s foundational document. But there is a war on the current Court over *Brown*’s true meaning and legacy. That is why it is essential today to “turn back the clock to 1868” and reexamine the Equal Protection Clause’s text and history. This

***Caste is, and should be, at the center of the story of the Fourteenth Amendment and Brown.***

examination reveals that Justice Breyer’s dissent in *Parents Involved*, not the Chief Justice’s opinion, got *Brown* right. As Justice Breyer explained, *Brown* invalidated “a caste system rooted in the institutions of slavery and 80 years of legalized subordination,” correctly interpreting the Fourteenth Amendment, in light of its text and history, to forbid “practices that lead to racial exclusion.”<sup>170</sup> Caste is, and should be, at the center of the story of the Fourteenth Amendment and *Brown*. In *Parents Involved*, Chief Justice Roberts ignored this history and perverted *Brown* and its legacy. ■

# Equal Protection and Gender Equality

From the day the Fourteenth Amendment was ratified, the text of the Equal Protection Clause protected women from arbitrary and invidious discrimination. In writing the text, the framers went beyond the promise of equality in the Declaration of Independence, clearly guaranteeing the equal protection of the laws to all persons, not simply to “all men.” Women, undoubtedly, are persons within the terms of the Equal Protection Clause. “Every human being in the country, black or white, man or woman,” the framers recognized, “has a right to be protected in life, in property, and in liberty . . . .”<sup>171</sup> Following passage of the Fourteenth Amendment by Congress, the framers urged the American people to ratify it because “every body – man, woman, and child – without regard to color, should have equal rights before the law.”<sup>172</sup> As Sen. Aaron Sargent explained, “The fourteenth amendment was not intended merely to say that black men should have rights, but that black and white men and women should have rights. It was a guarantee of equality of right to every person within the jurisdiction of the United States, be he black or white.”<sup>173</sup>

*In writing the text, the framers went beyond the promise of equality in the Declaration of Independence, guaranteeing the equal protection of the laws to all persons, not simply to “all men.”*

Other parts of the Fourteenth Amendment, however, approved of discrimination against women. Section 2 imposed a penalty of reduced congressional representation on states that denied the right to vote to any of their “male inhabitants,” implicitly sanctioning the denial of the right to vote to women. The framers invoked women’s so-called “natural” roles within the family to explain Section 2’s treatment of women. Sen. Jacob Howard argued that “[t]here was such a thing as the law of nature which has a certain influence even in political affairs and . . . by that law women and children were not regarded as the equals of men.”<sup>174</sup> The denial of the right to vote, in the framers’ way of thinking, was consistent with equality because “fathers, husbands, brothers, and sons to whom the right of suffrage is given will . . . be as watchful of the rights of their wives, sisters, and children who do not vote as of their

own.”<sup>175</sup> On similar reasoning, the framers did not think that the Equal Protection Clause would nullify laws denying women the right to serve on a jury, or laws that denied married women the same right to enter into contracts, own property, or sue on their own behalf that their husbands enjoyed.<sup>176</sup>

Women applauded Section 1’s protection of the rights of all citizens and persons<sup>177</sup> – language that clearly protected their rights as individuals to liberty and equality – but were deeply disturbed about the introduction of the word “male” in Section 2 of the Fourteenth Amendment, and immediately began agitating against their second-class citizenship. Their first tack, however, was not to call for a new constitutional amendment, but to press the argument that the Fourteenth Amendment’s text prohibited gender discrimination in voting. Calling for a “New Departure under the Fourteenth Amendment,” women’s rights activists of the 1860s and 1870s, led by Susan B. Anthony and Elizabeth Cady Stanton, stressed that the Constitution’s text guaranteed women’s equality, including their right to vote.<sup>178</sup> Focusing on the broad guarantees in Section 1 of the Fourteenth Amendment while ignoring the word “male” in Section 2, New Departure activists argued that women were a part of “We the People” and could not be excluded from the Constitution’s broad protections for liberty, equality, and citizenship. The right to vote, Susan B. Anthony argued, was a fundamental right, “the one [right] without which all the others are nothing,” and the Fourteenth Amendment “settles the equal status of all citizens”: “[t]here is . . . but one safe principle of government – equal rights to all. And any and every discrimination against any class . . . can but embitter and disaffect that class, and thereby endanger the safety of the whole people.”<sup>179</sup> “Being persons . . . every discrimination against women in the constitutions and laws of the several states is to-day null and void, precisely as is every one against negroes.”<sup>180</sup>

Unfortunately, these arguments were hard to square with Section 2 of the Fourteenth Amendment, and the Supreme Court unanimously rejected them in the 1874 case of *Minor v. Happersett*.<sup>181</sup> Undeterred, Susan B. Anthony and her allies continued to ground women’s rights in the Fourteenth Amendment’s text, even as the women’s rights movement began to push for a constitutional amendment guaranteeing women the right to vote. Testifying in 1880 before the Senate Judiciary Committee then considering an early version of what became the Nineteenth Amendment, Anthony told the Senators that “[t]he Constitution as it is protects me. If I could get a practical application of the Constitution it would

protect me and all women in the enjoyment of perfect equality of rights everywhere under the shadow of the American flag. I do not come to you . . . for any more amendments to the Constitution, because I think they are unnecessary, but because you say that there is not enough in the Constitution to protect me.”<sup>182</sup> At a later hearing, Elizabeth Cady Stanton, too, emphasized that the Constitution’s text, if properly applied, already safeguarded women’s equal rights. “The Constitution as it is, in spirit and letter, is broad enough to protect the personal and property rights of all citizens under the flag. By every principle of fair interpretation, we need no amendment, no new definition of the terms ‘people,’ ‘persons,’ ‘citizens’ . . . . We have abundant guaranties in the Constitution to secure to woman all her rights.”<sup>183</sup>

Over the next four decades, women’s rights activists fought tirelessly to remove the word “male” from the Constitution, finally succeeding with the ratification of the Nineteenth Amendment in 1920.<sup>184</sup> In ratifying the Nineteenth Amendment, “We the People” made clear that women must be treated as full and equal citizens with the same right to vote and participate in the public sphere as men. Women no longer could be excluded from voting – the preeminent symbol of citizenship – on the grounds that their place was in the home and their destiny was to be ruled by men. The American people repudiated the sexist notions about women’s proper role in the family that led the framers of the Fourteenth Amendment to write sex discrimination into Section 2 of the Amendment.<sup>185</sup> In approving the Nineteenth Amendment, the nation decisively rejected “the old conception of the place of woman,”

*In ratifying the Nineteenth Amendment, “We the People” made clear that women must be treated as full and equal citizens with the same right to vote and participate in the public sphere as men.*

concluding that a woman was no longer to be “ruled by a male head” and have “her place in the world . . . determined by the place held by this head . . . .”<sup>186</sup> After ratification of the Nineteenth Amendment, the consti-

tutional text affirmed a “robust vision of women as full and equal members of the political People who govern America.”<sup>187</sup>

Almost immediately, the Supreme Court recognized that women’s claim to equality before the law was now on stronger constitutional footing. In *Adkins v. Children’s Hospital*,<sup>188</sup> the Court cited the

Nineteenth Amendment in striking down a law setting a minimum wage for women as a violation of the Due Process Clause of the Fifth Amendment. Justice Sutherland’s opinion for the Court explained that, “[i]n view of the great – not to say revolutionary – changes which have taken place . . . in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, . . . we cannot accept the doctrine that women of mature age . . . require or may be subjected to restrictions on their liberty of contract which could not be lawfully imposed in the case of men under similar circumstances.”<sup>189</sup> In view of the Nineteenth Amendment, the Court rejected the argument that biological differences justified the legislation, dismissing “the old doctrine that [a woman] must be given special protection or be subjected to special restraint in her contractual and civil relationships.”<sup>190</sup>

