

ORIGINALISM AND THE COLORBLIND CONSTITUTION

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INTRODUCTION

Anyone who has read the legal literature on the subject knows two things about originalism and affirmative action. They know that originalism strongly supports the constitutionality of affirmative action and that the two originalist justices—Justices Scalia and Thomas—appear to be hypocrites for holding that the Constitution forbids government affirmative action. At least, these are the claims of various leading scholars, including Cass Sunstein and Jed Rubenfeld.¹

What is peculiar, however, is how confident these assertions about the Constitution’s original meaning and the hypocrisy of the Justices are, and how insubstantial the evidence is that is said to support these claims. The claims of original meaning are based on a set of federal statutes passed at the time of the Fourteenth Amendment that are thought to provide race-based benefits to blacks. But these statutes do not provide strong evidence that the Fourteenth Amendment allows race-based government actions that benefit blacks or other minorities. These were federal statutes that were not governed by the Fourteenth Amendment and therefore were not directly informative of its meaning. Moreover, most of these statutes, and perhaps virtually all of them, are not necessarily best interpreted as providing race-based benefits.

In this Article, I challenge the claim that the original meaning clearly allows the states to engage in affirmative action. I argue that the original meaning does not plainly establish that affirmative action by the states is constitutional.² Instead, there is, at the least, a reasonable argument to be made that state government affirmative action is unconstitutional. In fact, based on the available evidence, I believe that the case for concluding that the Fourteenth Amendment’s original meaning prohibits affirmative action as to laws within its scope is stronger than the case for concluding that it allows affirmative action. I do not, however, take the next step and argue that the Constitution’s original meaning forbids affirmative action. That would require a satisfactory understanding of the original meaning of the Fourteenth Amendment, an understanding that I do not believe we currently possess.

This Article, then, contests both of the basic claims made by the critics. It argues that the original meaning can reasonably be interpreted as prohibit-

1 See *infra* Part III.

2 The Article does not address the issue of the constitutionality of affirmative action by the federal government, which raises distinct issues.

ing affirmative action and that the originalist Justices are therefore not being inconsistent or hypocritical by supporting a colorblind Constitution. I do, however, agree with one significant complaint that the critics make of Justices Scalia and Thomas. These Justices have not made any real effort to justify their affirmative action opinions based on the Constitution's original meaning. Instead, their decisions have relied on a combination of precedent, moral claims, and legal principles. As originalists, these Justices should have grounded their arguments in the original meaning. This Article argues that, had they done so, they would have had a basis in the original meaning to support their views.

In Part I of this Article, I describe the opinions of Justices Scalia and Thomas on affirmative action, showing that they both view the Fourteenth Amendment as adopting the principle of a colorblind Constitution. In Part II, I then move on to the views of Cass Sunstein, Jed Rubenfeld, and other critics of the two originalist Justices, who argue that originalism strongly supports the constitutionality of affirmative action.

Part III then explores the federal statutes relied upon by the critics of Justices Scalia and Thomas. First, this Part asks whether these federal laws—assuming that they provide special benefits to blacks—are fairly interpreted as informing the meaning of the Fourteenth Amendment. If the equality component of the Fourteenth Amendment applied to the federal government, I argue that these federal statutes would constitute some evidence of the Amendment's meaning. But this evidence would be far from conclusive, since it would at best be the view of the Congress, which might be mistaken or biased.

Once one recognizes that the Fourteenth Amendment does not apply to the federal government, the connection between this federal legislation and the Amendment's meaning becomes far more attenuated. I argue that the federal legislation was unlikely to have reflected the meaning of the Fourteenth Amendment because the federal government was purposefully excluded from the Amendment. The best explanation for why the Amendment excluded the federal government is that the enactors believed the federal government could be trusted far more than the states. While the Congress likely believed that the federal government should not engage in arbitrary racial discrimination, it allowed this norm to be enforced solely through a principle of political morality.

The Part then examines these federal statutes to determine whether they in fact provide race-based benefits to blacks. It turns out that many, and perhaps virtually all, of these statutes do not discriminate on the basis of race. In particular, the important Freedmen's Bureau Acts do not racially discriminate, but instead provide benefits to former slaves that are not best understood as involving race. Moreover, four of the five remaining statutes that initially appear to provide benefits based on the race of the recipient do not upon examination necessarily turn out to do so. In each of these cases, there is at least a reasonable interpretation of the statute that would render it to not confer special race-based benefits to blacks. The last statute does appear

to confer such benefits, but it may turn out to confer them on considerably narrower grounds than the critics suggest.

Part III concludes by examining various federal laws, largely ignored by the critics, that discriminated against blacks or other minorities. While the logic of the critics' interpretation suggests that these laws should also inform the meaning of the Fourteenth Amendment, that would then suggest that the states could discriminate significantly against blacks. The better interpretation, I contend, is to view these laws as also not significantly informing the Amendment's meaning.

While Part III argues that the originalist evidence relied upon by the critics to support affirmative action is weak, Part IV argues that there is relatively strong originalist evidence in favor of the colorblind Constitution. This section explores two leading and representative theories of the original meaning of the equality component of the Fourteenth Amendment to show that they are reasonably interpreted to support the colorblind Constitution. These theories are John Harrison's interpretation of the Privileges or Immunities Clause to protect against caste legislation and Michelle Saunders's interpretation of the Equal Protection Clause to prohibit class legislation. Harrison's theory interprets the Privileges or Immunities Clause to prohibit state laws that racially discriminate either for or against blacks. While Saunders's theory interprets the Equal Protection Clause not to prohibit all race-based legislation, but only special laws that lack an adequate public purpose justification, I argue that her interpretation needs to be revised to take into account certain aspects of the enactment of the Fourteenth Amendment. Once those revisions are made, Saunders's theory suggests that state racial discrimination should probably be subject to even stricter scrutiny than she suggests.

I. THE ORIGINALISTS' COLORBLIND CONSTITUTION

The objects of the scholars' criticisms are Justices Scalia's and Thomas's affirmative action opinions. These two Justices have adopted the position that the Constitution is colorblind and therefore does not permit racial distinctions. They argue that all racial distinctions are subject to strict scrutiny and that virtually no racial distinctions pass muster. Yet, these two Justices, who have espoused originalism, have not explained how these interpretations derive from the Fourteenth Amendment's original meaning. To provide a sense of their arguments, I review their main affirmative action opinions.

A. *Justice Scalia*

Justice Scalia explained his view of the unconstitutionality of affirmative action most completely in his sole concurrence in *City of Richmond v. J.A. Croson Co.*³ In *Croson*, Richmond, Virginia had adopted a minority business

3 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment).

utilization plan that required prime contractors who won bids for city contracts to subcontract at least 30% of the dollar amount of the contracts to one or more minority business enterprises.⁴ The record revealed “no direct evidence of race discrimination on the part of the city,” nor evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.⁵

The Supreme Court held that Richmond’s plan was an unconstitutional violation of the Equal Protection Clause.⁶ Justice O’Connor wrote an opinion, parts of which were for a majority of the Justices and other parts merely for a plurality. The majority held that the city had not established a compelling governmental interest justifying the plan, because the city had not shown the type of identified past discrimination in the city’s construction industry that would have justified race-based relief under the Equal Protection Clause.⁷

Writing solely for himself, Justice Scalia authored an opinion that concurred in the judgment. Scalia agreed with O’Connor’s opinion that strict scrutiny must be applied to all government racial classifications, but disagreed that states may in some circumstances discriminate based on race in order to remedy past race discrimination.⁸

Scalia wrote that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”⁹ At least where state government action is involved, “only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception” to the colorblindness principle of the Fourteenth Amendment.¹⁰

Scalia argued that there are “many permissible ways” that a state can “undo the effects of past discrimination” without classifying by race.¹¹ As to state contracting, the state may adopt a preference for small or new businesses. Scalia agreed with the Court “that a fundamental distinction must be

4 *Id.* at 477 (majority opinion).

5 *Id.* at 480.

6 *Id.* at 506.

7 *Id.* at 505.

8 *Id.* at 520 (Scalia, J., concurring).

9 *Id.* at 521 (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).

10 *Id.* (citation omitted).

11 *Id.* at 526 (citation omitted). Scalia maintained that “there is only one circumstance in which the States may act *by race* to ‘undo the effects of past discrimination’: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.” *Id.* at 524. Scalia used this principle to explain the school desegregation cases in which the Court had sometimes held that states are obligated to employ race-conscious remedies. *Id.* He sought, however, to cabin this exception, claiming that “outside the context of school assignment,” the Court had been unwilling to conclude “that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system.” *Id.* at 525. Scalia’s language here cabinning the principle suggests that he did not believe these precedents reflected the original meaning of the Equal Protection Clause, but that he was following them based on *stare decisis*.

drawn between the effects of ‘societal’ discrimination and the effects of ‘identified’ discrimination.”¹² Laws that are tailored to provide contracts to those who have been identified as having previously been discriminated against are permissible not because it would “justify race-conscious action,” but because “it would enable race-neutral remediation.”¹³ In a claim that will be relevant to evaluating the congressional statutes passed during Reconstruction, Scalia wrote:

Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*. In other words, far from justifying racial classification, identification of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded.¹⁴

Justice Scalia concluded the opinion by arguing that providing race-based benefits to blacks will in the long run reinforce racial thinking, which will “be the source of more injustice still.”¹⁵

Scalia’s opinion then had certain characteristics. First, he adopted a primarily colorblind position. It was not entirely colorblind, since he was willing to permit race-conscious action that addressed the continuing effects of past discrimination as to school segregation. But presumably Scalia’s position here was based on precedent rather than a view of the Fourteenth Amendment.¹⁶ Second, he implemented his notion of the colorblind Constitution through a strict scrutiny approach. While Justice O’Connor’s opinion in *Crosby* also endorsed strict scrutiny, her version allowed more room for race-conscious action. Third, Justice Scalia engaged in little discussion of the constitutional text and almost no discussion of the history of the Fourteenth Amendment.¹⁷ Finally, Scalia often made moral claims about the issues, such as asserting that racial discrimination of any kind is unethical and that affirmative action leads to greater harm in the future.¹⁸ While these claims might possibly be understood as merely rhetorical or part of the analysis of

12 *Id.* at 526.

13 *Id.*

14 *Id.* at 526–27 (emphasis in original).

15 *Id.* at 527–28.

16 Justice Scalia also did not make crystal clear when he was applying his own views and when he was following or making allowance for the Court’s precedents. At times, one gets the strong impression that he was following precedent, as with the school desegregation cases, but it is not entirely clear.

17 Justice Scalia discussed the text and history most in reference to the Court’s application of the Fourteenth Amendment to the federal government. *See* 488 U.S. at 521–22. While he gave reasons why the federal government should have greater discretion as to implementing the Equal Protection Clause, he did not address the most fundamental issue—that the Equal Protection Clause does not apply to the federal government—presumably because this issue had been resolved to the contrary by the case of *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

18 488 U.S. at 521.

whether the program satisfied strict scrutiny, when combined with the absence of historical analysis, it can give rise to the inference that his position was based on moral principles rather than originalist or strictly legal analysis.

B. Justice Thomas

In the main, Justice Thomas has very similar views on the constitutionality of affirmative action to those of Justice Scalia. Both articulate a colorblindness principle that is implemented through strict scrutiny. Despite these similarities, Justice Thomas clearly writes with a different voice when discussing affirmative action.

Justice Thomas's views on the constitutionality of affirmative action are contained mainly in his opinions in three cases: *Grutter v. Bollinger*,¹⁹ *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁰ and *Fisher v. University of Texas at Austin*.²¹ In *Grutter*, a majority of the Supreme Court approved the affirmative action admissions plan operated by the University of Michigan Law School. Under the plan, the Law School did not restrict the types of diversity eligible for substantial weight, recognizing that there are many possible bases for diversity.²² The Law School believed that, by enrolling a "critical mass" of [underrepresented] minority students, the school could ensure their ability to make unique contributions to the school.²³

The Supreme Court upheld the Law School's admission's plan. In the majority opinion written by Justice O'Connor, the Court first reaffirmed that racial classifications are constitutional only if they satisfy strict scrutiny.²⁴ The Court held that the Law School had a compelling interest in attaining a diverse student body.²⁵ In reaching that conclusion, the Court gave deference to the Law School's academic decisions,²⁶ assuming good faith on the part of the Law School absent a showing to the contrary.²⁷

Justice Thomas largely dissented from the Court's holding. In an opinion joined only by Justice Scalia, Justice Thomas agreed with the majority that "the Law School's racial discrimination" should be subjected to strict scrutiny.²⁸ Thomas argued "that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute" a

19 539 U.S. 306, 349 (2003) (Thomas, J., concurring in part and dissenting in part).

20 551 U.S. 701, 748 (2007) (Thomas, J., concurring).

21 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring).

22 *Grutter*, 539 U.S. at 316 (majority opinion) (internal citation omitted).

23 *Id.* (alteration in original).

24 *Id.* at 326.

25 *Id.* at 328.

26 *Id.*

27 *Id.* at 329.

