



## ARTICLE

## Textualism and the Fourteenth Amendment

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**Abstract.** Modern Fourteenth Amendment doctrine is difficult to square with constitutional text. The text of the Equal Protection Clause, for example, makes no distinction between racial classifications and other discriminatory practices; it requires equal protection of the laws for every “person” within a state’s jurisdiction. Nor does the text require equal treatment or equal rights; it requires equality only in the “protection of the laws.” Yet the Supreme Court assumes that the Equal Protection Clause is implicated whenever a state treats people differently—without pausing to ask whether the state has withheld the equal “*protection of the laws.*” And the Court has created a textually unsupported distinction between racial discrimination, which it subjects to “strict scrutiny,” and other discriminatory practices that receive “rational basis review.”

Yet textualism has been enjoying a resurgence in both constitutional and statutory interpretation. This resurgence raises two questions for the Court’s equality doctrines. The first is whether those who embrace textualism must reject the Court’s equality jurisprudence as textually illegitimate. The second is whether those who embrace the Supreme Court’s landmark equality pronouncements must reject textualism as incompatible with those rulings. The answer to both questions is no. Almost all of the Supreme Court’s canonical racial-equality decisions have a firm textual foundation in congressional civil rights legislation—a fact that the Supreme Court has all but ignored by insisting on grounding its equality pronouncements exclusively in the Equal Protection Clause. And Congress enacted most of these civil rights statutes *before* the Supreme Court invoked the Equal Protection Clause to declare a discriminatory practice unconstitutional. So these civil rights statutes can and should be used to supply textual support for the

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Court's decisions and doctrines, especially in cases where the Equal Protection Clause and other constitutional provisions are textually ill suited for the task.

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## Introduction

Constitutional text is little more than an afterthought in much of the Supreme Court's decisionmaking.<sup>1</sup> And nowhere is that more apparent than in the Court's equal protection doctrine. The Court interprets "equal protection of the laws" to require equality in matters having nothing to do with protection.<sup>2</sup> It requires the federal government to comply with the Court's equal protection doctrine, even though the text of the Equal Protection Clause applies only to the states.<sup>3</sup> And it has created a "tiers of scrutiny" doctrine that applies different standards of review to different categories of discriminatory laws<sup>4</sup>—even though the text of the Equal Protection Clause draws no distinction between laws that discriminate against racial minorities and laws that classify on other grounds.<sup>5</sup>

Even the most foundational principles of equal protection jurisprudence have no apparent connection to the text of the Fourteenth Amendment. The Justices tell us, for example, that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."<sup>6</sup> Yet the Fourteenth Amendment makes no mention of race and has no textual prohibition on state-sponsored racial discrimination. And other provisions in the Constitution make clear that the Fourteenth Amendment did not give blacks the right to vote; the Fifteenth Amendment would not have been necessary if the Fourteenth Amendment had done this,<sup>7</sup> and Section 2 of the Fourteenth Amendment assumes that states may deny blacks the right to

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1. See, e.g., David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4 (2015) ("[R]outinely the text, although not flatly inconsistent with the outcome of a case, has very little to do with the way the case is argued or decided. In most litigated cases, constitutional law resembles the common law much more closely than it resembles a text-based system.").
  2. See, e.g., *Holmes v. City of Atlanta*, 350 U.S. 879, 879 (per curiam) (invalidating a policy that assigned a public golf course to different races on different days), *vacating mem.*, 223 F.2d 93 (5th Cir. 1955); *Mayor of Balt. City v. Dawson*, 350 U.S. 877 (per curiam) (invalidating racial segregation at public beaches and bathhouses), *aff'g mem.*, 220 F.2d 386 (4th Cir. 1955) (per curiam).
  3. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).
  4. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016) (applying strict scrutiny to race discrimination); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to sex discrimination); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985) (applying rational basis review to disability discrimination).
  5. U.S. CONST. amend. XIV, § 1.
  6. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (footnote omitted).
  7. See U.S. CONST. amend. XV, § 1.

vote and accept reduced representation in Congress.<sup>8</sup> All of this is hard to square with the Court's oft-repeated mantra that the Fourteenth Amendment prohibits all racial classifications in government<sup>9</sup>—and the Justices have not explained how that mantra can be reconciled with these textual realities of the Reconstruction Amendments. Instead, the Justices have relied on judicial precedent and ruminations about the Fourteenth Amendment's "purpose,"<sup>10</sup> rather than anything that appears in a formally enacted text.

The atextual nature of the Court's opinions has led many to conclude that modern equality jurisprudence can be defended only by rejecting textualism and embracing purposivist or precedent-based interpretive methodologies.<sup>11</sup> Indeed, even textualist jurists have surrendered to purposivism when attempting to explain how the Fourteenth Amendment can prohibit *racial* classifications while permitting other forms of state-sponsored discrimination.<sup>12</sup> But it is a mistake to think that full-throated textualism is incompatible

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8. See *id.* amend. XIV, § 2; *infra* notes 41-42 and accompanying text.
  9. See *Johnson v. California*, 543 U.S. 499, 510-11 (2005) (relying on "the Fourteenth Amendment's ban on racial discrimination"); *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'" (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964))).
  10. See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) ("[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination . . ." (emphasis added) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923))); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (Holmes, J.) ("Th[e] Fourteenth] Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them." (emphasis added)); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) ("In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to [the Equal Protection] clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." (emphasis added)).
  11. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975); Strauss, *supra* note 1, at 3-5, 37-45; see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 921 (1996) ("The Equal Protection Clause is treated as a general constitutional injunction of 'equality,' despite the narrower wording . . .").
  12. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting) (describing "racial discrimination by the States" as "distinctively violative of the principal purpose of the Fourteenth Amendment" (emphasis added)); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 349-50 (1985) ("[D]espite the broad drafting, privileges or immunities are secured only against racial discrimination, for that was the only thing forbidden by the statute whose constitutionality the amendment was meant to assure."); *id.* at 385 (defending *Strauder v. West Virginia*, 100 U.S. 303 (1880), by relying on "the amendment's purpose of protecting blacks against discrimination"); John Harrison, *Reconstructing the Privileges*  
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with the Supreme Court's racial-equality pronouncements. And it is equally wrong to think that modern equality jurisprudence necessarily rests on an interpretive methodology that minimizes or ignores the language of formally enacted texts.

There is in fact plenty of textual support for the Supreme Court's modern equality decisions—and it comes not from the Equal Protection Clause, but from the congressional civil rights enactments that require racial minorities to be treated as full and equal citizens. Statutes of this sort have been on the books since before the Fourteenth Amendment was ratified,<sup>13</sup> and they continue to exist today. The Civil Rights Act of 1866, for example, predates the Fourteenth Amendment and gives minority citizens the same rights to own property and to make and enforce contracts that white citizens enjoy.<sup>14</sup> In 1875, Congress went a step further and outlawed racial discrimination in jury selection and in places of public accommodation.<sup>15</sup> Today, federal legislation prohibits state and local governments from segregating or discriminating against racial minorities in employment, education, and public accommodations, and it forbids racial discrimination in every program or activity that receives federal funds.<sup>16</sup>

The conventional view is that these civil rights statutes simply repeat what the Equal Protection Clause had always required of state and local governments.<sup>17</sup> But there are problems with interpreting the Equal Protection Clause that way. First, many of these civil rights statutes require equal *treatment* of racial minorities, which goes beyond the equal *protection of the laws* that the Fourteenth Amendment requires. Second, these civil rights statutes outlaw only *racial* discrimination, yet the text of the Equal Protection Clause makes no distinction between racial classifications and other forms of discrimination. On the contrary, the constitutional text requires states to confer the “protection of

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*or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992) (noting that the “primary purpose” of the Fourteenth Amendment “was to mandate certain rules of racial equality”).

13. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

14. *Id.*

15. See Civil Rights Act of 1875, ch. 114, §§ 1, 4, 18 Stat. 335, 336-37.

16. See 42 U.S.C. § 2000a (2015) (forbidding racial segregation in places of public accommodation); *id.* § 2000a-1 (preempting state and local laws that require racial discrimination “at any establishment or place”); *id.* § 2000d (forbidding racial discrimination in any program or activity that accepts federal funds); *id.* §§ 2000e to 2000e-17 (forbidding racial discrimination in state employment).

17. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (“Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”); *id.* at 328 (Brennan, J., concurring in the judgment in part and dissenting in part); *Strauder*, 100 U.S. at 311-12; Harrison, *supra* note 12, at 1389 (“Orthodox teachings maintain that the Equal Protection Clause constitutionalizes the Civil Rights Act of 1866.”).

the laws” equally upon *every* person—man, woman, or child; citizen or alien—within the state’s jurisdiction. Finally, many of these discriminatory practices (such as school segregation and race-based exclusions from jury service) were considered lawful and acceptable when the Fourteenth Amendment was ratified.<sup>18</sup>

The sounder view is to regard these civil rights statutes as an exercise of delegated congressional authority rather than self-executing constitutional commands. And the principal source of authority for racial-equality legislation is not the Equal Protection Clause, but the Citizenship Clause—which secures the status of federal and state “citizen[]” to those born or naturalized in the United States<sup>19</sup>—along with the provisions that empower Congress to “enforce” this status and to make laws “necessary and proper” to that end.<sup>20</sup> The Citizenship Clause, standing alone, does not abolish racially discriminatory laws; the text confers only the formal title of “citizen” and does not entrench restrictions on a state’s authority to classify or discriminate among the citizenry. But Section 5 of the Fourteenth Amendment empowers Congress to “enforce” the Citizenship Clause with “appropriate legislation.”<sup>21</sup> And the Necessary and Proper Clause allows Congress to make all laws “necessary and proper” for carrying into execution the powers held by Congress—including the power to secure one’s status as a citizen of his state.<sup>22</sup> *This* is what empowers Congress to reach beyond the mere self-executing commands of the Fourteenth Amendment, and to legislate against regimes that give racial minorities the formal title of “citizen” yet relegate them to second-class citizenship by withholding rights and privileges that white citizens enjoy. And these constitutional provisions permit Congress to legislate not only against *state* action but also against *private* interference with the rights that attach to citizenship—such as voting and jury service. The text of the Citizenship Clause, unlike other provisions of the Reconstruction Amendments, is not limited to state action.

The enforcement power and the Necessary and Proper Clause give Congress discretion to decide how far it will go in ensuring that minorities are not merely *called* citizens but also *treated as* citizens on the same terms as white

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18. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885-90 (1995).

19. U.S. CONST. amend. XIV, § 1.

20. See *id.* amend XIV, § 5; *id.* art. I, § 8, cl. 18.

21. *Id.* amend. XIV, § 5.

22. See *id.* art. I, § 8, cl. 18 (empowering Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . .”) (emphasis added)); *infra* notes 69-79 and accompanying text.

Americans. And these powers allow Congress to legislate against *all* regimes of caste or second-class citizenship—including practices (such as segregated schools and sex discrimination) that were not considered to be unconstitutional when the Fourteenth Amendment was ratified. Nothing in the text of the Fourteenth Amendment limits Congress to the protection of racial minorities, and nothing in the text of the Amendment treats *racial* discrimination differently from discrimination on account of sex, religion, disability, or any other factor. So any equality norms that Congress may enact for minority citizens should be equally constitutional as applied to women, religious minorities, the elderly, the disabled, or other marginalized groups. And the courts' special solicitude for the victims of racial discrimination is not attributable to anything in the Equal Protection Clause. It instead reflects *Congress's* decisions to abolish racial classifications that undermine one's status as a full and equal citizen, while leaving other state law classifications undisturbed.

Rooting the Court's equality jurisprudence in congressional legislation offers some advantages over the status quo regime. First, it avoids distorting the text of the Equal Protection Clause. The language of the Equal Protection Clause does not require equal rights or equal treatment for racial minorities; it requires only the "equal protection of the laws"—a protection that must be conferred universally upon every "person" within the state's jurisdiction.<sup>23</sup> Yet the Supreme Court has transmogrified the command of "equal protection of the laws" into an equal-treatment requirement—but only equal treatment with respect to race, sex, and other court-defined categories, because it would of course be absurd to interpret the Fourteenth Amendment as prohibiting *all* forms of unequal treatment. But nothing in the text of the Equal Protection Clause differentiates race or sex discrimination from other discriminatory practices. It forbids a state to "deny to *any person* within its jurisdiction the equal protection of the laws"—regardless of the state's reasons or motivations for that denial.<sup>24</sup>

Second, Congress's civil rights statutes provide clear guidance to courts and litigants about what is and is not prohibited. The Supreme Court's tiers-of-scrutiny doctrine, on the other hand, is composed of vague jargon that turns on the subjective predilections of individual judges—such as whether a law advances an "important" or "compelling" state interest.<sup>25</sup> Worse, the Court's

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23. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1, 3 (2008) ("The Equal Protection Clause does not require all laws to be equal. Rather, the requirement of equal protection is a requirement that the government supply 'protection of the laws,' and do so equally.").

24. U.S. CONST. amend. XIV, § 1 (emphasis added).

25. Compare *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (announcing that "student body diversity" qualifies as a "compelling" state interest), with *Roe v. Wade*, 410 U.S. 113, 163-  
*footnote continued on next page*



precedents apply these court-created tests in inconsistent ways. Some cases apply rational basis review in a hyper-deferential fashion that eschews any inquiry into whether a law actually promotes the interests that it purports to advance.<sup>26</sup> Other cases apply a more stringent rendition of rational basis review that demands at least some evidentiary support for the challenged law,<sup>27</sup> or that disapproves over- or underinclusive means of advancing legitimate goals.<sup>28</sup> All of this doctrinal looseness increases the costs of litigating and deciding equal protection claims and causes judicial ideology to play an outsized role in determining the outcomes of cases. A regime in which the Supreme Court defers to the equality norms enacted by Congress, and waits for Congress to act before imposing equal-treatment requirements on the states, will make the Court's equality jurisprudence more predictable and less dependent on the ideological proclivities of individual judges.

Finally, there is little normative downside to linking the Court's equality jurisprudence to Congress's civil rights enactments. Although many people regard the Supreme Court as the vanguard of civil rights progress, the fact remains that almost every practice that discriminated against racial minorities or women was outlawed by federal statute *before* the Supreme Court declared it unconstitutional. Congress had banned race-based exclusions from jury service in the Civil Rights Act of 1875—five years before *Strauder v. West Virginia* held that race-based juror exclusions violated the Equal Protection Clause.<sup>29</sup>

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64 (1973) (asserting that the state interest in protecting unborn human life from destruction is not “compelling” unless the fetus is viable). *See also* *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam) (upholding a discriminatory provision in the Social Security Act that allowed women but not men to omit additional earnings when calculating their retirement benefits, while asserting that the “[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women” qualifies as “an important governmental objective”); *id.* at 321 (Burger, C.J., concurring in the judgment) (“I question whether certainty in the law is promoted by hinging the validity of important statutory schemes on whether five Justices view them to be more akin to the ‘offensive’ provisions struck down in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), or more like the ‘benign’ provisions upheld in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), and *Kahn v. Shevin*, 416 U.S. 351 (1974).” (italics omitted)).

26. *See, e.g., FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (holding that under rational basis review, a legislative decision “is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data”).

27. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (“[T]he record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city’s legitimate interests . . . .”; *id.* at 450 (“[T]his record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.”).

28. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (disapproving Colorado’s Amendment 2 under rational basis review because “[i]t is at once too narrow and too broad”).

29. *See infra* Parts II.B.3, IV.A.

Congress had also outlawed racial discrimination by common carriers and private interference with the right to vote decades before the Supreme Court acted against these discriminatory practices.<sup>30</sup> And Congress enacted extensive antidiscrimination protections for women, the elderly, and the disabled before the Supreme Court did *anything* to protect these groups from state-sponsored discrimination.<sup>31</sup> On all of these civil rights issues, Congress acted before the Court did and, more importantly, Congress did so by enacting clear statutory language that reasonable jurists could hardly dispute. And while the Supreme Court has on occasion used the Equal Protection Clause to impose equality norms that Congress was unwilling to enact, the Court has *also* wielded its powers to *invalidate* congressional civil rights statutes as contrary to the Court's preferred interpretation of the Fourteenth Amendment.<sup>32</sup> There is no mechanism to ensure that the Supreme Court's freewheeling will improve on what Congress has done, and history has shown that the Court is as likely to thwart congressional efforts to secure equal citizenship as it is to impose equality norms that do not appear in congressional statutes.

Whether the Supreme Court *should* abandon its current approach toward equal protection in favor of a text-based reliance on congressional enactments depends on a variety of factors. These include the weight accorded to *stare decisis*, the extent to which textualism should inform the Supreme Court's decisionmaking, and the extent to which the Court should avoid making unnecessary constitutional pronouncements. Reasonable jurists disagree on these questions, and this Article takes no sides on these metaphysical disputes. But the Court should, at the very least, invoke the text of these congressional enactments as an *additional* reason to support racial-equality rulings that would otherwise rest exclusively on textually dubious constructions of the Equal Protection Clause. That will broaden the overlapping consensus behind these rulings and provide a rationale that enables textualists as well as nontextualists to support the results reached in those cases.

This Article will proceed in five Parts. Part I analyzes the text and structure of the Fourteenth Amendment, and explains the many ways in which the Court's modern equality doctrine departs from the text it purports to interpret. Parts II and III will offer a textual reconstruction of the Supreme Court's equality jurisprudence.

Part II considers the role of the Citizenship Clause, which has been largely overlooked as a source of authority for congressional civil rights legislation. Part II.A shows that the text of the Necessary and Proper Clause extends to *all* powers granted to Congress, including Congress's authority to "enforce" the

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30. See *infra* Parts II.B.2, IV.B.

31. See *infra* Part IV.F; *infra* note 365.

32. See *infra* notes 375-77 and accompanying text.

Fourteenth Amendment and its promise of citizenship. That gives Congress authority to enact laws that are “necessary and proper” to securing one’s status as a “citizen”—and this prerogative empowers Congress to legislate against regimes of caste and second-class citizenship, as well as against private interference with rights that are connected to citizenship, such as voting and jury service. Part II.B shows how the early civil rights statutes enacted by Congress—the Civil Rights Act of 1866, the Civil Rights Act of 1870, and the Civil Rights Act of 1875—are best understood as laws that the Citizenship Clause and the Necessary and Proper Clause authorized Congress to enact, rather than laws that simply repeat the self-executing requirements of the Fourteenth Amendment. Finally, Part II.C considers and rejects two other rationales that have been offered for the Supreme Court’s racial-equality jurisprudence. The first is the idea that the Citizenship Clause, standing alone, entrenches equality among the citizenry as a self-executing constitutional mandate. The second is the idea that the Fourteenth Amendment gives the federal judiciary, rather than Congress, a discretionary prerogative to nullify discriminatory state laws.

When the Supreme Court’s race- and sex-equality doctrines are grounded in the early and modern civil rights statutes that Congress has enacted, the Equal Protection Clause can be left to do the work that the text has assigned. Part III offers a theory of equal protection more in keeping with the language of the Equal Protection Clause, which makes no mention of race and requires the states to extend the “equal *protection of the laws*” to every “person” within their jurisdiction. This provision refers only to “laws” that “protect”—and it forbids a state to selectively withhold the protections conferred by those laws from *any* “person” within its borders. The text is unconcerned with whether a state has discriminated against a “suspect class” or with whether a court thinks a discriminatory law is rational or justified. It simply requires a state to enforce its protective laws according to their terms, and to refrain from discriminating in the enforcement of those protective laws.

Part IV revisits the Supreme Court’s most iconic civil rights pronouncements—including *Strauder v. West Virginia*, *Batson v. Kentucky*, *Loving v. Virginia*, Justice Harlan’s dissent in *Plessy v. Ferguson*, and the cases that extend *Batson* to private litigants. Each of these opinions is difficult (if not impossible) to defend as a textual interpretation of the Equal Protection Clause. But all of them become easy to defend if one shifts the focus away from the Equal Protection Clause and toward the congressional civil rights statutes that implement the Fourteenth Amendment’s promise of citizenship. Part V concludes by discussing the normative implications of grounding the Supreme Court’s equality jurisprudence in congressional statutes rather than the self-executing commands of the Fourteenth Amendment.

## I. The Text and Structure of the Fourteenth Amendment

There are many ways in which the Supreme Court's Fourteenth Amendment jurisprudence departs from the enacted language of that provision. Sections 1 and 2 of the Amendment provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.<sup>33</sup>

One notable (and jarring) feature of these provisions is that they never once mention race or racial discrimination. Section 1 protects "citizens" and "person[s]." But nothing in the text gives special protections to victims of *racial* discrimination—as opposed to those facing discrimination on account of sex, age, religion, alienage, disability, or other factors. Section 2 likewise makes no mention of race; it reduces a state's representation in Congress when it withholds the right to vote from *any* male citizen over the age of twenty-one (except as punishment for crime or rebellion). For a provision enacted in the aftermath of the Civil War, and for the ostensible purpose of protecting newly freed black citizens from racist state legislation, the absence of racial language is surprising. But this is the text that was enacted, and one must confront rather than ignore the Amendment's failure to mention race—and its failure to distinguish racial discrimination from other discriminatory practices.

The Supreme Court's current approach to the Fourteenth Amendment is incompatible with the text in at least four respects:

First, the Equal Protection Clause confers identical protections on every "person" within a state's jurisdiction. Women, children, aliens, religious minorities, and people with disabilities are just as much "persons" as racial minorities—and all of them are entitled to the same "equal protection of the laws." It is not textually defensible to assert (as the Supreme Court has so often

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33. U.S. CONST. amend. XIV, §§ 1-2.

done) that blacks or racial minorities are the primary or exclusive beneficiaries of the Equal Protection Clause.<sup>34</sup> And there is no textual basis for the “suspect class”<sup>35</sup> concoction. The text protects *persons*—not races or “suspect classes”—and it gives every “person” an equal entitlement to equal protection. Any practice that denies the “equal protection of the laws” to racial minorities should be equally unconstitutional when applied to women, children, aliens, religious minorities, or any other “person” within the state’s jurisdiction.<sup>36</sup>

Second, the Equal Protection Clause does not require states to *treat* people equally; it forbids them to deny the equal “protection of the laws.”<sup>37</sup> It has become almost routine for jurists to ignore this phrase when interpreting the Equal Protection Clause. Some commentators, for example, claim that the Equal Protection Clause establishes an “anticaste” or “antisubordination” principle that reaches any type of law that imposes disadvantages.<sup>38</sup> And the Supreme Court assumes that the Equal Protection Clause is implicated whenever a law classifies or discriminates—without asking whether the

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34. *See, e.g.*, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) (“We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of th[e Equal Protection Clause.]”); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (“[T]he Fourteenth Amendment[s] . . . aim was against discrimination because of race or color.”); *Gibson v. Mississippi*, 162 U.S. 565, 580 (1896) (“[T]he Fourteenth Amendment . . . was designed, primarily, to secure to the colored race . . . all the civil rights that, under the law, are enjoyed by white persons . . . .”); *see also Tennessee v. Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting) (describing “racial discrimination by the States” as “distinctively violative of the principal purpose of the Fourteenth Amendment”).
35. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam) (“[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” (footnote omitted)); *id.* at 312 & n.4 (noting that classifications based on race, ancestry, or alienage qualify as “suspect”).
36. *See Earl A. Maltz, The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 504 (1985) (“Race-focused theories are inconsistent with the language of the equal protection clause . . .”).
37. *See id.* at 507 (“Section 1 does not mandate equality of rights generally or even equality before the law. It merely requires that states provide ‘equal protection of the laws.’” (quoting U.S. CONST. amend. XIV, § 1)).
38. *See, e.g.*, William N. Eskridge Jr., *Original Meaning and Marriage Equality*, Nineteenth Annual Frankel Lecture at the University of Houston Law Center (Oct. 31, 2014), in 52 HOUS. L. REV. 1067, 1084 (2015) (“Original meaning theory suggests that the Equal Protection Clause encoded . . . the rule against class or caste legislation.”); *see also* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-10 (1986) (defending an “anti-subordination” interpretation of the Equal Protection Clause); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 156 (1976) (advocating a “group-disadvantaging” interpretation of the Equal Protection Clause).

classification or discrimination withholds the “protection of the laws.”<sup>39</sup> But almost every law treats some people differently from others, so the courts wind up shunting most of these statutes into the court-created cubbyhole of “rational basis review.”<sup>40</sup> That maneuver avoids the wholesale nullification of law, but at the expense of aggravating the judiciary’s departure from constitutional text. The Fourteenth Amendment does not prohibit *irrational* denials of equal protection; it prohibits *every* denial of equal protection to *any* person within the state’s jurisdiction. The question is whether a state has failed to confer the “protection of the laws” in an equal manner, not whether a court thinks the state’s discrimination is rational or justified.