But the Court’s recognition that the Nineteenth Amendment supported women’s equality under the law was quickly forgotten. *Adkins* was a controversial *Lochner*-era ruling that gave strong constitu-

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tional protection to liberty of contract under the doctrine of substantive due process, and the decision was overruled by the Supreme Court in 1937.<sup>191</sup> In the decades that followed, the Court upheld discriminatory legislation, ruling that states may treat women as less than full citizens on the

ground that a “woman is still regarded as the center of home and family life.”<sup>192</sup> “The Constitution, in other words, gave women the vote, but only that. In other respects, our fundamental instrument of government was thought an empty cupboard for sex equality claims.”<sup>193</sup>

All that changed in the early 1970s in the Burger Court. In the short span of several years, the Burger Court reshaped equal protection doctrine, repeatedly holding that the Fourteenth Amendment’s text protected women as well as men from discrimination based on gender. In a string of victories, Ruth Bader Ginsburg convinced the Court to honor the text of the Equal Protection Clause that promises equal protection of the laws not only for men, but for all persons.

In 1971, in *Reed v. Reed*,<sup>194</sup> the Court first held that the Equal Protection Clause protects

women from invidious discrimination, invalidating an Idaho statute establishing a mandatory preference for men over women in the administration of an estate as “the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.”<sup>195</sup> In 1973, in *Frontiero v. Richardson*,<sup>196</sup> a four-Justice plurality concluded that gender was a suspect classification, noting that “statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its members.”<sup>197</sup> Ultimately, in 1976, in *Craig v. Boren*,<sup>198</sup> the Court held that laws that discriminated on the basis of gender – whether the discrimination fell on men or women – were subject to intermediate scrutiny, demanding a showing that the discriminatory statute “serve important government objectives” and “be substantially related to the achievement of those objectives.”<sup>199</sup> This standard – less demanding than strict scrutiny but still quite strict in fact<sup>200</sup> – created a high constitutional hurdle for state laws that discriminate on the basis of gender, requiring the government to establish “an exceedingly persuasive justification” for gender-based discrimination and forbidding the government from writing into the law “fixed notions concerning the roles and abilities of males and females.”<sup>201</sup> “No longer is the female only destined for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”<sup>202</sup> Today, it is well settled that, under the Fourteenth Amendment’s broad text, the government violates “the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate and contribute to society based on their individual talents and capacities.”<sup>203</sup>

These holdings are dictated by the text of the Equal Protection Clause, which perfected the Declaration by affirming the equality of all persons. As Justice Kennedy has observed, the framers rejected an equality guarantee that proscribed only racial discrimination in favor of a broad guarantee of equality written in “more comprehensive terms,”<sup>204</sup> applying to all individuals, both women and men. “The neutral phrasing of the Equal Protection Clause,” Justice Kennedy explained, “extending its guarantee to ‘any person,’ reveals its concern with rights of individuals . . . . ‘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 [or] sexual . . . class.’”<sup>205</sup>

The text and history of the Nineteenth Amendment solidify the case in favor of *Reed*, *Frontiero*, *Craig*, and their progeny. While there may have been justification to read the text of the Equal Protection Clause narrowly when Section 2 of the Fourteenth Amendment itself blessed gender discrimination in voting, the Nineteenth Amendment repealed Section 2's discrimination against women, striking the word "male" from the Constitution and unequivocally securing equal citizenship for women. The Nineteenth Amendment removed the Fourteenth Amendment's blemish on the protection of equality for all persons. As the history above shows, in ratifying the Nineteenth Amendment, the American people declared that women were equals of men entitled to the right to vote, not subordinate second-class citizens. The people decisively rejected the sexist notions about women's proper role in the family that had led the framers of the Fourteenth

Amendment to write sex discrimination into Section 2 of the Amendment. "Ever since the Nineteenth Amendment," as

*The Nineteenth Amendment removed the Fourteenth Amendment's blemish on the protection of equality for all persons.*

Ruth Bader Ginsburg and others have

recognized, "women are citizens of equal stature with men. . . . [W]omen and men are persons of equal stature and dignity before the law."<sup>207</sup> Discrimination that the framers of the Fourteenth Amendment once justified "based on an old-fashioned view of women's role and capacities" has no place in our country today because "the Constitution itself . . . affirms a very different and more robust vision of women as full and equal members of the political People who govern America."<sup>207</sup> ■

# Equal Protection and Sexual Orientation

The sweeping text of the Equal Protection Clause prohibits all forms of arbitrary and invidious discrimination, including discrimination on account of sexual orientation. The text applies both to discrimination, such as racial and gender discrimination, that was the focus of considerable debate at the framing, as well as to discrimination that the framers never considered at all during the debates. It guarantees the equal protection of the laws to all persons, prohibiting “all caste-based and invidious class-based legislation.”<sup>208</sup> As Justice Kennedy has observed, “[t]he Equal Protection Clause and our constitutional tradition are based on the theory that an individual possesses rights that are protected against lawless action by the government.”<sup>209</sup> While state governments, of course, have broad power to classify persons in the pursuit of legitimate government interests,<sup>210</sup> they may not treat any persons as second-class citizens, deny them equal rights and responsibilities, or subordinate them.<sup>211</sup> The guarantee of the equal protection of the laws therefore protects gay men and lesbians from state legislation treating them as inferiors, “not as worthy or deserving as others.”<sup>212</sup>

In 1996, in *Romer v. Evans*,<sup>213</sup> the Supreme Court applied the text of the Equal Protection Clause in striking down Colorado’s Amendment 2 as an effort by the state to reduce gay men and lesbians to pariahs, “a stranger to its

*The sweeping text of the Equal Protection Clause prohibits all forms of arbitrary and invidious discrimination, including discrimination on account of sexual orientation.*

laws.”<sup>214</sup> Amendment 2 prohibited all state and local legislative, executive, and judicial action to protect gay men and lesbians from discrimination, an incredibly broad “disqualification of a class of persons from the right to seek the protection of the law . . . .”<sup>215</sup> Justice Kennedy’s opinion for the Court turned to a number of settled equal protection first principles, ideas reflected in some of the oldest and most famous precedents of the Court, in holding that the Equal Protection Clause prohibits discrimination on account of sexual orientation and striking down Amendment 2. As Justice Kennedy explained, the text’s “pledge of the protection of equal laws” requires “the law’s neutrality where the rights of persons are at

stake” and forbids the government from discriminating against individuals out of “animosity toward the class of persons affected.”<sup>216</sup> Justice Kennedy’s opinion opened by quoting Justice Harlan’s declaration in *Plessy* that “the Constitution ‘neither knows nor tolerates classes among citizens’” and concluded its penultimate paragraph by quoting the Court’s recognition in the *Civil Rights Cases* that the Fourteenth Amendment bans all “class legislation,” no matter at whom it is directed.<sup>217</sup> Applying these first principles, the Court concluded that Amendment 2 was a form of class legislation, “a status-based enactment” that denies equal rights under the law to gay men and lesbians “to make them unequal to everyone else.”<sup>218</sup>

In dissent, Justice Scalia argued that Amendment 2 did not violate the Equal Protection Clause because the government has a legitimate interest in expressing “moral disapproval of homosexual conduct,” and “preserv[ing] traditional sexual mores against the efforts . . . to revise those mores . . . .”<sup>219</sup> Tradition, according to Justice Scalia, defines the scope of the Fourteenth Amendment’s protections. Justice Scalia concluded that the Fourteenth Amendment offers scant protection to gay men and lesbians against discrimination by the government because our nation has a “centuries old”<sup>220</sup> history of discriminating against them. This turns the Equal Protection Clause’s universal guarantee of equality on its head. As Justice Scalia has himself recognized elsewhere, “[n]o tradition can supersede the Constitution.”<sup>221</sup>