28 *See id.* at 350–51 (Thomas, J., concurring in part and dissenting in part). Justice Thomas was also the only Justice to join Justice Scalia's opinion. Both Justices joined Chief Justice Rehnquist's dissent.

compelling government interest.²⁹ Justice Thomas then wrote that “[t]he 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.”³⁰

In the remainder of the opinion, Justice Thomas criticized the majority’s analysis. He argued that the Law School’s interest here was not really diversity, but having an elite law school with a diverse student body.³¹ But this interest was not compelling. In fact, Thomas maintained that merely having a public law school, whether elite or not, was not even a compelling interest, especially one like the University of Michigan that educated mainly out-of-state students.³² Thomas also objected to granting deference to a public university accused of race discrimination, claiming it was both unprecedented and inconsistent with strict scrutiny.³³

In *Seattle School District*, the Supreme Court, in an opinion by Chief Justice Roberts, held that a public school system that either had not operated legally segregated schools or that had, but had been subsequently found to have rectified the segregation, may not classify students by race in making school assignments.³⁴ The school districts had sought to use race in assigning students to schools in an effort to increase racial balance.³⁵ Roberts’s opinion, parts of which secured majority support and parts of which merely secured a plurality of four Justices, concluded that the school districts’ assignment plans neither served a compelling state interest nor were narrowly tailored to such an interest.³⁶

Justice Thomas joined the entirety of the Chief Justice’s opinion.³⁷ Thomas wrote a sole concurrence, however, to address arguments that Justice Breyer had made in dissent.³⁸ First, Justice Thomas drew a distinction between segregation and racial balance. According to Thomas, segregation as to public schooling involves “the deliberate operation of a school system to ‘carry out a governmental policy to separate pupils in schools solely on the

29 *Id.* at 353. Thomas stated that the Court’s cases had previously found only two circumstances where there was a compelling state interest to justify racial discrimination by government actors: promoting national security and remedying past discrimination for which the state was responsible. *Id.* at 351. But Thomas appeared to reject the latter basis from *Croson*. *Id.* at 353.

30 *Id.* at 353.

31 *Id.* at 355–56.

32 *Id.* at 358–59.

33 *Id.* at 362.

34 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (majority opinion).

35 *Id.* at 710.

36 *Id.* at 708–09, 726.

37 *Id.* at 709.

38 *Id.* at 748 (Thomas, J., concurring).

basis of race.’”³⁹ Racial imbalance is not segregation, since it can result from a variety of other causes.⁴⁰

Justice Thomas argued that school districts lack a present interest in remedying past segregation. “The Constitution generally prohibits government race-based decisionmaking,”⁴¹ but

has carved out a narrow exception to that general rule for cases in which a school district has a “history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race.”⁴²

Thus, Thomas appeared to accept the school desegregation cases as a legitimate exception to the colorblindness rule.⁴³

Justice Thomas rejected what he regarded as the dissent’s attempt to weaken the requirements of strict scrutiny.⁴⁴ He saw this weakening as a “rejection of the colorblind Constitution.”⁴⁵ Justice Thomas concluded by repeating Justice Harlan’s statement from his dissent in *Plessy* that “[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens.”⁴⁶

In *Fisher*, the Supreme Court reviewed the admission process of the University of Texas Law School, which considered race as one of various factors for admission. Seven members of the Court joined an opinion that clarified the Court’s holding in *Grutter*. The Court made clear that strict scrutiny without deference applies to reviewing the use of race as a means of pursuing educational diversity.⁴⁷ Justice Thomas joined the opinion’s clarification of *Grutter*, but subject to the reservation that he continued to believe that *Grutter* was mistaken.⁴⁸

Like his other opinions, Justice Thomas’s concurrence argues for a colorblindness approach based on strict scrutiny, relying on constitutional interpretation, precedent, and desirable consequences.⁴⁹ The focus of this opinion, however, is to show that the type of arguments used to justify affirmative action had been used in the past to support discrimination against minorities.⁵⁰ Thomas attempts to demonstrate this by a review of the argu-

39 *Id.* at 749 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 6 (1971)).

40 *Id.* at 750.

41 *Id.* at 751.

42 *Id.* at 752 (quoting *Swann*, 402 U.S. at 5–6 (1971)).

43 In this respect, Justice Thomas appeared to follow the same position as Justice Scalia. See *supra* text accompanying note 17.

44 551 U.S. at 757–58.

45 *Id.* at 772.

46 *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

47 *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (majority opinion).

48 *Id.* at 2422 (Thomas, J., concurring).

49 *Id.* at 2422–34.

50 *Id.* at 2429.

ments made to the Court in the school desegregation cases as well as the defenses made for slavery and segregation.⁵¹

Thus, Justice Thomas's opinions in *Grutter*, *Seattle School District*, and *Fisher* share many of the characteristics of Justice Scalia's opinion in *Crosby*—endorsing colorblindness and strict scrutiny, following a mix of constitutional interpretation and precedent, and avoiding discussion of history while making claims of political morality. But in two places in these opinions—once in *Seattle School District* and once in *Fisher*—Thomas did address issues relating to the original meaning. In *Seattle School District*, Thomas discussed in a footnote the claim that Congress during Reconstruction had passed race-based laws that benefited blacks.⁵² Thomas discussed the issue in response to an objection from Justice Breyer in his dissent. Breyer cited to studies that referred to federal funding under the Freedman's Bureau of "race-conscious school integration programs."⁵³ Justice Thomas responded that he had

no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members. . . . What the dissent fails to understand, however, is that the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. . . . Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not inconsistent with the colorblind Constitution.⁵⁴

Thomas's argument here is not entirely clear. But he appears to be contending that the Freedmen's Bureau Laws did not discriminate based on race because these laws provided benefits to victims of state oppression rather than to blacks simply. Under this interpretation, Thomas's argument accords with Justice Scalia's view that the states can act to provide benefits to blacks, not as blacks, but as the victims of prior discrimination.

While Thomas makes an important point about the Freedman's Bureau Laws, it is insufficient to provide an originalist defense of his position on affirmative action. There are additional laws relied upon by critics of the colorblindness position that Thomas's defense does not explain. Nor does Thomas provide an original meaning argument based on the language of the Fourteenth Amendment.

In his *Fisher* concurrence, Justice Thomas also discusses a case that is relevant to the original meaning. Justice Thomas notes that in the 1868 case of *Clark v. Board of Directors*,⁵⁵ the Iowa Supreme Court held that an Iowa school's refusal to admit a black student on the ground that public sentiment opposed integrated schools violated the state constitution.⁵⁶ While Justice

51 *Id.* at 2429–32.

52 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 n.19 (2007) (Thomas, J., concurring).

53 *Id.* at 829 (Breyer, J., dissenting).

54 *Id.* at 772 n.19 (Thomas, J., concurring).

55 24 Iowa 266 (1868).

56 *Id.* at 276.

Thomas raised the case to show that the idea of colorblindness was not “new[.]”⁵⁷ he did not make any serious effort to argue that it was the original meaning of the Fourteenth Amendment. For example, Justice Thomas did not discuss any other cases, nor did he note that the decision was decided on state law grounds. Although the decision might be an important part of a showing that colorblindness had been incorporated into the Fourteenth Amendment, it would only be a small part of such a showing, which would require extensive argument.

Overall, then, Justice Thomas, like Justice Scalia, has not made a serious effort to show that the colorblindness approach is consistent with the original meaning. Still, these two references show that Justice Thomas has at least addressed the issue.⁵⁸

II. THE CRITICS OF ORIGINALIST COLORBLIND CONSTITUTIONALISM

The legal literature has for some time now reached two conclusions regarding originalism, affirmative action, and the originalist Supreme Court Justices. First, the literature has concluded that the original meaning of the Fourteenth Amendment allows affirmative action, at least for blacks and perhaps for minorities and women generally. Second, the literature has implied and in some cases clearly charged that the two principal originalists on the Supreme Court have behaved hypocritically as to affirmative action. These Justices have embraced a color blindness approach to the Fourteenth Amendment and affirmative action, but they should have approved of affirmative action based on the historical evidence.

These criticisms have been made by a variety of constitutional commentators, including some of the leading constitutional scholars in the academy. In *Radicals in Robes*, Harvard Law Professor Cass Sunstein devotes a chapter largely to originalism and affirmative action, vigorously making both points.⁵⁹ First, Sunstein writes that the history surrounding the Fourteenth Amendment “cuts hard against” the originalists, who he refers to as the fundamentalists.⁶⁰ Sunstein continues that the originalists’ view

strongly suggests that affirmative action policies were originally regarded as legitimate. Hence there is no historical warrant for the fundamentalist view that affirmative action is generally unconstitutional. On the contrary, history supports affirmative action. In the aftermath of the Civil War, Congress enacted programs that provided particular assistance to African-Americans, and this makes it extremely difficult to attack affirmative action on fundamentalist grounds.⁶¹

57 *Fisher*, 133 S. Ct. at 2429 (Thomas, J., concurring).

58 The commentators, who have criticized Thomas for not addressing this issue, did so prior to *Seattle School District* and *Fisher* and therefore were correct that Thomas had not addressed the issue as of the time they wrote. See *infra* note 65 and accompanying text.

59 CASS SUNSTEIN, *RADICALS IN ROBES* 131 (2005).

60 *Id.* at 138.

61 *Id.*

In making this argument, Sunstein relies on the work of Eric Schnapper, which is discussed below.⁶² He references the two Freedman's Bureau Acts as well as a law that provided special procedures for paying African American soldiers on the ground that such soldiers were being victimized.⁶³ Sunstein reiterates this conclusion at several points, writing that the "central point is that by invoking an ideal of color-blindness, fundamentalists are making up a principle, not following the original understanding."⁶⁴

Second, Sunstein argues that the originalist Justices have not lived up to their own principles. They

have abandoned their own favorite principles of interpretation. Astonishingly, the Court's most enthusiastic fundamentalists, Justices Scalia and Thomas, have voted to strike down affirmative action programs without devoting so much as a sentence to the original understanding of the Equal Protection Clause. Both justices usually pay a great deal of attention to history, particularly when they are voting to invalidate the actions of other branches of government. But on affirmative action their judgments do not depend on history at all. They don't seem to care about it.⁶⁵

Elsewhere in the chapter Sunstein writes: "What is most remarkable is that fundamentalists have voted to strike down affirmative action programs without producing a hint of a reason to think that such programs are inconsistent with the original understanding of the ratifiers."⁶⁶

Sunstein concludes: "I have shown that with respect to affirmative action, the fundamentalist position is arrogant, hypocritical, and extremely hard to defend. Fundamentalists ought to approve of affirmative action as a matter of constitutional law, even if they disapprove of it as a matter of principle and politics."⁶⁷

In another important article in *The Yale Law Journal*, Yale Law Professor Jed Rubenfeld relies on different evidence to reach much the same conclusions.⁶⁸ First, Rubenfeld attempts to show that colorblindness is not the original meaning of the Fourteenth Amendment based on his discussion of a variety of federal laws that provided benefits to blacks. Unlike the Freedmen's Bureau Acts relied upon by Sunstein, which did not generally provide benefits to blacks as such but instead to former slaves and refugees, the laws discussed by Rubenfeld are explicitly race-conscious laws, such as laws providing benefits to destitute colored persons.⁶⁹ Rubenfeld writes that "while the Freedmen's Bureau Acts were arguably race-neutral, the statutes referred to in the text above were not."⁷⁰

62 *Id.* at 259 n.5.

63 *Id.* at 139–40.

64 *Id.* at 141.

65 *Id.* at 133–34.

66 *Id.* at 140.

67 *Id.* at 148.

68 Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 427 (1997).

69 *Id.* at 430–31.

70 *Id.* at 431 n.23.

Rubinfeld concludes that these statutes show that advocates of following the original understanding cannot be in favor of a colorblind interpretation of the Fourteenth Amendment. He writes:

What do [these statutes] prove? Only that those who profess fealty to the “original understanding,” who abhor judicial “activism,” or who hold that the legal practices at the time of enactment “say what they say” and dictate future interpretation, cannot categorically condemn color-based distribution of governmental benefits as they do.⁷¹

Second, Rubinfeld emphasizes what he regards as the inconsistency of the originalist Justices. He writes:

[T]o be true to their principles, two of the five Justices in the prevailing anti-affirmative action majority—Justices Scalia and Thomas, whose commitment to original understandings and practices is also a matter of record—should drop their categorical opposition to race-based affirmative action measures.⁷²

And later Rubinfeld elaborates:

I am no originalist, so I cannot regard the practices of Congress in the 1860s as dispositive of affirmative action’s constitutionality. . . . [T]he point is not to foreclose argument by citing old statutes. It is to begin the argument with a little more candor. The colorblind contingent must begin by recognizing that they are calling on courts to render the kind of judgment about justice (beyond the letter of the law, beyond original intent) that elsewhere they deplore.⁷³

Finally, Eric Schnapper, who wrote one of the earliest articles on the subject and on whom Sunstein relies, also argues that the original meaning of the Fourteenth Amendment allows laws that benefit blacks.⁷⁴ He begins his article:

This article contends that the legislative history of the [F]ourteenth [A]mendment is not only relevant to but dispositive of the legal dispute over the constitutional standards applicable to race-conscious affirmative action plans. From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the [F]ourteenth [A]mendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of

71 *Id.* at 431–32 (footnote omitted).

72 *Id.* at 427.

73 *Id.* at 432.