Third, Section 2 of the Fourteenth Amendment allowed states to withhold the franchise from any male citizen over the age of twenty-one in exchange for reduced representation in Congress.<sup>41</sup> It also allowed states to disenfranchise women without facing *any* representation penalty.<sup>42</sup> This provision is hard to reconcile with the “anticaste” or “antisubordination” interpretations of the Fourteenth Amendment that are so prevalent in the academy.<sup>43</sup> The categorical denial of the franchise on account of race or sex is quintessential caste legislation—legislation that “subordinates” the disenfranchised and relegates them to second-class citizenship. Yet Section 2 assumes the continued existence of these caste-like voting regimes. Section 2 is also incompatible with the Supreme Court’s insistence that race- and sex-based classifications are

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39. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” (quoting U.S. CONST. amend. XIV, § 1)); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946) (“The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment . . . . The right is the right to equal treatment.”).

40. See, e.g., *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (applying “rational basis review” in resolving an equal protection challenge to a selective loan-forgiveness program).

41. U.S. CONST. amend. XIV, § 2.

42. See *id.*

43. See *supra* note 38; see also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 314-16, 316 nn.58-59 (2007); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2347-48 (1997); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 15-46 (2011); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977) (“The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.”); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2455 (1994); Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649, 1655 (2004).

inherently suspect under the Fourteenth Amendment.<sup>44</sup> The Fourteenth Amendment obviously did not give blacks or women the right to vote—that is why the Fifteenth and Nineteenth Amendments were needed—so it is hard to see how this Amendment can simultaneously subject *all* race- and sex-based classifications to heightened scrutiny.<sup>45</sup>

Finally, the text of the Fourteenth Amendment distinguishes between state and private conduct. The Privileges or Immunities Clause, for example, is implicated only when a *state* “make[s]” or “enforce[s]” a “law.”<sup>46</sup> The Due Process Clause can be violated only when a *state* “deprive[s]” a person of “life, liberty, or property.”<sup>47</sup> And the Equal Protection Clause applies only when a *state* “den[ies]” the “equal protection of the laws.”<sup>48</sup> These provisions do not necessarily require “state action”; a state can deny the equal protection of the laws by standing around and doing nothing in response to private acts of violence.<sup>49</sup> But only a *state* can violate these constitutional prohibitions. Yet the Supreme Court has extended the Equal Protection Clause to private attorneys who use peremptory strikes to exclude jurors on account of their race.<sup>50</sup> And it has extended the strictures of the Fifteenth Amendment—which governs only the behavior of “the United States” or “any State”<sup>51</sup>—to private organizations such as the Texas Democratic Party.<sup>52</sup>

All of this dissonance between text and doctrine has led many to conclude that the Court’s equality cases are best defended by embracing a pragmatic or living-constitution mindset that downplays the importance of formally

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44. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (“Racial classifications are antithetical to the Fourteenth Amendment, whose ‘central purpose’ was ‘to eliminate racial discrimination emanating from official sources in the States.’” (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964))); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994) (“Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”).

45. *See Strauss, supra* note 1, at 41-42.

46. U.S. CONST. amend. XIV, § 1.

47. *Id.*

48. *Id.*

49. *See United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282) (“Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.”).

50. *See Georgia v. McCollum*, 505 U.S. 42, 54-55 (1992) (“[T]he private party’s exercise of peremptory challenges constituted state action . . . .”); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-28 (1991).

51. U.S. CONST. amend. XV, § 1.

52. *See Smith v. Allwright*, 321 U.S. 649, 663-64 (1944).

enacted texts.<sup>53</sup> And it is certainly true that the Court's racial-equality doctrines are difficult to derive from the text and structure of the Fourteenth Amendment. But the Supreme Court's racial-equality pronouncements have a firm textual foundation in congressional civil rights statutes—which the Court has almost entirely overlooked by insisting on grounding its equality decisions in self-executing constitutional commands.

## II. A Textual Reconstruction of Equality Jurisprudence: The Citizenship Clause and Its Implementing Legislation

A text-centered equality jurisprudence would move the Court's equality doctrines away from the Equal Protection Clause and toward the civil rights statutes that Congress has enacted to secure equal status among the citizenry. And the principal source of authority for these congressionally enacted equality norms is the Citizenship Clause, which empowers Congress both to secure equal status for minority citizens and other marginalized groups, and to protect the rights that attach to citizenship from state or private interference.

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All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.<sup>54</sup>

The Citizenship Clause has been largely overlooked as a source of authority for racial-equality legislation. And that is unsurprising given the Supreme Court's capacious interpretations of the Equal Protection Clause and the Thirteenth Amendment. When the Supreme Court construes "equal protection of the laws" to prohibit state-sponsored racial discrimination,<sup>55</sup> and equates private racial discrimination with the "badges and incidents of slavery,"<sup>56</sup> there is little need to consider whether the Citizenship Clause can supply an independent source of authority for racial-equality laws.

But these judicial constructions of the Equal Protection Clause and the Thirteenth Amendment are textually dubious. The Equal Protection Clause is not an equal-treatment requirement, as shown by the fact that it did not give blacks or women the right to vote.<sup>57</sup> It simply requires that a state confer the

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53. See Grey, *supra* note 11, at 708, 711-12; Strauss, *supra* note 11, at 883-84.

54. U.S. CONST. amend. XIV, § 1.

55. See, e.g., *Johnson v. California*, 543 U.S. 499, 505-06 (2005).

56. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (emphasis omitted) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

57. See *supra* notes 41-45 and accompanying text.



“protection of the laws” equally upon every “person” within its jurisdiction.<sup>58</sup> And the Thirteenth Amendment prohibits only “slavery” and “involuntary servitude.”<sup>59</sup> Racial discrimination is not slavery; a business or property owner who refuses to serve or sell to blacks (or anyone else) has not enslaved them or subjected them to involuntary servitude under any normal understanding of those terms.<sup>60</sup> The “badges and incidents of slavery” trope comes from a post-ratification floor statement uttered by Senator Trumbull,<sup>61</sup> it does not appear anywhere in the enacted language of the Thirteenth Amendment.

The Citizenship Clause provides a more convincing source of authority for the iconic civil rights protections that Congress has enacted. Standing on its own, of course, the Citizenship Clause does very little—it confers only the formal status of “citizen” on those born or naturalized in the United States.<sup>62</sup> But the Fourteenth Amendment empowers Congress to “enforce” this

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58. See *supra* notes 38-40 and accompanying text.

59. U.S. CONST. amend. XIII, § 1.

60. See, e.g., David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 396 (2008) (“The Thirteenth Amendment forbade slavery, not racial discrimination; it did not authorize Congress to legislate equal civil rights. To equate emancipation with freedom and freedom with the enjoyment of civil rights was nothing but a play on words.” (footnote omitted)).

61. See CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866) (statement of Sen. Trumbull) (“[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is . . . a badge of servitude which, by the [Thirteenth Amendment] is prohibited.”). As is so often the case with legislative history, there were floor statements from other legislators that contradict Senator Trumbull’s exposition of the Thirteenth Amendment. Senator Henderson, when he introduced the Thirteenth Amendment, had solemnly disclaimed that it would require “negro equality.” CONG. GLOBE, 38th Cong., 1st Sess. 1465 (1864) (statement of Sen. Henderson) (“I will not be intimidated by the fears of negro equality. . . . Whether he shall be a citizen of any one of the States is a question for that State to determine. . . . The qualification of voters for members of Congress is a question under the exclusive control of the respective States. . . . So in passing this amendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States.”); see also CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan) (“[The Thirteenth Amendment] was intended, in other words, and a lawyer would have so construed it, to give to the negro the privilege of the habeas corpus; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered. *That is all.*” (emphasis added) (italics omitted)). The Supreme Court never so much as acknowledged Senator Henderson’s statement when it endorsed the “badges and incidents of slavery” theory in *Jones v. Alfred H. Mayer Co.*, even as it touted Senator Trumbull’s commentary as authoritative and conclusive. See *Jones*, 392 U.S. at 440-41. Worse, Senator Trumbull’s utterances were made *after* the Amendment had been safely ratified; no such claims about “badge[s] of servitude” were made during the debates over the Amendment. See CURRIE, *supra* note 12, at 400-01 (criticizing the badges-and-incidents construction of the Thirteenth Amendment as “a triumph of the Trojan Horse theory of constitutional adjudication”).

62. U.S. CONST. amend. XIV, § 1.

citizenship guarantee, and Article I, Section 8 allows Congress to make laws “necessary and proper” to that end. The Civil Rights Act of 1866 and subsequent civil rights statutes fit comfortably within Congress’s prerogative to make laws “necessary and proper” for securing one’s status as a “citizen” of his state—as they ensure that blacks and newly freed slaves will not merely be *called* citizens, but will also be *treated as* full and equal citizens of their states, with the same rights to make contracts, own property, and serve on juries that white citizens enjoy. And the seminal court decisions that struck down racially discriminatory practices are best defended as rulings that implement the text of these congressionally enacted statutes, rather than as rulings that enforce the self-executing commands of the Fourteenth Amendment.

A. Congress’s Authority to “Enforce” the Citizenship Guarantee and to Make Laws “Necessary and Proper” to That End

The original Constitution never defined who would qualify as a “citizen”—even though it repeatedly referred to federal and state citizens when defining eligibility for federal offices and enumerating the jurisdiction of the federal courts.<sup>63</sup> This not only left the definition of a “citizen” unresolved, it also failed to designate the institutions that would define the scope of the citizenry. The original Constitution did empower Congress “[t]o establish an uniform Rule of Naturalization,”<sup>64</sup> and the antebellum Congress used this power to confer federal citizenship by statute.<sup>65</sup> But *Dred Scott* had cast doubt on whether Congress could grant citizenship to blacks; the Court had held that citizenship was open only to the white race and purported to derive that holding from the original meaning of the Constitution.<sup>66</sup> It was also far from clear that the

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63. See *id.* art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . . .”); *id.* art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have . . . been nine Years a Citizen of the United States . . . .”); *id.* art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .”); *id.* art. III, § 2, cl. 1 (“The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State[;] between Citizens of different States[;] between Citizens of the same State claiming Lands under Grants of different States[;] and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

64. *Id.* art. I, § 8, cl. 4.

65. See, e.g., Act of Mar. 3, 1843, ch. 101, 5 Stat. 645, 647 (naturalizing the Stockbridge tribe of Indians).

66. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 419-20 (1857) (“[C]itizenship . . . was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *id.* at 420 (arguing that “Congress had no power to naturalize” blacks “imported into or born in this country”).

Naturalization Clause allowed Congress to confer *state* citizenship against the wishes of a recalcitrant state government.

The Citizenship Clause removed these doubts by conferring federal citizenship on “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof.”<sup>67</sup> The Citizenship Clause also secured *state* citizenship for U.S. citizens residing within that state.<sup>68</sup> This prevents the states from using “birthright citizenship” as an excuse for denying state citizenship to migrants arriving from other states, or to naturalized citizens who emigrate from foreign countries. And it prevents the states from adopting *Dred Scott’s* racist theory of citizenship and denying state citizenship to blacks.

As a self-executing matter, the Citizenship Clause does little more than secure the title of “citizen” and the constitutional rights that attach to that status—such as the right to sue in federal court under the diversity jurisdiction<sup>69</sup> and the right to remain free from discrimination when visiting other states.<sup>70</sup> But Section 5 of the Fourteenth Amendment empowers Congress to “enforce” this citizenship guarantee with “appropriate legislation.”<sup>71</sup> By conferring this new constitutional power on Congress, the Amendment triggers Congress’s additional authority under the Necessary and Proper Clause, which allows Congress to “make all Laws which shall be necessary and proper” for executing not only the powers listed in Article I, but “all other Powers vested by this Constitution in the Government of the United States.”<sup>72</sup> So Congress may enact laws that “enforce” the Fourteenth Amendment’s citizenship requirements, as well as laws that are “necessary and proper” to implementing that regime.

The Supreme Court appears to be unaware that the text of the Necessary and Proper Clause extends to the Fourteenth Amendment’s enforcement power. Justice Brennan’s opinion for the Court in *Katzenbach v. Morgan* held (correctly) that the necessary-and-proper standard governs the constitutionality of Fourteenth Amendment enforcement legislation.<sup>73</sup> But he did not rely on

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67. U.S. CONST. amend. XIV, § 1.

68. *Id.*

69. *See id.* art. III, § 2 (extending the judicial power to certain cases involving “citizens” of a state).

70. *See id.* art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

71. *Id.* amend. XIV, § 5.

72. *Id.* art. I, § 8, cl. 18 (empowering Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof” (emphasis added)).

73. 384 U.S. 641, 651 (1966).

the text of the Necessary and Proper Clause, which unmistakably applies to “all other Powers vested by this Constitution in the Government of the United States.”<sup>74</sup> Instead, Justice Brennan claimed that the “draftsmen” of the Fourteenth Amendment “sought to grant” these powers to Congress because earlier drafts of the Amendment had “employed the ‘necessary and proper’ terminology to describe the scope of congressional power under the Amendment.”<sup>75</sup> Justice Brennan’s efforts to rely on this legislative history were unconvincing; one could just as easily claim that the decision to *remove* the “necessary and proper” language from the earlier drafts indicates that the legislature had *not* “sought to grant” those powers to Congress.<sup>76</sup> Yet Justice Brennan could have uncovered an unimpeachable argument for his necessary-and-proper standard by reading the Constitution rather than the drafts of the Fourteenth Amendment that were never enacted into law. The text of the Necessary and Proper Clause unambiguously applies to the Section 5 enforcement power, so there was no need to plumb the Fourteenth Amendment’s legislative history or ponder what the “draftsmen” were hoping to accomplish.

The Court’s jurisprudence has gone downhill from there. In *City of Boerne v. Flores*, the Court did not even mention the necessary-and-proper standard from *Morgan* and appeared to replace it with a more restrictive “congruence and proportionality” test.<sup>77</sup> Once again, the Court seemed unmindful of the fact that the text of the Necessary and Proper Clause augments Congress’s power to “enforce” the Fourteenth Amendment.<sup>78</sup> Justice Scalia likewise appeared unaware of this in *Tennessee v. Lane*, where he renounced “congruence and proportionality” and sought to cabin Congress’s enforcement powers to the self-executing requirements of the Fourteenth Amendment.<sup>79</sup>

Whether the Supreme Court admits it or not, the Necessary and Proper Clause *does* supplement Congress’s power to “enforce” the Fourteenth Amendment—including the Amendment’s citizenship guarantees. That creates a distinction between the self-executing requirements of the Fourteenth Amendment, which the courts may enforce without awaiting congressional legislation, and the additional requirements that Congress may (but need not)

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74. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

75. *Morgan*, 384 U.S. at 650 & n.9.

76. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (“Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.”).

77. 521 U.S. 507, 519-20, 530 (1997).

78. See *id.* at 516-29.

79. 541 U.S. 509, 554-65 (2004) (Scalia, J., dissenting).

enact under Section 5 and the Necessary and Proper Clause. Many of the protections in Congress's civil rights statutes are hard to defend as self-executing requirements of the Fourteenth Amendment's language. But they are much easier to defend as legislation authorized by Section 5 and the Necessary and Proper Clause, which permit (but do not require) Congress to reach beyond the Fourteenth Amendment's self-executing commands.

#### B. Federal Civil Rights Protections as Citizenship Clause Legislation

After the Civil War, many ex-Confederate states were determined to return blacks to slavery-like conditions.<sup>80</sup> They were also intent on relegating free blacks to the status that *Dred Scott* had envisioned for them—a status that denied them all privileges of citizenship and treated them as “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations.”<sup>81</sup> Many of these states had enacted Black Codes<sup>82</sup> that forbade blacks to vote,<sup>83</sup> hold office,<sup>84</sup> own firearms,<sup>85</sup> serve on juries,<sup>86</sup> testify against whites,<sup>87</sup> work in certain trades,<sup>88</sup> or attend public school.<sup>89</sup>

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80. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 199-201 (1988).

81. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; see also *id.* at 404-05 (describing free blacks as “a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them”); *id.* at 407 (describing the black race as “so far inferior, that [blacks] had no rights which the white man was bound to respect”); *id.* at 409 (“[N]o distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.”).

82. See FONER, *supra* note 80, at 199-201; THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* (1965) (collecting Black Codes adopted in the post-Civil War South); see also STEPHEN MIDDLETON, *THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY* (1993) (collecting Black Codes adopted in “free” states in the run-up to the Civil War).

83. See WILSON, *supra* note 82, at 110-15 (collecting laws from Texas, Tennessee, and Arkansas).

84. See *id.* at 110, 113 (collecting laws from Texas and Tennessee); see also FONER, *supra* note 80, at 207.

85. See WILSON, *supra* note 82, at 56, 69, 73, 98 (describing laws in Alabama, Mississippi, South Carolina, and Florida); see also FONER, *supra* note 80, at 203.

86. See WILSON, *supra* note 82, at 66, 110, 113-15 (collecting laws from Florida, Texas, Tennessee, and Arkansas).

87. See *id.* at 73, 99-100, 103, 110 (collecting laws from South Carolina, Florida, Virginia, Georgia, and Texas); see also FONER, *supra* note 80, at 204.

88. See WILSON, *supra* note 82, at 69, 75 (describing laws in Mississippi and South Carolina).

Criminal laws often specified harsher punishments for blacks or gave judges latitude to engage in racially discriminatory sentencing.<sup>90</sup>

The Thirteenth Amendment had empowered Congress to outlaw some of this racially discriminatory behavior—such as the practices that shunted blacks into involuntary or unpaid labor.<sup>91</sup> But the Thirteenth Amendment left Congress powerless to confront other types of racial persecution that persisted in both northern and southern states. Many states continued to deny blacks citizenship.<sup>92</sup> And many features of the Black Codes—such as the exclusions from jury service—could not plausibly be characterized as imposing slavery or involuntary servitude. Jury service is itself a form of involuntary labor, so exempting blacks from jury duty would seem consonant rather than inconsistent with the Thirteenth Amendment. Women and children were also excluded from jury duty,<sup>93</sup> and no one could seriously claim that these exclusions made them into slaves or forced laborers.

The Citizenship Clause gave Congress additional powers to dismantle this racial caste system. Under the Thirteenth Amendment, Congress could target only the discriminatory practices that threatened to return blacks to slavery. But the Citizenship Clause went beyond the Thirteenth Amendment by securing not merely the freedom from slavery but also one's status as a *citizen*—both as a citizen of the United States and as a citizen of the state in which one resides.<sup>94</sup> And by empowering Congress to “enforce” these citizenship requirements and to enact all laws “necessary and proper” to that end, the Fourteenth Amendment authorizes Congress to preempt laws that undermine blacks' constitutionally protected status as citizens of the state where they reside—just as the Thirteenth Amendment empowers Congress to legislate

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89. See *id.* at 100 (describing a Florida law establishing a system of schools for black children funded entirely by tuition fees and special taxes on blacks); see also FONER, *supra* note 80, at 207-08; Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 374 (1969).

90. See FONER, *supra* note 80, at 199-201; WILSON, *supra* note 82, at 68-69, 72; see also CONG. GLOBE, 39th Cong., 1st Sess. 427 (1866) (statement of Rep. Higby) (“We see to-day in the reorganized States of the South that for the most frivolous offenses they are selling the men who were once in slavery into slavery again.”).

91. U.S. CONST. amend. XIII, § 1. Most Black Code provisions were almost instantly countermanded or repealed. See, e.g., WILSON, *supra* note 82, at 71, 75, 77; see also FONER, *supra* note 80, at 208-09.

92. FONER, *supra* note 80, at 66-67; Richardson, *supra* note 89, at 373 (noting that the Florida committee appointed to draft freedmen legislation “quoted the Dred Scott case to prove that the Negro was not a citizen and that Congress had no power to make him such”).

93. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 2 (1994) (“Women were ineligible for jury service in every state until 1898, when Utah allowed them to be jurors.”); Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 484-85 (2002).

94. U.S. CONST. amend. XIV, § 1.

against practices that undermine blacks' constitutionally protected status as free laborers. A state that relegates minorities (and others) to second-class citizenship by depriving them of rights or responsibilities held by other citizens of that state is fair game for congressional legislation.

This congressional power becomes apparent when one considers those who obtain their citizenship through naturalization. Suppose that Congress decided to naturalize some or all of the eleven million immigrants unlawfully present in this country,<sup>95</sup> and a state opposed to this policy responds by denying driver's licenses to those newly minted citizens. Congress would—and should—have power to preempt that discriminatory measure under the Necessary and Proper Clause. To be sure, the state's law would not violate the self-executing requirements of the Citizenship Clause. Withholding a driver's license does not strip an individual of his citizenship, and citizens do not have a constitutional right to a driver's license. Nor would the state's law contradict the language of the Equal Protection Clause. Issuing a driver's license is hard to characterize as "protection," and it is entirely constitutional for a state to withhold driver's licenses from "persons" (such as illegal aliens) within its jurisdiction.<sup>96</sup> But Congress may decide that it is "necessary and proper" to preempt state laws that retaliate or discriminate against those that it has naturalized. Otherwise the states could undermine Congress's naturalization decisions by enacting laws that encourage naturalized citizens to self-deport or that relegate them to a disfavored caste.

The same congressional power extends to those who hold their citizenship on account of birthright. The Fourteenth Amendment immediately naturalized all blacks born in the United States and entrenched birthright citizenship as a permanent constitutional requirement.<sup>97</sup> Congress's power to "enforce" this citizenship regime, when combined with the Necessary and Proper Clause, allows Congress to preempt discriminatory laws that undermine blacks' status as full and equal citizens of their state—just as the Thirteenth Amendment allows Congress to legislate against practices that undermine blacks' self-ownership in labor markets. The Citizenship Clause also permits Congress to legislate against *private* actors who threaten or retaliate against those who exercise the rights associated with state citizenship, such as voting or jury service. Unlike the other provisions in Section 1 of the

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95. See Vivian Yee et al., *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), <https://nyti.ms/2mvaHOg> (reporting that "the best estimates say" that there are eleven million illegal immigrants living in the United States).

96. See, e.g., *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 526, 537 (6th Cir. 2007) (holding that the Equal Protection Clause permits states to deny driver's licenses to aliens who have not been granted lawful permanent status).

97. U.S. CONST. amend. XIV, § 1.

Fourteenth Amendment, the Citizenship Clause contains no “state action” requirement.<sup>98</sup>

1. The Civil Rights Act of 1866

Congress has deployed these Citizenship Clause enforcement powers on numerous occasions. The first occasion was in the Civil Rights Act of 1866, which predates the Fourteenth Amendment but was reenacted in 1870 after the Amendment’s ratification.<sup>99</sup> Section 1 of the Act provides:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.<sup>100</sup>

Congressional supporters claimed that the Thirteenth Amendment authorized this legislation,<sup>101</sup> but the Thirteenth Amendment gets them only part of the way there. Requiring equal punishments for crimes, for example, was needed to prevent abuse of “vagrancy” laws, which states used to target blacks and sentence them to involuntary labor.<sup>102</sup> Requiring the states to enforce labor contracts also seems necessary and proper to preventing the

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98. *Id.*

99. See Civil Rights Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (“*And be it further enacted, [t]hat the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.*”).

100. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended in scattered sections of 42 U.S.C.).

101. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull) (“[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is . . . a badge of servitude which, by the [Thirteenth Amendment], is prohibited.”).

102. See Act of Jan. 15, 1866, ch. 28, 1866 Va. Acts 91, 91-92 (providing that officers shall “order [a] vagrant . . . to be employed in labor for any term not exceeding three months, and . . . to be hired out for the best wages that can be procured”); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 650 (1982).



resurrection of slavery; otherwise states could allow employers to stiff black workers out of their wages and treat them as unpaid laborers.

But other provisions in the Act have nothing to do with the prevention of slavery. Consider the right to inheritance. It is certainly despicable for a state to disqualify blacks from inheriting, but that does not lead to enslavement; it is just garden-variety racial persecution. Aliens were also forbidden to inherit property in many of the states,<sup>103</sup> but that did not make them into slaves—and it would not justify congressional enforcement legislation under the Thirteenth Amendment.

The Citizenship Clause, by contrast, can authorize *all* of the protections in the Civil Rights Act of 1866. Once the Fourteenth Amendment conferred citizenship on newly freed slaves, it authorized Congress to go beyond measures that merely prevent the reinstatement of slavery. Congress could now legislate to secure their status *both* as free laborers *and* as citizens of their states. States that gave blacks the nominal title of “citizen,” yet relegated them to second-class citizenship by depriving them of rights or responsibilities that other citizens of that state enjoyed, became lawful targets for congressional enforcement legislation—just as states that gave blacks the formal title of “freedmen” while refusing to enforce their labor contracts.

Some have argued that the Fourteenth Amendment not only authorizes the Civil Rights Act of 1866 but *entrenches* its provisions as self-executing constitutional commands. But that stance is hard to square with the language and structure of the Fourteenth Amendment. Consider those who claim that the Equal Protection Clause imposes the Civil Rights Act of 1866 as a permanent constitutional mandate.<sup>104</sup> The first problem with this view is that “equal protection of the laws” is a universal right that must be extended to all “persons”—citizens and aliens alike—and it is common for states to restrict the right of “persons” to own or inherit property. Many states forbade (and continue to forbid) aliens to own or inherit real property,<sup>105</sup> and a law that disables blacks from inheriting no more denies the “equal protection of the laws” than a law that withholds inheritance from aliens. The second problem is that “equal protection of the laws” does not require equal rights or equal

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103. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 169 (1874) (“[A]t the time of the adoption of the Constitution, in many of the States (and in some probably now) aliens could not inherit or transmit inheritance.”).

104. See William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1250-51 (2009); Harrison, *supra* note 12, at 1389 (“Orthodox teachings maintain that the Equal Protection Clause constitutionalizes the Civil Rights Act of 1866.”).

105. See *Minor*, 88 U.S. (21 Wall.) at 169; Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 152 (1999) (“In the United States today, approximately half of the states have laws that restrict to some degree the rights of non-citizens to own real property.”).

treatment; the text refers only to laws that *protect* people, and requires only that protective laws be enforced according to their terms.<sup>106</sup> Many of the rights listed in the Civil Rights Act of 1866 are hard to pass off as “protection”; no one is “protected” from anything when they purchase or inherit property, for example. And even if these rights qualified as “protection,” the “equal protection of *the laws*” implies that the states need only extend the protections that the existing *laws* provide.<sup>107</sup>

Others have argued that the Privileges or Immunities Clause entrenches the Civil Rights Act of 1866 and establishes a self-executing constitutional prohibition on racially discriminatory laws.<sup>108</sup> But this interpretation of the Privileges or Immunities Clause encounters serious textual problems. The Privileges or Immunities Clause governs only the “mak[ing]” or “enforc[ing]” of state law.<sup>109</sup> The protections in the Civil Rights Act of 1866 (and subsequent civil rights legislation) apply *regardless* of whether a state has “ma[de]” or “enforce[d]” a law; they protect citizens against rogue police and lawless judges as much as they protect against formally enacted legislation.<sup>110</sup> The Civil Rights Act of 1866 also protects citizens residing in the territories—where the Privileges or Immunities Clause and the Equal Protection Clause are inapplicable by their terms.<sup>111</sup> And it is hard to see how the state law rights to

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106. See *infra* Part III.

107. See *infra* notes 206-08 and accompanying text.

108. See CURRIE, *supra* note 12, at 348-51; Harrison, *supra* note 12, at 1409.

109. U.S. CONST. amend. XIV, § 1 (“No State shall *make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .*” (emphasis added)).

110. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended in scattered sections of 42 U.S.C.) (“[C]itizens of the United States . . . of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .” (emphasis added)).

111. See *id.* Congress should, of course, hold the prerogative to protect civil rights in the territories under its power to “make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2. But *Dred Scott* had held that this power extends only to territory belonging to the United States in 1789—a holding that carries “original meaning” to its *reductio ad absurdum*. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 432-36 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; see also CURRIE, *supra* note 12, at 269 (“[Chief Justice] Taney’s construction seems singularly unpersuasive; he might as convincingly have argued that the ex post facto clause applied only to the thirteen original states.” (footnote omitted)). Other members of the *Dred Scott* majority denied that the Rules and Regulations Clause allowed Congress to govern the “internal polity” or “domestic relations” of a territory. See, e.g., *Dred Scott*, 60 U.S. (19 How.) at 501, 514 (Campbell, J., concurring in the judgment) (“[T]he recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal polity, or to adjust the domestic

*footnote continued on next page*

make contracts and own property can qualify as “privileges or immunities of citizens of the United States” when so many citizens (such as children and married women) lacked those privileges when the Fourteenth Amendment was ratified<sup>112</sup>—and when children continue to lack the full extent of those privileges today.<sup>113</sup> It is not textually defensible to assert that the Fourteenth Amendment permits states to withhold “privileges or immunities” from one subset of the citizenry (children or married women) yet forbids them to withhold those rights from racial minorities. Nothing in the text of the Privileges or Immunities Clause distinguishes racially discriminatory laws from those that classify on account of sex, age, or marital status. And no one seriously maintains that every “citizen” of the United States must hold the same rights to enter contracts and own property.<sup>114</sup>

It is also impossible for a state law to “abridge” a privilege or immunity that is itself defined under the laws of that state. Laws that forbid children or

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relations, or the persons who may lawfully inhabit the territory . . . . [T]he power . . . is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition.”). Because questions about the Constitution’s application to territories did not arise in earnest until “the dawn of the 20th century,” *Dred Scott’s* preposterous holding on the scope of the Rules and Regulations Clause had not been overruled when the Reconstruction Congress enacted its civil rights statutes, leaving the Citizenship Clause as the *only* plausible basis for the Reconstruction Congress to impose racial-equality measures in the territories. *See Boumediene v. Bush*, 553 U.S. 723, 755-57 (2008). Indeed, *Dred Scott’s* precise holding on that issue has never been expressly overruled. *See United States v. Kagama*, 118 U.S. 375, 380 (1886) (“[The] power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.” (citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885))); *see also De Lima v. Bidwell*, 182 U.S. 1, 208-09 (1901) (McKenna, J., dissenting) (stating that the Court would “not stop to reconcile this conflict” over the source of federal authority to regulate the territories). Although “Congress’s plenary power to govern territories was well established by 1901,” the Court accepted that it “might not emanate from the Constitution per se.” Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 817-19 (2005).

112. *See Ward Farnsworth, Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1236-37, 1251-58 (2000) (describing the legal disabilities imposed on married women at the time of the Fourteenth Amendment’s ratification).

113. RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 14 (AM. LAW INST. 1981); 42 AM. JUR. 2D *Infants* § 46 (West 2016).

114. *Cf. Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 170 (1874) (“If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented *whether all citizens* are necessarily voters.” (emphasis added)).

married women to enter contracts or own property do not “abridge” those privileges; they simply *define the scope* of those state law privileges as extending only to adult men and adult unmarried women. The same goes for other laws that exclude children, women, and racial minorities from state law privileges or immunities, such as the “privilege” of voting.<sup>115</sup> For this reason, the *Slaughter-House Cases* sensibly concluded that the Privileges or Immunities Clause offers no protection for rights derived from state law.<sup>116</sup> A state law “privilege” or “immunity” comprises whatever restrictions state law imposes on the exercise of that right—so it is hard to see how the text of the Privileges or Immunities Clause can require the equal enjoyment of *state law* rights.

The more defensible view—at least from a textual standpoint—is that the Fourteenth Amendment authorizes but does not entrench the protections in the Civil Rights Act of 1866. And it authorizes these protections by empowering Congress to “enforce” the status of citizenship that the Fourteenth Amendment promised to newly freed slaves, and to make all laws necessary and proper to that end. The problem with racially discriminatory inheritance regimes is not that they deny “the equal protection of the laws” or abridge “the privileges or immunities of citizens of the United States,” but that they relegate minorities to second-class citizenship by depriving them of rights that other citizens enjoy. The Citizenship Clause—along with the Necessary and Proper Clause—is what empowers Congress to preempt caste legislation of that sort.

## 2. Private interference with the right to vote: The Civil Rights Act of 1870

The Civil Rights Act of 1866 was only the first piece of congressional legislation to implement the Citizenship Clause. In 1870, Congress passed a new civil rights act, which included provisions outlawing private interference with the right to vote.<sup>117</sup> Section 4 of the Civil Rights Act of 1870 imposed criminal penalties on those who “hinder, delay, prevent, or obstruct[] any citizen from doing any act required to be done to qualify him to vote or from voting at any election.”<sup>118</sup> And section 5 imposed additional penalties on those who

prevent, hinder, control, or intimidate . . . any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment

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115. *See id.* at 172 (“Each State determined for itself [when the Constitution was adopted] who should have [the right to vote].”).

116. 83 U.S. (16 Wall.) 36, 74-75 (1873).

117. *See* Civil Rights Act of 1870, ch. 114, §§ 2-7, 17, 19-20, 16 Stat. 140, 140-41, 144-45.

118. *Id.* § 4.

or occupation, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor[] or by threats of violence to himself or family.<sup>119</sup>

But in *James v. Bowman*, the Supreme Court declared section 5 unconstitutional, announcing that the Fifteenth Amendment cannot support “a statute which purports to punish purely individual action.”<sup>120</sup> The Court was correct to hold that Congress cannot reach purely private conduct under the Fifteenth Amendment; the text extends only to denials of the right to vote “by the United States or by any State.”<sup>121</sup> But the Court was wrong to conclude that Congress is powerless to punish private actors who threaten or retaliate against citizens who exercise their right to vote. The Citizenship Clause, unlike the Fifteenth Amendment, is *not* limited to the actions of state officials.<sup>122</sup> And this enables Congress to enforce the Citizenship Clause by outlawing *private* conduct that hinders or interferes with those who exercise the rights or responsibilities of state citizenship, such as voting and jury service.<sup>123</sup> The statute should have been upheld—not on the theory that the state is responsible for every act of private violence that it fails to prohibit or prevent,<sup>124</sup> but because the Citizenship Clause and the Necessary and Proper Clause authorize Congress to legislate against *anyone* who threatens or retaliates against someone for carrying out the privileges or duties connected to one’s status as a citizen.

The Supreme Court’s refusal to recognize this congressional power to regulate private action under the Citizenship Clause led the Court to gut the Fifteenth Amendment’s state-action requirement in later cases challenging the white primary. *Smith v. Allwright* held that the Texas Democratic Party—a private, voluntary organization—had violated the Fifteenth Amendment by excluding blacks from its primary elections.<sup>125</sup> The Court noted that primary elections were heavily regulated by the state of Texas, and the Texas Democratic primary was “part of the machinery for choosing officials.”<sup>126</sup> But the rule excluding blacks had been adopted by the Democratic Party rather

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119. *Id.* § 5.

120. 190 U.S. 127, 139 (1903).

121. U.S. CONST. amend. XV, § 1.

122. *See id.* amend. XIV, § 1.

123. *See id.* amend. XIV, § 5.

124. *See, e.g.,* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 61 (1996) (“[A]ll private action ultimately rests on the state’s willingness to enforce the civil and criminal rules that facilitate that action.”).

125. 321 U.S. 649, 664-66 (1944).

126. *Id.* at 664.

than the state,<sup>127</sup> so it was not apparent how the right to vote had been denied “by the United States or by any State.” In the end, the Court declared (unconvincingly) that “the State makes the action of the party the action of the State” whenever membership in that party is “the essential qualification for voting in a primary to select nominees for a general election.”<sup>128</sup>

*Terry v. Adams* went one step further by rejecting the private character of the “Jaybird” Democratic Association, a whites-only organization whose recommended candidates “nearly always” won the Democratic primary and subsequent general election.<sup>129</sup> The Jaybirds had argued that their “elections” were free from state regulation and oversight and therefore could not qualify as state action under *Smith v. Allwright*.<sup>130</sup> Yet none of the opinions could produce a persuasive textual explanation for how the plaintiffs had been denied their right to vote *by the state*. Justice Black’s opinion (joined only by Justice Douglas and Justice Burton) and Justice Clark’s concurrence come dangerously close to holding that a state is constitutionally responsible for conduct that it “permit[s] within its borders,” even when the state exerts no control over the individuals’ behavior.<sup>131</sup> But if a state’s failure to prohibit a private organization’s actions is enough to make the *state* responsible for the organization’s racial exclusions, then all private action is attributable to the state, and the Fifteenth Amendment’s limitation to actions taken “by the United States or by any State” becomes meaningless verbiage.

The Court was right to disapprove the white primary and the Jaybirds’ shenanigans. But it would have found a better textual grounding for its decisions in section 1 of the Civil Rights Act of 1870, which prohibits racially discriminatory voter qualifications in language broad enough to encompass primary elections and Jaybird-type organizations:

[A]ll citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom,

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127. *Id.* at 657.

128. *Id.* at 664-65.

129. 345 U.S. 461, 463 (1953) (opinion of Black, J.).

130. *Id.* at 462-63.

131. *Id.* at 469 (“It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.”); *id.* (“It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage.”); *id.* at 484 (Clark, J., concurring) (“[W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution’s safeguards into play.”).

usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.<sup>132</sup>

Unlike the Fifteenth Amendment, this statute is not limited to state action. It reaches “any election by the people” and forbids racial exclusions in “all such elections”—regardless of whether the state or a private entity denies the right to vote. And although the statute does not define an “election by the people,” that phrase can comfortably include primary elections and Jaybird-type elections that recommend candidates for public office, especially when the Democratic primary or the Jaybird election is the *de facto* means of selecting the eventual winner. The Court should have held that an “election by the people” includes any election conducted by eligible voters for the purpose of selecting candidates for public office—and a private organization that holds elections for this purpose but excludes blacks from membership is violating the Civil Rights Act of 1870.

Would this construction of the statute exceed Congress’s powers to enforce the Reconstruction Amendments? Not at all. Congress’s power to enforce the *Citizenship* Clause is not limited by the Fifteenth Amendment’s state-action requirement. And this power, along with the Necessary and Proper Clause, allows Congress to legislate against *state or private* actors who would thwart black citizens from exercising rights or privileges that derive from their status as “citizens,” such as voting and serving on juries. There was no need for the white-primary cases to make hash of the distinction between state action and private conduct. The Court should have assumed the private character of the Texas Democratic Party and the Jaybirds, and struck down the racial exclusions under the Civil Rights Act of 1870.

At this point someone will interject that the Fourteenth Amendment was “intended” to protect only civil rights, and not political rights such as the right to vote.<sup>133</sup> And it is certainly true that the Fourteenth Amendment did not

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132. Civil Rights Act of 1870, ch. 114, § 1, 16 Stat. 140, 140.

133. See, e.g., Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 223 (1995) (“[A] key distinction drawn by the drafters of the Civil Rights Act of 1866 and the closely related Fourteenth Amendment was that between civil and political rights; only the former were intended to be safeguarded.” (footnotes omitted)); Bickel, *supra* note 18, at 58 (“[S]ection 1 of the fourteenth amendment, like section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation.”); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 999, 1024 (1995) (“The most fundamental conception of the Fourteenth Amendment was that it would extend to the citizens of each state . . . such civil rights as the right to contract, own property, and sue, but not political rights such as the right to vote, hold office, or serve on a jury.”); see also *Gibson v. Mississippi*, 162 U.S. 565, 580 (1896) (“[T]he Fourteenth Amendment . . . was designed, primarily, to secure to the colored race . . . all the civil rights that, under the law, are enjoyed by white persons . . . .”); *Ex parte Virginia*, 100 U.S. 339, 367-68 (1880) (Field, J., dissenting) (“The equality of the  
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confer a right to suffrage as a self-executing matter; the Fifteenth Amendment proves as much,<sup>134</sup> and Section 2 of the Fourteenth Amendment acknowledges the states' continued control over the franchise.<sup>135</sup> But neither Section 2 nor the Fifteenth Amendment precludes a regime that *permits Congress to legislate* protections for the voting rights that one holds by virtue of his status as a citizen. Once the Fifteenth Amendment required states to extend the franchise to their black and white citizens on equal terms, the Citizenship Clause empowered Congress to protect those who exercise this privilege of citizenship—and to protect those citizens from *state or private* interference with their right to vote.

More importantly, the text of the Fourteenth Amendment makes no distinction between “civil rights” and “political rights.” The idea that a citizen’s political rights are somehow cordoned off from congressional enforcement legislation comes not from the text but from floor statements uttered by individual legislators during the debates over the Fourteenth Amendment.<sup>136</sup> But the evidence from the Fourteenth Amendment’s legislative history is, at best, inconclusive.<sup>137</sup> True, *some* members of Congress denied that the Fourteenth Amendment would empower Congress to legislate on voting-related matters. But others insisted that Congress *would* hold authority to protect voting rights under the Fourteenth Amendment<sup>138</sup>—and others

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protection secured extends only to civil rights as distinguished from those which are political . . .”).

134. See U.S. CONST. amend. XV, § 1.

135. See *id.* amend. XIV, § 2.

136. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham) (“[T]he amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.”); *id.* at 2766 (statement of Sen. Howard) (“It is very true, and I am sorry to be obliged to acknowledge it, that [Section 1] of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all . . .”); *id.* (“The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.”); see also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 216-17 (1998) (“Time and again Reconstructionists in 1866 declared that section 1 . . . focused on ‘civil rights,’ not ‘political rights’ like voting and militia service.”); *id.* at 217 n.\* (citing evidence from legislative history).

137. See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 126-33 (1988) (noting that while “[s]ome congressmen did assert that the Fourteenth Amendment affected only civil and not political rights,” others “took a different view”).

138. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2398 (1866) (statement of Rep. Phelps) (“An act of Congress to define the privileges and immunities of citizens could and doubtless would be made to include the privileges of voting, serving upon juries, and of holding office. . . . Civil rights are limited to suing and testifying in courts, and being amenable to the same punishments as other citizens. ‘Privileges and immunities’ are a much broader and more comprehensive term, and may, by definition, include suffrage, jury duty, and eligibility to office.”); *id.* at 2467 (statement of Rep. Boyer) (“The first section

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claimed that Congress already held this power under other constitutional provisions.<sup>139</sup> As is often the case with legislative history, it all depends on which floor statements one chooses to emphasize.

The evidence from legislative history is further muddled by the fact that an earlier draft of the Fourteenth Amendment explicitly limited its protections to civil rights, providing that “[n]o discrimination shall be made by any State, or by the United States, as to the civil rights of persons, because of race, color or previous condition of servitude.”<sup>140</sup> Yet the Joint Committee on Reconstruction scrapped this version in favor of the language that became Section 1, which makes no mention of “civil rights”—and also makes no mention of

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[of the Fourteenth Amendment] . . . is intended to secure ultimately, and to some extent indirectly, the political equality of the negro race.”); *id.* at 2538 (statement of Rep. Rogers) (“What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. . . . The right to be a juror is a privilege.”). Representative Niblack, who opposed the Fourteenth Amendment, said that he would propose a new section clarifying “[t]hat nothing contained in this article shall be so construed as to authorize Congress to regulate or control the elective franchise within any State, or to abridge or restrict the power of any State to regulate or control the same within its own jurisdiction, except as in the third section hereof prescribed.” *Id.* at 2465 (statement of Rep. Niblack). Representative Stevens also opined that the Fourteenth Amendment empowered Congress to secure equal voting rights, although he uttered this statement after the Fourteenth Amendment had been ratified. CONG. GLOBE, 40th Cong., 2d Sess. 1966-67 (1868); see also William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 63-65 (surveying the legislative history of the Fourteenth Amendment and declaring that it was “impossible to conclude” that the Amendment was understood to prevent Congress from regulating the franchise).

139. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 182-83, 408-09, 412 (1866) (statements of Rep. Kelley) (asserting that the Framers of the Constitution had vested Congress with the power to control suffrage in the states); *id.* at 427 (statement of Rep. Higby) (“I do not believe that any State which excludes any class of citizens on account of race or color is republican in form.”); *id.* at 431 (statement of Rep. Bingham) (“[T]he words of the Constitution, the people of ‘the States shall choose their Representatives,’ is an express guarantee that a majority of the free male citizens of the United States in every State of this Union, being of full age, shall have the political power subject to the equal right of suffrage in the minority of free male citizens of full age. There is a further guarantee in the Constitution, of a republican form of government to every State, which I take to mean that the majority of the free male citizens in every State shall have the political power.”); *id.* at 674 (statement of Sen. Sumner) (arguing that Congress could give blacks the right to vote under the Thirteenth Amendment, the Republican Form of Government Clause, and numerous other constitutional provisions); *id.* at 1058 (statement of Rep. Kelley) (claiming that the Republican Form of Government Clause empowers Congress to regulate suffrage in the states); *id.* at 1117 (statement of Rep. Wilson) (acknowledging that Congress may regulate suffrage in the states “when it becomes necessary to enforce the guarantee of a republican form of government”).

140. BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 106 (1914).

race.<sup>141</sup> It is hard to insist that the Reconstruction Congress “intended” to protect only civil rights when it deleted the very language that would have limited the Amendment’s scope in that regard.

In all events, a text-centered interpretation of the Fourteenth Amendment is unconcerned with the subjective thoughts of legislators; it seeks only to uncover the most plausible construction of the enacted language from the standpoint of a reasonable speaker of English. The text of the Fourteenth Amendment says nothing about “civil” or “political” rights; it simply empowers Congress to enforce the status of citizenship and to make laws necessary and proper to that end. That language is enough to allow Congress to ensure that black citizens enjoy *all* of the rights that white citizens hold under the laws of their state—not only “civil” rights such as property ownership but also “political” rights such as voting and jury service.

### 3. Jury service: The Civil Rights Act of 1875

The Reconstruction Congress added to its array of Citizenship Clause legislation by enacting the Civil Rights Act of 1875, which (among other things) gave blacks the same right as white citizens to serve on juries.<sup>142</sup> Most states had excluded black citizens from jury service before the Civil War,<sup>143</sup> and the Civil Rights Act of 1866 left this practice undisturbed. But Congress eventually got around to outlawing these racial exclusions in 1875, when it enacted a sweeping prohibition on racially discriminatory juror-selection practices:

[N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.<sup>144</sup>

The text of this statutory prohibition extends to every grand and petit jury, in every civil and criminal case in state or federal court. And it governs *every* “person” charged with “any duty” in the selection or summoning of jurors.

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141. *Id.* at 106, 177; *see also* Maltz, *supra* note 36, at 504, 520.

142. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336-37 (codified as amended at 18 U.S.C. § 243 (2015)).

143. ABRAMSON, *supra* note 93, at 2 (“No African-American served on any trial jury in the United States, North or South, until 1860 during a criminal trial in Worcester, Massachusetts.”).

144. Civil Rights Act of 1875 § 4.

That includes not only prosecutors and judges but also private attorneys who wield peremptory strikes to exclude jurors on account of their race.

Of course, the Citizenship Clause did not establish this right to jury service as a self-executing matter. It has long been understood that only a subset of the citizenry is eligible for jury service; children and convicted felons are excluded,<sup>145</sup> and women were excluded when the Fourteenth Amendment was ratified.<sup>146</sup> A constitutional guarantee of citizenship does not by itself guarantee one's status as a juror. But the enforcement power and the Necessary and Proper Clause allow Congress to legislate against juror exclusions if Congress concludes that those discriminatory measures undermine one's status as a full and equal citizen.