Far from sanctioning historical discrimination, the Equal Protection Clause eliminates it. As this narrative demonstrates, the Equal Protection Clause, as well as later Amendments that added to the Constitution’s protection of equality, were aimed at ending longstanding discrimination. The very purpose of these Amendments was “to eliminate practices that existed at the time of ratification and were expected to endure,” in short “to protect against traditions, however long-standing and deeply rooted.”<sup>222</sup> In drafting the Equal Protection Clause, the framers were particularly concerned with eradicating racial discrimination against the newly freed slaves, ending our nation’s long tradition of denying African Americans equal rights and equal citizenship. While the framers sanctioned some

*Far from sanctioning historical discrimination, the Equal Protection Clause eliminates it.*

“traditional” forms of gender discrimination and wrote the word “male” into Section 2 of the Fourteenth Amendment, the Nineteenth Amendment removed that blemish on the Constitution’s universal protection of equality, guaranteeing women’s equal citizenship. The Nineteenth Amendment buried the longstanding notion that women were second-class citizens, destined to be ruled by men. “We the People” determined that women were men’s political equals, entitled to what Justice Ginsburg has called “full citizenship stature.”<sup>223</sup> Thus, history shows that both the Fourteenth and Nineteenth Amendments were specifically aimed at ending longstanding discrimination. Against the backdrop of this history, it would be an awful mistake to carve out an exception to the Equal Protection Clause’s universal guarantee of equality for longstanding forms of discrimination, such as discrimination on account of sexual orientation.<sup>224</sup> On the contrary, as Justice Kennedy’s opinion in *Romer* properly recognized, the Fourteenth Amendment’s guarantee of the equal protection of the laws applies with full force to discrimination against gay men and lesbians, prohibiting efforts “to make them unequal to everyone else.”<sup>225</sup>

In *Romer*, the Court did not decide whether discrimination on account of sexual orientation is a

*Under the Equal Protection Clause, states may not deny to gay men and lesbians rights basic to “ordinary civic life in a free society” in order to “make them unequal to everyone else.”*

constitutionally suspect classification requiring strict scrutiny (as in race cases) or intermediate scrutiny (as in gender cases).

Instead, Justice Kennedy’s

majority opinion held Amend-

ment 2 unconstitutional under rational basis review, the most lenient standard of scrutiny applied in equal protection cases. While rational basis review is exceedingly deferential – the standard the court uses to sustain most challenges to social and economic legislation<sup>226</sup> – it does not allow “‘indiscriminate imposition of inequalities’ . . . born of animosity to the class of persons affected.”<sup>227</sup> Under the text, it is a violation of equal protection to treat any class of persons as having second-class, inferior status. Under the Equal Protection Clause, states may not deny to gay men and lesbians rights basic to “ordinary civic life in a free society,” in order “to make them unequal to everyone else.”<sup>228</sup> Since Amendment 2 violated these fundamental precepts, there was no need for the Court to apply any form of heightened scrutiny.

Justice Kennedy’s opinion in *Romer* represents a line of reasoning in equal protection jurisprudence – emphasizing text and its broad protection rather than the tiers of strict or intermediate scrutiny – long associated with Justice Stevens.<sup>229</sup> While differing in focus, these approaches are not at odds. As Justice Stevens explained in 1976, “[t]here is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”<sup>230</sup> In his opinions, Justice Stevens urged a context-sensitive version of the rational basis framework<sup>231</sup> that placed particular emphasis on our Constitution’s “commit[ment] to the proposition that all persons are created equal.”<sup>232</sup> As Justice Stevens rightly noted, “the Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subject to a ‘tradition of disfavor,’ in order to prevent use of a ‘stereotyped reaction [that] may have no rational relationship – other than pure prejudicial discrimination – to the stated purpose for which the classification is being made.’”<sup>233</sup> In turning to these first principles in striking down invidious discrimination against gay men and lesbians, Justice Kennedy’s opinion in *Romer* closely followed these teachings.

Today, of course, the constitutional issues surrounding the scope of the Fourteenth Amendment’s protection against discrimination on account of sexual orientation are playing out in cases involving state laws that deny gay men and lesbians the right to marry the person of their choice. In *Perry v. Schwarzenegger* (now *Perry v. Brown*), a federal district court last year held that such a law in California – the state’s infamous Proposition 8 – violated the Fourteenth Amendment.<sup>234</sup> That ruling is now on appeal before the Ninth Circuit. It is quite possible that *Perry*, or another case challenging marriage discrimination against gay men and lesbians, will reach the Supreme Court in the near future. If and when that happens, and if the Court is faithful to the text of the Equal Protection Clause and its first principles, it will strike down these discriminatory state laws.

Under the text, laws that deny gay men and lesbians the right to marry the person of their choice contravene the Fourteenth Amendment’s guarantee of the equal protection of the laws. By forbidding committed same-sex couples from participating in what the Supreme Court has called “the most important relation in life” and the “foundation of the family in our society,”<sup>235</sup> laws that deny to gay

men and lesbians the right to marry violate the Fourteenth Amendment's textual guarantee of equality under the law and equality of rights.<sup>236</sup> By denying gay men and lesbians one of our most cherished and fundamental rights – a right deeply rooted in the text and history of the Fourteenth Amendment – these laws treat gay men and lesbians as second-class persons, unworthy of having their loving relationships recognized.<sup>238</sup> ■

# Conclusion

There are few areas of the law as deeply polarized and emotionally heated as the meaning of the Constitution's guarantee of the equal protection of the laws. Modern progressives celebrate the Equal Protection Clause as a broad guarantee against invidious discrimination, including discrimination on the basis of sex and sexual orientation, arguing that the Supreme Court has a special role in protecting suspect classes from discrimination. Modern conservatives see the Clause as primarily concerned with racial classifications, and valuable mainly as a club against affirmative action programs. Both the conservative attack on affirmative action and the progressive effort to apply the Clause's majestic words broadly have drawn support to date from the Supreme Court's swing Justice, Anthony Kennedy. In a very real sense, today the Equal Protection Clause means what Justice Kennedy says it means.

What is lost – all too often – in this conversation is the full sweep of our constitutional history: the principle of equality first stated in the Declaration, perfected in the Equal Protection Clause, and extended in the Nineteenth Amendment and other Amendments. Indeed there appears to be something of a conspiracy of silence on this front. Progressives, recognizing that the framers of the Fourteenth Amendment were not always as enlightened as they were when they were writing the soaring words of the Equal Protection Clause, are all too willing to heed the Supreme Court's advice in *Brown* about refusing to turn back the clock to 1868. Conservatives, clearly aware that their assault on affirmative action would suffer if confronted with the words and deeds of the framers of the Fourteenth Amendment keep quiet too, at least when it comes to arguing against affirmative action. Virtually no one brings the Nineteenth Amendment or other Amendments to bear on our understanding of constitutional principles of equality.