74 Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985).

the [A]mendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.⁷⁵

While these three pieces have received a great deal of attention, they are hardly the only articles that have made these claims. Similar claims of one or the other type have been made by other leading scholars, such as Jack Balkin, Robert Post, and Reva Siegel.⁷⁶

While the critics argue that the originalist evidence cuts against the colorblind Constitution, what view of the Fourteenth Amendment do they believe this evidence supports? Although the critics' views may differ a bit and are at times vague, in the main, they appear to believe that the originalist evidence supports what might be termed an antisubordination or group-based approach to the Fourteenth Amendment. As developed by Sunstein, Schnapper, and Balkin, the critics adopt something like the following approach.⁷⁷ Programs, such as affirmative action, that are designed to provide benefits to groups that are historically disadvantaged should be pre-

75 *Id.* at 754 (footnote omitted). Given Schnapper's view about the original meaning of the Fourteenth Amendment, it would appear that he would regard originalists who do not follow that original meaning as hypocritical. But Schnapper does not appear to make the charge of hypocrisy. Instead, he argues like a moderate originalist, writing that the historical intent behind the various provisions of the Constitution is often obscure, but where it is clear that intent must be faithfully implemented by the judiciary. In such situation, the Constitution accords to the Supreme Court no mandate to develop a new theory of its own, or to reconsider arguments first bruited and rejected over a century ago. . . . The interpretation of the [F]ourteenth [A]mendment's limitations on affirmative action should turn . . . not on whether a majority of the present Supreme Court would have opted for these race-conscious Reconstruction programs, but on the fact that the [T]hirty-[N]inth Congress repeatedly chose to do so.

See id. at 798.

76 Relying on much the same evidence, Balkin concludes that the federal laws passed during Reconstruction help to establish that affirmative action is constitutional. He writes: Current law treats [affirmative action] the same way it treats Jim Crow laws. . . . The ideas of caste and class legislation can offer a useful corrective. Policies that seek to integrate citizens from diverse backgrounds and ensure that important educational and employment opportunities are open to all groups in society do not subordinate majority groups or treat them as less worthy citizens. Nor do they make blacks or Latinos into a favored caste. Quite the contrary: these programs are necessary to the extent that minority groups still enjoy less status and less equality of opportunity in American society. As noted previously, the Reconstruction Congress passed race-conscious laws that granted educational benefits to blacks, whether or not they themselves had formerly been held in slavery. These laws made racial classifications, but they did not subordinate or oppress whites or make them into second-class citizens.

JACK M. BALKIN, *LIVING ORIGINALISM* 234–35 (2011). Dean Robert Post and Professor Reva Siegel reach the same conclusions. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 564 (2006).

77 Jed Rubenfeld, in contrast to the other critics, does not appear to argue for an originalist view of the Fourteenth Amendment other than to claim that the Amendment does not support a colorblindness approach. *See* Rubenfeld, *supra* note 68, at 429–32.

sumptively deemed constitutional whereas benefits to groups that are not subordinate should be treated with strong skepticism.⁷⁸ Affirmative action programs should be reviewed mainly to make sure that they operate to help promote the real interests of subordinate groups and to diffuse the costs to individual members of nonsubordinate groups.⁷⁹

Under this approach, there is a different standard of review for laws that benefit blacks and other subordinate groups than for laws that benefit non-subordinate groups. Moreover, the approach focuses primarily on group membership rather than individual treatment. For example, the approach does not require that disadvantaged individuals in the nonsubordinate group receive similar benefits to those in the subordinate group. Nor does it prohibit advantaged individuals in the subordinate group from receiving these benefits. These latter requirements are not needed under an approach that focuses on group status rather than individual treatment.

III. THE FEDERAL LAWS PASSED AT THE TIME OF THE FOURTEENTH AMENDMENT

In exploring whether the original meaning of the Fourteenth Amendment prohibits all race discrimination, the best evidence would come from that of word meanings and the purpose of the Amendment. Theories of this kind, which are generally regarded as providing the strongest evidence of the original meaning, are discussed in Part IV.

The critics of the opinions of Justices Scalia and Thomas, however, focus upon a different type of originalist evidence: they discuss various federal statutes that were passed near the time that the Fourteenth Amendment was enacted. Because the critics believe that Congress at the time passed many laws that selectively benefited blacks, they argue that a colorblindness interpretation of the Constitution that would have conflicted with those statutes cannot be correct.

This Part examines this historical evidence and considers its implications. This evidence consists largely of seven sets of laws passed by the government, which fall into two categories. First, there were two Freedmen's Bureau Acts that provided various benefits to former slaves and refugees. Second, Congress passed a number of mainly spending provisions that provided benefits to black people. The analysis of these laws differs. The Freedmen's Bureau Laws explicitly provide benefits to former slaves, not to blacks. Thus, the critics must argue that these laws nonetheless provide race-based benefits. The other category of laws does appear to explicitly provide benefits to blacks. Here the critics must argue that, upon examination, these benefits are actually race-based.

In this Part, I first put aside the issue of whether these laws provide race-based benefits and examine whether these federal laws inform the meaning

⁷⁸ See SUNSTEIN, *supra* note 59, at 149–50; BALKIN, *supra* 76, at 234–35; Schnapper, *supra* note 74, at 798.

⁷⁹ Balkin, *supra* note 76, at 234–35.

of the Fourteenth Amendment. I contend that there is very little reason to believe that they do. The basic argument is that the Congress that passed these laws understood that the Fourteenth Amendment did not apply to the federal government and, therefore, we cannot assume that Congress was conforming its laws to the Amendment. In fact, the federal government was purposefully excluded from the Amendment and there are good reasons for believing that the Congress was taking advantage of the flexibility that the Amendment allowed it to pursue public policy in the various circumstances confronting it at the time.

Having concluded that these laws do not significantly inform the meaning of the Fourteenth Amendment, I then examine whether these laws actually provided race-based benefits to blacks. I argue that there is no strong evidence for concluding that six of these seven laws confer race-based benefits. The two most important of these laws—the Freedmen’s Bureau Acts—did not provide such benefits, but instead conferred non-race-based benefits to victims of slavery. Moreover, four of the five other laws that do explicitly refer to blacks do not, upon closer examination, constitute strong evidence of race-based laws—either because they are not best interpreted as providing benefits to blacks on racial grounds or because they can be reasonably interpreted as providing non-race-based benefits. The fifth of the other laws, however, does appear to provide race-based benefits, at least under one of the versions of strict scrutiny employed by the originalist Justices, but may do so on considerably narrower grounds than the critics suggest.

I then consider a set of laws largely ignored by the critics: federal laws passed at the time of the Fourteenth Amendment that harmed minorities. I argue that the critics would have a hard time with these laws. If the laws that benefit blacks inform the meaning of the Amendment, then so should these laws. But if both sets of laws inform the meaning of the Amendment, then it would have a peculiar meaning. It would seem to allow a large variety of laws that can either harm or benefit blacks and other minorities. One might wonder where the equality principle in the Fourteenth Amendment is. Instead, it is far better to conclude that these laws were passed by a Congress that did not consider itself bound by the Amendment.

Overall, then, I conclude that the laws passed by the federal government do not support the arguments of the critics. These laws neither inform the meaning of the Fourteenth Amendment nor do they, with one exception, represent significant evidence of race-based laws that selectively benefited blacks.

A. *Do the Laws Benefiting Blacks Inform the Meaning of the Fourteenth Amendment?*

One might wonder why laws that are passed by the federal government would be a good indication of the meaning of Fourteenth Amendment provisions that do not apply to the federal government. The critics of Justices Scalia and Thomas might respond that these laws were passed by the same Congress that passed the Fourteenth Amendment (or by Congresses near in

time to its passage). The critics therefore might claim that these laws represent the values that Congress placed into the Amendment.

I argue here, however, that the claim that these laws inform the meaning of the Fourteenth Amendment is actually quite weak. To explore the strength of the evidence provided by these laws, I first discuss a hypothetical alternative version of the Fourteenth Amendment that applies its equality rule directly to the federal government. If such an amendment existed, there would have been a much stronger argument that these federal laws inform the meaning of the Fourteenth Amendment, but by no means one as strong as that claimed by the critics. I then examine the actual Fourteenth Amendment and show that there are very strong reasons why the Congresses that passed these federal laws should not be understood as having been interpreting the meaning of the Fourteenth Amendment or conforming these laws to the Amendment. Thus, one cannot infer that these federal laws reflected Congress's view of the meaning of the Amendment.

1. The Best Case for the Critics: An Alternative Fourteenth Amendment

In assessing the strength of the evidence provided by these federal statutes, it is useful to imagine an alternative version of the Fourteenth Amendment. Under this version, the Amendment applies the equality rule—either through the Privileges or Immunities Clause or the Equal Protection Clause—to the federal government. In fact, there were earlier versions of the Amendment that actually did this, including a version proposed by Thaddeus Stevens.⁸⁰ These proposed amendments, however, were rejected by the Congress. Under an amendment that applied to the federal government, the case for viewing these federal statutes as informing the meaning of the Fourteenth Amendment is much stronger. Yet, even then, it is of limited force.

If the Fourteenth Amendment applied to the federal government, then the Congress that passed this legislation would have been bound by the Amendment. One might then infer that that Congress would have interpreted the Constitution and concluded that this legislation was consistent with the meaning of the Amendment. This type of argument is often made as, for example, when the legislation passed by the First Congress is said to inform the meaning of the original Constitution.⁸¹

If the Fourteenth Amendment applied to the federal government, then this federal legislation would have been considerably stronger evidence of the meaning of the Fourteenth Amendment, but even then it would have been of limited force. These statutes would, at most, be evidence of the interpretation of the Constitution of the Congress at the time that the Fourteenth Amendment was proposed. While that evidence would certainly be relevant, it would not normally be thought by most contemporary originalists as being

80 Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 276 (1997) (discussing proposals, including Stevens's, that would have applied an equality requirement to the federal government).

81 Cf. *Marsh v. Chambers*, 463 U.S. 783, 790–91 (1983).

dispositive. Instead, the proper meaning of the Fourteenth Amendment would turn on what a reasonable and informed person at the time would have concluded that the words meant in context. Congressional interpretations of the Constitution would be evidence of what such a reasonable person would have concluded, but would not automatically indicate the meaning of the provision.

To explore the strength of the evidence that these statutes might provide, it is useful to compare the various types of evidence that statutory enactments can provide. First, the strongest evidence would exist if the Congress that enacted these statutes offered a constitutional interpretation to justify its decision. Suppose that many members of Congress had determined that the statutes provided race-based benefits to blacks and that such statutes were consistent with the equality component of the Fourteenth Amendment. Suppose further that these members had articulated and adopted an interpretation of the language of the Amendment that yielded that result. Finally, suppose that this interpretation showed substantial care and effort. Under those circumstances, this interpretation would be entitled to significant respect. An interpretation adopted by people at the time, who were knowledgeable about the meaning of a provision, would be important evidence of its meaning.

Yet, even this interpretation would hardly be dispositive. An interpretation of this sort would not necessarily be what a reasonable interpreter of the constitutional language would reach. The congressional interpreters might simply be mistaken about their constitutional interpretation. Moreover, this interpretation might be entitled to less weight and, therefore, be more likely to be mistaken if there were other interpretations offered at the time, either in the Congress or elsewhere. Finally, the Congress that passed the legislation might have been interpreting the Constitution strategically. It is well known that a constitutional provision that was said to mean one thing at the time it was being debated, might then be treated as having a different meaning after it was enacted. Thus, one might often be skeptical that the later interpretation was correct. This is especially the case if the meaning embraced by the later interpretation might not have been enacted because of the supermajority requirements for passing a constitutional provision.

At the opposite extreme is the weakest type of evidence from legislation—legislation that is passed without any discussion of the constitutional issues. In this situation, the Congress might be silent about the legislation or might address policy matters, but does not discuss the meaning of the Constitution. This type of evidence is very weak. It will, of course, have the problems discussed above (such as possibly being mistaken or having been enacted for strategic reasons). But it will have much more serious problems. First, this evidence will not indicate what interpretation of the Constitution the Congress employed. All that Congress did was pass a particular law. That law might be constitutional under a number of different interpretations. For example, legislation that provides race-based benefits might be justified under either a narrow or broad exception to a colorblindness interpretation.

Second, not knowing the actual constitutional interpretation is also problematic because it prevents us from assessing how strong the interpretation is. Third, because there are also no arguments for the interpretation, it is difficult to determine how strong the support offered for the interpretation was. Fourth, because the interpretation is not supplied, it is also difficult to determine whether the Congress thought about the issue seriously or failed to consider it at all. Finally, it will also be impossible to determine how many members of Congress actually held or voiced a particular interpretation.

Thus, this evidence is extremely weak. All we know is that Congress passed a particular law, but we do not know whether it considered the Constitution, and, if it did so, how carefully it did so, what its interpretation was, and how strong its arguments for that interpretation were. Overall, then, naked legislation of this type, without the clothing of an explicit constitutional interpretation, tells us very little about what the constitutional interpretation was and how much weight we should give to it.

The weakness of such naked interpretations is particularly important for our consideration in the next section of the legislation that the critics have argued supports the constitutionality of race-based benefits for blacks. As we will see, that legislation falls into the naked category. In some cases, the legislative history is silent about the legislation. In other cases, there is some discussion, but it does not involve the Constitution. Instead, it either discusses policy or political morality, such as whether it is appropriate to provide benefits to blacks rather than to all persons.⁸²

2. Reasons for Exempting the Federal Government: The Jurisdictional Theory

While these statutes would inform the meaning of the Fourteenth Amendment in a limited way if the Amendment applied to the federal government, it, of course, does not. The exclusion of the federal government from the equality rule of the Amendment disrupts all the more the connection between the federal legislation and the Amendment. In fact, given that the Amendment does not apply to the federal government, one might wonder why this federal legislation is even considered relevant to the Amendment's meaning. The answer given most often is that Congress proposed the Fourteenth Amendment, and it would have been unlikely to violate the Amendment's provisions in passing legislation, even if the Amendment did not technically apply to the federal government. The assumption here is that members of Congress had a single principle that they believed in and they

⁸² While this latter question might be thought to be linked to the Equal Protection Clause, that cannot be assumed. The question is what principle the Fourteenth Amendment adopted. One cannot assume that this discussion was applying the Fourteenth Amendment principle when, as we will see, there are reasons why other principles might be applied, when the Fourteenth Amendment did not apply to the federal government, and when the legislators did not invoke the Fourteenth Amendment.

thought that principle should govern action by both the states and the federal government.