It is very hard to maintain that the text of the Fourteenth Amendment entrenches the Civil Rights Act's prohibition on juror discrimination as a self-executing constitutional mandate. The Privileges or Immunities Clause is no help because it governs only the "mak[ing]" or "enforc[ing]" of state law.<sup>147</sup> Yet the Civil Rights Act's prohibition on juror discrimination applies *regardless* of whether a juror is excluded pursuant to state law. It covers rogue judges who exclude blacks from juries in violation of state law,<sup>148</sup> as well as private attorneys who use their peremptory strikes in a racially discriminatory manner. It also governs racial exclusions in territorial courts, where the Privileges or Immunities Clause is inapplicable.<sup>149</sup> And it is hard to characterize jury service as a "privilege" or "immunity" of citizenship; it is more akin to a *responsibility* of citizenship, like taxation or military conscription, rather than an entitlement or a benefit. Finally, even if jury duty could somehow be passed off as a "privilege" or "immunity" rather than a burden, there remains the challenge of making it into a "privilege or immunity of citizens of the United States" when so many U.S. citizens (such as children and convicted felons) have long been ineligible for jury service.

It is equally difficult to shoehorn these statutory provisions into the Equal Protection Clause. The opportunity to serve on a jury is not "protection of the laws" in ordinary parlance; no one is "protected" from anything when

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145. See, e.g., 28 U.S.C. § 1865(b) (2015) (requiring that a district court judge "shall deem any person qualified to serve on grand and petit juries in the district court unless," among other things, he "is not . . . eighteen years old"); TEX. GOV'T CODE ANN. § 62.102 (West 2015) ("A person is disqualified to serve as a petit juror unless the person . . . is at least 18 years of age . . ."); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (noting that "[t]hirty-one states and the federal government subscribe to the practice of lifetime felon exclusion" from jury service).

146. See Farnsworth, *supra* note 112, at 1269-71.

147. U.S. CONST. amend. XIV, § 1.

148. See *Ex parte Virginia*, 100 U.S. 339, 340, 348 (1880).

149. See *supra* note 111 and accompanying text.

summoned for jury duty. Indeed, most people regard jury service as a nuisance and would be delighted to receive a statutory exemption. And the longstanding exclusion of aliens from the jury box shows that jury conscription cannot be part of the “protection of the laws” that states must confer equally on every “person” within their jurisdiction. Aliens are just as much “persons” as racial minorities—so if it is constitutional to exclude aliens from the jury, there is nothing in the text of the Equal Protection Clause that establishes a different rule for minority citizens.

It is somewhat more plausible to think that racial discrimination in jury selection violates the equal protection rights of *litigants* who would benefit from a colorblind jury-selection process.<sup>150</sup> But that rationale cannot support the sweeping prohibition that appears in the Civil Rights Act of 1875, which applies even when both parties *want* to keep blacks off the jury or acquiesce to the exclusion. Finally, it is hard to see how a *state* denies equal protection when a private litigant wields his peremptory strikes in a racially discriminatory fashion.<sup>151</sup>

Once again, the Citizenship Clause, along with the Necessary and Proper Clause, provides the most plausible textual support for this iconic civil rights legislation. The Citizenship Clause enables Congress to ensure that black citizens are equally subjected to the responsibilities as well as the “privileges” and “immunities” of citizenship. And it empowers Congress to outlaw private conduct (as well as state action) that undermines one’s status as a citizen. The Citizenship Clause is also the natural textual source for a statutory prohibition on juror discrimination. The *reason* race-based jury exclusions are odious is because they undermine black Americans’ status as full and equal citizens, not because they violate the equal protection rights of litigants or withhold a “privilege” or “immunity” from the excluded jurors.<sup>152</sup> Race-based exclusions

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150. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (“[C]ompelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone . . . is . . . a denial to him of equal legal protection[.]” (emphasis added)); see also CURRIE, *supra* note 12, at 385 (“The risk of prejudice from all-white juries suggested why this arrangement might place blacks at a disadvantage, and . . . this disadvantage made the law unequal in the constitutional sense . . . [T]he statute exposed blacks more than whites to the risk of a prejudiced jury.”).

151. See *Georgia v. McCollum*, 505 U.S. 42, 62-63 (1992) (O’Connor, J., dissenting) (“[O]ur decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions.”); *id.* at 69-70 (Scalia, J., dissenting); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631-32 (1991) (O’Connor, J., dissenting).

152. See *Strauder*, 100 U.S. at 308 (“The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, [and] an assertion of  
*footnote continued on next page*

of jurors are equally pernicious (and equally unlawful) when litigants consent to the exclusion, or when the excluded juror is happy to be absolved of the inconveniences of jury service.

### C. Other Views of the Citizenship Clause

Several commentators have espoused more ambitious understandings of the Citizenship Clause and the Fourteenth Amendment—claiming that these constitutional provisions empower or compel the judiciary to nullify discriminatory laws without waiting for Congress to enact preempting legislation. There is much that has been said in defense of these views, but they are hard to defend as textual interpretations of the Constitution.

Some commentators, for example, maintain that the Citizenship Clause establishes a *self-executing* prohibition against laws that create second-class citizenship, and entrenches equal citizenship as a permanent constitutional command.<sup>153</sup> That stance is very hard to defend on textual grounds. First, other provisions in the Constitution make clear that the status of citizenship does not by itself require or guarantee equal rights. Article II, for example, renders naturalized citizens ineligible for the presidency.<sup>154</sup> And Articles I and II forbid

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their inferiority . . . .”); *id.* (“The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”).

153. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 381-82 (2005) (“All persons born under the flag were citizens, and thus *equal* citizens. . . . [T]he citizenship clause thus proclaimed an ideal of republican equality binding on state and federal governments alike.”); Bruce Ackerman, *Ackerman, J., Concurring, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION* 100, 115 (Jack M. Balkin ed., 2001) (declaring that the Citizenship Clause “forbids the national government from creating second-class citizens”); Jack M. Balkin, *Chief Justice Balkin Announced the Judgment of the Court, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION, supra*, at 77, 87 (declaring that the Citizenship Clause “do[es] not permit the national government to create first- and second-class citizens, whether on grounds of race or any other criteria”); see also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 768 (1999) (“Government-sponsored efforts to stigmatize blacks, to relegate them to a kind of second-class citizenship, violate the core concept of the Citizenship Clause. All are declared citizens, and thus all are *equal* citizens.”); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 502 (2013) (“There is . . . a strong textual and historical argument for recognizing an equality component in the Fourteenth Amendment’s Citizenship Clause . . . .”).

154. See U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”). The Twelfth Amendment disqualifies naturalized U.S. citizens

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underage citizens to seek election to Congress or the presidency.<sup>155</sup> Second, Section 2 of the Fourteenth Amendment assumes that the states may exclude citizens from voting, and the Fifteenth Amendment was needed to give blacks the right to vote.<sup>156</sup> That makes clear that the Citizenship Clause did not abolish “caste legislation” of its own force. Finally, nothing in the text of the Fourteenth Amendment defines the permissible and impermissible ways in which governments may classify or discriminate among their citizens. This makes it very difficult for courts to claim that the language of the Citizenship Clause entrenches any particular vision of equal status among the citizenry.

Others claim that the Fourteenth Amendment gives the federal judiciary, rather than Congress, a discretionary power to reach beyond the Amendment’s self-executing requirements and nullify laws that unjustly discriminate among the citizenry. On this view, the Fourteenth Amendment delegates to federal courts the prerogative to create a constitutional common law of equal rights—a law that invalidates what the judges regard as unjustifiable regimes of caste or second-class citizenship, and a law that judges can change in response to “new insights” and new “societal understandings.”<sup>157</sup>

The Supreme Court has largely embraced this approach to the Fourteenth Amendment, but the text of the Constitution is difficult to square with that understanding of the judicial role. Section 5 of the Fourteenth Amendment gives Congress, not the judiciary, the power to “enforce” the Fourteenth Amendment with appropriate legislation.<sup>158</sup> And Article I gives Congress, not the judiciary, the power to enact laws “necessary and proper” for implementing the status of citizenship.<sup>159</sup> To the extent that there are gaps between the self-executing requirements of the Fourteenth Amendment and the outer boundaries of federal power authorized by the Amendment, it is for Congress to decide whether and to what extent federal law should reach beyond the Amendment’s baseline commands. There is no comparable provision anywhere in the Constitution that gives such discretionary powers to the judiciary. And it is not tenable for the Court to assume these discretionary powers when the text of the Constitution explicitly allows Congress to decide how far it will go

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from the vice presidency as well. *See id.* amend. XII (“[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

155. *See id.* art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3; *id.* art. II, § 1, cl. 5.

156. *Id.* amend. XIV, § 2.

157. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). For exposition and a defense of the common law approach to constitutional interpretation, see generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

158. U.S. CONST. amend. XIV, § 5.

159. *Id.* art. I, § 8, cl. 18.

in enforcing the Fourteenth Amendment and in making laws necessary and proper to that end.

### III. The Equal Protection Clause

When one roots the Supreme Court's racial-equality jurisprudence in Congress's civil rights legislation, there is no longer a need to distort or ignore the language of the Equal Protection Clause, and the Equal Protection Clause can be given a construction that better accords with the constitutional text. Today, however, the Supreme Court interprets "equal protection of the laws" to require equal treatment on account of race and sex (most of the time),<sup>160</sup> to forbid discrimination with respect to a court-defined category of "fundamental rights,"<sup>161</sup> and to forbid discrimination that a court deems irrational.<sup>162</sup> Whatever one thinks of the Court's equal protection jurisprudence, it has little relation to the text of the Fourteenth Amendment, which guarantees "the equal protection of the laws" rather than equal treatment, and makes no distinction between racial classifications and other forms of discrimination.

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No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.<sup>163</sup>

Equal protection doctrine got off to a bad start in the *Slaughter-House Cases*.<sup>164</sup> The plaintiffs in those cases argued that Louisiana had denied them "equal protection" by forbidding them (while allowing others) to operate slaughterhouses in New Orleans.<sup>165</sup> The Court brushed aside this claim—but not on the ground that the plaintiffs were complaining about discriminatory *treatment* rather than discriminatory *protection of the laws*. Instead, the Court declared that the "pervading purpose" of the Reconstruction Amendments was

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160. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

161. See, e.g., *Att'y Gen. v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) (plurality opinion) ("[W]here a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.").

162. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631-32 (1996).

163. U.S. CONST. amend. XIV, § 1.

164. 83 U.S. (16 Wall.) 36 (1873).

165. *Id.* at 59-60, 66.

to protect blacks from racially discriminatory laws<sup>166</sup>—and it rejected the plaintiffs’ equal protection claim because they had failed to allege discrimination against blacks:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.<sup>167</sup>

The Court took the same tack in *Strauder v. West Virginia*,<sup>168</sup> which nixed a law that excluded blacks from jury service. Quoting heavily from the *Slaughter-House Cases*, the Court relied on what it described as the “common purpose” of the Reconstruction Amendments: “[S]ecuring to a race recently emancipated . . . all the civil rights that the superior race enjoy.”<sup>169</sup> And it nullified West Virginia’s juror exclusion law as contrary to that court-announced “purpose.”<sup>170</sup>

Justice Field’s dissent in *Strauder* made a devastating textual argument. First, Justice Field observed that the Equal Protection Clause confers universal protections on every “person” within the state’s jurisdiction: “All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected.”<sup>171</sup> So one cannot hold that the Equal Protection Clause requires states to allow blacks on juries, unless the Equal Protection Clause allows *all* persons—including women, children, and aliens—into the jury box.<sup>172</sup> Second,

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166. *Id.* at 81 (“In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to [the Equal Protection] clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.”).

167. *Id.*

168. 100 U.S. 303 (1880).

169. *Id.* at 306. One of the problems with this statement is that jury service is a “political right,” not a “civil right.” See, e.g., McConnell, *supra* note 133, at 1024. So announcing that the “common purpose” of the Reconstruction Amendments was to secure equal “civil rights” for blacks does not move the ball. Justice Field made this point in dissent; the majority ignored it. See *Ex parte Virginia*, 100 U.S. 339, 367-68 (1880) (Field, J., dissenting); *Strauder*, 100 U.S. at 312 (Field, J., dissenting) (“I dissent from the judgment of the court in this case, on the grounds stated in my opinion in *Ex parte Virginia* . . .”).

170. *Strauder*, 100 U.S. at 310.

171. *Ex parte Virginia*, 100 U.S. at 367 (Field, J., dissenting).

172. See *id.* (“All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests.”).



Justice Field argued that “equal protection of the laws” has nothing to do with the qualifications that a state establishes to participate in its government.<sup>173</sup> One can be excluded from voting, jury service, and elected offices, as children and aliens are, and as women were at that time, while still receiving the full “protection of the laws.”

The Court’s “answer” to Justice Field was to declare that states may of course exclude women from juries, along with other “persons” such as children, aliens, the uneducated, and non-property owners.<sup>174</sup> But the Court made no attempt to reconcile its “race is different” stance with the text of the Equal Protection Clause.<sup>175</sup> Instead, the Court opined that the Fourteenth Amendment’s “purpose” was to protect blacks from racial discrimination, not to protect women from sex discrimination:

We do not believe the Fourteenth Amendment was ever intended to prohibit [the exclusion of women, children, aliens, the uneducated, and non-property owners from juries]. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color.<sup>176</sup>

That the text of the Equal Protection Clause makes no mention of race and confers universal protections on each “person” within a state’s jurisdiction did not appear to trouble the *Strauder* majority.

The idea that the Equal Protection Clause condemns racial classifications while permitting other forms of discrimination is the enduring legacy of the *Slaughter-House Cases* and *Strauder*—and it set the Court off on a jurisprudential path utterly divorced from constitutional or statutory text. A text-centered interpretation of the Equal Protection Clause would look very different.

#### A. Putting “Protection” Back into “Equal Protection of the Laws”

A violation of the Equal Protection Clause requires the existence of (1) laws; which (2) protect; and (3) a state that selectively withholds the protections of those laws from *any* person within its jurisdiction. It makes no difference whether the unprotected victims are racial minorities, religious

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173. *See id.* (“The equality of protection intended does not require that all persons shall be permitted to participate in the government of the State and the administration of its laws, to hold its offices, or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion.”).

174. *See Strauder*, 100 U.S. at 310 (“[A state] may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.”).

175. *See Green*, *supra* note 23, at 258 (“*Strauder* . . . gave almost no attention to the text of the Equal Protection Clause.”).

176. *Strauder*, 100 U.S. at 310. The rest of the opinion in *Strauder* features equally facile assertions about the Fourteenth Amendment’s “spirit,” its “general objects,” and the “purposes of its framers.” *See id.* at 306-08.

minorities, women, children, the elderly, people with disabilities, aliens, out-of-state migrants, prisoners, convicted felons, or homosexuals. Every “person” is entitled to “the equal protection of the laws” from their state and local governments.

Today the Supreme Court acts as if the word “protection” had never been enacted. The Justices think that *any* law that classifies or discriminates implicates the Equal Protection Clause, and they have concocted their own criteria for determining whether a discriminatory law gets “rational basis review,” “intermediate scrutiny,” or “strict scrutiny.”<sup>177</sup> But the Equal Protection Clause does not authorize the courts to apply heightened or diminished scrutiny to different categories of discriminatory legislation. It confers a universal right applicable to every person: a right to receive the *protection of the laws* on equal terms as others.<sup>178</sup> The Court’s preoccupation with its tiers-of-scrutiny doctrine has led the Court to shortchange this core textual guarantee.

### 1. *Romer v. Evans*

The pathologies of the Court’s current approach to equal protection are apparent in two of the Court’s recent decisions. In *Romer v. Evans*,<sup>179</sup> the Court disapproved an amendment to Colorado’s constitution that forbade the state and its subunits to

enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of

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177. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications . . . . Between the[] extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny . . . .” (citation omitted)).

178. See CURRIE, *supra* note 12, at 349 (“[E]qual protection seems to mean that the states must protect blacks to the same extent that they protect whites: by punishing those who do them injury. ‘Protection of the laws’ is, after all, a peculiar way to express a general freedom from discrimination . . . .” (footnote omitted)); Green, *supra* note 23, at 44 (“[P]rotection of the laws’ is the key language. In sum, the phrase ‘protection of the laws’ . . . refer[s] to the remedial and law-enforcement functions of government, rather than to rights in general.”); Harrison, *supra* note 12, at 1390 (“[T]he subject of the Equal Protection Clause is protection. That word suggests either the administration of the laws or, if it is about their content, laws that protect as opposed to laws that do other things.”); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required?: Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 708 (2005) (“The very idea of ‘equal protection of the laws,’ in its oldest and most literal sense, attests to the importance of enforcing the criminal and civil law so as to safeguard the potential victims of private violence.”).

179. 517 U.S. 620 (1996).

persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.<sup>180</sup>

There was a straightforward textual argument that the Court could have made against Amendment 2: the Amendment forbade localities to enforce their laws that prohibited discrimination based on one's sexual orientation—but *only* to the extent that those antidiscrimination laws protected homosexuals and bisexuals. Heterosexuals, by contrast, *could* continue to claim the protections of laws that prohibit discrimination based on sexual orientation. The Amendment would have been easier to defend if it had simply repealed and preempted laws and ordinances that prohibit discrimination based on sexual orientation—because then everyone would be deprived of that legal protection. No state or locality is required to outlaw discrimination based on sexual orientation, but it cannot selectively withhold the protections of those laws from homosexuals while leaving them in place for heterosexuals, as Amendment 2 appeared to require.

The Court never made this argument. Instead, it wrapped itself in doctrinal jargon and held that Amendment 2 “lacks a rational relationship to legitimate state interests.”<sup>181</sup> The Court's rational basis holding was unconvincing. Amendment 2 had a rational basis: protecting the associational and religious freedom of Coloradans who disapprove of homosexuality.<sup>182</sup> The Court acknowledged this interest<sup>183</sup> but said the Amendment was overinclusive relative to that goal.<sup>184</sup> Indeed it was, but rational basis review does not require a precise fit between means and ends.<sup>185</sup> And if the Court thought that

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180. *Id.* at 624 (quoting COLO. CONST. art. II, § 30b).

181. *Id.* at 631-35.

182. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 55 (1996) (“If rationality review is the appropriate standard, Amendment 2 seems constitutional, as an effort either to discourage the social legitimation of homosexuality or to conserve scarce enforcement resources and protect associational privacy.”).

183. See *Romer*, 517 U.S. at 635 (“The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”).

184. See *id.* (“The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.”).

185. See *Heller v. Doe*, 509 U.S. 312, 321 (1993) (“[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'” (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970))); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (“Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress is imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'” (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960))); Sunstein, *supra* note 182, at 55 (“[U]nder rational basis review[,] over-inclusive and under-inclusive legislation is perfectly acceptable, indeed quite common.”).

Amendment 2 was impermissibly overinclusive, then the remedy should not nullify the Amendment across the board; it should rather enjoin only the overinclusive applications.<sup>186</sup> The state surely has a “legitimate” interest in applying Amendment 2 to churches and private associations such as the Boy Scouts. Indeed, the Supreme Court has held that the First Amendment *compels* exemptions to antidiscrimination laws in those situations.<sup>187</sup>

Then the Court impugned the motivations of Amendment 2’s supporters, declaring that the Amendment “seems inexplicable by anything but animus toward the class it affects.”<sup>188</sup> But that is untrue; many libertarians oppose antidiscrimination protections for homosexuals yet support same-sex marriage, which refutes the Court’s assertion that opposition to antidiscrimination measures must necessarily be the product of “animus.”<sup>189</sup> Some, for example, might support Amendment 2 out of the nonbigoted belief that the common law rights of employers and property owners should prevail over government efforts to regulate the conditions on which private individuals choose to associate and deal.<sup>190</sup> One could also rationally believe that market

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186. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (“[B]ecause appellees are making a facial challenge to a statute, they must show that ‘no set of circumstances exists under which the Act would be valid.’” (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 524 (1989) (O’Connor, J., concurring in part and concurring in the judgment))); *Ala. State Fed’n of Labor v. McAdory*, 325 U.S. 450, 465 (1945) (“When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part.”).

187. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (concluding that the government cannot “impos[e] an unwanted minister” on a religious organization); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (holding that states cannot compel the Boy Scouts to accept homosexual scoutmasters).

188. *Romer*, 517 U.S. at 632.

189. Compare RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 3-4, 9 (1992) (criticizing employment discrimination laws), and 2016 Platform, LIBERTARIAN PARTY, <https://www.lp.org/platform> (last visited May 5, 2017) (“Members of private organizations retain their rights to set whatever standards of association they deem appropriate, and individuals are free to respond with ostracism, boycotts and other free-market solutions.”), with Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2473-74 (1994) [hereinafter Epstein, *Caste and the Civil Rights Laws*] (endorsing same-sex marriage), and 2016 Platform, *supra* (“Sexual orientation . . . should have no impact on the government’s treatment of individuals, such as in current marriage . . . laws.”). See also Ilya Shapiro, *We Support Gay Marriage but Oppose Forcing People to Support It*, CATO INST. (Nov. 2, 2012, 1:45 PM), <https://www.cato.org/blog/we-support-gay-marriage-oppose-forcing-people-support-it>.

190. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 111 (1962) (“Fair employment practice commissions that have the task of preventing ‘discrimination’ in employment by reason of race, color, or religion have been established in a number of states. Such legislation clearly involves interference with the freedom of individuals to enter into voluntary contracts with one another. . . . Thus it is directly an interference with freedom of the kind that we would object to in most other contexts.”); Epstein, *Caste*

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mechanisms and political accountability are sufficient to prevent unwarranted discrimination against homosexuals, so there is no need for localities to outlaw such conduct.<sup>191</sup> And one could rationally think that the benefits of antidiscrimination protections will be outweighed by the costs of meritless lawsuits.<sup>192</sup>

The Court never should have analyzed Amendment 2 under rational basis review. The Equal Protection Clause is not concerned with whether a state's discrimination is rational; the test is whether the state has selectively withheld the *protections* of a law from one class of persons while preserving the protections of that law for others. The inquiry in *Romer* should have boiled down to a simple question: Does Amendment 2 allow heterosexuals to claim the protections of local ordinances that prohibit discrimination based on sexual orientation, while forbidding homosexuals to do so? If so, then Amendment 2 denies the equal protection of the laws. It would be no different from a law that allows men but not women to claim the protections of local ordinances that outlaw sex discrimination, or that allows Christians but not Jews to claim the protections of local ordinances that forbid religious discrimination.

This also provides a complete answer to the dissenting opinion's reliance on *Bowers v. Hardwick*,<sup>193</sup> to which the majority did not deign to reply. *Bowers* had upheld a statute that criminalized homosexual sodomy, and Justice Scalia argued that this holding disposed of the equal protection question in *Romer*.<sup>194</sup> Not so. *Bowers* established only that states may subject homosexuals to discriminatory *treatment*. But the power to criminalize homosexual conduct does not imply the power to selectively withdraw the protection of enacted

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and the Civil Rights Laws, *supra* note 189, at 2470 (“[T]he proper background condition is one that allows all private individuals to choose the persons with whom they wish to associate and deal.”).

191. See, e.g., Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 26, 43-44 (2005) (“[S]ome of the greatest gains in the recognition of same-sex relationships have come from the market . . .”).

192. See, e.g., Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 300 (6th Cir. 1997) (“[T]he elimination of actionable special rights [for homosexuals] . . . would effectively advance the legitimate governmental interest of reducing the exposure of the City’s residents to protracted and costly litigation.”); Tiffany L. King, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005, 1041 (2002) (“A prevalent argument against expanding Title VII to protect sexual orientation is that expansion would open the floodgates of litigation.”).

193. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

194. *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) (“If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.” (emphasis in original)).

laws from those who engage in homosexual acts. Even the most vile criminals are entitled to be *protected* by the state's laws on equal terms as others, even as the state subjects them to disfavored treatment. Child molesters can be imprisoned and required to register as sex offenders—but a state cannot allow prison guards and fellow inmates to beat and rape child molesters while protecting other inmates from private violence and vigilante justice.<sup>195</sup> Justice Scalia, like the majority, failed to distinguish discriminatory *treatment* (the issue in *Bowers*) from discriminatory *protection of the laws* (the issue in *Romer*).

That does not necessarily mean that Justice Scalia was wrong to dissent in *Romer*. It might be possible to construe Amendment 2 as withdrawing from *all* people—heterosexuals as well as homosexuals—the protections of laws that outlaw discrimination based on sexual orientation. That may not be the most natural construction of Amendment 2, but courts may impose saving constructions on state laws to avoid conflicts with the Constitution,<sup>196</sup> and such a construction would have obviated the equal protection problems described above. *Romer* is a hard case, and I discuss it not to offer a definitive resolution but to highlight the problems that arise from equating “equal protection of the laws” with “equal treatment”—and from thinking that the Fourteenth Amendment prohibits only “irrational” discrimination unless a “suspect class” is involved. The Court would have produced a more convincing opinion if it had focused on the fact that the text of Amendment 2 allowed heterosexuals (but not homosexuals) to retain the protections of local antidiscrimination ordinances.

## 2. *United States v. Morrison*

In *United States v. Morrison*, the Court held that Section 5 of the Fourteenth Amendment did not authorize Congress to establish a federal civil remedy for victims of gender-motivated violence in the Violence Against Women Act.<sup>197</sup>

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195. See, e.g., *Davidson v. People*, 4 Colo. 145, 150 (1878) (“The fact that a man is a violent, turbulent and dangerous character, does not justify or excuse another in coolly and deliberately taking his life. He is equally under the protection of the law as the most inoffensive.”); *Blackburn v. State*, 23 Ohio St. 146, 163 (1872) (“[E]ven the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life’s enjoyment, and anxious to continue to live.”).

196. See, e.g., *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (“Where fairly possible, courts should construe a [state] statute to avoid a danger of unconstitutionality.” (quoting *Planned Parenthood Ass’n of Kansas City v. Ashcroft*, 462 U.S. 476, 493 (1983) (opinion of Powell, J.))); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830) (Story, J.) (“No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.”); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1945 (1997).

197. 529 U.S. 598, 626-27 (2000). The statute was enacted as part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, § 40001, 108 Stat. 1902, 1941-42  
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The Solicitor General had defended the Act by arguing that the states' criminal justice systems were biased against victims of gender-motivated violence, and he pointed to evidence before Congress showing that states had failed to sufficiently investigate and prosecute gender-motivated crime.<sup>198</sup> These allegations (if true) would establish a quintessential denial of equal protection: a failure to protect persons from private criminal violence on equal terms.

But the Court's opinion did not engage the government's evidence. Instead, it recited the "intermediate scrutiny" test from cases involving discriminatory treatment of women,<sup>199</sup> implying that a state that fails to protect women from acts of criminal violence might defend itself by invoking an "important government interest." But the equal protection requirement is absolute. As in *Romer*, the Court got caught up in doctrine created for cases of discriminatory protection of the laws, which goes to the textual core of the equal protection guarantee. Discriminatory protection can never be justified by "legitimate," "important," or "compelling" state interests; the text makes no allowance for a state to selectively withhold the protections of its laws from anyone.

Then the Court criticized Congress for establishing a civil remedy that ran against private individuals who committed acts of gender-motivated violence—rather than against the state officials who violated the Equal Protection Clause by failing to investigate and punish those acts.<sup>200</sup> The Court correctly noted that the Equal Protection Clause governs "only state action."<sup>201</sup> But it does not follow that Congress is powerless to provide a remedy against

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(codified as amended at 42 U.S.C. § 13981 (2015)). It first provides that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). Then its civil remedy provision states:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

*Id.* § 13981(c).

198. Brief for the United States at 37-42, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29), 1997 WL 1037259.

199. See *Morrison*, 529 U.S. at 620 ("As our cases have established, state-sponsored gender discrimination violates equal protection unless it 'serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives . . .'" (first alteration in original) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996))).

200. See *id.* at 620-26; see also *id.* at 626 ("Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.").

201. *Id.* at 621.

private individuals when a state refuses to hold them accountable for their torts or crimes. “Equal protection of the laws” is a constitutional command that Congress is empowered to “enforce,” and Congress holds the further power to make laws necessary and proper for enforcing this requirement.<sup>202</sup> If a state fails to provide equal protection and declines to punish private acts of violence, then it is hard to see why Congress should be disabled from providing the civil or criminal remedies that the state has unconstitutionally withheld. The private tortfeasors and criminals have not violated the Equal Protection Clause, but that should not preclude Congress from responding to a *state’s* nonprotection by directly supplying the legal remedies that the state was required to provide.

The outcome in *Morrison* should have turned on whether Virginia had withheld the equal protection of laws by failing to provide the plaintiff with adequate remedies for the unlawful attack that she had suffered. This has nothing to do with “intermediate scrutiny.” It simply asks whether the state has withheld legal protections that it makes available to other victims of criminal violence. And the Supreme Court should have remanded for the lower courts to make this determination. Whether Virginia had in fact violated the Equal Protection Clause in *Morrison* was not clear. On the one hand, Virginia did not prosecute the alleged attackers because a grand jury had found insufficient evidence to indict,<sup>203</sup> but perhaps this reflected the fact that the evidence was indeed too weak to support a criminal prosecution. On the other hand, Virginia tort law provided civil remedies for the alleged attack that the plaintiff did not pursue.<sup>204</sup> Given that the federal statute provided only a *civil* remedy for victims of gender-motivated violence, the adequacy of the state’s civil remedies should have been the key question to resolve. The availability of a state tort-law cause of action cuts against finding an equal protection violation, but perhaps the plaintiff could have shown that those state court proceedings would have been useless or biased against victims of sexual assault—perhaps because of onerous evidentiary rules (such as the absence of a rape-shield law) or a blame-the-victim mentality among state court judges or juries.

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202. See U.S. CONST. amend. XIV, § 5; *id.* art. I, § 8, cl. 18; see also *supra* notes 71-79 and accompanying text.

203. See Nina Bernstein, *Virginia Tech Wins Dismissal of a Rape Suit*, N.Y. TIMES (May 8, 1996), <https://nyti.ms/2kSJGDy>.

204. See, e.g., *Kidwell v. Sheetz, Inc.*, 982 F. Supp. 1177, 1185 (W.D. Va. 1997) (“Virginia law, then, recognizes a distinct cause of action for sexual assault and battery.”); *Johnson v. Behsudi*, 52 Va. Cir. 533, 535 (1997) (recognizing that victims of sexual violence have a claim for battery under Virginia tort law); *Fox v. Rich Prods. Corp.*, 34 Va. Cir. 403, 413 (1994) (recognizing the same claim).



Finally, even if the Supreme Court had been right to disapprove resort to a federal civil remedy by the plaintiff in *Morrison*, that does not justify its decision to permanently foreclose access to the civil remedy that Congress had created. There might be future situations in which a state withholds the “equal protection of the laws” from a victim of sexual assault, and if a victim can establish a discriminatory denial of protection then she has every right to invoke the federal civil remedy. One can hope that these situations will be rare, but rarity does not warrant facial invalidation.<sup>205</sup>

B. The Meaning of “Equal” Protection—and Its Relationship to “the Laws”

The Fourteenth Amendment forbids states to deny the “equal protection of the laws.” But one cannot define “equal” (or “equal protection”) without first determining the proper point of comparison: *Equal compared to what?*

In some cases, the appropriate point of comparison is self-evident. If a state declares open season on blacks and stands idly by while the Ku Klux Klan embarks on a statewide lynching campaign, the state could not defend itself by claiming that it protected all blacks equally. The relevant baseline is not how the state protects other *blacks* but how the state protects other *people*; that is why the Amendment forbids states to deny to “any *person*” within its jurisdiction the equal protection of the laws. When a state’s laws protect *all* people from murder, violence, or other harms, a state cannot decline to enforce those laws based on the identity of the victim. That violates the self-executing core of the Equal Protection Clause: a state official who selectively withholds protections that the laws confer.

Matters become more tricky when the state’s *laws* withhold protections from certain categories of people. The marital-rape exemption, for example, defines the crime of rape to extend only to acts committed by nonspouses.<sup>206</sup> In these situations, a state can claim that it provides the “equal protection of the laws”—so long as it enforces its “laws” equally according to their terms. The text of the Equal Protection Clause indicates that the existing laws are what provide the baseline for determining whether “equal” protection has been withheld; it assumes the existence of “laws,” and requires states to provide the equal protection *of those laws*. The Equal Protection Clause does not require states to provide “the protection of equal laws,”<sup>207</sup> and it does not say that a

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205. See *Ala. State Fed’n of Labor v. McAdory*, 325 U.S. 450, 465 (1945) (“When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part.”).

206. See, e.g., MODEL PENAL CODE § 213.1 (AM. LAW INST., Official Draft and Explanatory Notes 1962) (defining the crimes of “rape” and “gross sexual imposition” to extend only to acts committed by “[a] male who has sexual intercourse with a female not his wife”).

207. See *Harrison*, *supra* note 12, at 1390 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

state “shall protect every person equally.” One is entitled only to the protections that the laws confer, and nothing more.

But this does not mean that the Equal Protection Clause looks only to the protections that *state* law confers. The text forbids a state to deny the “equal protection of *the laws*”; it is not limited to the protections conferred by the *state’s* laws. And the problem with defining “equal” protection solely by reference to the requirements of state law is obvious: it would allow the states to withhold legal protections simply by enacting new laws that shrink the domain of criminal or tortious behavior. A state might, for example, amend its criminal laws to permit the murder of black people and then claim that it provides “equal protection” under the terms of those revised criminal laws. This would leave the constitutional command of “equal protection” entirely at the mercy of state governments—the very entities that the Fourteenth Amendment purports to limit and control.

This is where Congress steps in with its power to “enforce” the Equal Protection Clause and to make all laws “necessary and proper” to that end. A state that defines the crime of murder to exclude the killing of blacks—or that defines the crime of rape to exclude acts committed by one’s spouse—can assert only that it provides “equal protection” under the terms of the *state’s* laws. But Congress may enact “laws” of its own that require the states to confer legal protections that Congress thinks *should* be extended on equal terms to others. The Civil Rights Act of 1870 is an example of such legislation; it provides that each person must have “the full and equal benefit of all laws and proceedings for the security of person and property *as is enjoyed by white citizens.*”<sup>208</sup> This not only requires the states to protect racial minorities and aliens under the terms of their existing laws, it also forbids the states to amend their laws by removing legal protections on account of race or alienage. Legislation of this sort is “necessary and proper” for “enforc[ing]” the Equal Protection Clause because it prevents states from doing an end run around the Equal Protection Clause, and it supplies additional “laws” that define a state’s equal protection obligations. The “equal protection of the laws” is not limited to the equal protection of the *state’s* laws, and the word “laws” includes federal statutes that prohibit the states from selectively withdrawing legal protections from subsets of their population.

Some people will think that the federal judiciary rather than Congress should be charged with deciding whether a state law classification should be preempted as a denial of “equal” protection.<sup>209</sup> But it is hard to see how a state

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208. See Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981(a) (2015)) (emphasis added).

209. See Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 6 (2001) (“[I]n the years since *Cooper v. Aaron*,[ 358 U.S. 1 (1958),] the idea of judicial supremacy—the notion that judges have the last word when it comes to constitutional interpretation and that  
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has denied the “equal protection of the laws” if neither Congress nor the state has enacted a “law” that confers legal protections on the alleged victims. And if the courts can act without such a “law,” then the Equal Protection Clause has been transformed into a command that the states “shall protect people equally”—which is not what the text says. Then there is the fact that the Constitution specifically empowers Congress—not the judiciary—to “enforce” the Equal Protection Clause and to make all laws “necessary and proper” to that end.<sup>210</sup> To the extent that the Fourteenth Amendment authorizes federal power that extends beyond the initial self-executing requirements of the Equal Protection Clause, the enforcement power and the Necessary and Proper Clause indicate that Congress and not the judiciary should fill these gaps.

It is also impractical to think that the Equal Protection Clause would delegate the resolution of these questions to the federal judiciary, because courts are institutionally ill suited to remedy a state law’s failure to extend protections that a court thinks the state should provide. Suppose that a federal court believes that a state’s marital-rape exemption is an improper withholding of “equal” legal protections. What can the court do about it? The idea that a federal court would order a state’s legislature to enact a new law criminalizing marital rape—and then order reluctant prosecutors to bring charges under that law—seems extraordinary.<sup>211</sup> Even if a court were willing to impose that unheard-of remedy, it is hard to see how anyone would have standing to request it.<sup>212</sup> And even if one could find a plaintiff with standing, the federal courts would remain impotent to act unless Congress both confers jurisdiction *and* creates a cause of action for private litigants to challenge the state’s law. Federal courts have no freestanding authority to remedy a state’s nonprotection, and their ability to entertain equal protection claims depends entirely on congressional will.

Congress, by contrast, has all the tools needed to address a state law’s failure to protect people on equal terms. If Congress decides that the marital-rape exemption improperly withholds legal protections from victims of sexual violence, then it can enact a statute that abolishes those exemptions in state law and imposes criminal sanctions on state officials who fail to protect victims of

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their decisions determine the meaning of the Constitution for everyone—has finally found widespread approbation.” (italics omitted)).

210. U.S. CONST. amend. XIV, § 5; *id.* art. I, § 8, cl. 18.

211. *Cf. Heckler v. Chaney*, 470 U.S. 821, 832-34 (1985) (explaining the “general presumption of unreviewability of decisions not to enforce” under the Administrative Procedure Act).

212. See Linda Jackson, Note, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183, 199 n.112 (1994) (explaining that victims of marital rape would not have standing to challenge a marital-rape exception, so constitutional challenges have been rare).

marital rape on the same terms as other victims of sexual assault. Congress can easily remedy a state law that fails to protect people equally—and it has done so by enacting laws that give racial minorities “the full and equal benefit of all laws and proceedings for the security of person and property.”<sup>213</sup>

### C. The Boundaries of “Protection”

The Equal Protection Clause is implicated only by laws that confer “protection”—but how far does this concept extend? Laws “for the security of person and property,”<sup>214</sup> such as criminal law and tort law, are the paradigmatic examples of protective laws. But in the modern welfare state there are many other laws that “protect” a state’s residents. Antidiscrimination laws protect people from bias and prejudice; Medicaid protects people from diseases and ruinous medical bills; farm subsidies and unemployment insurance protect people from the vicissitudes of the market.

All of these laws confer “protection”—but nothing in the Fourteenth Amendment requires the states to extend these protections on equal terms to everyone. What the Fourteenth Amendment requires is that the states provide the “equal protection *of the laws*,” which forbids a state to withhold protections that the *laws* require—either the laws of the state or the laws that Congress has enacted to enforce the equal protection mandate. Whether a state has denied “equal” protection under the terms of its own laws will turn on what state law requires. And the state judiciary should be the initial forum to resolve that question and to provide the relief and protections required by state law. Indeed, it is hard to see how a “state” can be guilty of denying the equal protection of its laws until the remedies that the state provides to the victims of its alleged nonprotection have been exhausted or shown to be useless. So there is no reason to fear that a textual reading of “protection” will cause litigants to come running into federal court with § 1983 claims<sup>215</sup> whenever they think a state official has misapplied a provision in the state’s protective laws. State courts and state agencies should have the opportunity to correct or remedy these mistakes before the “state” as a whole can be found to have denied the equal protection of its laws.

Not all discriminatory behavior by a state will implicate the state’s “protection,” however. Some issues, such as the right to inherit property and access to public golf courses, are very hard to characterize as “protection.”<sup>216</sup> In

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213. See Civil Rights Act of 1870 § 16; Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a)).

214. Civil Rights Act of 1870 § 16; Civil Rights Act of 1866 § 1.

215. See 42 U.S.C. § 1983.

216. See, e.g., Strauss, *supra* note 1, at 42 (“A person who is excluded from a public swimming pool because he or she is a member of a racial minority is certainly treated unequally.”)  
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these situations Congress may legislate equal-treatment norms under the Citizenship Clause—and Congress has done so in the Civil Rights Act of 1866, which gives minority citizens the same right to inherit property that white citizens enjoy,<sup>217</sup> and in the Civil Rights Act of 1875, which outlaws racial discrimination in “places of public amusement” and penalizes those who deny minority citizens the “full and equal enjoyment” of these places.<sup>218</sup>

When a state’s laws discriminate in the field of protection, however, Congress may enact laws to secure equality not only for citizens but also for aliens. Consider section 16 of the Civil Rights Act of 1870, which extended some (but not all) of the protections in the Civil Rights Act of 1866 to aliens:

[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.<sup>219</sup>

This statute prohibits the states from discriminating not only against racial minorities but also against aliens—so it can be sustained only by relying on Congress’s powers to enforce the Equal Protection Clause or the Thirteenth Amendment.<sup>220</sup> But section 16 of the Civil Rights Act of 1870 notably omits any protections for the rights to “inherit, purchase, lease, sell, hold, and convey real and personal property”—even though the Civil Rights Act of 1866 had required that *citizens* enjoy those rights on equal terms without regard to race.<sup>221</sup> Why this discrepancy? One possibility is that Congress did not want to preempt state laws that forbade aliens to own real property.<sup>222</sup> But another explanation is that the laws of inheritance and property ownership—unlike

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But it is not clear that anyone would call that treatment a denial of equal ‘protection’—unless they had the clause in mind.”).

217. Civil Rights Act of 1866 § 1.

218. Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336.

219. Civil Rights Act of 1870 § 16 (emphasis added).

220. The right to make and enforce contracts and the right to equal taxation, licensing, and exactions can be sustained under the Thirteenth Amendment, as they protect aliens and citizens alike from employers that withhold wages and from governments that impose racially discriminatory obstacles to employment. And the rights to sue, be parties, and give evidence; the right to the full and equal benefit of all laws and proceedings for the security of person and property; and the right to like punishment, pains, and penalties are all necessary and proper to ensuring the equal protection of the laws.

221. Civil Rights Act of 1866 § 1.

222. See Harrison, *supra* note 12, at 1442 (“[A]liens generally were not permitted to own real property except as specifically provided by state law.”); see also *supra* note 105.

the other rights mentioned in the Civil Rights Act of 1866—do not implicate the state’s “protection,” nor do they trigger Congress’s Thirteenth Amendment enforcement powers. For *these* types of rights, Congress may use the Citizenship Clause and the Necessary and Proper Clause to preempt state laws that withhold these rights from *citizens*. But the Reconstruction Amendments do not authorize Congress to preempt laws that discriminate against *aliens* unless the state is withholding its “protection,” or unless the state is eroding or undermining an alien’s self-ownership in labor markets. The statutes enacted by the Reconstruction Congress reflect the distinction between Congress’s authority to enact equality norms for citizens (under the Citizenship Clause), and its authority to legislate equality for aliens (under the Equal Protection Clause and the Thirteenth Amendment).

#### IV. The Court’s Equality Doctrines Revisited

What does all of this have to say for judicial decisionmaking in Fourteenth Amendment cases? The principal doctrinal implication is one that can appeal to textualists and nontextualists alike: the courts should, to the extent possible, rely on the text of federal civil rights statutes when enjoining discriminatory laws and practices, either as a substitute for or as a supplement to rulings that would otherwise rest exclusively on the Equal Protection Clause.

It will almost always be easier to defend an equality pronouncement that relies on congressional civil rights legislation rather than the self-executing requirements of the Fourteenth Amendment. This is so for two reasons. First, the enforcement power and Article I, Section 8 allow Congress to reach beyond the Fourteenth’s Amendment’s self-executing commands—so a statute enacted by Congress may prohibit discriminatory behavior that does not violate the text or original meaning of the Fourteenth Amendment.<sup>223</sup> Second, these federal statutes often provide unimpeachable textual support for the Court’s decisions and doctrines, which obviates the need to rely on dubious interpretations of the Fourteenth Amendment’s language. Using federal statutes to avoid unnecessary and controversial constitutional pronouncements is something that should appeal not only to textualists but also to those who embrace judicial minimalism,<sup>224</sup> Thayerian deference to congressional enactments,<sup>225</sup> and principles of constitutional avoidance.<sup>226</sup>

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223. See *supra* Part II.A.

224. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-6 (1999).

225. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230-88 (2006); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

Even nontextualists or living constitutionalists who approve of the status quo should look for ways to broaden the overlapping consensus that supports the Court's canonical racial-equality rulings.<sup>227</sup> Judicial opinions that rely solely on the Fourteenth Amendment's self-executing requirements will never persuade textualists or formalists when the Court's doctrine disregards or departs from the constitutional language—as it so often does. Yet there are compelling textual arguments rooted in Congress's civil rights statutes that support the Court's rulings in the fields of race and sex equality. And to the extent that the Court can offer these statutory textual arguments to prop up a contentious or textually questionable equal protection holding, it should do so.

#### A. Jury Service

*Strauder v. West Virginia*<sup>228</sup> was correctly decided, but the Court should have relied on the Civil Rights Act of 1875. The Civil Rights Act supplied the complete answer for why the Court had disapproved only race-based juror exclusions while leaving in place the exclusions of women, children, and aliens.<sup>229</sup> The reason is that Congress had chosen to outlaw race-based exclusions—and *only* race-based exclusions—under its authority to enforce the Citizenship Clause.<sup>230</sup> But because the *Strauder* Court chose to rely exclusively on the Equal Protection Clause, it could not justify the atextual distinction that it drew between race-based juror exclusions and the exclusions of other “persons” such as women, children, and aliens.<sup>231</sup>

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226. See *Harris v. McRae*, 448 U.S. 297, 306-07 (1980) (“It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons, will inquire first into the statutory question. This practice reflects the deeply rooted doctrine ‘that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.’” (alteration in original) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)); *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949) (“The best teaching of this Court’s experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

227. See JOHN RAWLS, *POLITICAL LIBERALISM* 158-64 (1993).

228. 100 U.S. 303 (1880).

229. See *id.* at 310 (“[A] State . . . may confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.”).

230. See Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336-37 (codified as amended at 18 U.S.C. § 243 (2015)) (“[N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude . . .”); see also *supra* Part II.B.3.

231. See *supra* notes 174-76.

The Civil Rights Act's prohibition of juror discrimination survives to this day. It is codified at 18 U.S.C. § 243, which provides:

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000.<sup>232</sup>

Yet this statute has played no role in the Supreme Court's juror-exclusion case law, which (following *Strauder's* lead) has relied entirely on the Equal Protection Clause.<sup>233</sup> The Court's use of the Equal Protection Clause at the expense of 18 U.S.C. § 243 has led to many problems in the Court's juror-exclusion doctrine.

First, the Equal Protection Clause does not provide a persuasive basis for outlawing racially motivated peremptory strikes, because peremptory strikes allow jurors of *all* races to be struck for racially motivated reasons. *Swain v. Alabama* accommodated isolated incidents of racially motivated peremptory strikes for that very reason, noting that all potential jurors, "Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."<sup>234</sup> But the *Swain* Court said nary a word about 18 U.S.C. § 243, which bans *any* person charged with *any* duty in selecting jurors from excluding jurors on account of their race—including prosecutors who wield their peremptory strikes in a racially discriminatory fashion. Unless the *Swain* Court was prepared to declare this statute unconstitutional, it should not have tolerated *any* use of race-based peremptory strikes in the teeth of this federal statutory prohibition.

The Supreme Court overruled *Swain* in *Batson v. Kentucky* and barred prosecutors from using race-based peremptory challenges. *Batson* was correctly decided and long overdue. But (like *Strauder*) it relied entirely on the Equal Protection Clause.<sup>235</sup> And (as in *Strauder*) the Equal Protection Clause was the

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232. 18 U.S.C. § 243.

233. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994); *Georgia v. McCollum*, 505 U.S. 42, 50 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991); *Powers v. Ohio*, 499 U.S. 400, 409 (1991); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); see also *Holland v. Illinois*, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring).

234. 380 U.S. 202, 221 (1965). The *Swain* Court allowed that a prosecutor might violate the Equal Protection Clause if he,

in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.

*Id.* at 223. But this offered no possibility of relief for isolated incidents of racially discriminatory juror-selection practices.

235. *Batson*, 476 U.S. at 89.



wrong provision to use. The text of the Equal Protection Clause makes no distinction between peremptory strikes based on race and peremptory strikes based on other factors.<sup>236</sup> And the *Batson* Court never explained how a state denies “equal protection” when jurors of *all* races are subject to race-based peremptory strikes on equal terms. The easy answer to these objections is found in 18 U.S.C. § 243: Congress has forbidden race-based juror exclusions, regardless of whether the peremptory-strike regime exposes jurors of all races to the same risks of exclusion.<sup>237</sup>

The text of the Equal Protection Clause is also unable to support the decisions that extend *Batson* to peremptory strikes made by private attorneys. Only a state can violate the Equal Protection Clause, and a private litigant is not the state.<sup>238</sup> But the Citizenship Clause is not limited to state action, and Congress may enforce the Citizenship Clause by outlawing private conduct that seeks to deprive racial minorities of their opportunity to serve on a jury and to exercise this responsibility of citizenship. Congress did exactly that in 18 U.S.C. § 243, enacting a prohibition on race-based juror exclusions that extends to state actors and private individuals alike. The Supreme Court was right to extend *Batson* to peremptory strikes made by criminal defendants<sup>239</sup> and private civil litigants,<sup>240</sup> but it should have relied on 18 U.S.C. § 243 to do so.

Finally, the courts’ nonuse of 18 U.S.C. § 243 has distorted the law of remedies for *Batson* violations. Under the statute, anyone who excludes jurors on account of their race is subject to criminal prosecution and a \$5000 fine.<sup>241</sup> But courts hardly ever impose sanctions on lawyers who commit these criminal acts—even after they find that a *Batson* violation has occurred.<sup>242</sup> Instead, appellate courts respond to *Batson* violations with a rule of automatic reversal<sup>243</sup>—an upside-down remedy that provides a windfall to patently guilty

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236. See *supra* Part II.B.3; see also *supra* notes 168-76, 229-31 and accompanying text.

237. See 18 U.S.C. § 243.

238. See, e.g., *Polk County v. Dodson*, 454 U.S. 312, 317-19 (1981) (holding that a public defender does not act under color of state law when representing a defendant in a criminal trial, even when employed by the state).

239. See *Georgia v. McCollum*, 505 U.S. 42, 55 (1992).

240. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

241. 18 U.S.C. § 243.

242. See Jason Mazzone, *Batson Remedies*, 97 IOWA L. REV. 1613, 1624-26 (2012). In one of the few cases in which a court imposed monetary sanctions on an attorney for *Batson* violations, those sanctions were ultimately lifted following trial. See *People v. Willis*, 43 P.3d 130, 132, 137 (Cal. 2002).

243. See *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (“If the trial court decides that the facts establish, *prima facie*, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner’s conviction be reversed.”); see also *Winston v. Boatwright*, 649 F.3d 618, 627 (7th Cir. 2011) (citing the automatic-reversal rule for *Batson* violations).

criminals without imposing any penalty on the guilty lawyer who violated 18 U.S.C. § 243.

Certainly litigants should receive a new trial if a *Batson* violation prejudiced the outcome; nonharmless errors that occur at trial warrant a vacatur of conviction,<sup>244</sup> and *Batson* violations are no different in this regard. But why reverse the conviction of an obviously guilty criminal defendant? Judges who defend this automatic-reversal regime argue that racial discrimination in jury selection is so abhorrent that it cannot go unremedied—even if one could prove beyond a reasonable doubt that the unlawful discrimination had no effect on the outcome.<sup>245</sup> But the notion that automatic reversal is necessary to ensure *some* consequence for racially discriminatory juror-selection practices is wrong. Lawyers who violate a federal criminal statute such as 18 U.S.C. § 243 are subject not only to prosecution but also to court-imposed sanctions and bar discipline—neither of which requires proof beyond a reasonable doubt.<sup>246</sup> These are the remedies that should be imposed in response to *Batson* violations. They would likely do more to deter *Batson* violations than the automatic-reversal rule, which imposes no penalty at all on the lawyer who perpetrated the violation. And it can only help if prosecutors and private attorneys are reminded that it is a federal crime to exclude jurors on account of race—they may not even be aware of this fact.

#### B. *Plessy v. Ferguson*

*Plessy v. Ferguson*<sup>247</sup> is regarded as one of the great antiprecedents in Supreme Court history<sup>248</sup>—and deservedly so. The Court’s reasoning was

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244. See *Chapman v. California*, 386 U.S. 18, 21-22 (1967).

245. See *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion) (“We have recognized that ‘some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.’ The right to an impartial adjudicator, be it judge or jury, is such a right.” (alteration in original) (citation omitted) (quoting *Chapman*, 386 U.S. at 23)); *Winston*, 649 F.3d at 627 (“*Batson* itself as well as the cases that follow it confirm that when a violation of equal protection in jury selection has been proven, the remedy is a new trial, without the need for any inquiry into harmless error or examination of the empaneled jury. . . . ‘If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.’” (quoting *Smith v. Texas*, 311 U.S. 128, 132 (1940))); cf. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 487-88 (9th Cir. 2014) (“[T]here is no harmless error analysis with respect to *Batson* claims.’ . . . [A] *Batson* violation undermines the integrity of the entire trial . . . .” (quoting *Turner v. Marshall*, 121 F.3d 1248, 1254 n.3 (9th Cir. 1997))).

246. See MODEL RULES OF PROF’L CONDUCT r. 8.4(b) (AM. BAR ASS’N 2016) (defining “professional misconduct” to include “commit[ting] a criminal act that reflects adversely on the lawyer’s . . . fitness as a lawyer”); MODEL RULES FOR LAWYER DISCIPLINARY ENF’T r. 18(C) (AM. BAR ASS’N 2002) (requiring only “clear and convincing evidence” for charges of professional misconduct).

247. 163 U.S. 537 (1896).

shoddy, its efforts to pooh-pooh the stigmatizing effects of racial segregation<sup>249</sup> seem shockingly naive to modern readers, and the concept of “separate but equal” was thoroughly discredited in the school-segregation cases.<sup>250</sup> Today no one attempts to defend *Plessy*, and the ruling is universally regarded as abhorrent from the standpoint of morality and justice. But most constitutional theories have a difficult time explaining why *Plessy* was wrong as a matter of law.

Common law constitutionalism, for example, has attempted to justify the Court’s evolution from *Plessy* to *Brown* by relying on post-*Plessy* precedents that showed how “separate but equal” was unworkable.<sup>251</sup> But that does not explain why *Plessy* was wrong on the day it was decided. There was no body of precedent at the time of *Plessy* that had undercut the “separate but equal” idea. And the overwhelming majority of pre-*Plessy* court decisions had upheld school segregation and antimiscegenation laws.<sup>252</sup> The *Plessy* Court relied heavily on these pro-segregation precedents, and it distinguished *Strauder* and *Yick Wo v. Hopkins*<sup>253</sup> as cases involving racial exclusions rather than racial separation.<sup>254</sup> *Plessy* was very much a precedent-based decision that employed common law reasoning—and the precedent existing at the time seemed to support what the Court did.<sup>255</sup>

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248. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406, 412 (2011).

249. See *Plessy*, 163 U.S. at 551 (declaring that any “badge of inferiority” that arises from racial segregation is “solely because the colored race chooses to put that construction upon it”).

250. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

251. See STRAUSS, *supra* note 157, at 85-92.

252. See *Plessy*, 163 U.S. at 544-46 (collecting authorities); see also *Pace v. Alabama*, 106 U.S. 583, 584-85 (1883) (unanimously upholding a state law prohibition on interracial marriage). A few pre-*Plessy* cases had disapproved racial segregation, but only a few, and none of them relied exclusively on the Fourteenth Amendment. See *Coger v. N.W. Union Packet Co.*, 37 Iowa 145, 153-55 (1873) (disapproving racial segregation in common carriers by relying on a combination of the Fourteenth Amendment, the state constitution, and the “doctrines of natural law and of christianity”); *Clark v. Bd. of Dirs.*, 24 Iowa 266, 274, 276-77 (1868) (holding school segregation unconstitutional under the state constitution); *People ex rel. Workman v. Bd. of Educ.*, 18 Mich. 400, 408-09 (1869) (holding school segregation illegal under a state statute).

253. 118 U.S. 356, 374 (1886) (disapproving a permitting regime for laundry businesses that city officials had administered in a racially discriminatory manner).

254. See *Plessy*, 163 U.S. at 545-46, 550.

255. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 40 (1990) (noting that the outcome in *Plessy* “should have appeared pretty well predetermined by” *Pace*, which had unanimously upheld a state law prohibition on interracial marriage); Greene, *supra* note 248, at 415 (“[J]udicial precedent was firmly on the side of the [*Plessy*] majority.”).

Legalistic theories of constitutional interpretation also struggle to explain why *Plessy* was wrong. Originalists must confront a mountain of evidence that the Fourteenth Amendment was not originally understood to prohibit racial segregation.<sup>256</sup> And it is hard to get a self-executing prohibition on racial segregation out of the Amendment's text. One could plausibly argue that a state would violate the Equal Protection Clause if it allowed railroads to *exclude* blacks, because the common law requires common carriers to serve all comers on reasonable and nondiscriminatory terms,<sup>257</sup> and a state that withholds this common law protection from blacks while extending it to whites is failing to enforce this common law protection in an evenhanded fashion. But it is harder to make out an equal protection claim when a state requires its railroads to accept blacks and whites but seat them in separate coaches. One can grant that segregated coaches are stigmatizing and inherently unequal—but how does that deny the equal *protection* of the laws? The Louisiana Separate Car Act purported to protect blacks and whites equally, by protecting all passengers from having members of other races sit in their coach.<sup>258</sup> Absent evidence that Louisiana was selectively enforcing its segregation statute, it is hard to accuse the state of withholding legal “protections” in a discriminatory manner.<sup>259</sup>

The reason *Plessy* was *legally* wrong—rather than just a missed opportunity for the Supreme Court to impose its vision of a better society—is that the Civil

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256. See, e.g., Bickel, *supra* note 18, at 58 (concluding, based on an analysis of the legislative history, that the Fourteenth Amendment, “as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation”); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 75-76 (1990) (“The inescapable fact is that those who ratified the [Fourteenth Amendment] did not think it outlawed segregated education or segregation in any aspect of life.”). Michael McConnell has adduced impressive evidence showing that many in the Reconstruction Congress believed that Congress held the power to enact a national prohibition on racial segregation in public accommodations and in the public schools. See McConnell, *supra* note 133, at 984-1086. But that does not show that the Fourteenth Amendment was originally understood to outlaw racial segregation as a self-executing matter. As we have seen, the enforcement power and the Necessary and Proper Clause empower Congress to go well beyond the Fourteenth Amendment's self-executing commands. See *supra* notes 70-79 and accompanying text.

257. See H.W. Chaplin, *Limitations upon the Right of Withdrawal from Public Employment*, 16 HARV. L. REV. 555, 556-57 (1903) (explaining the common law duties of common carriers).

258. No. 111, § 1, 1890 La. Acts 152, 153 (“[A]ll railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations . . .”).

259. See Greene, *supra* note 248, at 417 (“*Plessy* was consistent . . . with the text of the Equal Protection Clause.”).

Rights Act of 1875 preempted the Louisiana Separate Car Act. The Civil Rights Act commanded that persons in the United States

shall be entitled to the *full and equal enjoyment* of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and *applicable alike to citizens of every race and color*, regardless of any previous condition of servitude.<sup>260</sup>

And the statute imposed civil and criminal liability on those who

deny[] to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial.<sup>261</sup>

The Louisiana statute required what this federal statute forbade. It compelled railway companies to “provide equal but separate accommodations for the white, and colored races.”<sup>262</sup> But telling black passengers that they cannot sit in coaches reserved for white passengers is not “*full and equal enjoyment*” of the railroad’s accommodations. And a law that instructs white passengers to sit in one coach and black passengers in another is not a condition or limitation “*applicable alike to citizens of every race and color*.”<sup>263</sup>

Of course, the *Civil Rights Cases* had declared these federal statutory provisions unconstitutional, holding that Congress cannot regulate private-sector discrimination under the Fourteenth Amendment unless the discrimination is “sanctioned in some way by the State” or “done under State

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260. Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336 (emphasis added).

261. *Id.* § 2.

262. *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (quoting Louisiana Separate Car Act § 1); *see also id.* (“No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to.” (quoting Louisiana Separate Car Act § 1)).

263. Some have suggested that the Civil Rights Act of 1875 might be interpreted to allow separate but equal accommodations. *See* CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 137 (1987); Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 641-48. That is not a plausible construction of the text. If the Civil Rights Act had required only “equal enjoyment,” rather than “full and equal enjoyment,” then perhaps separate but equal could pass muster under the terms of the statute. But the statute requires *both* “equal” enjoyment *and* “full” enjoyment. Civil Rights Act of 1875 § 1. Racially segregated coaches offer only *partial* enjoyment of a railroad’s accommodations; that is the antonym of “full” enjoyment. Indeed, it is hard to see how the word “full” does any work in the statute unless it forbids separate but equal accommodations: the accommodations that offer “equal”—but not “full”—enjoyment. It is equally untenable to shoehorn Louisiana’s separate-but-equal requirement into the caveat for “conditions and limitations established by law.” *Id.* Every “condition” or “limitation” imposed by law must be “applicable alike to citizens of every race and color.” A law that classifies or discriminates on account of race is, by definition, not “applicable *alike* to citizens of every race and color.”

authority.”<sup>264</sup> But that holding was inapplicable to the situation in *Plessy*, where the plaintiff had challenged a state law that *mandated* racial segregation on railway carriages. Louisiana’s Separate Car Act was undoubtedly state action, and it was governed by the Civil Rights Act of 1875—even after the *Civil Rights Cases* had immunized purely private discrimination from congressional enforcement legislation.

The *Plessy* Court acted as though the *Civil Rights Cases* had wiped these federal statutes off the books, as if the Supreme Court wields a writ of erasure that blots out unconstitutional legislation.<sup>265</sup> The Supreme Court has no such power. Judicial review means only that the Court may decline to enforce a federal statute in a particular case—if (and only if) the Court concludes that enforcing the statute would conflict with its paramount duty to obey the Constitution.<sup>266</sup> But federal statutes that the Supreme Court has declared “unconstitutional” remain laws until Congress repeals them,<sup>267</sup> and the Court must enforce those laws when it can do so consistent with the Constitution. The Civil Rights Act of 1875 remained valid and enforceable as applied to state action—and it preempted Louisiana’s segregation statute.

Finally, the Citizenship Clause is what authorized Congress to preempt the Louisiana Separate Car Act. Relying on the Equal Protection Clause to support the Civil Rights Act of 1875 is a tough sell for two reasons. First, Louisiana’s law purported to impose equal burdens on white and black passengers, and

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264. 109 U.S. 3, 17-19 (1883).

265. See *Plessy*, 163 U.S. at 546 (“In the *Civil Rights case* . . . it was held that [the public accommodations provision in the Civil Rights Act of 1875] was unconstitutional *and void*, upon the ground that the Fourteenth Amendment was prohibitory upon the States only . . . .” (emphasis added)).

266. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (“If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”); THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”).

267. See *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) (“Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear.” (quoting *Perez v. Ledesma*, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part))); *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) (McConnell, J.) (“There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts.”); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 171 (6th ed. 2009) (“[A] federal court has no authority to excise a law from a state’s statute book.”); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 767 (1979) (“No matter what language is used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority.”).

there is no evidence that Louisiana was enforcing its law in an inconsistent or selective manner. Second, the seating arrangements in railroad cars do not involve discriminatory *protection* of the state's laws. The problem with legally mandated racial segregation is not that it withholds legal "protections" from railroad passengers, but that it marks racial minorities as second-class citizens unworthy to sit or associate with whites.<sup>268</sup> The Citizenship Clause authorizes Congress to preempt caste legislation of that sort—and Congress did exactly that in the Civil Rights Act of 1875.<sup>269</sup>

### C. School Desegregation

Today, the status of *Brown v. Board of Education*<sup>270</sup> and its condemnation of school segregation are utterly secure. *Brown's* prohibition on state-imposed racial segregation has ascended into the canon that judicial appointees must endorse as a condition of nomination and confirmation.<sup>271</sup> Congress has also prohibited public school segregation in Title VI of the Civil Rights Act of 1964, which provides statutory authority for courts to root out any vestiges of de jure segregation that remain in the public schools.<sup>272</sup> Title VI relies on Congress's spending power rather than the Citizenship Clause,<sup>273</sup> but it reaches every entity that receives federal money—and nearly every public school in the

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268. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

269. It is not clear whether the protections in the Civil Rights Act of 1875 extend to aliens as well as citizens. Section 1 of the Act declares that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of [public] accommodations" without regard to race. See Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336. But section 2 imposes penalties only on those who deprive *citizens* of the full enjoyment of public accommodations. See *id.* § 2 ("That any person who shall violate the foregoing section by denying to *any citizen*, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall [be subject to civil and criminal liability].") (emphasis added). The discrepancy between these two sections is a puzzle, but it does not affect the proper outcome in *Plessy* because Homer Plessy was a citizen.

270. 347 U.S. 483.

271. See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 389-90 (2000) (citing evidence from Supreme Court confirmation hearings that "[c]onservative Supreme Court nominees beginning with Rehnquist realized that they had to embrace *Brown's* validity in order to be confirmed").

272. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2015)).

273. *Barnes v. Gorman*, 536 U.S. 181, 185-86 (2002) ("Title VI invokes Congress's power under the Spending Clause . . . to place conditions on the grant of federal funds.").

country accepts federal funds.<sup>274</sup> Title VI effectively codifies *Brown's* mandate to eliminate racial segregation in public education, and it supplies all the textual authority needed for modern-day courts to implement *Brown's* command.

But Congress enacted Title VI ten years *after* the Supreme Court's ruling in *Brown*. That raises the question whether text-centered interpretation could have supported the outcome in *Brown* on the day it was decided. Certainly *Brown* was correct to repudiate *Plessy*, which was wrongly decided from the outset.<sup>275</sup> But overruling *Plessy* was the easy part. The hard part was to explain how school segregation had become unlawful when Congress had not yet enacted a statute prohibiting the practice. Without any congressional enforcement legislation, the Court could rely only on the self-executing requirements of the Equal Protection Clause. But the Court struggled to provide a satisfactory textual explanation for its ruling. Chief Justice Warren made a convincing argument that segregated schools were inherently unequal,<sup>276</sup> but that gets him only part of the way there. He also needed to explain how the provision of unequal schools denies the equal *protection* of the laws, and on this point the Chief Justice offered nothing but an *ipse dixit*.<sup>277</sup>

The Court also failed to explain how the text of the Equal Protection Clause can support a distinction between racial segregation and other forms of discrimination in public education. State university systems, for example, segregate their students by academic ability, relegating less capable students to universities that are indisputably inferior and "inherently unequal." But no one thinks that denies the equal protection of the laws; it is simply a denial of equal treatment. If this type of segregation is constitutional (and it surely is), then how does the text of the Fourteenth Amendment establish a different rule for racial segregation? The word "race" cannot be found anywhere in the Fourteenth Amendment. And the text requires equal protection of the laws for every "person," regardless of whether an alleged denial of protection has anything to do with race.<sup>278</sup>

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274. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE VI ENFORCEMENT HIGHLIGHTS 1 (2012), <http://www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf> (noting that Title VI "applies to all elementary and secondary schools, colleges and universities—public or private—that receive federal financial assistance").

275. See *supra* Part IV.B.

276. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954).

277. See *id.* at 495 ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

278. U.S. CONST. amend. XIV, § 1.



These textual hurdles have convinced some commentators that *Brown* can be defended only by embracing a common law or living constitution whose meaning is determined primarily by judicial precedent rather than constitutional text.<sup>279</sup> And they may be right, given that Title VI lagged the Court's decision in *Brown* by ten years. But it is a mistake to assume that textualism would have prolonged the demise of racial segregation, even if it would have precluded the courts from abolishing school segregation before Congress had enacted legislation to do so. To begin, *Plessy* would have been decided the other way if the Supreme Court had enforced rather than ignored the Civil Rights Act of 1875—and that would have taken a significant step toward dismantling the racial caste system in the southern states. In addition, the segregationist regime in the South was made possible only by persistent and repeated violations of the text of the Fourteenth and Fifteenth Amendments that neither Congress nor the courts had shown any wherewithal to correct.<sup>280</sup> By the early twentieth century, the southern states had disenfranchised their black citizens,<sup>281</sup> and neither Congress nor the courts took effective action in response. Worse, the southern states tried to disguise their actions by establishing facially neutral voting qualifications—such as grandfather clauses, literacy tests, and poll taxes—while administering those rules in a racially discriminatory fashion.<sup>282</sup> Yet neither Congress nor the courts enforced Section 2 of the Fourteenth Amendment and reduced these states' membership in the House of Representatives<sup>283</sup>—a remedy that the Constitution commanded regardless of whether these “voting qualifications” violated the Fifteenth Amendment or discriminated on account of race.<sup>284</sup> This

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279. See, e.g., STRAUSS, *supra* note 157, at 79-80 (“*Brown* didn’t come out of the text and the original understandings, but it also didn’t come out of nowhere. . . . Once we understand that our Constitution is not just the text, and not just the original understandings—but is a living constitution that evolves as the common law does—*Brown* begins to look, if not routine, unquestionably lawful.”).

280. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 351-59 (describing the process by which southern states eliminated black voting).

281. See *id.* at 356 (“Black voter registration and turnout fell dramatically in the 1890s and was substantially eliminated by the beginning of the twentieth century, except in the largest southern cities where a few hundred blacks continued to vote.”).

282. *Id.* at 352-53.

283. See George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 94 (1961) (“[T]he nine decades that have passed since [Section 2’s] adoption have failed to produce a successful attempt to enforce its provisions.”).

284. See U.S. CONST. amend. XIV, § 2, cl. 2 (“[W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of  
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allowed the southern states not only to disenfranchise their black citizens but also to retain full population-based representation in the House, which improperly gave southern legislators added heft in their efforts to block federal civil rights and voting rights legislation.<sup>285</sup>

Had the text of the Constitution's voting rules been enforced from the get-go, and had the *Plessy* Court enforced the text of the 1875 Civil Rights Act, it is possible that school segregation would have ended before 1954—either because the southern states would have eliminated this practice in response to their black constituents, or because Congress would have enacted federal civil rights legislation to secure racial equality in education. Of course, there is no way to know what actually would have happened in this parallel universe, but there is also no basis for assuming that school segregation would have lasted beyond 1954 if *Plessy* had enforced the Civil Rights Act of 1875 and if Congress and the courts had enforced the Constitution's voting rules.

Yet the *Brown* Court had to decide the legality of school segregation against the backdrop of these persistent and repeated violations of the Constitution's voting rules. And these past violations of constitutional text may provide the seeds for a textualist defense of the Court's actions in *Brown*. The regime of racial oppression in the South had been perpetuated by a decades-long refusal by Congress or the states to enforce the Fifteenth Amendment or Section 2 of the Fourteenth Amendment.<sup>286</sup> This not only deprived blacks of political power in violation of the Constitution, it also led to an unconstitutionally composed Congress. The southern states were overrepresented in the House on account of the failure to enforce Section 2, and the southern representatives in both the House and Senate were not politically accountable to their black constituents.<sup>287</sup> Rather than wait for this unconstitutionally composed Congress to act against this regime of racial apartheid, the Court effectively put the southern states into receivership and imposed racial equality by judicial decree. In light of these repeated and flagrant constitutional violations, and Congress's inability or unwillingness to enforce the voting rules that the

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male citizens twenty-one years of age in such State." (emphasis added)); Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 109 (1960) ("[Section 2] is not directed solely at the Negro or the South, for a certain amount of disfranchisement occurs in almost all areas of the union. It is aimed at inducing the enfranchisement of *all* citizens over twenty-one, regardless of their race, literacy or economic status." (emphasis added)).