This narrative has argued that the text and history of the Equal Protection Clause and later Amendments valuably inform modern debates about the meaning of the Clause. In particular, the history chronicled in this narrative shows three main things. First, the broad terms of the Equal Protection Clause were entirely deliberate: the framers purposefully enacted a universal guarantee of equality under

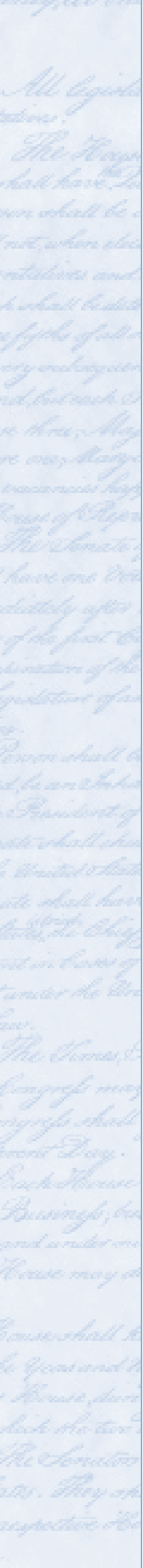
law, covering every person in the United States. Second, the framers of the Fourteenth Amendment were not prepared to fully live up to that universal guarantee of equality, particularly when it came to equality for women, and they, in fact, sanctioned discrimination against women in voting in Section 2 of the Fourteenth Amendment. Third, subsequent Amendments have extended our constitutional tradition of equality – most important the Nineteenth Amendment, which prohibits gender discrimination in voting and repealed the Fourteenth Amendment’s sanction for discrimination on the basis of sex. In ratifying the Nineteenth Amendment, the American people erased the one textual limit on the Fourteenth Amendment’s otherwise sweeping protection of equality.

As this history indicates, the demand for equality is central to the idea of America, but also elusive and seemingly a step or two beyond our grasp. The institution of slavery mocked the inspiring words of the Declaration even as they were written by Thomas Jefferson in 1776. “We the People” enshrined slavery in our Constitution even as we promised to “secure the Blessings of Liberty to ourselves

***The Equal Protection Clause makes the “self-evident” truth of the Declaration binding law in America and clarifies that equality is guaranteed to every person, black or white, male or female, gay or straight.***

and our Posterity.”<sup>239</sup> State-sponsored segregation, anti-miscegenation laws and discrimination against women marred the canvas upon which the Equal Protection Clause was written. Discrimination against women continued for decades after passage of the Nineteenth Amendment. The vestiges of state-sponsored discrimination remain to this day, as do laws that blatantly discriminate against gay and lesbian Americans.

Lived equality in America has never quite measured up to the “self-evident” truth of the Declaration or the broad and inspiring words of the Constitution’s Equal Protection Clause. But that does not make these words any less important. At Gettysburg, President Lincoln called the United States a nation “dedicated to the proposition that all men are created equal.”<sup>240</sup> The Equal Protection Clause makes the “self-evident” truth of the Declaration binding law in America and clarifies that equality is guaranteed to every person, black or white, male or female, gay or straight. Lincoln called upon “us the living” to



commit ourselves to the “unfinished work” of the soldiers who died at Gettysburg. Those words still ring true today. ■

## Endnotes

- 1 *Plessy v. Ferguson*, 163 U.S. 537, 559 (1897) (Harlan, J., dissenting).
- 2 347 U.S. 483 (1954).
- 3 404 U.S. 71 (1971).
- 4 517 U.S. 620 (1996).
- 5 *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).
- 6 Michael Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 (2002) (“[A] jurisprudence based on a narrowly defined original understanding of the Equal Protection Clause is morally unacceptable because it would license such odious institutions as racially segregated schools, antimiscegenation laws, and the most egregious forms of discrimination against women.”); see also GOODWIN LIU, ET AL., *KEEPING FAITH WITH THE CONSTITUTION* 50 (2009) (“*Brown* cannot be explained on originalist grounds.”).
- 7 See *The Originalist*, CAL. LAWYER (Jan. 2011) (interview with Justice Scalia), available at <http://www.callawyer.com/story.cfm?eid=913358&evid=1>
- 8 Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 63 (2000).
- 9 Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard) (“The committee were of the opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race.”).
- 10 See, e.g., Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955).
- 11 See generally Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229 (2000).
- 12 See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 216-17 & n.\* (1998); see also Akhil Reed Amar & Jed Rubenfeld, *A Dialogue*, 115 YALE L.J. 2015, 2024 (2006) (“The framers would never have written Section 2 of the Fourteenth Amendment, imposing political penalties on states that denied black men the vote, if they thought such denials were barred by Section 1.”).
- 13 See WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 135 (1988) (noting that “the segregation issue was not an important one in th[e] debates” over the Fourteenth Amendment). While Nelson observed that “[h]istorians that conclude that most Americans in 1866 favored segregated schools are probably correct in their assessment,” he concluded that “Congress never institutionalized this judgment in its debates on the Fourteenth Amendment . . . .” *Id.* See also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957 (1995) (noting that “[t]hrough the entire course of debate, there is no explicit affirmation of school segregation”). For discussion of debate concerning miscegenation laws, see Steven Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 319-23 (1995). Significantly, the Civil Rights Act of 1866 contained no guarantee of the equal protection of the laws, no universal guarantee of equality, and no prohibition on invidious discrimination against all persons. 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, 477 (1982) (“The language of the fourteenth amendment ... is markedly different from the Act: it is more general and open-ended .... [T]he framers consciously used broad language that is not a mere substitute for the

- 1866 Act.”).
- 14 See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151-54 (1994) (Kennedy, J., concurring); *Romer v. Evans*, 517 U.S. 620 (1996).
- 15 *J.E.B.*, 511 U.S. at 151 (Kennedy, J., concurring).
- 16 *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).
- 17 E.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1988); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Gratz v. Bollinger*, 539 U.S. 244 (2003).
- 18 *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).
- 19 *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (“Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory.”).
- 20 Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).
- 21 Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).
- 22 U.S. Const., Amdt. XIV, §1.
- 23 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05, 407 (1857).
- 24 Cong. Globe, 39th Cong., 1st Sess. 2961 (1866) (Sen. Poland).
- 25 Cong. Globe, 39th Cong., 1st Sess. 2539 (1866) (Rep. Farnsworth).
- 26 See William M. Wiecek, *The Emergence of Equality as a Constitutional Value: The First Century*, 82 U. CHI.-KENT. L. REV. 233, 248 (2007).
- 27 AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 385 (2005) (“Whereas the Founding text used the word ‘men’ in describing the principle of birthright equality, its Reconstruction descendant did not . . .”).
- 28 See Dimond, *supra*, at 474 .
- 29 See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1847 (2010) (“[T]he Joint Committee’s Report focused particularly on lack of legal protection for blacks in the South. The majority of the injustices reported were examples of private violence and the failure of states to protect blacks and white unionists from this violence. . . . We must therefore regard protection of black and their white allies as a central and immediate purpose of the new amendment . . .”).
- 30 See REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xvii (1866).
- 31 *Id.*, pt. II, 17.
- 32 Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (Rep. Bingham); see also *id.* at 1263 (Rep. Broomall) (“[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country.”).
- 33 See Earl Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL’Y 223, 224-25 (1994); Charles McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 535-64 (1984).
- 34 Cong. Globe, 39th Cong., 1st Sess. 1090 (1866).