While this argument appeals to many people, it runs into problems immediately. If Congress had an equality principle that it believed should regulate all governments, including the federal government, then why did it not apply that principle to the federal government in the Fourteenth Amendment, especially when draft amendments had been proposed that would have done exactly that? As this question suggests, a fundamental feature of any approach to understanding the Fourteenth Amendment and the federal legislation at that time is to explain why the Amendment was not applied to the federal government. Once that is explained, then one can inquire as to whether the federal statutes are likely to be informative of the meaning of the Amendment.

The most straightforward and convincing explanation for the failure to apply the Fourteenth Amendment to the federal government is what might be called the jurisdictional theory. Under this theory, one does not ask whether people believed simply in applying a principle to the government. Rather, the question is whether they believed in applying a principle to a particular level of government—either the federal government or the states.

According to the jurisdictional theory of the Fourteenth Amendment, the Congress that proposed the Amendment thought that an equality principle should be applied to the states but not to the federal government. The enactors of the Amendment had good reason to believe that the states should be strictly limited by a clear provision from passing laws that discriminated on the basis of race. The Black Codes were a clear example of what the former Confederate states might do if they were allowed to act freely. Thus, to prevent the states from oppressing blacks and from passing other types of class legislation, Congress applied an equality principle to the states.⁸³

By contrast, the enactors of the Fourteenth Amendment might have reasonably believed that such a legal provision was not needed against the federal government. The federal government had shown itself to be a much better protector of the rights of minorities than had the states. In fact, congressional Republicans saw the Congress and the Union Army as part of the solution to the attacks on the rights of blacks, not as something to be feared. Thus, they might have thought it unnecessary to impose a limit on the federal government.

This jurisdictional approach to constitutional provisions was hardly an innovation within the American tradition. The Bill of Rights was based on a different version of the jurisdictional theory. The Antifederalists, who were the principal proponents of the Bill, believed that the federal government

83 Class legislation was a term used at the time of the Fourteenth Amendment “to refer to legislation that ‘single[s] out one class and confer[s] upon them a consequence which [it does] not confer upon another class.’” See Saunders, *supra* note 80, at 289 n.198 (alteration in original) (quoting CONG. GLOBE, 40th Cong., 1st Sess. 76, 79 (1867) (statement of Sen. Grimes (R-Iowa))). Such legislation was deemed to be problematic. The Black Codes were the paradigmatic example of class legislation.

posed a substantial danger to the people's liberties because it was a central and distant power. They therefore supported significant restrictions on the federal government. None of the provisions were applied against the states.⁸⁴ In fact, when Madison sought to apply a couple of rights against the states, the Senate deleted them. The reverse jurisdictional theory—applying restrictions to the states, but not to the federal government—appealed to the enactors of the Fourteenth Amendment.⁸⁵

These jurisdictional theories may seem alien to modern American constitutional lawyers. In *Bolling v. Sharpe*,⁸⁶ the Supreme Court wrote that it would be “unthinkable” for the Constitution to prohibit the states from operating segregated schools but to permit the federal government to do so.⁸⁷ Similarly, the Supreme Court has held that virtually the entire Bill of Rights, which originally applied only against the federal government, now applies against the states. Thus, it is natural for modern constitutional lawyers to assume that a provision that was applied against one level of government should apply against another one. But this natural reaction for modern lawyers should be understood to be anachronistic when applied to the period when the Amendment was enacted. At that time, there was nothing strange about applying a principle to one level of government but not to another.

While there is a strong case for the basic outlines of the jurisdictional theory of the Fourteenth Amendment, that theory still requires further development. One basic question is, if people at the time accepted the jurisdictional theory, then how did they expect or desire the federal government to behave? One possibility is that they exempted the federal government from the Fourteenth Amendment because they wanted to allow the federal government to pass class laws and to be able to discriminate based on race.

But this possibility seems quite unlikely. If one examines the discussions of the federal legislation that was enacted at the time of the Fourteenth Amendment, the evidence suggests that legislators opposed enacting laws that discriminated for no good reason. Thus, there is a strong argument that the legislators at the time believed that the federal government should conform to certain norms of behavior. If so, then the question remains why they did not restrain the federal government based on those norms. The best answer appears to be that they believed that it would be better to allow the federal government to act based on a legally unenforceable equality norm—a

84 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). Some state constitutions already protected some of the rights in the Bill as a matter of state law, but citizens in many states were not constitutionally protected as to some or all of these rights.

85 The fact that the Fourteenth Amendment may have applied the Bill of Rights to the states does not undermine these jurisdictional theories. By the time of Reconstruction, the Republicans no longer believed that the federal government was the principal danger. Rather, they believed that the states were the problem and therefore may have supported applying the Bill to the states.

86 347 U.S. 497 (1954).

87 *Id.* at 500.

norm of political morality rather than law—than to subject it to a single legally enforceable equality requirement.

There are at least two reasons why they might have believed it was better to subject the federal government merely to a norm of political morality. First, there might have been significant disagreement about the content of the equality principle. One group might have favored one version of the principle, another group a different version, and a third group yet another version. For example, one group might have believed separate but equal was adequate, whereas a different group believed that no racial distinctions were justified. One group might have believed that special benefits for blacks as an oppressed group was justified whereas a different group might have opposed such benefits as a special privilege. One group might have believed the equality principle should extend only to civil rights, whereas another might have believed it should extend to all laws.

If people disagreed about the correct equality principle, then they might not have wanted to enact a single principle into the Constitution, or they might not have had sufficient support to do so. Instead, they might have believed it was better to leave the Constitution silent on this issue, thereby allowing the Congress to decide on a case-by-case basis which conception of equality to follow.

Of course, the enactors of the Fourteenth Amendment did choose a single conception of equality to apply to the states. But here there is a ready explanation for why they drew a distinction between the states and the federal government. Given the history of the two levels of government, the enactors might have reasonably believed that the states could not be trusted to choose a reasonable equality conception whereas the federal government could be. Put differently, the benefits of constitutionalizing a single equality conception (in terms of preventing oppression) outweighed the benefits of not doing so (in terms of flexibility to accommodate different conceptions) at the state level, but not at the federal level.

The second reason why the enactors might have believed it was better to subject the federal government only to a norm of political morality was the belief that the appropriate norm was too complicated to communicate in a brief constitutional provision. For example, it might have been thought that a rule of no racial distinctions should exist for basic rights, whereas a principle of separate but equal should exist for important, but less basic rights, and a more lenient restriction should exist for other matters. Or it might have been thought that the appropriate rule would depend on the circumstances, so that segregation might be justified under certain circumstances, but not others. This reason differs from the first one. Under the first reason, people disagree as to the appropriate rule. Under the second reason, everyone might agree on the appropriate rule, but it is simply too complicated to communicate to the judiciary.

Once again, this reason would explain why an equality norm was not applied to the federal government. It would simply have been too difficult to communicate it in a way that would be likely to be understood. Instead, it

would have made sense to allow the Congress, which had shown itself to be trustworthy, to make the decisions on a statute-by-statute basis. Of course, the enactors did impose an equality limitation on the states. But that limitation was needed because the states could not be trusted to treat all groups fairly. Therefore, the Congress was willing to propose for the states either a simpler norm or to incur the risk that the courts would mistakenly interpret the norm. In this case, the benefits of constitutionalizing a single equality conception (in terms of preventing oppression) outweighed the benefits of not doing so (in terms of allowing the legislature to apply the complicated equality norm itself) at the state level, but not at the federal level.

In fact, both of these reasons might have applied at the same time. There might have been disagreement about the appropriate norm (first reason) and one or more of the differing groups might have believed that the norm they favored was too complicated to be communicated (second reason).

Under this understanding of the jurisdictional theory of the Fourteenth Amendment, the federal statutes passed by Congress would not provide much information about the meaning of the Amendment. First, the Congress that passed the Amendment would have known that it was not constrained by the Amendment and, therefore, would not have felt bound to conform its legislation to it. Second, while the debates over this legislation might discuss issues such as whether the legislation was class legislation or discriminatory, this discussion would not have been about the constitutionality of the legislation, but instead would have involved issues of political morality.⁸⁸ Thus, there would be little reason to conclude that the federal legislation reflected Congress's views on the meaning of the Fourteenth Amendment.⁸⁹

88 A review of the debates indicates this is the case. While there are sometime debates over this legislation, it involves questions of discrimination and class legislation, but not claims that the legislation is unconstitutional as a violation of the Equal Protection Clause or the Privileges or Immunities Clause. Cf. Paul Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J. S. HIST. 271, 276 (1995) (detailing how debates regarding the Freedmen's Bureau Acts primarily involved questions of class legislation rather than constitutionality).

89 In recent years, some scholars have argued that a Fourteenth Amendment equality principle applies against the federal government. See, e.g., Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493 (2013). The main argument appears to be that the Citizenship Clause of the Fourteenth Amendment, which provides that "All persons born or naturalized in the United States . . . are citizens of the United States," confers the basic rights of citizens, including not being subject to arbitrary discrimination, against both the federal government and the states. U.S. CONST. amend. XIV, § 1. While this is not the place to attempt to rebut this argument, a few words may be in order.

First, it would be extremely odd to read the Fourteenth Amendment in this way. The obvious meaning of the Amendment is that it confers citizenship rights in the Privileges or Immunities Clause, which stated that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. If the Amendment had been intended to protect the privileges or immunities of citizenship against the federal government, it could have easily used the language "[n]o

3. Alternative Theories

Given the strength of the jurisdictional understanding of the Fourteenth Amendment and Congress's statutes, the question is whether there is any argument that the federal statutes significantly inform the meaning of the Fourteenth Amendment. To infer such evidence, one would have to explain why the Framers excluded the federal government from the Fourteenth Amendment restrictions, but still believed its principles applied to the federal government.

One possible explanation again derives from the view that Congress did not apply the Fourteenth Amendment to the federal government because it believed that this was unnecessary given the federal government's good behavior. According to this explanation, a constitutional amendment is only justified by a strong necessity and the federal government had not shown it needed restricting. But at the same time, Congress believed that federal legislation should conform to the same principles of legislation that the Fourteenth Amendment incorporated. This explanation, then, differs from the jurisdictional theory on the ground that it argues that the Congress believed that the federal legislation should conform to the Fourteenth Amendment, even though it consciously chose not to apply the Amendment to the federal government.

While this explanation could theoretically account for Congress's actions, it suffers from significant weaknesses. First, it seems implausible to argue that Congress would have decided not to apply the Fourteenth Amendment's equality limitation to the federal government, even though it regarded that limitation as being an entirely appropriate for the federal government, simply on the ground that the federal government had not behaved badly in recent years. The Congress knew that the federal govern-

State nor the federal government," as the Fifteenth Amendment would shortly do. Instead, the language of the Fourteenth Amendment makes perfect sense. The first sentence of the Amendment, the Citizenship Clause, indicates who is a citizen (persons born or naturalized in the United States); the second sentence, in the Privileges or Immunities Clause, indicates what their rights are (no state may abridge the privileges or immunities of citizens).

Second, the historical context for the Fourteenth Amendment is also informative. The Thirteenth Amendment, which had prohibited slavery, had failed to provide a firm foundation for the Civil Rights Act of 1866. While some Republicans had argued that not being a slave meant possessing basic civil rights, others argued that slavery referred to a specific institution and that one could be free of the bondage of chattel slavery without enjoying basic civil rights. One reason to pass the Fourteenth Amendment was to place the Civil Rights Act on a secure constitutional footing in a way that the Thirteenth Amendment had failed to do. But to rely on an inference that the mere status of citizenship conferred basic civil rights was similar to relying on the inference that the absence of slavery conferred such rights. Such reliance on an unclear inference would have committed the same error that the enactors of the Thirteenth Amendment had, in an amendment intended to correct that error. It makes much more sense to see the Fourteenth Amendment enactors as spelling out the rights of citizens—protecting against states abridging their privileges or immunities.

ment might eventually come under the control of the Democrats, who might pass oppressive legislation. Moreover, the mere fact that Congress had not recently behaved badly was not a strong reason for not extending the Amendment to the federal government, because the opportunity to pass a constitutional amendment on a subject does not come around all that often. The opportunity was available at this time since the subject of nondiscrimination was being discussed and a version of the amendment that would have covered the federal government had been proposed.⁹⁰

This explanation for not applying the Amendment to the federal government contrasts with the explanation based on the jurisdictional theory. Under the jurisdictional theory, there were much stronger reasons not to extend a limitation on the states to the federal government—Congress either could not agree on a single standard or believed it was too complicated to enact in a brief provision. But under this alternative theory, there was no strong reason not to extend the limitation to the federal government since the Congress believed the Fourteenth Amendment contained the appropriate standard for the federal government.