285. See Jennifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 GONZ. L. REV. 365, 377 (2011-2012) ("Because Southern districts included their sizeable black communities, the disenfranchisement of Southern blacks translated into the super-enfranchisement of Southern whites.").

286. See *supra* notes 280-82 and accompanying text.

287. See *supra* note 285 and accompanying text.

Constitution had provided to protect blacks from racial oppression, the Court's response was aggressive but not indefensible. It would be analogous to the structural injunctions that courts sometimes issue in institutional-reform litigation, in response to repeated patterns of intransigent lawbreaking.<sup>288</sup>

Thankfully, any lingering discomfort that one might have with the textual foundations of *Brown* is put to rest by Congress's decision to outlaw racial segregation and discrimination in the Civil Rights Act of 1964.<sup>289</sup> Modern civil rights legislation gives textualist jurists all the authority they need to counter racial discrimination not only in public education but in any other area of public life. So even if one harbors doubts about whether *Brown* was textually sound on the day it was decided, Congress has fully ratified the Court's decision and secured the principle of race-neutral government, and present-day textualist jurists can and should enforce that regime with a clear constitutional conscience.

D. *Loving v. Virginia*

*Loving v. Virginia*<sup>290</sup> is another canonical ruling that is hard to derive from constitutional text. The Court's opinion made a powerful case against the injustice of antimiscegenation laws.<sup>291</sup> But its legal rationale rested almost entirely on judicial precedent and barely mentioned the text of the Fourteenth Amendment.<sup>292</sup> The Court also invoked the controversial doctrine of "substantive due process"<sup>293</sup>—a doctrine that has long been criticized as lacking foundation in constitutional language.<sup>294</sup>

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288. See, e.g., *Brown v. Plata*, 563 U.S. 493, 499-500, 502 (2011) (affirming an injunction requiring California to reduce its prison population to a particular threshold, because after violations of prisoners' constitutional rights "persisted for years," it "became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population"); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 29-30, 32 (1971) (affirming an injunction requiring busing to integrate schools and holding that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad").

289. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h (2015)).

290. 388 U.S. 1 (1967).

291. *Id.* at 11 ("[T]hat Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications . . . [are] measures designed to maintain White Supremacy."); *id.* at 12 (noting that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" and rejecting the idea that a state could "deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes" (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942))).

292. *Id.* at 7-12.

293. See *id.* at 12.

294. See, e.g., Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125 ("[T]he Court makes no pretense that its judgments have any basis other than the  
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The *Loving* Court would have found a more convincing textual grounding for its ruling in the Civil Rights Act of 1866, which provides:

[C]itizens, of every race and color, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . as is enjoyed by white citizens, . . . any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.<sup>295</sup>

There is abundant authority establishing that marriage is a species of contract.<sup>296</sup> Indeed, during the debates over the Civil Rights Act of 1866, Senator Reverdy Johnson asserted that the Act would preempt antimiscegenation laws “because marriage is a contract.”<sup>297</sup> Senators Lyman Trumbull and William Fessenden immediately denied that the Act would preempt antimiscegenation laws, but they did not deny that marriage was a contract; they argued only that the antimiscegenation laws imposed the “same” limits on blacks and whites by prohibiting each group from marrying outside its race.<sup>298</sup> Of course, what these Senators said or thought about marriage as a contract is not controlling; the point is that the word “contract” comprises the institution of marriage, and this was recognized as a proper construction even in 1866.<sup>299</sup> Indeed, if marriage were not a “contract” under the Civil Rights Act of 1866, then the states could have prohibited blacks from marrying *anybody*, because the Supreme Court had not yet recognized the idea of a substantive-due-process right to marry.<sup>300</sup>

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Justices’ view of desirable policy. This is fundamentally the method of substantive due process.”); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 500-01 (1997).

295. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a) (2015)).

296. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES \*421 (“Our law considers marriage in no other light than as a civil contract . . . . [T]he law treats it as it does all other contracts . . . .”); see also *Meister v. Moore*, 96 U.S. 76, 78 (1878) (“Marriage is everywhere regarded as a civil contract.”); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1230 (1998) (analyzing contemporary marriage as a “long-term relational contract”).

297. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Johnson).

298. *Id.* (statement of Sen. Trumbull); *id.* (statement of Sen. Fessenden) (“[A black man] has the same right to make a *contract of marriage* with a white woman that a white man has with a black woman.” (emphasis added)).

299. The Alabama Supreme Court also held that marriage is a “contract” and declared that the Civil Rights Act of 1866 preempted the state’s antimiscegenation law. See *Burns v. State*, 48 Ala. 195, 198 (1872) (“The civil rights bill now confers this right upon the negro in express terms, as also the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation.”). The court went on to hold that the state’s antimiscegenation law also violated the state and federal constitutions. *Id.* at 198-99.

300. See *Pace v. Alabama*, 106 U.S. 583, 584-85 (1883).

The only remaining question is whether a law that prohibits *both* blacks and whites from marrying outside their race gives black citizens the “same right” to make and enforce marriage contracts “as is enjoyed by white citizens.” Senators Trumbull and Fessenden thought so,<sup>301</sup> but that is a strained and unnatural construction of the statutory language. The Civil Rights Act of 1866 gives every citizen the “*same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.*”<sup>302</sup> That language indicates that minority citizens must be treated *as if they were white citizens* for each of the rights listed in the statute—and that the precise scope and content of the rights held by white citizens must be extended to minority citizens on equal terms. If a white citizen has the right to marry a white spouse, then one cannot escape the conclusion that an antimiscegenation law withholds that “same right” from a minority citizen. Perhaps one could say that an antimiscegenation regime offers a *similar* right to minorities by allowing them to marry within their race—but that is surely not the “*same right*” to marry that is “enjoyed by white citizens,” especially when antimiscegenation laws leave minorities with a smaller pool of permissible spouses. Finally, if the Trumbull-Fessenden interpretation of the statute were correct, then the states could have prohibited blacks and whites from entering into *any* type of interracial contract, including labor contracts, and that is an untenable construction that would have endangered the livelihoods of newly freed slaves.

Of course, it is unlikely that members of the Reconstruction Congress intended to preempt antimiscegenation laws when they enacted the Civil Rights Act of 1866.<sup>303</sup> Senators Trumbull and Fessenden specifically denied that the Act would have this effect.<sup>304</sup> And although Senator Johnson and Representative Andrew Rogers insisted that the Act *would* preempt antimiscegenation laws,<sup>305</sup> each of those legislators opposed the Civil Rights

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301. See *supra* note 298.

302. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a) (2015)) (emphasis added).

303. See Brief & Appendix on Behalf of Appellee at 6, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) (“A review of the debates on the bill which ultimately became the Civil Rights Act of 1866, discloses beyond cavil the intention of the Framers to exclude State antimiscegenation laws from the terms of that enactment.”); RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 251 (2003) (“Most [congressmen] subscribed to Lyman Trumbull’s interpretation, believing that the Civil Rights Act of 1866 would *not* grant colored people a federal right to marry across racial lines.”); Bickel, *supra* note 18, at 58 (“[T]he Civil Rights Act of 1866 . . . as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation.”).

304. See CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Trumbull); *id.* (statement of Sen. Fessenden).

305. See *id.* at 505–06 (statement of Sen. Johnson); *id.* at 1121 (statement of Rep. Rogers) (“As a white man is by law authorized to marry a white woman, so does this bill compel the  
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Act and had every incentive to exaggerate its effects.<sup>306</sup> But textual interpretation is unconcerned with floor statements, and it gives no weight to unenacted legislative wishes. What matters is the text that received the formal approval that the Constitution requires—and the text of the Civil Rights Act of 1866 is most plausibly and sensibly construed to preempt antimiscegenation laws.

It is also hard to have much sympathy for the congressional opponents of interracial marriage. The members of the Reconstruction Congress were acutely aware that the text they enacted could be interpreted to preempt state antimiscegenation laws; Senator Johnson and Representative Rogers had put each house on notice that the Act could easily be construed that way. Yet the opponents of interracial marriage never bothered to amend the statute to clarify this point. One must wonder why not. Perhaps the legislators were privately hoping that courts would someday construe the Civil Rights Act to preempt antimiscegenation laws, while cynically maintaining a public posture against interracial marriage. Perhaps an amendment that explicitly preserved the states' antimiscegenation laws would have unraveled the legislative coalition needed to pass the Civil Rights Act over President Johnson's veto. Or perhaps the opponents of interracial marriage didn't care enough about the issue to make the change. There is no way to know, which is one of the reasons why arguments based on congressional intent get so little traction these days.<sup>307</sup> All we know is that Congress enacted a statute that gives minority

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State to grant to the negro the same right of marrying a white woman; and the judge who should declare the marriage void, in pursuance of the law of his State, is liable to be indicted, imprisoned, and fined.”).

306. Cf. Brief & Appendix on Behalf of Appellee, *supra* note 303, at 23 (“[A]ll of the proponents of . . . the Civil Rights Act of 1866 were of one accord in insisting that there was nothing in those acts that could possibly be construed as nullifying the antimiscegenation laws of the various states.”).
307. See John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 9 (2014) (“Today, however, almost no one really believes that Congress—as a collective body—forms an *actual* intent about the hard questions that preoccupy the law of statutory interpretation.”); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 239 (1992) (“Legislative intent is an internally inconsistent, self-contradictory expression. Therefore, it has no meaning.”); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) (“[I]t is virtually impossible to determine the singular ‘motive’ of a collective legislative body . . . .”); *Rust v. Sullivan*, 500 U.S. 173, 185 (1991) (rejecting the litigants’ “attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent”); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 791 (7th Cir. 2013) (Posner, J.) (“Discovering the intent behind a statute is difficult at best because of the collective character of a legislature . . . .”); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005) (Easterbrook, J.) (“[R]eferences to the subjective knowledge of a body with two chambers and 535 members, and thus without a mind, rarely facilitate interpretation . . . .”).

citizens the “same right” to make and enforce contracts that white citizens enjoy, and the congressional opponents of interracial marriage assumed the risk that courts might someday issue a decision like *Loving* when they voted to enact this text.

#### E. Affirmative Action

The constitutional attacks on affirmative action encounter the same textual problems that confront the rest of the Court’s equal protection doctrine: the text requires equal *protection of the laws*, not equal treatment, and it does not create special rules for racially discriminatory treatment or protection. None of this seems to trouble the Court’s textualists, who consistently vote to limit affirmative action programs under the Equal Protection Clause.<sup>308</sup> But there is an unassailable textual argument available to those who oppose race-based affirmative action in higher education, and it is found in Title VI of the Civil Rights Act of 1964:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>309</sup>

This statute reaches almost every public and private university in the country, along with public elementary and secondary schools.<sup>310</sup> And Title VI’s prohibition on racial discrimination is absolute. There are no exceptions for “compelling interests” or “student body diversity,” or any of the other jargon that appears in the Court’s equal protection cases.

But in *Regents of the University of California v. Bakke*, the Supreme Court held that Title VI prohibits only the *subset* of racial discrimination that would

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308. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring in the judgment); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring) (“[A] State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”); *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part) (“The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”); *id.* at 353 (Thomas, J., concurring in part and dissenting in part) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”). The Court’s textualists appear equally untroubled by the fact that the text of the Equal Protection Clause has no application to *federal* affirmative action programs. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240-41 (Thomas, J., concurring in part and concurring in the judgment).

309. 42 U.S.C. § 2000d (2015).

310. See OFFICE FOR CIVIL RIGHTS, *supra* note 274, at 1.

violate the Equal Protection Clause if committed by a state actor—and it held that Title VI therefore permits at least some forms of race-based affirmative action.<sup>311</sup> The Court made no attempt to explain how the language of Title VI could bear that construction. Instead, Justice Powell and Justice Brennan plodded through the legislative history and announced that Congress had “intended” to equate Title VI with the Equal Protection Clause—and that Congress therefore had no “intention” of enacting what the statute actually says.<sup>312</sup>

The Court’s conclusion was unconvincing for many reasons. First, the floor statements quoted by Justice Powell and Justice Brennan do not come anywhere close to saying that Title VI would prohibit *only* the discrimination outlawed by the Equal Protection Clause.<sup>313</sup> Second, there were plenty of floor statements from legislators who claimed that Title VI *would* indeed require colorblindness.<sup>314</sup> Finally, the *Bakke* Court treated statutory language not as

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311. 438 U.S. 265, 284-87 (1978) (opinion of Powell, J.); *id.* at 328 (Brennan, J., concurring in the judgment in part and dissenting in part).

312. *See id.* at 284 (opinion of Powell, J.) (“Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution.”); *id.* at 285 (“[S]upporters of Title VI repeatedly declared that the bill enacted constitutional principles.”); *id.* at 328-35 (Brennan, J., concurring in the judgment in part and dissenting in part) (“The history of Title VI—from President Kennedy’s request that Congress grant executive departments and agencies authority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch . . . authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.”); *id.* at 340 (“[A]ny claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history.”).

313. *See id.* at 284-87 (opinion of Powell, J.) (citing 110 CONG. REC. 6543-44 (1964) (statement of Sen. Humphrey); *id.* at 2467-68 (statement of Rep. Celler); *id.* at 1519; *id.* at 2467 (statement of Rep. Lindsay); *id.* at 1527-28 (statement of Rep. Celler); *id.* at 13,333 (statement of Sen. Ribicoff); and *id.* at 6553 (statement of Sen. Humphrey)); *see also id.* at 328-38 (Brennan, J., concurring in the judgment in part and dissenting in part) (citing 110 CONG. REC. 1519 (1964) (statement of Rep. Celler); *id.* at 2467; *id.* at 1528; *id.* at 2467 (statement of Rep. Lindsay); *id.* at 6544 (statement of Sen. Humphrey); *id.* at 13,333 (statement of Sen. Ribicoff); and *id.* at 6543-44 (statement of Sen. Humphrey)). These floor statements merely observe that Title VI prohibits racial discrimination that violates the Constitution; that is a far cry from declaring that Title VI prohibits *only* the discriminatory practices that violate the Constitution. *See, e.g.*, 110 CONG. REC. 6544 (1964) (statement of Sen. Humphrey) (declaring that the purpose of Title VI was “to insure that Federal funds are spent in accordance with the Constitution *and the moral sense of the Nation*” (emphasis added)).

314. *See, e.g.*, 110 CONG. REC. 5864 (1964) (statement of Sen. Humphrey) (“What [discrimination] really means in the bill is . . . a distinction in treatment given to different individuals because of their different race, religion, or national origin.”); *id.* at 6047 (statement of Sen. Pastore) (“[I]t will not be permissible to say ‘yes’ to one person;”  
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law but as mere evidence of what the law might be. The real law, according to the *Bakke* Court, was “congressional intent,” with statutory text nothing more than a clue for deciphering what that “congressional intent” might have been.<sup>315</sup> The Supreme Court’s recent statutory-construction cases have abandoned this type of intentionalist reasoning in favor of a more textualist approach.<sup>316</sup> Yet the Court continues to retain this atextual yoke that *Bakke* created for Title VI and the Equal Protection Clause.<sup>317</sup>

A text-centered resolution to the affirmative action controversy would be simple: allow the practice under the Equal Protection Clause, while forbidding it under Title VI. That would permit Congress to decide whether to amend Title VI to permit race-conscious admissions policies or other types of preferences for underrepresented minorities. And it would have the added benefit of giving the final word to the national political branches—which are better suited than the judiciary to resolve the disputed empirical questions and value judgments that go into deciding whether a controversial practice such as affirmative action should continue.<sup>318</sup> Whether affirmative action benefits or hurts minorities—and the extent to which it benefits or hurts others—are empirical questions, and new studies and new evidence will continue to emerge that strengthen or weaken the case for this practice.<sup>319</sup> Congress (and state

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but to say ‘no’ to another person, only because of the color of his skin.”); *id.* at 6547 (statement of Sen. Humphrey) (“Human suffering draws no color lines, and the administration of help to the sufferers should not.”); *id.* at 6561 (statement of Sen. Kuchel) (“[A]ll citizens should derive equal benefits from [federally funded] programs without regard to the color of their skin.”); *id.* at 7055 (statement of Sen. Pastore) (“[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind.”); *id.* at 12,675 (statement of Sen. Allott) (describing Title VI as mandating that federally funded benefits be distributed “regardless of color”).

315. *See* 438 U.S. at 284 (opinion of Powell, J.).

316. *See, e.g.,* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) (rejecting an argument based on legislative history “at the very outset simply because [the statute] is not ambiguous”).

317. *See* *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

318. *See, e.g.,* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997) (recognizing that legislative institutions are “far better equipped than the judiciary” to resolve complex empirical questions (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (plurality opinion))).

319. *Compare* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 474 (2004) (arguing that affirmative action in law school admissions reduces black students’ bar-passage rates by inducing them to attend higher-ranked schools where they are ill equipped to succeed), *with* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1809 (2005) (“We find no persuasive evidence that current levels of affirmative action have reduced the probability that black law students will become lawyers.”), *and* Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do*  
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legislatures) should consider all of this when deciding whether their antidiscrimination statutes should make allowances for remedial or diversity-based racial preferences.<sup>320</sup>

#### F. Sex Discrimination

Congress began acting against sex discrimination well before the Supreme Court decided that sex equality was a constitutional right. The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 protected women from wage and job discrimination.<sup>321</sup> Initially these statutes did not apply to state employers, but Congress extended them to the states in 1972 (Title VII)<sup>322</sup> and 1974 (Equal Pay Act).<sup>323</sup> In 1972, Congress also prohibited sex discrimination in every education program that receives federal funds.<sup>324</sup> And in 1978, Congress amended Title VII to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions.<sup>325</sup>

The Supreme Court, by contrast, did nothing to counter sex discrimination until it decided *Reed v. Reed*<sup>326</sup> in 1971. And it did not apply heightened scrutiny to sex classifications until *Frontiero v. Richardson*,<sup>327</sup> decided in 1973. The Supreme Court refused to interpret the Equal Protection Clause to protect women from pregnancy discrimination;<sup>328</sup> Congress responded by supplying that protection in the Pregnancy Discrimination Act of 1978.<sup>329</sup> The Court has been very much a laggard compared to Congress when it comes to protecting

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*Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 652 (2008) (“[T]he available evidence offers only weak support for the mismatch hypothesis.”).

320. See CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 149 (2005) (“Affirmative action programs must be evaluated on the basis of their content and their consequences. Above all, we need to know how they are operating in the real world.”).

321. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended in scattered sections of 42 U.S.C.); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended in scattered sections of the U.S. Code).

322. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e (2015)).

323. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended in scattered sections of 29 U.S.C.).

324. See Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373-74 (codified as amended at 20 U.S.C. §§ 1681-1688 (2015)).

325. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified as amended at 42 U.S.C. § 2000e(k)).

326. 404 U.S. 71, 74 (1971).

327. 411 U.S. 677, 682 (1973) (plurality opinion).

328. *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

329. See Pregnancy Discrimination Act of 1978 § 1.

women from invidious discrimination, and in many respects Congress's statutes go well beyond what the Supreme Court has been willing to do.

It is true that Congress's statutes do not reach *all* forms of state-sponsored sex discrimination. There is no federal statute, for example, that would have preempted Oklahoma's law allowing eighteen-year-old women but not eighteen-year-old men to purchase 3.2% beer.<sup>330</sup> And Title IX exempts public undergraduate institutions that have "traditionally and continually" operated as single-sex schools.<sup>331</sup> But the Supreme Court's decisions also stop short of eliminating all sex classifications in government. The Court upheld a federal statute exempting women from military conscription<sup>332</sup>—even though this statute violates the touchstone of the Court's sex-equality jurisprudence by "reinforcing stereotypes about the 'proper place' of women."<sup>333</sup> And the Court upholds other sex classifications that it thinks are sufficiently justified.<sup>334</sup> The Court makes exceptions to its rules against sex discrimination just as Congress does; neither regime is absolute. But Congress's sex-equality regime is rooted in the unambiguous language of formally approved statutes, which provides an unassailable textual basis for countering sex discrimination by state and local governments.

The constitutional law of sex equality, by contrast, rests on a textually dubious construction of the Equal Protection Clause. The Equal Protection Clause requires that each "person" within a state's jurisdiction receive the "equal *protection of the laws*." It does not require equal rights or treatment, as shown by the fact that it did not give women the right to vote, and nothing in the text treats sex classifications differently from laws that discriminate against "persons" such as children or aliens. Many of the Court's sex-equality cases involve challenges to federal policies—policies to which the Equal Protection Clause is textually inapplicable.<sup>335</sup> Then there is Section 2 of the

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330. See *Craig v. Boren*, 429 U.S. 190, 191-92 (1976). Title II of the Civil Rights Act of 1964, which forbids discrimination in places of public accommodation, applies only to discrimination or segregation on the ground of race, color, religion, or national origin. See 42 U.S.C. § 2000a(a).

331. See 20 U.S.C. § 1681(a)(5) (2015).

332. See *Rostker v. Goldberg*, 453 U.S. 57, 78-79 (1981).

333. *Orr v. Orr*, 440 U.S. 268, 283 (1979).

334. See, e.g., *Califano v. Webster*, 430 U.S. 313, 318 (1977) (per curiam) (upholding a Social Security Act provision permitting women to omit additional earnings from calculation of their retirement benefits); *Schlesinger v. Ballard*, 419 U.S. 498, 508-10 (1975) (upholding divergent mandatory retirement provisions for male and female naval officers); *Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974) (upholding a Florida statute permitting an annual property-tax exemption for widows).

335. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199, 201-02 (1977) (plurality opinion) (invalidating Social Security Act provisions for calculating retirement benefits); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-38 (1975) (invalidating a Social Security Act provision granting survivor benefits); *Schlesinger*, 419 U.S. at 499-500 (upholding

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Fourteenth Amendment, which specifically allowed the states to disenfranchise women without facing *any* representation penalty in Congress.<sup>336</sup> How can the Fourteenth Amendment—which explicitly acknowledges the propriety of disenfranchising women—simultaneously require an “exceedingly persuasive justification” for every government action that classifies or discriminates on account of sex?<sup>337</sup> The Supreme Court has not attempted to answer this question; indeed, it has not even mentioned Section 2 in any of its sex-equality cases.

A textual jurisprudence of sex equality would shun the Equal Protection Clause and rely on the statutes that Congress has enacted to secure equal status for men and women. The problem with laws that discriminate against women—or that rely on archaic stereotypes of a woman’s “proper place” in society—is that they treat women as less than full and equal citizens by excluding them from privileges or responsibilities held by men. This is not something that implicates the “equal protection of the laws,” any more than a law that excludes aliens or children from the rights held by citizens or adults. Women, children, and aliens are still protected according to the terms of the laws, even as they are treated differently by regimes that classify on the basis of sex, age, or alienage. But it does implicate women’s status as citizens of the United States and as citizens of their states of residence. Even the Supreme Court has recognized that its malapropistic “equal protection” doctrine is designed to ferret out any “law or official policy [that] denies to women, simply because they are women, *full citizenship stature*.”<sup>338</sup> A jurisprudence that seeks to ensure “full citizenship stature” for women should proceed from the Citizenship Clause, not the Equal Protection Clause.

Of course, the Citizenship Clause does not secure equal rights for women (or minorities) as a self-executing matter—Section 2 and the Nineteenth Amendment show that the Citizenship Clause did not give women the right to vote, and other provisions in the Constitution show that the status of citizenship does not by itself entail equal rights.<sup>339</sup> But Section 5 and the Necessary and Proper Clause empower Congress to enact laws that secure women’s status as full and equal citizens, just as they allow Congress to secure

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statutes prescribing mandatory retirement rules for naval officers); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (plurality opinion) (invalidating statutes establishing dependency status rules for purposes of servicemember fringe benefits).