- 35 Cong. Globe, 37th Cong., 2nd Sess. 1638 (1862) (Rep. Bingham).
- 36 Cong. Globe, 36th Cong., 2nd sess. app. 83 (1861) (Rep. Bingham).
- 37 Cong. Globe, 41st Cong., 2nd Sess. 3871 (1870) (Rep. Bingham); *see also id.* at 3658 (Sen. Stewart) (“[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . ; let them be protected by the laws and the same laws that other men are.”). Indeed, the very first legislation enacted to enforce the Fourteenth Amendment protected the right of aliens to equal treatment under the law. *See, e.g.,* Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1368-70, 1371-72 (2007).
- 38 AMAR, BILL OF RIGHTS, *supra*, at 260-61 n.\* (1998).
- 39 Cong. Globe, 39th Cong., 1st Sess. 10 (1865).
- 40 THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONG., 1865-1867, at 46 (Benjamin B Kendrick ed. 1914).
- 41 *Id.* at 50. Other members of Congress also offered similar proposals that aimed broadly at racial discrimination. *See* Cong. Globe, 39th Congress, 1st Sess. 1287 (1866) (proposing ban on “any distinction between citizens . . . on account of race or color or previous condition of slavery”); *id.* at 1906 (proposing language 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”).
- 42 JOURNAL OF THE JOINT COMMITTEE, *supra*, at 83. The framers also rejected an alternative “equal protection” provision – proposed by Bingham and approved by the Joint Committee in February 1866 – that did not guarantee equal protection as a constitutional right, but simply added to the powers of the federal government, empowering Congress to pass legislation to secure “to all persons in the several State equal protection in the rights of life, liberty, and property.” *Id.* at 61. Bingham’s proposed amendment ran into difficulty in the House. Many members thought it gave Congress too sweeping a mandate to pass equal legislation on subjects of traditional state concern, *see* Cong. Globe, 39th Cong., 1st Sess. 1064 (1866), while another, Rep. Hotchkiss, objected that it did not provide a “constitutional right that cannot be wrested from any class of citizens,” *id.* at 1095, advising Bingham to rewrite the proposal to provide that “no State shall discriminate against any class of its citizens.” *Id.* After the House voted to postpone debate on the proposal, Bingham took the advice and drafted the equal protection guarantee to be an affirmative constitutional right of the people.
- 43 John Harrison and a number of other scholars have asserted that the guarantee of the equal protection of the laws had a far more limited meaning. According to Harrison, the Equal Protection Clause does not forbid discriminatory legislative acts like the Black Codes or Jim Crow segregation, it only prohibits government officials from enforcing the law in a discriminatory manner, and requires that legal remedies be available to all persons. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1390, 1433-51 (1992); *see also* Richard Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) (“[A]ll the clause forbids is the selective withdrawal of legal protection on racial grounds.”). Harrison’s reading is hard to square with the text, which requires equal protection of all laws, including legislative acts. As this section demonstrates, the framers understood the Equal Protection Clause as a guarantee of equality under the law for all persons, which prohibited all forms of invidious discrimination. *See, e.g.,* Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 316 n.59 (2007) (criticizing Harrison’s approach); Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 290-92 (1997) (same).

- 44 Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).
- 45 *Id.*
- 46 Cong. Globe, 39th Cong., 1st Sess. app. 219 (1866).
- 47 Cong. Globe, 39th Cong., 1st Sess. 2961 (1866).
- 48 *Id.* at 2459 (Rep. Stevens).
- 49 *Id.* at 2502 (Rep. Raymond).
- 50 See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 72-77 (1949) (discussing press coverage).
- 51 *Cincinnati Commercial*, June 21, 1866, at 4.
- 52 *Id.*
- 53 *Chicago Tribune*, Aug. 2, 1866, at 2 (quoting speech of Sen. Lyman Trumbull).
- 54 *Cincinnati Commercial*, Aug. 20, 1866, at 2 (quoting speech of Rep. Robert Schenck).
- 55 *Cincinnati Commercial*, Sept. 29, 1866, at 1 (quoting speech of Sen. John Sherman).
- 56 Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).
- 57 *Id.*
- 58 *Id.* at 2459.
- 59 *Id.* at 2462.
- 60 For a comprehensive discussion of the debates on the Act, focusing on the schools provision, see McConnell, *Originalism*, *supra*. Ultimately, however, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court held that the public accommodations provision of the Act exceeded Congress’ power to enforce the Thirteenth and Fourteenth Amendments by regulating the actions of private parties.
- 61 McConnell, *Originalism*, *supra*, at 1104 (“The Act constitutes an official declaration by the body entrusted with enforcement of the Amendment that segregation is a form of inequality.”).
- 62 Cong. Globe, 42nd Cong., 2nd Sess. 381 (1872).
- 63 *Id.* at 382-83; *see also id.* at 384 (“It is easy to see that the separate school founded on an odious discrimination . . . is an ill-disguised violation of the principle of Equality . . .”).
- 64 Cong. Globe, 42nd Cong., 2nd Sess. 847 (1872) (Sen. Morton); *see also id.* (“[T]he States cannot create inequalities by their own legislation. . . . It is not simply a matter of protection, of standing guard against physical violence, against the burning of property, against riot; but it means that no State shall deprive any person . . . of the equal benefit of the laws. The word ‘protection’ is used . . . in this broad sense . . .”); Cong. Rec., 43rd Cong., 1st Sess. 409 (1874) (Rep. Elliott) (“What it does forbid is inequality, is discrimination . . . . If a State denies to me rights which are common to all her other citizens, she violates this amendment . . .”); *id.* at 412 (Rep. Lawrence) (“[T]he word ‘protection’ must not be understood in any restricted sense, but must include every benefit to be derived from laws.”)
- 65 Cong. Rec., 43rd Cong., 1st Sess. app. 359 (1874) (Sen. Morton); *see also id.* at 360 (“If a State is at liberty to exclude a colored man from the cars on account of his color in travelling, then it has the power to make an odious discrimination because of race, the very thing that the fourteenth amendment intended to stamp out.”).

- 66 Cong. Rec., 43rd Cong., 1st Sess. 427 (1874) (Rep. Purman).
- 67 Cong. Rec., 43rd Cong., 1st Sess. 4154 (1874) (Rep. Pease).
- 68 Cong., Rec., 43rd Cong., 2nd Sess. 1000 (1875) (Rep. Burrows).
- 69 Cong. Rec., 43rd Cong., 1st Sess. 3452 (1874) (Sen. Frelinghuysen); *see also id.* (calling segregation “legalized disability or inferiority”).
- 70 For a comprehensive account of the votes on the bill, see McConnell, *Originalism*, *supra*, at 1050-79.
- 71 *See* ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 523-28 (1988).
- 72 McConnell, *Originalism*, *supra*, at 1080-86.
- 73 Cong. Rec., 43rd Cong., 2nd Sess. at 999 (Rep. Burrows); *see also id.* at 997 (Rep. Monroe) (“[I]t introduces formally into statute law a discrimination between different classes of citizens in regard to their privileges as citizens. . . . [I]f we once establish a discrimination of this kind we know not where it will end.”)
- 74 *Id.* at 998 (Rep. Lewis).
- 75 *Id.* at 981 (Rep. Cain).
- 76 *Id.* at 997, 998 (Rep. Monroe).
- 77 DAVID H. GANS & DOUGLAS T. KENDALL, THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT (2008).
- 78 DAVID H. GANS & DOUGLAS T. KENDALL, THE SHIELD OF NATIONAL PROTECTION: THE TEXT AND HISTORY OF SECTION 5 OF THE FOURTEENTH AMENDMENT (2009).
- 79 100 U.S. 303 (1880).
- 80 *Id.* at 310.
- 81 *Id.* at 307; *see also id.* at 307-08 (“The words of the amendment . . . contain a right . . . most valuable to the colored race – the right to exemption from unfriendly legislation against them distinctively as colored – exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights other enjoy . . .”).
- 82 *Id.* at 308.
- 83 118 U.S. 356 (1886).
- 84 *Id.* at 369; *see also Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (Field, J.), (“[H]ostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form . . . is forbidden by the fourteenth amendment . . .”).
- 85 *Yick Wo*, 118 U.S. at 369.
- 86 *Id.* at 373, 374.
- 87 109 U.S. 3 (1883).
- 88 *Id.* at 24.
- 89 *Id.*
- 90 163 U.S. 537 (1896).
- 91 *Id.* at 543.
- 92 *Id.* at 544. Running through the *Plessy* opinion was the notion that the right of African Americans to ride on a train with

whites could not be decreed by law, but must be left to personal choice. “If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.” *Id.* at 551. But Louisiana’s statute made this mutual consent impossible by making it a crime for whites and African Americans to ride together on railways that, by law, are open to all who form a contract with the railroad and purchase a ticket, thus enforcing racial subordination and inequality.