Second, even if one assumes that Congress chose not to extend the Amendment to the federal government solely because the federal government had behaved well in recent years, that does not mean that the federal statutes that were enacted reflected the Congress's view of the Fourteenth Amendment. Once Congress had decided not to apply the Amendment to the federal government, it is not clear that it would have felt constrained by that Amendment. It is not uncommon for people, who are willing to apply a standard to themselves but did not do so, to depart from that standard in the future when dealing with a specific situation.⁹¹

90 See Saunders, *supra* note 80, at 278.

91 The difficulty of finding an argument that allows these federal statutes to inform the meaning of the Fourteenth Amendment remains even if one assumes, as I express skepticism about in the next section, that the federal statutes were intended to provide race-based benefits to blacks. Suppose that Congress actually had the intent that the critics allege that they had. Suppose that Congress believed that government should not discriminate against blacks, but that it should be free to take actions to benefit blacks because of their subordinate condition. Under those circumstances, it is hard for the critics to explain why the Amendment did not extend to the federal government.

Before explaining why, it is important to note that advocates of a colorblind interpretation of the state equality requirement, who also believed that Congress intended to freely benefit blacks in these federal statutes, could account for why Congress did not apply the Amendment to the federal government. The reason would be that Congress intended to benefit blacks through federal legislation and applying an amendment that had a colorblind requirement to the federal government would prohibit such legislation.

By contrast, the critics cannot use a similar account to explain the failure to extend the Amendment to the federal government. After all, if the critics were right that the Amendment allows state laws that benefit blacks and that Congress intended to benefit blacks when it passed federal legislation, then there would have been no reason to exclude the federal government from the Amendment's coverage. The Amendment would have allowed the federal legislation that benefited blacks even if it applied to the federal government.

To conclude, then, the argument that the federal legislation passed at the time of the Fourteenth Amendment significantly informs its meaning appears weak. First, even if one believed these statutes were intended to reflect the meaning of the Fourteenth Amendment, they would at best be naked legislation that does not indicate how Congress interpreted the Constitution, how it reached that interpretation, how strong its reasons were, or how much effort went into its determination. Second, there are strong reasons to doubt that this federal legislation was intended to conform to the meaning of the Fourteenth Amendment. Under the jurisdictional theory, the Congress purposefully chose not to extend the Amendment to the federal government. Given this decision, it is difficult to conclude that it believed federal legislation should necessarily conform to the Amendment.

B. *Do These Laws Employ Racial Categories?*

There is one additional reason why these federal statutes do not represent significant evidence that the Fourteenth Amendment allows race-based laws that benefit blacks: there is a strong argument that most and perhaps virtually all of these statutes are not best understood as providing race-based benefits to blacks. I first consider the two Freedmen's Bureau Acts and then turn to the spending and other laws.

1. The Freedmen's Bureau Acts

The Freedmen's Bureau Acts were passed in 1865 and 1866. The 1865 Act, passed while Abraham Lincoln was alive, mainly provided benefits to war refugees and to freedman and their families.⁹² Section 2 of the Act authorized the issuance of "provisions, clothing, and fuel . . . needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children."⁹³ Section 4 authorized the setting "apart, for the use of loyal refugees and freedmen," abandoned, confiscated, or purchased lands, and assigning "to every male citizen, whether refugee or freedman . . . not more than forty acres of such land."⁹⁴ Thus, the 1865 Act provided food, clothing, and shelter to refugees and freedman, and authorized the transfer of up to 40 acres of acquired land for the use of refugees and freedman.

The 1866 Act significantly expanded upon the previous year's statute. This Act was initially vetoed by Andrew Johnson on a variety of grounds,⁹⁵ but eventually a different version was passed and then enacted over John-

92 Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507, 507.

93 *Id.* at 508.

94 *Id.*

95 Andrew Johnson, Veto Message to the Senate (Feb. 19, 1866), *reprinted in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 398, 400 (James D. Richardson ed., 1899).

son's veto.⁹⁶ Section 2 expanded upon the prior Act's assistance, allowing for the Bureau's supervision and care for all loyal refugees and freedmen.

While the assistance to freedmen and refugees in both acts have received the most attention, other provisions in the 1866 Act are also important. First, some provisions in the Act either prohibit discriminatory laws or provide benefits on a nondiscriminatory basis. Section 14 sought to protect citizens against racial discrimination in states where the rebellion had caused a discontinuance in ordinary government.⁹⁷ It provided that the basic civil rights of each citizen, in a list similar to that of the Civil Rights Act of 1866, shall be secured "without respect to race or color . . ."⁹⁸ Section 8 called for funds derived from the sale of land in Saint Helena to be used for the support of schools "without distinction of color or race, . . . in the parishes of Saint Helena and Saint Luke."⁹⁹ Finally, Section 12 is a mixture of providing educational benefits for freedmen and for promoting nondiscriminatory state education. It allowed for the disposal of Confederate state property for funds to be used for "the education of the freed people," but would provide these funds to any Confederate state that would provide education "without distinction of color."¹⁰⁰

Finally, there are various provisions in the 1866 Act that relate to land transfers or land occupation pursuant to prior acts either by General Sherman or by tax commissioners. Sections 7, 9, and 11 involve land distributed under General Sherman's 1865 field order.¹⁰¹ Sherman's order had set aside various lands in the South for the settlement of blacks "made free by" the Civil War.¹⁰² These provisions, therefore, provide benefits to former slaves.

In addition, Section 6 of the Act allowed for the confirmation of certain land sales made to heads of families of the African race by South Carolina tax commissioners.¹⁰³ This provision clearly refers to the race of these families and in this respect might be thought of as race-based legislation. But there are two arguments that suggest that the Congress was not endorsing or taking racial action. First, because this transfer was made by the South Carolina tax commissioners pursuant to Abraham Lincoln's 1863 Executive Order, this statute is merely confirming a prior act.¹⁰⁴ When one confirms a prior act that was legal at the time, one does not necessarily endorse the racial distinction drawn there. One might simply be protecting a reliance interest. Second, while the transfer did refer to the race of the families, it is not clear that

96 Freedmen's Bureau Act of 1866, ch. 200, 14 Stat. 173.

97 *Id.* at 176–77.

98 *Id.*

99 *Id.* at 175.

100 *Id.* at 176.

101 *Id.* at 175–76.

102 GENERAL SHERMAN, SPECIAL FIELD ORDERS, No. 15 (January 16, 1865), *reprinted in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATION ARMIES, 60, 60–62 (Daniel S. Lamont et. al. eds., 1893).

103 14 Stat. at 174–75.

104 *Id.*

it needs to be thought of as racial legislation. After all, in South Carolina, it seems likely that virtually every black person would have been a former slave.

While the Freedmen's Bureau Acts contain multiple provisions, it is the provisions providing assistance to freedmen and refugees that have received the most attention. Virtually all, if not all, of the other provisions are either race neutral or provide benefits to former slaves. Thus, the significant issue is whether providing benefits to former slaves is race-based action, and, therefore, I will focus on that.

Eric Schnapper, the critic who has done the most work on the Freedmen's Bureau Acts, argues that these provisions are race-based. While Schnapper explores the legislative history of the two Freedmen's Bureau Acts at length, his explanation for why these acts are race-based is not as clear as it might be.¹⁰⁵ My best understanding of why he views these laws as race-based is that they conferred benefits on former slaves, and former slaves were all blacks.¹⁰⁶ But this argument neglects that there is a strong argument that the category of former slaves is nonracial.¹⁰⁷

There are several strong reasons for concluding that the Freedmen's Bureau Acts do not employ an impermissible racial category under the original meaning of the Fourteenth Amendment. First, the term "freedmen" does not as a formal matter involve a racial category. It simply refers to people who were previously slaves and were freed by the Civil War. While it is true that all of these former slaves were blacks, not all blacks in the United States were former slaves.¹⁰⁸ There were certainly blacks who had been free prior to the Civil War and some who had been free from birth.

105 Schnapper, *supra* note 74, at 762–75.

106 *Id.* Schnapper's argument largely proceeds by historical example. Schnapper discusses the development of the various versions of the Freedmen's Bureau Acts. He also reviews the arguments made in the legislative debates for and against the Acts. But these various arguments differ from one another and it is hard to know what specifically he is relying on. The core idea seems to be, as the text indicates, that all of the former slaves were blacks.

107 Another problem with Schnapper's argument based on the legislative history is his unqualified use of the opponents of the Freedmen's Bureau Acts. These opponents, a relatively small minority who in total consisted of less than one third of each house, argued that laws that prevented discrimination against both blacks and whites and that provided benefits to former slaves, were class legislation and impermissible. *Id.* at 763–67 (discussing opposition to Freedmen's Bureau Act of 1866 by Senators Guthrie, Hendricks, Johnson, McDougall, and Saulsbury and Representatives Chanler, Marshall, Ritter, Rousseau, and Taylor). Since these opponents also did not support the Civil Rights Act and the Fourteenth Amendment, one cannot accept their views of what constituted class legislation to be informative of the Fourteenth Amendment. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866) (Civil Rights Act) (Representatives Marshall, Taylor, Ritter, and Rousseau voting against the Civil Rights Act; Representative Chanler not voting); CONG. GLOBE, 39th Cong., 1st Sess. 3042, 3149 (1866) (Fourteenth Amendment) (Representative Chanler, Marshall, Taylor, and Ritter voting against Fourteenth Amendment; Representative Rousseau not voting).

108 At the time of the Civil War, eighty-nine percent of blacks in the United States were slaves. *See* JOSEPH C.G. KENNEDY, U.S. DEP'T OF THE INTERIOR, POPULATION OF THE UNITED

Second, while as a formal matter freedmen is not a racial term, it obviously has a strong connection and overlap with race. Thus, even if one does not treat the term as racial, one would still want to closely examine whether the term was being secretly used for racial purposes. There is, however, no reason to believe that the term freedmen was being used in this manner. There is an obvious reason why the Congress might have passed these Acts that has nothing to do with the race of the former slaves. These slaves had been oppressed in the most extensive way and had not received a basic education or learned the trade skills necessary to live self-sufficiently. Moreover, not only did they lack human capital, they also had acquired no physical capital in the form of land or money. Thus, it made perfect sense to provide them with education, food, shelter, and land in order to allow people who had been uniquely oppressed to enter society as free individuals. Further, even if one did not believe that these goods and services were needed to allow the former slaves to live self-sufficiently, one might argue that the benefits could be justified as a limited form of compensation for the harms these slaves had suffered.¹⁰⁹

Third, the bulk of the provisions under the Freedmen's Bureau Acts provided benefits to both freedmen and refugees. The term refugees would normally include whites, and once it is recognized that virtually all southern blacks would be freedmen, refugees becomes a term that would appear to have been intended mainly to cover whites. If one were concerned that the use of freedmen was an attempt to provide benefits on racial grounds, then the inclusion of refugees should help to quiet that concern. One question that one must ask about a category that overlaps with race is whether that nonracial category is being used as a subterfuge to benefit or harm a race. If the Acts merely provided benefits to freedmen, even though non-blacks were similarly in need of the same benefits, then one might be suspicious of the omission. By contrast, if the benefit is extended to non-blacks in a similar position, there is far less concern of it being a secretive attempt to provide racial benefits. I am skeptical that refugees really were similarly situated to former slaves, but if one did think so, this would quiet that concern. Moreover, there is evidence in the legislative history that refugees were added in part because of concerns that the proposed legislation was seen by some as race-based.¹¹⁰

Further, it is worth noting a significant portion of the 1866 Act operates to prohibit discrimination or to provide benefits on a nondiscriminatory basis. This, as well, suggests that Congress was not intending to discriminate. Overall, then, these arguments strongly suggest that the Freedmen's Bureau Acts were not race-based legislation.

STATES IN 1860: COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 7 (1862). Of the remaining eleven percent, some, of course, were former slaves.

109 While it is not relevant to the original meaning question, it is useful to note that Justice Scalia's position, that it is not race discrimination to provide benefits to blacks who were discriminated against, conforms to this understanding.

110 See Moreno, *supra* note 88, at 276–77.

The strongest argument for treating the Freedmen's Bureau Acts as race-based is offered by Stephen Siegel.¹¹¹ Siegel argues that various provisions at the time of the Amendment, including the Civil Rights Act of 1866, prohibited discrimination on the basis of "any previous condition of slavery or involuntary servitude."¹¹² Thus, Siegel concludes that the Fourteenth Amendment would also have treated the category of previous condition of servitude as an impermissible category.¹¹³

Although not without some appeal, this argument does not withstand scrutiny. First, the fact that the Civil Rights Act prohibited discrimination based on previous condition of servitude does not mean that the Fourteenth Amendment also prohibited it. As I argued above, previous condition of servitude is not a racial category. While its overlap with race suggests that it should be closely scrutinized to determine whether it is being used as a subterfuge for race, the strong reasons for providing benefits to former slaves—in terms of allowing them to become independent persons and as a limited compensation for slavery—suggests there is little reason to see the Freedmen's Bureau Acts as a subterfuge for race.

Second, that the Civil Rights Act prohibited discrimination based on previous condition of servitude does not mean that Congress believed that this category was racial or that it should generally be prohibited as class legislation. There is an obvious alternative explanation for the inclusion of previous condition of servitude in the Civil Rights Act. The Act was addressed toward the Black Codes, which were laws passed by former confederate states that denied blacks basic rights. If these laws were prohibited, it seems obvious that the next step for the former Confederate states would have been to pass similar laws that were directed not at blacks per se, but at former slaves. Thus, the Civil Rights Act appeared to prohibit discrimination based on previous condition of servitude because the former Confederate states were likely to use that as a subterfuge if it had not been prohibited. This prohibition did not mean that all laws that employed previous condition of servitude involved racial or class legislation.