336. U.S. CONST. amend. XIV, § 2.

337. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”).

338. *Id.* at 532 (emphasis added).

339. *See supra* notes 154-56 and accompanying text.

this status for racial minorities.<sup>340</sup> The text makes no distinction between race and sex, and any equality norms that Congress may enact for racial minorities are equally permissible with respect to women.

Finally, the task of determining whether a sex-based classification should be invalidated for establishing “second-class citizenship”—or should be upheld as a sensible and legitimate recognition of the differences between men and women—depends on social and cultural factors that change over time. Consider jury-service laws. In 1961, the Supreme Court unanimously upheld a law that required women to opt in for jury service by registering with the clerk of the court, while automatically enrolling men for jury service when they registered to vote.<sup>341</sup> But in 1975, the Supreme Court changed its tune, nullifying a Louisiana statute identical to the Florida law that it had previously upheld.<sup>342</sup> The stock justification for these juror opt-in laws was that compulsory jury service interferes with women’s responsibilities in the home; hence, women should be called for jury duty only on a volunteer basis to avoid undue hardship to their families.<sup>343</sup> The Supreme Court in 1961 viewed this rationale as one that exalted the role of women in society, by establishing a woman’s family responsibilities as important enough to trump jury duty, and that empowered women by giving them a freedom to opt out from jury service that was denied to men.<sup>344</sup> But by the 1970s, many had come to view these jury exemptions as diminishing women’s status as citizens, by suggesting that women *should* prioritize family responsibilities over civic responsibilities—even though men, who also have responsibilities to support their families, are expected to subordinate those duties to a jury summons. Indeed, the vast majority of states made no distinction between men and women for purposes of jury duty at the time of the Supreme Court’s ruling in *Taylor v. Louisiana*,<sup>345</sup> even Louisiana had repealed its juror opt-in law before the Supreme Court declared it unconstitutional.<sup>346</sup>

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340. See *supra* Part II.A.

341. See *Hoyt v. Florida*, 368 U.S. 57, 60-61 (1961).

342. See *Taylor v. Louisiana*, 419 U.S. 522, 533-35 (1975).

343. See *Hoyt*, 368 U.S. at 61-63.

344. See *id.* at 62 (“[W]oman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.”).

345. At the time of *Taylor*, thirty-six states had “no statutory distinction between men and women for purposes of juror qualification and selection.” Martha Craig Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1, 5 n.19 (1975).

346. See *Taylor*, 419 U.S. at 523 & nn.1-2.

The point is not to take sides on whether juror opt-in statutes relegate women to second-class citizenship. By contemporary standards, almost everyone would regard these laws as patronizing and inconsistent with the status that women should enjoy as equal citizens of their state. The point is that the judgments that go into determining *which* legal classifications or discriminatory practices should be preserved—and which should be discarded as impermissible regimes of “second-class citizenship”—depend on social, cultural, economic, and political factors rather than the meaning of legal texts, and that Congress and the states, as representative and politically accountable institutions, are better suited than the judiciary to channel these influences. The language of the Fourteenth Amendment does not secure equal status for women as a self-executing matter, but it empowers Congress to secure that status—and Congress may similarly act to secure equal status for racial minorities, religious minorities, people with disabilities, and other marginalized components of the citizenry.

## V. Advantages of a Text-Centered Equality Jurisprudence

This text-centered equality doctrine—rooted in the text of congressional statutes rather than the Equal Protection Clause—offers several advantages over the status quo regime.

First, a regime that grounds the Court’s equality pronouncements in the text of congressional legislation will enable the Supreme Court to refute accusations that it is simply making things up or imposing its normative beliefs on the rest of us.<sup>347</sup> If a court fails to persuasively demonstrate that its rulings are based on laws rather than a judge’s personal beliefs of righteousness and justice, then judging becomes no different from politics, and there is no reason to defer to the judiciary’s vision of the good when it conflicts with decisions made by society’s elected representatives. For this reason, judicial opinions go to great lengths to show that their rulings are grounded in legal authorities—such as statutory text and judicial precedent—and avoid making naked appeals to policy or morality.

The problem with the Supreme Court’s current equal protection jurisprudence is that it relies almost *entirely* on judicial precedent rather than the language of formally approved texts.<sup>348</sup> And precedent-based argument does little to dispel the appearance of judicial willfulness because precedent is itself a judicial creation, and it is often intentionally crafted to lay the groundwork for

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347. See, e.g., Robert H. Bork, *Original Intent and the Constitution*, HUMANITIES, Feb. 1986, at 22, 26 (claiming that judges who depart from original intent are simply “enforcing their own morality upon the rest of us and calling it the Constitution”).

348. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 323-27 (2003); *United States v. Virginia*, 518 U.S. 515, 531-34 (1996); Strauss, *supra* note 11, at 883.

more ambitious future decisions.<sup>349</sup> Precedent can also be distinguished, ignored, or overruled—or it can be reaffirmed and expanded—and there is no meta-rule for determining when a constitutional precedent should be buttressed and when it should be disparaged. The language in Congress’s civil rights statutes, by contrast, is entirely exogenous to the judiciary and cannot be altered or overruled by a judicial vote.

Second, the antidiscrimination rules in Congress’s civil rights legislation are clearer and more precise than the equal protection doctrine that the Supreme Court has produced. The command of Title VI is simple and straightforward: no program or activity receiving federal funds may discriminate on the ground of race. The equal protection doctrine that the Court has produced on the affirmative action question, by contrast, is almost indeterminate.<sup>350</sup> On sex equality, Congress’s statutes provide clear and

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349. Examples of this are legion. The opinion in *Eisenstadt v. Baird* was written with an eye toward *Roe v. Wade*, which had already been argued before the Court issued its ruling in *Eisenstadt*. Compare *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” (emphasis omitted)), with *Roe v. Wade*, 410 U.S. 113, 129, 152 (1973). See also *Roe*, 410 U.S. at 169-70 (Stewart, J., concurring) (“As recently as last Term, in [*Eisenstadt*], we recognized ‘the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’ That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.” (emphasis omitted) (quoting *Eisenstadt*, 405 U.S. at 453)); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 175, 234 (1979) (describing how Justice Brennan wrote the *Eisenstadt* opinion to “help [Justice] Blackmun develop a constitutional grounding for a right to abortion” in *Roe*). The opinion in *Northwest Austin v. Holder* was likewise written to buttress the future ruling that nixed the Voting Rights Act’s preclearance regime. Compare *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201-05 (2009) (insisting upon the need for current conditions to justify the preclearance regime), with *Shelby County v. Holder*, 133 S. Ct. 2612, 2622-31 (2013) (referring to *Northwest Austin* more than twenty times). Compare also *United States v. Windsor*, 133 S. Ct. 2675, 2689-96 (2013) (disapproving the federal Defense of Marriage Act), with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-2608 (2015) (citing *Windsor* seven times).

350. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2207-08 (2016); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419-20 (2013); *Grutter*, 539 U.S. at 326-27; *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003). The current law of affirmative action goes something like this: (1) racial classifications must be “narrowly tailored to further compelling governmental interests,” *Grutter*, 539 U.S. at 326, but (2) “[c]ontext matters” and “[n]ot every decision influenced by race is equally objectionable,” *id.* at 327, and (3) courts should “defer” to a law school’s claim that race-conscious admissions policies will yield educational benefits, *id.* at 328, even though (4) racial classifications are supposed to require a “searching judicial inquiry into the justification for such race-based measures,” *id.* at 326 (emphasis added) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)), because (5) “universities occupy a special niche in our constitutional tradition,” *id.* at 329, but (6) “outright racial balancing . . . is patently unconstitutional,” even at a university, *id.* at 330, so (7) “a race-

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unequivocal direction to the states: no wage discrimination,<sup>351</sup> no employment discrimination,<sup>352</sup> no pregnancy discrimination,<sup>353</sup> and no discrimination in educational programs that receive federal funds.<sup>354</sup> Exceptions to these rules are spelled out clearly in the statutes.<sup>355</sup> Compare that to the amorphous jargon in the Court's "intermediate scrutiny" test, which requires a state to show that a

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conscious admission program cannot use a quota system"; a university may "consider race or ethnicity only as a 'plus' in a particular applicant's file," *id.* at 334 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)), but (8) the "goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota," *id.* at 335-36, so long as (9) the university "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment," *id.* at 337, and therefore (10) a university may not award "mechanical, predetermined diversity 'bonuses' based on race or ethnicity," *id.* at 337; see also *Gratz*, 539 U.S. at 270, and finally (11) "race-conscious admissions policies must be limited in time," *Grutter*, 539 U.S. at 342; *id.* at 351 (Thomas, J., concurring in part and dissenting in part) ("I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years.").

351. See 29 U.S.C. § 206(d)(1) (2015) (providing that a state employer, subject to exceptions, may not "discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions").
352. See 42 U.S.C. § 2000e-2(a)(1) (2015) (forbidding state employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex").
353. See 42 U.S.C. § 2000e(k) (clarifying that the "terms 'because of sex' or 'on the basis of sex'" in federal antidiscrimination law "include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and [that] women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work").
354. 20 U.S.C. § 1681(a) (2015) (providing, subject to exceptions, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance").
355. See, e.g., 29 U.S.C. § 206(d)(1) (providing exceptions in the Equal Pay Act for "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex"); 42 U.S.C. §§ 2000e-1, 2000e-2(e) to -2(j), 2000e-3(b) (providing numerous exceptions to Title VII's prohibitions on sex and pregnancy discrimination, including exceptions for employees of religious entities as well as bona fide seniority or merit systems); 20 U.S.C. § 1681(a)(1)-(9), (b) (providing numerous exceptions to Title IX's prohibition on sex discrimination in educational programs that receive federal funds, including exceptions for religious schools, military schools, and public undergraduate institutions that have traditionally and continually operated as single-sex schools).



sex classification is “*substantially* related” (how substantial?) to achieving “*important* governmental objectives” (how important?) and to offer an “*exceedingly* persuasive justification” for that classification.<sup>356</sup> And the Court applies its “rational basis” test in an inconsistent manner, offering multiple differing formulations with varying degrees of rigor.<sup>357</sup>

Of course, ambiguities can arise in federal civil rights statutes as well—one example is whether the Civil Rights Act of 1866 preempts antimiscegenation laws.<sup>358</sup> But Congress’s civil rights statutes are a paragon of clarity when compared with the court-created tiers-of-scrutiny doctrine. And that is not surprising. Members of Congress have incentives to draft precise statutes because they know that ambiguities will empower their institutional rivals—either the executive branch or the judiciary—to resolve the meaning of the statute. No such incentives exist at the Supreme Court, where the Court itself gets to apply the standards that it announces.

Third, linking the Court’s equality jurisprudence to congressional enactments can reduce tension between the judiciary and Congress and make the judicial-appointment process less ideological. The last four successful Supreme Court nominees have been confirmed on near-party-line votes<sup>359</sup>—and the Supreme Court’s loose and atextual Fourteenth Amendment doctrines can only aggravate this trend. When the Supreme Court’s equality jurisprudence is based on a common law process in which the judges expand or cut back on court-created precedents, the judges inevitably fall back on their ideological priors when deciding whether to expand or distinguish or overrule a previous holding. The Senators know this, and they vote accordingly. A regime in

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356. *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996) (emphasis added) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

357. *See supra* notes 26-28 and accompanying text.

358. *See supra* Part IV.

359. *See U.S. Senate Roll Call Votes 109th Congress-2nd Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=2&vote=00002](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00002) (last visited May 5, 2017) (detailing the vote on the confirmation of Samuel A. Alito Jr. to be an Associate Justice on the Supreme Court); *U.S. Senate Roll Call Votes 111th Congress-1st Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00262](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00262) (last visited May 5, 2017) (detailing the vote on the confirmation of Sonia Sotomayor to be an Associate Justice on the Supreme Court); *U.S. Senate Roll Call Votes 111th Congress-2nd Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=2&vote=00229](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00229) (last visited May 5, 2017) (detailing the vote on the confirmation of Elena Kagan to be an Associate Justice on the Supreme Court); *U.S. Senate Roll Call Votes 115th Congress-1st Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=115&session=1&vote=00111](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00111) (last visited May 5, 2017) (detailing the vote on the confirmation of Neil M. Gorsuch to be an Associate Justice on the Supreme Court).

which the Court defers to the equality norms enacted by Congress—rather than deciding for itself the equality norms that should be enforced under the Fourteenth Amendment—will make the Court’s equality jurisprudence more mechanical and predictable, and that will diminish the role of ideology in at least some of the Supreme Court’s decisionmaking. It will also establish a more cooperative relationship between the Supreme Court and Congress, which promises to reduce at least some of the contention that permeates the judicial-appointment process.<sup>360</sup>

Some may fear that lashing the Supreme Court to Congress’s enforcement legislation will leave persecuted minorities worse off, but those concerns are unfounded. History has shown that Congress has been well ahead of the Supreme Court when it comes to protecting marginalized groups from discriminatory laws. Congress outlawed racial discrimination in jury selection before the Supreme Court declared it unconstitutional in *Strauder*.<sup>361</sup> Congress outlawed racial discrimination by common carriers long before the Supreme Court declared state-mandated segregation unconstitutional in *Brown*.<sup>362</sup> Congress outlawed private interference with the right to vote before the Supreme Court declared the white primary unconstitutional.<sup>363</sup> Congress outlawed sex discrimination by state employers and federally funded education programs before the Supreme Court subjected sex discrimination to heightened scrutiny.<sup>364</sup> And Congress outlawed pregnancy discrimination, age discrimination, religious discrimination, and disability discrimination by state employers before the Supreme Court did anything to protect those affected groups.<sup>365</sup> On almost every civil rights issue involving race, sex, age, religion,

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360. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 299 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (criticizing harshly the Rehnquist Court for refusing to defer to the factfinding in Congress’s civil rights legislation); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945-47 (2003).

361. See Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336-37 (codified as amended at 18 U.S.C. § 243 (2015)); see also *supra* Parts II.B.3, IV.A.

362. See Civil Rights Act of 1875 §§ 1-2; see also *supra* Part IV.B.

363. See Civil Rights Act of 1870, ch. 114, §§ 4-5, 16 Stat. 140, 141; see also *supra* Part II.B.3.

364. See Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373-74 (codified as amended at 20 U.S.C. §§ 1681-1688 (2015)).

365. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2015)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(b), 81 Stat. 602, 602 (codified at 29 U.S.C. § 62(b) (2015)); Civil Rights Act of 1964, Pub. L. No. 88-352, tits. II, VII, 78 Stat. 241, 243-46, 253-66 (codified as amended in scattered sections of 42 U.S.C.) (outlawing religious discrimination in places of public accommodation and employment); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(4), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101(b)(4)).

and disability, Congress has led and the Supreme Court has followed. The one issue on which the Supreme Court acted before Congress did was school segregation—but even here one must remember that the Supreme Court prolonged the demise of racial segregation by refusing to enforce the Civil Rights Act of 1875 in *Plessy v. Ferguson*,<sup>366</sup> and by invalidating the voting protections that Congress had established in the Civil Rights Act of 1870.<sup>367</sup>

Same-sex marriage is another issue on which the Supreme Court acted before Congress did.<sup>368</sup> But even on the issue of homosexual rights, the judiciary's record vis-à-vis Congress is at best mixed. It was Congress that repealed the ban on homosexuals serving in the military—and Congress did so before the Supreme Court had issued *any* decision subjecting laws that discriminate against homosexuals to heightened scrutiny.<sup>369</sup> Before Congress acted, the federal appellate courts had repeatedly upheld this controversial policy against constitutional challenge, and the Supreme Court consistently denied certiorari.<sup>370</sup> Even on the marriage issue, the Court tolerated laws against same-sex marriage for nearly 150 years after the Fourteenth Amendment's ratification, acting only after the idea of same-sex marriage became politically fashionable. In 1972, the Court held that the idea of a constitutional right to same-sex marriage was so frivolous as to not even present a federal question.<sup>371</sup> The Court also passed on an opportunity to impose same-sex marriage on the nation in 2013, declaring that it lacked jurisdiction to consider the issue in a questionable and hotly disputed ruling.<sup>372</sup> Yes, the Court still acted before Congress did—and Congress was unlikely to repeal the Defense of Marriage Act until the Democratic Party secured majorities in the House and Senate. But no one should think that this episode portrays the Supreme Court as the heroic champion of the downtrodden. The Court acted only after public opinion had shifted on same-sex marriage,<sup>373</sup> and

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366. See *supra* Part IV.B.

367. See *supra* Part II.B.2.

368. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2689-96 (2013).

369. See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f), 124 Stat. 3515, 3516-17.

370. See, e.g., *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132-36 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Thomasson v. Perry*, 80 F.3d 915, 927-34 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996); *Ben-Shalom v. Marsh*, 881 F.2d 454, 458-66 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Beller v. Middendorf*, 632 F.2d 788, 801-12 (9th Cir. 1980) (Kennedy, J.), *cert. denied*, 452 U.S. 905 (1981).

371. See *Baker v. Nelson*, 409 U.S. 810, 810 (1972), *overruled by Obergefell*, 135 S. Ct. 2584.

372. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013); *id.* at 2668-75 (Kennedy, J., dissenting) (criticizing the majority's jurisdictional holding).

after the President and one of the two major political parties had endorsed the cause.<sup>374</sup>

It is also important to remember that the Supreme Court has *thwarted* federal legislation that secures equal citizenship for blacks, women, the elderly, and people with disabilities. Judicial supremacy comes as a package deal, and a regime that empowers the Court at the expense of Congress will allow the Justices to *block* congressional equality norms that do not comport with their preferred understandings of what the Fourteenth Amendment should require. And the Supreme Court has done this on many occasions. *James v. Bowman* invalidated a congressional statute that protected blacks from private violence or retaliation for exercising their right to vote.<sup>375</sup> *Plessy v. Ferguson* refused to enforce the Civil Rights Act of 1875 against Louisiana's mandatory-segregation statute.<sup>376</sup> And the Rehnquist Court invalidated the civil remedy in the Violence Against Women Act, as well as Congress's decisions to subject state employers to private lawsuits for discriminating against the elderly and people with disabilities.<sup>377</sup> If one compares the Supreme Court's overall record on protecting civil rights with that of Congress, Congress comes out well ahead.

Finally, there is little reason to fear that an equality jurisprudence rooted in congressional enactments will become vulnerable to legislative repeal. The statutory civil rights protections that Congress has enacted to protect minorities, women, the elderly, and the disabled are as politically entrenched from repeal as the Fourteenth Amendment itself.<sup>378</sup> Each of these laws is backed by powerful constituencies that no elected official wants to cross.<sup>379</sup>

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373. See Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx> (noting a shift in public opinion at the end of 2010).

374. See Becky Bowers, *President Barack Obama's Shifting Stance on Gay Marriage*, POLITIFACT (May 11, 2012, 4:19 PM), <http://www.politifact.com/truth-o-meter/statements/2012/may/11/barack-obama/president-barack-obamas-shift-gay-marriage>; Jeremy W. Peters & Michael D. Shear, *Democrats Draft Gay Marriage Platform*, N.Y. TIMES (July 30, 2012), <http://nyti.ms/2hSTkSG>.

375. 190 U.S. 127, 136-39 (1903) (invalidating a statute on state-action grounds under the Fifteenth Amendment based on the Court's Fourteenth Amendment jurisprudence).

376. See *supra* Part IV.B.

377. See *United States v. Morrison*, 529 U.S. 598, 620-21, 626 (2000) (invalidating part of the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91-92 (2000) (invalidating age discrimination protections); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (invalidating disability protections).

378. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 424-26 (2007).

379. See, e.g., Ctr. for Am. Women & Politics, Rutgers, the State Univ. of N.J., *Gender Differences in Voter Turnout* (2015), <http://www.cawp.rutgers.edu/sites/default/files/resources/genddiff.pdf> (finding that the number of female voters has exceeded

*footnote continued on next page*

And in all events, the Supreme Court's equal protection pronouncements are just as vulnerable to "repeal" by future Justices, especially given their lack of textual grounding in the Fourteenth Amendment. If one were to imagine that the mood of the country could change to the point that Congress and the President would repeal the Civil Rights Act of 1866 and other statutes that secure equal citizenship for racial minorities, there is little reason to think that Supreme Court Justices appointed by those elected officials would retain the court-created equal protection doctrines that Congress and the President reject. And it is easier for the Supreme Court to scrap a constitutional precedent—it requires only a simple majority of the nine Justices<sup>380</sup>—than it is for Congress to repeal a statute through the bicameralism-and-presentment process.

### Conclusion

The Supreme Court has never provided a textual rationale for interpreting "equal protection of the laws" as an equal-treatment requirement. Nor has the Court explained how the text of the Fourteenth Amendment can support a distinction between the racial discrimination that the Court subjects to "strict scrutiny" and the other classifications that it relegates to "rational basis review." It is also hard to see how the text of the Equal Protection Clause, which limits only a *state's* behavior, can prohibit racial discrimination committed by private attorneys or other private entities.

Yet one can find plenty of textual support for the Supreme Court's racial-equality rulings—not in the text of the Equal Protection Clause, but in the civil rights legislation that Congress has enacted to implement the Fourteenth Amendment's promise of citizenship. These federal statutes have been hiding in plain sight for more than a century of racial-equality litigation. Yet the text of these statutes easily supports the outcomes reached in *Strauder*, *Batson*, *Loving*, and the *Plessy* dissent—as well as the white-primary cases and the rulings that extend *Batson* to private attorneys. And it provides a more convincing rationale for those decisions than anything that the Supreme Court has said.

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the number of male voters in every presidential election since 1964); Albert B. Grenshaw, *Assessing the Political Power of Seniors*, WASH. POST (Apr. 29, 1992), <http://wapo.st/2hNhY7r> (discussing the power of senior interest groups, including the AARP); *Voters with Disability Key to 2016 Election Outcome*, RESPECT ABILITY (Aug. 5, 2015, 3:31 PM), <http://respectabilityusa.com/2015/08/voters-with-disabilities-key-to-2016-election-outcome> (noting that "America has 56 million people with disabilities" and together they constitute "America's largest minority").

380. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("*Baker v. Nelson* must be and now is overruled."); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("*Bowers v. Hardwick* should be and now is overruled.").

When one roots the Supreme Court's equality jurisprudence in these congressional enactments, there is no longer a need to distort the language of the Equal Protection Clause. "Equal protection of the laws" is not a requirement of equal treatment—and it is absurd to think that every "person" is entitled to equal treatment by their state. Instead, the Equal Protection Clause prevents a state from selectively withholding protections that the laws require or provide. And it does not matter whether a state's nonprotection is motivated by racial animus or sex stereotyping. The text makes no distinction between racist or sexist behavior and other discriminatory denials of legal protection.

Textualists need not shy away from this construction of the Equal Protection Clause out of fear that it will pull the rug out from under the Supreme Court's canonical racial-equality rulings. All of those rulings are supported by the text of federal civil rights statutes that are politically entrenched from repeal. And nontextualists should not insist that these landmark racial-equality rulings depend on a jurisprudential philosophy that downplays the importance of formally approved texts and empowers the judiciary at the expense of the political branches. Many jurists have been peddling a tying arrangement that yokes the Supreme Court's racial-equality pronouncements to a living-constitution mindset, insisting that one cannot purchase the outcomes in those cases without also buying into a pragmatic or precedent-based approach to judging.<sup>381</sup> But it is wrong to suggest that text-centered interpretation would have left the courts powerless to counter racial discrimination committed by governments or private entities. There may be other reasons for rejecting textualist or formalistic theories of interpretation. But no one should reject those methodologies out of fear that they will make one into an unwitting accomplice to racism.

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381. See, e.g., SUNSTEIN, *supra* note 320, at 131-50; Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 91-92 (2009); Grey, *supra* note 11, at 712-13; see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992) (claiming that *Loving v. Virginia* refutes the notion that courts may enforce only rights memorialized in constitutional or statutory text, because "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century").