93 *Id.* at 550.

94 *Id.* at 552.

95 *Id.* at 559 (Harlan, J., dissenting).

96 *Id.*

97 *Id.*

98 *Id.* at 562 (Harlan, J., dissenting).

99 *Id.* at 557 (Harlan, J., dissenting).

100 *See infra* at pp. 27-30.

101 *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents of Univ. of Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 337 U.S. 637 (1950).

102 347 U.S. 483 (1954).

103 *Id.* at 495.

104 *See, e.g., Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. Atlanta*, 350 U.S. 879 (1955); *Gayle v. Browder*, 352 U.S. 903 (1956); *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958).

105 *Brown*, 347 U.S. at 494.

106 *Id.* at 492.

107 *Id.* at 489.

108 *Id.* at 489-90.

109 *Id.* at 493.

110 *See, e.g., Cong. Rec.*, 84th Cong., 2nd Sess. 4459-60 (1956).

111 *See Herbert Wechsler, Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

112 *See infra* at 27-30.

113 Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

114 Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421, 423 (1960).

115 *Id.* at 424 (“Segregation in the South comes down in apostolic succession from slavery and the *Dred Scott* case. The South fought to keep slavery, and lost. Then it tried the Black Codes, and lost. Then it looked around for something else and found segregation.”).

116 *Id.* (“[I]f a whole race of people find itself confined within a system which is set up . . . for the very purpose of keeping it in an inferior station, and if the question is then . . . propounded whether such a race is being treated ‘equally,’ I think we ought to exercise one of the sovereign prerogatives of philosophers – that of laughter.”).

- 117 Amar, *The Document and the Doctrine*, *supra*, at 63-64; *see also* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 450 (2007) (“Segregation . . . was designed to single out a particular group for special burdens and disabilities, subordinate them and send a message about their inferiority.”).
- 118 Even Justice Scalia, viewed by many to be the Patron Saint of originalism, has recognized that it is the enacted text that binds judges, not the subjective intent of the framers or the expectations of the framers or ratifying generation about how the terms would be interpreted. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 144-49 (1997); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 98 U. VA. L. REV. \_\_ (forthcoming 2012); *see also* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s ‘Moral Reading’ of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997) (“[N]o reputable originalist . . . takes the view that the Framers’ assumptions and expectations about the correct applications of their principles is controlling . . . . Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances have changed to make them wrong.”).
- 119 *See* Michael J. Klarman, *Brown, Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884-94 (1995); Michael W. McConnell, *The Originalist Justification For Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1938-39 (1995) (“[S]chool desegregation was deeply unpopular among whites in both North and South, and school segregation was very commonly practiced.”).
- 120 *See* McConnell, *Originalism*, *supra*, at 978 (“The Fourteenth Amendment was proposed in 1866 and in the same year, Congress made appropriations to the two separate school systems without reexamining the segregation issue.”); Amar, *The Document and the Doctrine*, *supra*, at 63 n. 113 (“The Reconstruction Congress continued to fund the preexisting segregated schools in the nation’s capital, but did not explicitly vote for segregation as such.”).
- 121 *See* McConnell, *Originalism*, *supra*, at 1093. McConnell’s original intent argument has been criticized for ignoring that “[n]owhere near a majority, let alone a supermajority of the states, would have endorsed a constitutional ban on school desegregation in 1866-68.” Klarman, *supra*, at 1893. Once the views of the ratifying public are taken into account, Michael Klarman argues, McConnell “fails to show either that *Brown* is correct on originalist grounds, or even . . . that *Brown* is ‘within the legitimate range of interpretations’ of the Fourteenth Amendment.” *Id.* at 1883. Of course, Klarman can hardly contest that majorities of Congress in the 1870s, including leading framers of the Fourteenth Amendment, viewed segregation as a form of caste legislation prohibited by the terms of the Equal Protection Clause. Indeed, he concedes “the existence of far broader support for school integration than many constitutional scholars would have thought likely at this early date” and that this “congressional support for school desegregation should be understood . . . as probative of constitutional interpretation.” *Id.* at 1882. At best, Klarman suggests some of the difficulties with an original intent approach, an approach that itself is distinctly out of favor today. *See supra* note 118. But he does not and cannot show that *Brown* is wrong as a matter of the text and first principles of the Equal Protection Clause.
- 122 Cong. Globe, 42nd Cong., 1st Sess. 384 (1872) (Sen. Sumner).
- 123 Cong. Rec., 43rd Cong., 2nd Sess. 1000 (1875) (Rep. Burrows).
- 124 Cong. Rec., 43rd Cong., 1st Sess. 3452 (1874) (Sen. Frelinghuysen).
- 125 Black, *supra*, at 429-30.

- 126 388 U.S. 1 (1967).
- 127 *Id.* at 11-12.
- 128 *Id.* *Loving* also rested on the Fourteenth Amendment’s protection of substantive liberty, explaining that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Id.* at 12. “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State’s citizens of liberty without due process of law.” *Id.*
- 129 Pamela S. Karlan, *What Can Brown Do For You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009).
- 130 426 U.S. 229 (1976).
- 131 *Id.* at 239, 240.
- 132 *Id.* at 242.
- 133 *Casteneda v Partida*, 430 U.S. 482 (1977).
- 134 *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton v. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *see also Keyes v. School Dist No. 1*, 413 U.S. 189 (1973).
- 135 *Rogers v. Lodge*, 458 U.S. 613 (1982). *But see City of Mobile v. Bolden*, 446 U.S. 55, 65-74 (1980) (plurality opinion) (offering narrow understanding of what constitutes a discriminatory purpose).
- 136 *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1119-34 (1989) (discussing these lines of cases).
- 137 *Davis*, 426 U.S. at 254 (Stevens, J., concurring).
- 138 For an excellent discussion of the shift in the Court’s understanding of discriminatory purpose, *see* Ian Haney López, *Intentional Blindness: The Entwined Origins of Colorblindness and Discriminatory Intent* (Aug. 2011) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1920418](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920418)).
- 139 *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).
- 140 *Bolden*, 446 U.S. at 75 n.22.
- 141 Siegel, *supra*, at 1135 (describing intent standard as requiring “a legislative state of mind akin to malice”).
- 142 481 U.S. 279 (1987).
- 143 *Id.* at 292.
- 144 *Id.* at 321 (Brennan, J., dissenting).
- 145 *Id.* at 312.
- 146 *Id.* at 346 (Blackmun, J., dissenting).
- 147 *See also Hernandez v. New York*, 500 U.S. 352 (1991); *United States v. Armstrong*, 517 U.S. 456 (1996).
- 148 488 U.S. 469 (1989).
- 149 *See University of California Regents v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).
- 150 Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