It is true that the Civil Rights Act also prohibited states from providing special benefits to the freedmen of the type that the Freedmen's Bureau Acts provided. But it seems exceedingly unlikely that the former Confederate states would provide those benefits and therefore the cost of this prohibition was extremely small.¹¹⁴ Instead, the federal government was the entity that was most likely to provide these benefits and the Civil Rights Act neither pur-

111 See Stephen Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998).

112 *Id.* at 559 (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27).

113 *Id.* at 560.

114 Similarly, neither the non-Confederate former slave states nor the free states seem likely to have passed laws benefiting former slaves. The non-Confederate former slave states seem unlikely to have desired to provide benefits to their former slaves. And the free states might or might not have desired to do so in the abstract, but very few recently freed slaves would have been living in those states.

ported to nor could prevent Congress from enacting Freedmen's Bureau-type laws.

Finally, the language of the Fourteenth Amendment reinforces the conclusion that the "previous condition of servitude" category is not absolutely prohibited by the Amendment. The Fourteenth Amendment equality component used language (either the Equal Protection Clause or the Privileges or Immunities Clause) that is generally regarded as prohibiting class or caste-based legislation—that is, legislation that imposes benefits or burdens on a distinct class that is not justified based on an adequate public purpose.¹¹⁵ If a law uses a subterfuge to discriminate based on race, then it will constitute class legislation and will be prohibited. By contrast, if a law uses a classification, such as previous condition of servitude, that might be used as a subterfuge but in this case is innocently employed to pursue a genuine public purpose, such as assisting former slaves to enter society as independent individuals, then it will be permitted.¹¹⁶ Thus, it would not be necessary to read into the Fourteenth Amendment a categorical prohibition based on previous condition of servitude. Instead, the constitutionality of a classification based on previous condition of servitude would depend on whether it was being used as a subterfuge for racial purposes or to promote a legitimate public purpose.¹¹⁷

115 See *infra* Part IV for a discussion of two theories that derive the Fourteenth Amendment equality requirement from the Equal Protection Clause and from the Privileges or Immunities Clause, both of which view the original meaning of the equality component as prohibiting class or caste based legislation.

116 If the Civil Rights Act had merely prohibited providing a different set of rights to blacks than whites (but had not prohibited providing a different set of rights based on previous condition of servitude), then it is not clear whether the courts would have construed the provision as prohibiting state laws that used previous condition of servitude as a subterfuge for race. It all depends on how expansively the courts would engage in aggressive interpretation to restrain subterfuges. Thus, it was necessary to add previous condition of servitude to the Act. By contrast, it was not necessary to add it to the Fourteenth Amendment because such subterfuges would already be covered by the prohibition on class legislation.

117 Schnapper also argues for the constitutionality of race oriented benefits based on the claim that there is "substantial evidence that Congress adopted the [F]ourteenth [A]mendment in part to provide a constitutional basis for the Freedmen's Bureau Act." Schnapper, *supra* note 74, at 785. But since the Freedmen's Bureau Act does not provide race-based benefits to blacks, the evidence that Schnapper presents would not support reading the Fourteenth Amendment to allow race-based benefits, even if it did establish that the Congress had enacted the Amendment in part to provide resources to former slaves. But Schnapper's evidence here is problematic because it is ambiguous. While there are some statements that suggest the Fourteenth Amendment was intended to provide a basis for the Act, those statements could easily be understood as referring to the provision in the Act that prohibits race discrimination as to civil rights rather than to the provisions providing resources to former slaves. Although this is not the place to examine Schnapper's evidence in detail, it is my view that the evidence more strongly suggests that the Amendment was enacted as a basis for the race discrimination prohibition.

2. Other Laws

Let me now discuss various laws that do not focus on previous condition of servitude but instead appear to classify based on race. Jed Rubenfeld's influential discussion, as well as those of other scholars, focuses on five principal sets of laws.¹¹⁸ One 1866 law donated federally owned land in the District of Columbia "for the sole use of schools for colored children."¹¹⁹ A second 1866 act is said to have appropriated funds for the relief of destitute colored women and children.¹²⁰ A third 1867 law provided for money for destitute "colored" persons within the District of Columbia.¹²¹ A fourth 1866 law required military chaplains appointed for black troops to provide them with basic educational instruction.¹²² Finally, Congress adopted special rules and procedures for the payment of "colored" servicemen in the Union Army.¹²³

While the critics claim that these five laws confer race-based benefits on blacks, and at first glance they appear to do so, upon examination it is not at all clear that they do. The first two laws do not provide any evidence of providing special race-based benefits to blacks. The third and fourth laws can be reasonably interpreted as not providing such benefits. The fifth law does appear to provide race-based benefits, but it may do so under significantly narrower grounds than the critics suggest.

First, while Rubenfeld presents the law that donated federal owned land in the District of Columbia "for the sole use of schools for colored children" as a special benefit to blacks, this appears to be a misinterpretation.¹²⁴ Prior to 1862, public schools in the District were limited to white children.¹²⁵ In 1862, Congress initiated a separate school system for "colored" children. Under a system of separate but equal, each of the school systems should have received equal funding.¹²⁶ The law that Rubenfeld identifies contributed land to the public schools for black children.¹²⁷ This contribution, therefore, cannot be considered in isolation from the other more general funding provided to the two school systems. One can consider this contribution as a special benefit to blacks only if funding for black schools exceeded on a per

118 See *id.* at 758–78; Siegel, *supra* note 111, at 547–64.

119 Act of July 28, 1866, ch. 308, 14 Stat. 343.

120 Act of July 28, 1866, ch. 296, 14 Stat. 317.

121 Resolution of March 16, 1867, No. 4, 15 Stat. 20.

122 Act of July 28, 1866, ch. 299, 14 Stat. 337.

123 Act of July 28, 1866, ch. 299, 14 Stat. 367–68.

124 Rubenfeld, *supra* note 68, at 431 n.23 (quoting Act of July 28, 1866, ch. 308, 14 Stat. 343).

125 See Siegel, *supra* note 111, at 550.

126 *Id.*

127 That the land went to public schools is shown by the fact that the law states that the land goes to the "trustees of colored schools for the cities of Washington and Georgetown, in the District of Columbia." Act of July 28, 1866, ch. 308, 14 Stat. 343. See also Act of July 11, 1862, ch. 151, 12 Stat. 538 (referring to "a board of trustees of the schools for colored children in the cities" of "Washington and Georgetown"); Carr v. Corning, 182 F.2d. 14, 18 (D.C. Cir. 1950) (discussing the statute donating land for colored schools as going to the black public schools).

capita basis the funding for white schools. Based on the operation of segregated schools generally, this seems quite unlikely. Moreover, the contribution of land for black public schools is entirely understandable without assuming additional contributions to black schools. If white schools had been operating in the past, then it would not be necessary to provide land for those schools, since they would have already been built. But black schools, which were just being started, would require additional capital contributions to be erected.¹²⁸

Second, Rubenfeld's discussion of the appropriation of funds for the relief of destitute colored women and children also appears to be misleading. The 1866 law appropriated funds for the National Association for the Relief of Destitute Colored Women and Children.¹²⁹ The private association had received a charter from the Congress in 1863.¹³⁰ The Association, which was initially located in Georgetown in the confiscated estate of a Confederate officer and provided food and shelter, had been established because of concerns about the plight of former slaves.¹³¹ Fugitive slaves largely from Virginia, who were known as contrabands, had entered the District of Columbia and taken up residences in shantytowns and makeshift camps.¹³² One source estimates that perhaps a third of the contrabands in the District died between 1862 and 1866.¹³³ The National Association in 1863 became a home "for sixty-four former slaves, most of them children."¹³⁴

In this case, the funding of the National Association, without more, would be unlikely to constitute the conferral of race-based benefits. The funding of a private organization is not state discrimination unless the state's decision to fund it is based on a discriminatory intent. Here there is no evidence that the federal government had a discriminatory intent. One nondiscriminatory reason for the funding is that the organization appeared to benefit only former slaves. Another possible nondiscriminatory reason is that it was addressing a serious problem of poverty through an existing organiza-

128 It is worth noting that this segregated school system was, of course, unconstitutional under a colorblind interpretation of the Constitution. In this section of the paper, I am generally discussing laws that appear to benefit blacks, but the segregated schools may have harmed them. I will be discussing this segregation of the schools below in the section that discusses laws that operated against blacks. I raise the issue here only because Rubenfeld treats the law as if it benefited blacks.

129 Act of July 28, 1866, ch. 296, 14 Stat. 310, 317.

130 Act of Feb. 14, 1863, ch. 33, 12 Stat. 650; *Early History of the National Association for the Relief of Destitute Colored Women and Children*, FREEDMEN AID SOCIETIES, <http://drbronsontours.com/bronsonnationalassociationforthereliefofdestitutecoloredwomenandchildren.html> (last visited Sept. 23, 2013).

131 Carlton Fletcher, *Historical Sketches of Glover Park, Upper Georgetown, & Georgetown Heights*, GLOVER PARK HISTORY, <http://gloverparkhistory.com/estates-and-farms/burleith/the-colored-home/> (last visited Sept. 23, 2013).

132 *Id.*; KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. 55–59 (2010).

133 CONSTANCE M GREEN, THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITAL 81 (1967).

134 Fletcher, *supra* note 131.

tion. Rubenfeld appears to have misunderstood this law because he presents it as having the purpose of providing relief for “destitute colored women and children.”¹³⁵ But that is incorrect. The law provides funds for the organization with that name, not necessarily for that purpose. Thus, the fact that National Association’s purpose was to alleviate the poverty of colored women and children does not necessarily mean that Congress’s purpose in assisting the organization, given the circumstances at the time, should be understood as providing race-based benefits to blacks.

Third, the proper interpretation for the 1867 law that provided for money for destitute “colored” persons within the District of Columbia is also more complicated than Rubenfeld’s brief discussion suggests. Once the background circumstances that led to this law are taken into account, one might easily conclude that the law was not intended as race-based legislation. To understand the enactment of the 1867 law, one must first review Congress’s enactment of a similar law the previous year. At that time, the Congress proposed a law that would have provided funds just for destitute colored persons.¹³⁶ Opponents of the law criticized it on what amounted to the grounds that it discriminated based on race because there were also white persons who were destitute.¹³⁷ Defenders of the law argued it was not really discriminatory because the predominant need was by blacks, but they were willing to allow the funds to be provided to all destitute persons irrespective of color if administered by the Freedmen’s Bureau.¹³⁸ When the law came up for reenactment the next year, however, Congress limited the funding to “freedmen or destitute colored persons” without explanation.¹³⁹

We do not know the reason why Congress chose to change the beneficiaries of the funding in 1867. But that Congress modified the statute in response to the objection of race discrimination the year before suggests that it took the issue seriously and did not believe that providing money to blacks was unproblematic. One possibility is that, after observing the distribution of funds, Congress determined that the advocates of the initial version of the prior year’s statute were correct and that the predominant need existed among blacks. In that event, though, the 1867 law would still constitute a race-based measure, even though some might see it as one that had a public policy basis.

But this understanding of the 1867 law may view it as more race-based than the evidence actually indicates. When one examines the justification given in 1866 for restricting the benefits to blacks, there is a strong argument that the law was either not race-based or far less race-based than the discussion above suggests. In response to the criticism that the original 1866 bill was racially discriminatory, it was defended on the grounds that there were various places in the city where former slaves, known as contrabands, lived in

135 Rubenfeld, *supra* note 68, at 430 (quoting Act of July 28, 1866, ch. 296, 14 Stat 317).

136 CONG. GLOBE, 39th Cong., 1st Sess. 1507–08 (1866).

137 *Id.*

138 *Id.*

139 Resolution of March 16, 1867, No. 4, 15 Stat. 20.

densely populated shantytowns.¹⁴⁰ The poverty in these shantytowns was extremely serious, with extended families crowded into six or eight foot square rooms with no windows for light.¹⁴¹ These areas were also breeding grounds for disease, since they had poorly functioning sanitation.¹⁴² Finally, the people living in these areas were not being helped by the government of the District of Columbia. The explanation offered for this neglect is that the contrabands were mainly refugees, who were not viewed as the problem of the District of Columbia.¹⁴³

This justification for the benefits then suggests a non-race-based reason. Under this justification, these benefits were not provided to destitute blacks because of their race or because there was a tendency for blacks to be in worse circumstances. Rather, Congress provided the benefits because there was a special problem exhibited by the shantytowns in the District where only blacks lived. The blacks living in the shantytowns were suffering the worst poverty in the District, were also part of a serious public health problem, and were not receiving assistance from the local government.¹⁴⁴ Under this view, stating that the benefits should be provided to destitute blacks was a way of identifying the people in these circumstances, since it was the most destitute blacks who were in these circumstances. As Senator Morrill who explained

140 According to Senator Morrill:

There are some ten or fifteen thousand of these people that have been thrown into this city from the adjoining States, and they are existing here in a state of almost utter destitution, inconceivable suffering, and want. The committee have made their condition the subject of personal inspection, and have come to the conclusion that as an act of humanity to these people, as well as a matter of security to the public health, it is absolutely indispensable that some immediate relief should be had for these people. They are now gathered in colonies on the skirts of the city, in some instances close upon the thickly settled parts of the city, and they are literally breeding disease and death.

CONG. GLOBE, 39th Cong., 1st Sess, 1507 (1866).

141 *Id.* at 1508.

142 *Id.*

143 *Id.* The fact that residents of the shantytowns were blacks may also have been an explanation for the failure of the District government to assist them. See MASUR, *supra* note 132, at 55.

144 As Senator Morrill stated:

These colored people came here homeless, houseless, destitute, without shelter, and without protection of any kind whatever, and were thrown upon this city with no obligation to provide for them whatever. They are destitute and their condition is one of peculiar hardship and suffering to themselves, and of very great hardship to the city. . . . The hardship of their condition is increased by the fact that the city does not feel under the slightest obligation whatever to provide for them. *There are no poor white people in this city in that condition.* The cases are not parallel. It does not follow because the Government feels under some obligation, as I trust they do, and know they ought, in this case to provide for this class of destitute and unfortunate people, who are thrown upon this community, that the poor white people of the District need something from the Treasury of the United States.

Id. at 1508 (emphasis added).

the law to the Senate stated, “there are no poor white people in this city in that condition.”¹⁴⁵

Under this interpretation, the law would not have been intended as a race-based measure, but instead as a measure to deal with poverty and related problems that happened to have afflicted blacks.¹⁴⁶ Of course, under modern equal protection analysis, this statute would be likely to be viewed as race-based—or at least as presumptively race-based—because it draws a textual racial distinction. If the statute were defended as non-race-based, the counter-inquiry would ask why Congress had not passed a textually race-neutral statute—by either listing the areas that were subject to the extreme poverty, health effects, and neglect by the local government or by limiting the payment of benefits to the people with the greatest poverty living in areas that had these three characteristics. Although the first option may have been impeded by Congress’s apparent lack of knowledge of all of the relevant areas, it is not clear why the second would not have worked.¹⁴⁷

While this formal focus on the statutory text would treat the statute as race-based, there is a strong argument that it should not be viewed as race-based for purposes of our inquiry into Congress’s understanding of the Fourteenth Amendment. Congress knew that the Fourteenth Amendment did not apply to this statute. Therefore, there was no particular reason for Congress to conform to the constitutional rule that treated textual distinctions based on race as being especially problematic. Instead, it might have believed that the vague political norm against class legislation could have been satisfied by a statute that was justified as having been intended to address a race-neutral matter. Thus, the possibility that the statute would have been unconstitutional under the Fourteenth Amendment does not necessarily suggest that Congress would have viewed race-based statutes that ben-

145 *Id.*

146 It should be noted that there is strong support for reading the statute as limiting benefits to the people living in these shantytown areas. If one looks to Congress’s intent, then the evidence of intent supports interpreting the statute as limiting to these areas. See *supra* text accompanying notes 129–40. But even if one looks to the statutory text, a similar result obtains. To begin with, it is certainly the case that this statute allows the executive to allocate the funds to these shantytown areas. The poverty occurring there was extremely serious and the other circumstances, such as local government neglect and public health hazards, made it all the more reasonable to spend the money there. But it also seems very likely that the executive would have been required to spend the money in these areas. Based on the legislative history, it seems that the worst poverty in the District existed in these areas. If that is true, then spending the funds for other purposes, especially when the additional matters of public health and local government neglect are considered, would seem to be an abuse of discretion. Thus, there is a strong case that, given the circumstances existing at the time, the money could only be legally used on these shantytowns. Moreover, the fact that the money was enacted for only a one-year period enhances the argument, because it makes it more likely that the circumstances that Congress assumed existed would continue to do so during the entire duration of the law.

147 See CONG. GLOBE, 39th Cong., 1st Sess. 1507–08 (1866) (statement of A.C. Richards, Superintendent of Washington, D.C.) (stating that the D.C. inspector still has not had the opportunity to identify and list all of the shantytown areas).

edited blacks as uncontroversial. Rather, Congress might have viewed this statute as having a race-neutral purpose and therefore as not race-based. And since the only inference that one might draw in favor of the critics' view from this statute turns on Congress's values, the fact that Congress might have viewed this statute as not race-based greatly reduces the support for this inference.

There is also another way to see the statute as not providing race-based benefits to blacks. Under this view, one notes that the blacks who lived in these shantytowns were, according to the legislative history, largely former slaves. Thus, one non-race-based reason why the funds might have been provided was their status as former slaves rather than their race.

Of course, the 1867 law did not merely provide benefits to former slaves, but also to blacks. But there are non-race-based reasons for extending the benefits to blacks. The law might have extended the benefits beyond slaves to blacks generally based on the view that it would have been difficult to prove that the beneficiaries were former slaves. In the shantytown areas, the level of poverty would make it very unlikely that the recipients could prove or provide formal evidence that they were former slaves.¹⁴⁸ Conferring benefits on blacks who lived in areas where nearly everyone was a former slave would avoid the need for proving former servitude while nonetheless limiting benefits largely to former slaves.¹⁴⁹

The fourth statute involves a provision that requires chaplains appointed for "colored troops" to instruct these troops "in the common English branches of education."¹⁵⁰ Siegel claims that "the chaplains for white troops had no similar responsibilities."¹⁵¹ Thus, he suggests that black troops were provided more educational benefits than white troops.¹⁵² But the claim that this statute is an example of race-based benefits for blacks is once again not proven, since it may not have provided any special benefits to black soldiers.

To begin with, it is not clear to what extent, if any, black soldiers received educational benefits that white soldiers did not. Depending on how

148 The difficulty of proving one's status appears not to have been uncommon. See, e.g., GREEN, *supra* note 133, at 59 ("A Negro refugee from Virginia might have difficulty in proving that he was not a Maryland fugitive salable for jail fees when no master claimed him.").

149 Another reason the law might have extended the benefits beyond former slaves to the few additional blacks living in these shantytowns might have been based on the view that improving the conditions in the shantytowns required that benefits be provided to all recipients there. It is possible that the law would have provided relief to these areas in the form of shelter, food, and sanitation. Given the density of the population, providing relief to some of the inhabitants of these areas, without providing relief to others, might have been difficult. For example, if shelter or sanitation were provided in these areas to some inhabitants, it might be hard to effectively deny these benefits to the other inhabitants of these areas. Improving sanitation for some would probably require improving it for most or all of the inhabitants.

150 Act of July 28, 1866, ch. 299, 14 Stat. 337; see Siegel, *supra* note 111, at 560–61.

151 Siegel, *supra* note 111, at 560–61.

152 *Id.*

one interprets the statutory scheme and what the circumstances were at the time, there are at least two ways that black soldiers would have been provided no more benefit than comparable white soldiers. First, at the time, Congress had required that there be schools at all army bases.¹⁵³ Since white soldiers could attend these schools when stationed at bases, this suggests that the provision requiring chaplains to instruct black troops would have provided additional benefits to black soldiers only when they were not stationed at army bases.

But this understanding may overstate the differences in treatment between black and white soldiers. Because one of the traditional duties of chaplains was to provide education, it is sensible to interpret the duties of chaplains assigned to white troops as at least allowing that they provide educational instruction and probably requiring that they do so when circumstances justified it.¹⁵⁴ White soldiers who required instruction may therefore have received it even when not present at army bases.

Given that black soldiers were in general far less educated than white soldiers due to slavery and other causes, it is not at all clear that these provisions would have provided the white soldiers who required instruction any less instruction than the black soldiers who required it. The chaplains in black regiments would have had many more soldiers to instruct and therefore any additional time when they were required to instruct the black soldiers might not have resulted in more instruction per soldier for blacks than for whites.

In addition to not conferring additional benefits on black soldiers, these provisions might also have been motivated by race-neutral considerations. First, Congress might have adopted this statutory scheme because it believed that providing instruction to white troops in this manner (requiring it on army bases and authorizing it when off these bases) would have adequately provided education to the limited number of white troops who required it, but would not have been sufficient for the greater percentage of black troops who needed it. In the case of black troops, requiring the chaplains to provide instruction while off base might have been needed to provide sufficient instruction. Second, Congress might have feared that the white chaplains, who were providing the education, would be prejudiced against instructing black soldiers, believing that educating blacks was not appropriate.¹⁵⁵ In that event, Congress's decision to require education for black troops would have

153 Act of July 28, 1866, ch. 299, 14 Stat. 336.

154 See Act of July 8, 1838, ch. 162, 5 Stat. 259; JACK FONER, *THE UNITED STATES SOLDIER BETWEEN TWO WARS* 25–27 (1970). If the chaplains were required to exercise their duties reasonably, then they might have been required to provide education to white troops needing it unless there was a good reason for not doing so.

155 The concern about prejudice against educating blacks gains support from the fact that the armed forces segregated blacks and excluded them from the services that required more training and intelligence. See *infra* notes 170–74 and accompanying text.

been based not on providing additional instruction to blacks but simply ensuring that they received the same instruction as whites did.¹⁵⁶

The second way that black soldiers would not receive additional benefits derives from a different interpretation of the statutory scheme. Under this interpretation, the provision requiring chaplains to provide instruction for black soldiers might have been understood as applying entirely or mainly when those soldiers were at army bases. Consequently, black soldiers would not receive more instruction than white soldiers, who would also receive instruction at army bases (and on occasion in other places). This interpretation of the provision as being largely limited to instruction at army bases would gain force if, as seems plausible, instruction mainly occurred at army bases and was more difficult to provide when off base.

The main question for this interpretation is why Congress would have added a special provision requiring instruction of black soldiers when there was already a provision requiring schools at army bases. The explanation for this provision would be that Congress feared that the schools might have excluded the black soldiers. As discussed below, the armed forces already discriminated against black soldiers, especially as to positions requiring greater learning.¹⁵⁷ Moreover, there is some evidence that the schools were segregated, suggesting a hostility towards instruction by black soldiers.¹⁵⁸ In the absence of a provision requiring instruction to black soldiers, Congress might have been concerned that the black soldiers would not receive education from the schools. By requiring that the chaplains for the black soldiers provide education, Congress would have ensured that the black soldiers would have been taught by the chaplains for their regiments.

Under either of these scenarios, then, the provision requiring instruction for black soldiers would not have operated to, nor have been intended to, provide special benefits to blacks that comparable white soldiers would not receive. Instead, in both cases, Congress might have simply been addressing the special circumstances that the black soldiers were in—that a greater percentage of the black soldiers required instruction and that there was prejudice against instructing blacks.

It might be objected that whatever benefits were provided to the black troops were race-based benefits because the statutory provision drew a racial distinction. While this objection might have some force in a different context, it has much less force given the legal landscape at the time. The distinc-

156 One might object that providing additional protections for blacks based on the belief that they would face prejudice might constitute a form of special benefits. That is by no means clear. If blacks did face extra prejudice, failing to provide the special protections might constitute discrimination against blacks. Of course, the ideal race-neutral way to provide protection would be a provision, such as “all soldiers who require instruction shall receive it, with no discrimination as to race.” But the armed forces were already segregating (and discriminating against) blacks and, once that grouping had occurred, it might have made sense to frame the laws against that legal landscape.

157 See *infra* notes 174–79 and accompanying text.

158 See FONER, *supra* note 154, at 65–66 (discussing evidence of such segregation, including army regulations in 1881, necessitating separate classrooms).

tion between black and white troops was imposed by the armed forces, with blacks being both segregated and excluded from various units.¹⁵⁹ Once the troops were segregated, it might have seemed sensible to draw racial distinctions that served nonracial purposes. Put differently, there might have seemed to be little point to avoiding racial distinctions given the existing racial segregation and exclusion in the armed services.

Finally, even if one did view this educational instruction by chaplains as being race-based, it is hard to argue that it was a genuine benefit comparable to affirmative action in the legal context of the time. Given that blacks were both segregated and excluded from portions of the armed forces, these small islands of benefits existed in a larger sea of burdens placed on black soldiers and therefore hardly constitute a congressional determination that blacks could be benefited but not harmed.

In sum, it is not clear that black soldiers received special benefits, and if they did so, whether those benefits should be seen as a precedent for affirmative action when they were merely part of a larger scheme of burdens that the Armed Services imposed on blacks.

The fifth statute involved a provision that placed price controls on the amount that could be paid to agents who helped black servicemen secure bounties, pensions, and other payments that they were due.¹⁶⁰ Such agents were a common part of the system for paying servicemen. In the case of black servicemen, however, the Congress believed that many black servicemen were significantly overpaying for these agents' services in part because they did not understand how the payment system operated.¹⁶¹ As a result, the Congress passed a statute that imposed maximum fees on how much agents could charge black, but not white, servicemen.

Such a statute drew a clear distinction based on race. While it therefore constitutes the first clear example of a statute that confers race-based benefits, the question is how broad of an example it is. Does it suggest that the Congress approved of a lenient standard in reviewing government benefits for blacks or does it represent a narrow example of such benefits that might satisfy strict scrutiny? Here, I argue that there is a plausible case that the statute represents a relatively narrow exception that might satisfy a moderate version of strict scrutiny, although not the strict version that the originalist Justices defend.

While this statute may have been based on the greater exploitation of black servicemen, the details as to the situation facing black and white servicemen are important to assessing the justification used for the statute. Although we do not have those details, one can easily imagine a version of the facts that would have justified the statute as both benefiting black and white servicemen.