- 151 *Croson*, 488 U.S. at 500, 493.
- 152 *Id.* at 490 (explaining that, under Section 5 of the Fourteenth Amendment, “Congress may identify and redress the effects of society-wide discrimination”); *id.* at 521 (Scalia, J., concurring) (distinguishing state affirmative action plans from those enacted “by the Federal Government whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment”).
- 153 515 U.S. 200 (1995).
- 154 *Id.* at 224.
- 155 See *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Gratz v. Bollinger*, 539 U.S. 244 (2003). But see *Grutter v. Bollinger*, 539 U.S. 306 (2003).
- 156 See, e.g., *Croson*, 488 U.S. at 743-44 (Marshall, J., dissenting) (“[R]ace conscious classifications designed to further remedial goals ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to withstand constitutional scrutiny.”) (quoting *Bakke*, 438 U.S. at 359 (joint op. of Brennan, White, Marshall, and Blackmun, JJ.)); *Adarand*, 515 U.S. at 242 (Stevens, J., dissenting) (“[A] court should be wary of a governmental decision that relies on a racial classification. ‘Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the body politic,’ a reviewing court must satisfy itself that the reasons for any such classifications are ‘clearly identified and unquestionably legitimate.’”) (quoting *Fullilove*, 448 U.S. at 533-35 (Stevens, J., dissenting)); *id.* at 275 (Ginsburg, J., dissenting) (calling for “review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign”).
- 157 *Adarand*, 515 U.S. at 224.
- 158 *Adarand*, 515 U.S. at 264 (Stevens, J., dissenting).
- 159 *Id.* at 243 (Stevens, J., dissenting) (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)); see also *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting) (“Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated.”).
- 160 *Adarand*, 515 U.S. at 245 (Stevens, J., dissenting).
- 161 *Id.* at 246 (Stevens, J., dissenting) (“[A] single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of ‘equal protection.’”).
- 162 *Id.* at 273, 274 (Ginsburg, J., dissenting).
- 163 See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-32 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).
- 164 See *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) (“I assume that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate classwide recovery measured by a sum certain for every member of the injured class. . . . But that serious classwide wrong cannot in itself justify the particular classification Congress has made in this Act. Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.”).
- 165 551 U.S. 701 (2007).

166 *Id.* at 746.

167 *Id.* at 747-48.

168 *Id.* at 787-88 (Kennedy, J., concurring) (“Parts of the opinion of THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. . . . School districts can seek to reach *Brown*’s objective of equal educational opportunity.”). In Justice Kennedy’s approach, the government need not be strictly color blind; it may take measures to redress racial isolation in schools, so long as it does so using facially neutral means. For discussion, see Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1303-1308 (2011).

169 *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring) (“What the government is not permitted to do . . . is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits . . .”). As Siegel explains, “[w]here the plurality emphasizes colorblindness, Justice Kennedy’s concurring opinion points to concerns of balkanization . . . . In his view, . . . racial classifications in individualized admissions decisions . . . may affront individual dignity and exacerbate group division in a way that race conscious, facially neutral policies may not.” Siegel, *From Colorblindness*, *supra*, at 1308.

170 *Parents Involved*, 557 U.S. at 867, 829 (Breyer, J., dissenting).

171 Cong. Globe, 39th Cong., 1st Sess. 1255 (1866) (Sen. Wilson). Indeed, in discussing how Southern states had run roughshod over the fundamental rights of Americans, the framers often affirmed women’s fundamental rights to freedom of speech and religion. See Cong. Globe, 39th Cong., 1st Sess. app. 142 (1866) (Sen. Wilson) (criticizing Southern governments for “having imprisoned women for teaching little children to read God’s holy word”); Cong. Globe, 38th Cong., 2nd Sess. 193 (1865) (Rep. Kasson) (“[I]nnocent ladies, cultivated, intelligent, Christian women, have been driven from the cities and States of the South, not for any legal offense committed by them, but because they had dared to say something offensive to this intolerant spirit of slavery[.]”); Cong. Globe, 38th Cong., 1st Sess. 2615 (1864) (Rep. Morris) (noting that Southern states “incarcerated Christian men and women for teaching the alphabet”). For discussion, see AMAR, *THE BILL OF RIGHTS*, *supra*, at 240.

172 *Cincinnati Commercial*, Sept. 29, 1866, at 1 (quoting speech of Sen. John Sherman).

173 Cong. Rec., 43rd Cong., 1st Sess. 4174 (1874) (Sen. Sargent).

174 Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

175 Cong. Globe, 39th Cong., 1st Sess. 2962 (1866) (Sen. Poland); Cong. Globe, 39th Cong., 2nd Sess. 65-66 (1866) (Rep. Frelinghuysen) (“[T]he women of America vote by faithful and true representatives, their husbands, their brothers, their sons; and no true man will go to the polls . . . without remembering the true and loving constituency he has at home.”).

176 See Farnsworth, *supra*, at 1245-78.

177 See 2 HISTORY OF WOMAN SUFFRAGE 315 (Elizabeth Cady Stanton, et al. ed. 1881) (“Under Section 1 of the Fourteenth Amendment, [women] saw that being ‘persons’ and being born in the United States, they were ‘citizens,’ whom the National Government was bound to protect against the tyranny of the State.”); AMAR, *AMERICA’S CONSTITUTION*, *supra*, at 394 (noting support of Fourteenth Amendment by some “early feminists” because of “section 1’s strong affirmation of basic civil rights for all citizens – black and white, male and female”); see also Akhil Reed Amar, *Women and the*

*Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 469 (1995) (“[N]o one – none of the women – challenges Section One. They think Section One protects them because it isn’t limited to race – it protects all citizens, all persons.”)

178 On Anthony and Stanton and the women’s rights movement of the 1860s and 1870s, see Lucinda M. Finley, *Putting ‘Protection’ Back in the Equal Protection Clause: Lessons From the Nineteenth Century Women’s Rights Activists’ Understandings of Equality*, 13 TEMP. POL. & CIV. RTS. L. REV. 429, 446-49 (2004); Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968-74 (2002); Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the “Living Constitution,”* 76 N.Y.U. L. REV. 1456, 1473-1518 (2001); Ellen C. Dubois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836, 840-62 (1987).

179 See Susan B. Anthony, “Constitutional Argument,” 1872, in THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER 158, 161 (Ellen C. Dubois ed. 1981). Anthony principally relied on the Privileges or Immunities Clause – the centerpiece of the Fourteenth Amendment – which was designed to protect substantive fundamental rights for all Americans. She argued that the Fourteenth Amendment gave all citizens – women and men – all the rights of citizens.

180 *Id.* at 158.

181 88 U.S. (21 Wall.) 162 (1874) (rejecting the claim that the Privileges or Immunities Clause of the Fourteenth Amendment conferred on women the right to vote).

182 See *Arguments of the Woman-Suffrage Delegates Before the Senate Comm. On the Judiciary*, Sen. Misc. Doc. No. 47-74, 47th Cong., 1st Sess. 12 (1880); see also *id.* at 11 (statement of Susan B. Anthony) (“I voted in the State of New York . . . under the construction of these amendments, which we felt to be the true one, that all persons born in the United States . . . were citizens, and entitled to equality of rights, and that no State could deprive them of that equality of rights.”).

183 See *Hearing Before the Senate Committee on Woman Suffrage*, Sen. Misc. Doc. 50-114, 50th Cong., 1st Sess. 3 (1888).

184 As Carrie Chapman Catt famously put it, “[t]o get the word male . . . out of the constitution cost the women of the country fifty-two years of pauseless campaign. . . . During that time they were forced to conduct fifty-six campaigns of referenda to male voters; 480 campaigns to urge Legislatures to urge suffrage amendments to voters; 47 campaigns to induce State constitutional conventions to write woman suffrage into State constitutions; 277 campaigns to persuade State party conventions to include women’s suffrage planks; 30 campaigns to urge presidential party conventions to adopt woman suffrage planks in party platforms; and 19 campaigns with 19 successive Congresses.” CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS* 107 (1923).

185 For a comprehensive discussion of the debates over the Nineteenth Amendment, see Siegel, *She The People*, *supra*, at 977-1003.

186 56 Cong. Rec. 788 (1918) (Rep. Lehlbach).

187 Amar, *The Document and the Doctrine*, *supra*, at 52.

188 261 U.S. 525 (1923).

189 *Id.* at 399.

190 *Id.* at 400.

191 *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

- 192 *Hoyt v. Florida*, 368 U.S. 57, 61 (1961).
- 193 Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 164.
- 194 404 U.S. 71 (1971).
- 195 *Id.* at 76.
- 196 411 U.S. 677 (1973).
- 197 *Id.* at 686-87.
- 198 429 U.S. 190 (1976).
- 199 *Id.* at 197.
- 200 See Cass Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996).
- 201 See, e.g., *Mississippi University of Women v. Hogan*, 458 U.S. 718, 724, 725 (1982); see also *Craig*, 429 U.S. at 198-99.
- 202 *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).
- 203 *United States v. Virginia*, 518 U.S. 515, 532 (1996).
- 204 *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring).
- 205 *Id.* at 152-53 (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).
- 206 See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court*, Sen. Hrg. 103-482, 103rd Cong., 1st Sess. 193 (1993); see also Steven G. Calabresi & Livia Fine, *Two Cheers for Balkin's Originalism*, 103 NW. U. L. REV. 663, 694 (2009) ("When the Fourteenth Amendment is read holistically together with the Nineteenth Amendment, it is best understood as condemning most forms of sex discrimination as being class-based laws."); Amar, *The Document and the Doctrine*, *supra*, at 52 ("[A]fter the Nineteenth Amendment becomes part of the document, we have strong documentarian warrant to construe the Fourteenth Amendment in favor of women's rights. . . ."); Siegel, *She the People*, *supra*, at 952 (explaining that the Fourteenth and Nineteenth Amendments "are linked in the history of our Constitution's development: the beginning and end points in a struggle over women's status in our constitutional community"); Dorf, *supra*, at 980 (explaining that "the Nineteenth Amendment was . . . understood as part of the project of fleshing out the Fourteenth").
- 207 Amar, *The Document and the Doctrine*, *supra*, at 52.
- 208 *Plyler v. Doe*, 457 U.S. 202, 213 (1982).
- 209 *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring).
- 210 See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause gives the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.").
- 211 As the Court has recognized, equal protection scrutiny is most demanding when individuals have been subject to a "history of purposeful unequal treatment," *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976), based on a trait that "bears 'no relation to the individual's ability to participate or contribute to society,'" *Cleburne*, 473 U.S. at 441 (quoting *Matthews v. Lucas*, 427 U.S. 495, 505 (1976)): such legislative classifications are "seldom relevant to the achievement of any legitimate state interest" and more likely to "reflect prejudice and antipathy – a view that the burdened class are not as worthy or deserving."

ing as others.” *Id.* at 440. Even outside this heartland – where courts give a healthy dose of deference to the legislature’s line-drawing – courts have an obligation to ensure that legislation, enacted in the guise of furthering legitimate government interests, is not simply an effort to single out persons for unnecessary burdens out of spite or prejudice. “[I]f the constitutional conception of ‘equal protection of the laws means anything, it must mean at the very least that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (striking down statute designed to exclude “hippies” from federal food stamp program).

212 *Cleburne*, 473 U.S. at 440.

213 517 U.S. 620 (1996).

214 *Id.* at 635.

215 *Id.* at 633.

216 *Id.* at 623, 633-34.

217 *Id.* at 623, 635.

218 *Id.* at 635.

219 *Id.* at 644, 636 (Scalia, J., dissenting).

220 *Id.* at 644 (Scalia, J., dissenting).

221 *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., dissenting) (denying that “adherence to tradition would require us to uphold laws against interracial marriage” because such a “tradition” is “contradicted by a text – an Equal Protection Clause that establishes racial equality as a constitutional value”) (emphasis in original).

222 *See* Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988).

223 *Virginia*, 518 U.S. at 532.

224 As the the Court’s own cases establish, a longstanding history of discrimination is a factor that weighs heavily in favor of – not against – heightened equal protection under the Equal Protection Clause. *See Murgia*, 427 U.S. at 313; Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 320 (2011) (observing that, in deciding whether a classification is suspect or quasi-suspect, “[t]he most important factor is whether there has been a history of discrimination based on the classificatory trait in question”). Under Justice Scalia’s view, individuals who have faced a history of discrimination would receive less – not more – equal protection scrutiny when states deny them equal rights and responsibilities.

225 *Romer*, 517 U.S. at 635.

226 *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955) (upholding statute regulating optometrists and noting that “the prohibition of the Equal Protection Clause goes no further than the invidious discrimination”).

227 *Romer*, 517 U.S. at 633, 634 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

228 *Id.* at 631, 635.

229 *See, e.g., Craig*, 429 U.S. at 211-14 (Stevens, J., concurring); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451-55 (1985) (Stevens, J., concurring); *Adarand*, 515 U.S. at 243-46 (Stevens, J., dissenting); James Fleming, “*There Is Only One*

- Equal Protection Clause*”: *An Appreciation of Justice Stevens’ Equal Protection Jurisprudence*, 74 *FORD. L. REV.* 2301 (2006); Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 *FORD. L. REV.* 2339 (2006). For a recent suggestion that tiers of scrutiny be eliminated altogether, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 *S. CAL. L. REV.* 481 (2004).
- 230 *Craig*, 429 U.S. at 211-12 (Stevens, J., concurring).
- 231 *Cleburne*, 473 U.S. at 453 (Stevens, J., concurring) (“In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a ‘tradition of disfavor’ by our laws? What is the public purpose that is served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?.”); *Adarand*, 515 U.S. at 246 (Stevens, J., dissenting) (“[I]f the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provided a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause.”).
- 232 *Mathews v. Lucas*, 427 U.S. 495, 516 (1976) (Stevens, J., dissenting).
- 233 *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quoting *Mathews*, 427 U.S. at 520-21 (Stevens, J., dissenting)).
- 234 At the same time, several cases challenging the federal Defense of Marriage Act under the Due Process Clause of the Fifth Amendment, which has long been interpreted to contain an equal protection component, are also making their way through the federal courts.
- 235 See *Zablocki*, 434 U.S. at 386 (quoting *Maynard*, 125 U.S. at 205, 211).
- 236 Opponents of marriage equality often object that these arguments have no logical stopping point, and will lead inevitably to further rulings that protect other relationships such as polygamous marriages. But they miss the obvious fact that discrimination based on numbers is not invidious in the way discrimination based on race, sex, or sexual orientation is. Protecting the right of individuals to marry the person of one’s choice free from invidious discrimination simply does not entail overturning the structure of the institution of marriage as a committed, loving relationship between two adults. See Dale Carpenter, *Bad Arguments Against Same-Sex Marriage*, 7 *FLA. COASTAL L. REV.* 181, 211 (2005) (“The argument for gay marriage is indeed an argument for liberalizations of marriage-entrance rules. But it is not necessarily a call to open marriage to anyone and everyone, anymore than the fight against anti-miscegenation laws was a call to open marriage to anyone and everyone.”).
- 237 See, e.g., PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION & FAMILY VALUES* 39 (1997) (“Speaker after speaker pronounced marriage rights fundamental and resolved that freedom in the United States would entail the right to marry.”); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *U.C.L.A. L. REV.* 1297, 1338 (1998) (noting the framers’ judgment that the freedom promised by abolition “was ultimately worthless without the right to marry, to raise a family, and to maintain a home”).
- 238 For further discussion, see *Brief of Amicus Curiae Constitutional Accountability Center, Perry v. Schwarzenegger*, No. 10-16696 (9th Cir., filed Oct. 25, 2010).
- 239 U.S. CONST., preamble.
- 240 See ABRAHAM LINCOLN, *THE GETTYSBURG ADDRESS* (delivered Nov. 19, 1863).



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