Assume that blacks were much more likely to overpay their agents than whites. Assume also, however, that the price controls interfere with some

159 See *supra* notes 156–57 and accompanying text.

160 Act of July 28, 1866, ch. 299, 14 Stat. 367–68 (1866).

161 Siegel, *supra* note 111, at 561.

legitimate uses of agents. For example, in some cases, the servicemen might have additional issues that require extra effort on the part of the agents that needs to be compensated. In these cases, the price controls might prevent the servicemen from employing the agents. Under these circumstances, imposing the price control on blacks but not whites might produce net benefits for both blacks and whites. By imposing the price control on blacks, the relatively large number of blacks who would overpay the agents would be protected. It is true that blacks who would benefit from the additional services from agents would be harmed, but that number might be smaller than the larger number of blacks who would be harmed by the exploitative prices charged by the agents.

In contrast, whites as a group might have been better off being excluded from the price controls. If a relatively small percentage of whites were being exploited by agents, then the benefits from the price controls for them would be small. The costs to the whites from not being able to use agents in the more complicated cases, then, would be larger than the benefits from the price control.¹⁶²

These benefits from the race-based legislation, moreover, might not otherwise have been obtainable without this racial distinction if there were no other way for the Congress to determine which groups were the most in need of protection. It might be thought that Congress could have imposed the price controls only on servicemen who were likely to be vulnerable to exploitation, such as servicemen who had not received a certain level of education. But it is not clear that Congress had a better filter than race. For example, while education might seem like a useful filter, it is quite possible that, in a world in which many people had not received much formal schooling, educational attainment would not be a good means of determining who could protect themselves against exploitation.¹⁶³

162 Let me illustrate the point made in the text with an example. Suppose that the Armed Forces consists of 800 whites and 200 blacks. Assume that ten percent of blacks (twenty people) will be exploited by agents whereas only three percent of whites (twenty-four people) will be. Assume also that the same percentage of blacks and whites—five percent—require additional services by agents, so that ten blacks and forty whites would be prevented by the price control from employing agents. Finally, assume that the costs to a person exploited by an agent are equal to the costs from a person who needs the additional services provided by an agent but cannot secure them because of the price control. Under these assumptions, the benefits provided by imposing the price control on blacks, but not whites, would outweigh the costs. The price control would benefit blacks as a group (twenty blacks benefited, ten harmed) whereas the absence of the price control would benefit whites as a group (forty whites benefited, twenty-four harmed). Obviously, the example depends on the assumptions that I have made. But the point is that these assumptions are plausible given the information that the Congress had collected.

163 After passing this provision, Congress in the next year passed another law that had the Freedmen's Bureau administer these provisions. See *Colored Servicemen's Claim Act of 1867*, J. Res. 30, 15 Stat. 26. The Bureau received the checks for black servicemen, ensured that the agents received only the statutorily authorized amount, and followed other procedures to ensure that the agents were not abusive. These provisions do not really raise additional issues. If Congress had the authority to impose the price controls,

If this account of the legislation is accurate, then one might wonder whether the legislation is narrow enough to satisfy strict scrutiny. If it is true that the race-based distinction benefits both blacks and whites as to receiving the services of agents, and there is no other way of accomplishing this objective as effectively, then this legislation might satisfy the narrowly tailored prong of strict scrutiny.

This would then leave the question of whether this was a compelling state interest. Neither of the originalist Justices, however, would appear to believe that it was. Both Justice Scalia and Justice Thomas appear to believe that only the prevention of violence or imminent danger to life and limb would justify racial discrimination.¹⁶⁴ Thus, this statute would satisfy only one of the two prongs of Scalia and Thomas's version of strict scrutiny. But even if this statute fails the full colorblindness test, it would be much narrower than the antistatutory view held by many of the critics, which generally allows harm to whites so long as it benefits blacks.¹⁶⁵

Of course, it is not clear that this account of the facts existed either in reality or in the minds of the Thirty-Ninth Congress. But the point here—as with some of the above statutes as well—is that this is a very plausible account of the situation and it cannot be assumed away. Therefore, it is very possible that this was Congress's understanding of the situation and therefore the critics cannot assume that Congress had a broader race-based intent in enacting this statute.¹⁶⁶ Moreover, even if this account is not entirely accurate and Congress merely assumed that blacks were subject to much greater exploitation and that it was difficult to find another means of protecting them, that

then it would have the authority to take actions to enforce them. Similarly, if Congress lacked the authority to impose the controls, then it obviously could not enforce them. It is true that having the Freedmen's Bureau administer the program would have involved the expenditure of government funds. But administering payments to white soldiers would have been conducted by the armed services, which also would have involved government expenditures.

164 See *supra* notes 9–10, 28–29, and accompanying text.

165 There are at least two ways that this statute, given the understanding described in the text, is narrower than the antistatutory view. First, the racial distinction in this statute confers net benefits on both blacks and whites as groups. It is true that some blacks and some whites would be harmed by the arrangement, but overall both blacks as a group and whites as a group would be benefited. This feature of the statutory scheme (which might be thought of as promoting the public interest under Saunders's view, see *infra* Section IV.B) would be inconsistent with the typical affirmative action program, which benefits blacks or other subordinate groups, but harms other groups that do not receive these benefits.

Second, the racial distinction in this statute might have been necessary to produce these benefits, because an alternative non-race-based distinction was not available. This feature of the statutory scheme would likely also be inconsistent with most affirmative action programs. If the goal is to assist those who are disadvantaged or who have suffered discrimination, there are alternative methods for accomplishing these goals, such as affirmative action based on socioeconomic status or for those who show they have been the victim of discrimination.

166 See *supra* note 162.

would still suggest a considerably narrower understanding than the antisubordination interpretation adopted by the critics.

Overall, then, these seven federal statutes passed at the time of the Fourteenth Amendment do not support the critics' claim that Congress understood the Constitution to allow race-based laws that benefited blacks. Even if one puts aside that the statutes were passed by a Congress that did not consider itself bound by the Amendment, these statutes do not necessarily assume a view that the government has significant discretion to pass race-based laws that benefit subordinate groups. Instead, six of these seven laws are either not race-based or can reasonably be interpreted as not race-based. Only one of them clearly appears to be race-based and to fail the originalist Justices' version of strict scrutiny, and that law may constitute a far narrower example of race-based legislation than the critics suggest.¹⁶⁷

C. *The Laws Harming Blacks*

So far, this Article has discussed federal laws that benefited blacks and asked whether those laws provide any strong evidence about the meaning of the Fourteenth Amendment. But this view of the matter gives one a distorted perspective. The Congresses that passed the laws that benefited blacks also passed laws that harmed minorities. Do these laws also inform the meaning of the Fourteenth Amendment, and if they do, how they can be reconciled with laws benefiting blacks to produce a coherent understanding of the overall meaning of the Amendment?

There are three basic examples of laws that harmed minorities. First, there were laws that involved school segregation. As mentioned above, the Congress maintained a segregated school system in the District of Columbia.¹⁶⁸ This segregated school system actually grew out of a more racially discriminatory system. Before 1862, the District's public schools excluded free blacks, who were forced to attend private charitable schools.¹⁶⁹ In 1862, however, Congress tasked the District with "initiating a system of primary schools for the education of colored children."¹⁷⁰ While the legislation did not require segregated schools, the District authorities maintained a segregated system.¹⁷¹ The Thirty-Eighth and Thirty-Ninth Congresses revised the legislative scheme without taking any action to desegregate the schools.¹⁷² Thus, Congress at the least allowed for the local government to segregate the schools and may have even ratified the local government's actions.¹⁷³

167 See *supra* text accompanying notes 160–62.

168 Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 977–80 (1995).

169 Siegel, *supra* note 111, at 550.

170 Act of May 21, 1862, ch. 83, 12 Stat. 407.

171 Siegel, *supra* note 111, at 550–51.

172 *Id.*

173 Stephen Siegel argues that subsequent acts acknowledged and ratified the segregated system. See *id.* at 550 n.456. Moreover, he claims that the system was unequal in that it allowed whites to attend any school, but not blacks. *Id.*

Second, Congress also allowed for both segregation and exclusion of blacks in the armed forces. A law passed at the time of the Fourteenth Amendment provided for the segregation of blacks in certain infantry and cavalry units, and allowed for the exclusion of blacks from the other parts of the military, including the artillery, engineer, ordinance, and signal corps.¹⁷⁴

The manner in which this was done was a bit complicated. When the Thirty-Ninth Congress debated the Army Reorganization Bill, the assumption was that blacks would be excluded from the army unless they were specifically included.¹⁷⁵ Based on this assumption, the Congress passed a provision that allowed for the establishment of four separate units of infantry and two separate units of cavalry for black soldiers. No such units were included in other areas.¹⁷⁶ Thus, there was segregation for infantry and cavalry and exclusion in other areas.¹⁷⁷

One might question whether Congress's assumption underlying the legislation really represented the force of the act. In particular, it might be thought that the act did not require the exclusion of blacks from the units that were not identified as black units. But it is not clear that this alternative view matters much. First, if Congress made the assumption, even if it was not legally correct, the assumption would reflect Congress's views of the Constitution more than the actual legal meaning of the statute. Second, even if the assumption was not reflected in the law, the act would still be authorizing government discrimination. The statute certainly allowed the armed services to engage in discrimination and did nothing to stop the discrimination that the Congress knew was occurring administratively.

The third set of laws that discriminated against minorities were the naturalization laws. Until 1870, the naturalization laws extended only to white persons.¹⁷⁸ In 1870, Senator Charles Sumner sought to eliminate any racial distinctions in these laws. There was, however, strong opposition in the Western states to naturalizing the Chinese. A compromise was worked out that extended the naturalization laws to persons of African descent but continued to exclude the Chinese.¹⁷⁹ Thus, racial distinctions were not only not eliminated, but specifically continued by legislation in 1870.

These three pieces of legislation would appear to have significant implications for the meaning of the Fourteenth Amendment under the critics' approach. After all, if the federal laws benefiting blacks inform the meaning of the Amendment, then so should the federal laws that harmed blacks and other minorities. That would unfortunately suggest that the Fourteenth

174 Act of Jul. 28, 1866, ch. 299, 14 Stat. 332.

175 See Siegel, *supra* note 111, at 552 ("Congress debated the Army reorganization bill on the presumption that failure to legislate inclusion of blacks meant continued exclusion.").

176 JACK FONER, *BLACKS AND THE MILITARY IN AMERICAN HISTORY* 52-54 (1974).

177 Siegel, *supra* note 111, at 551-53.

178 *Id.* at 553-56.

179 *Id.*

Amendment allows both segregation and laws discriminating against blacks and other minorities.

Moreover, if one does conclude that these laws significantly inform the Fourteenth Amendment, then it is difficult to know how one should interpret the overall meaning of the Fourteenth Amendment. One would have to consider not only the set of laws that harm minorities, but also those that benefit them. Assuming that they all reveal something of the original meaning, how could one reconcile the meanings underlying these laws?

While one might explore a number of possibilities, perhaps the most plausible is that the state legislature enjoys significant discretion to adopt what it regards as reasonable laws favoring or harming minorities. Each of these laws—the laws favoring blacks and the laws harming minorities—might be thought to be permissible under a deferential approach. Although I have already explored the arguments for the laws favoring blacks, each of the laws that harm minorities might be deemed to be reasonable as well. Segregation might be thought to promote educational quality in a world where the races had often been segregated. Restricting blacks to a limited number of segregated units might be thought to be justified on a similar basis, with the limited units defended as the most that blacks were capable of filling at that time. Finally, the laws forbidding naturalization to Asians might have been thought to take into account the significant cultural differences between Asians and other Americans and the negative reactions those caused among some U.S. citizens. To be clear, all of these justifications for the laws that harm minorities would now be rightly regarded as racist. But if one were inclined to view contemporary laws as informing the meaning of the Fourteenth Amendment, then one might be hard-pressed to deny laws that Congress passed at the time of the Fourteenth Amendment were reasonable.

Such an interpretation of the Fourteenth Amendment seems quite inconsistent overall with the text, purposes, and history underlying the Amendment.¹⁸⁰ In particular, the idea that the state legislatures—the authors of the Black Codes—would be given authority to determine what is reasonable discrimination against or for blacks seems extremely unlikely. That interpretation would also be inconsistent with the Civil Rights Act.

By contrast, the jurisdictional understanding of the federal statutes and the Amendment is superior. Under this view, these various federal laws were passed by a Congress that was not, and did not deem itself, bound by the Fourteenth Amendment. Thus, it possessed greater flexibility to pass laws that reflected varying circumstances and varying views about appropriate legislation. But the set of laws produced by this flexibility did not reflect the meaning of the Fourteenth Amendment. Instead, the Amendment would have needed to have been clearer and more restrictive to guard against states that could not be trusted because they had shown themselves to be extremely resistant to conferring equal rights on all of their citizens.

180 This interpretation does bear some resemblance to that adopted by the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

IV. ORIGINALIST THEORIES OF THE EQUALITY COMPONENT OF THE FOURTEENTH AMENDMENT

While the previous Part argues that the evidence relied upon by the critics does not support their claim that the Fourteenth Amendment's original meaning significantly allows laws that benefit blacks, this still leaves the question whether there is evidence that the original meaning incorporates a strict standard of review of all racial distinctions—that is, the colorblindness approach. This Part argues that strong evidence of a colorblindness approach does in fact exist.

Although there are many theories of the Fourteenth Amendment, there are far fewer theories of the original meaning of the Amendment, and even fewer of the original meaning of its equality component. In this Part, I review what I regard as the two leading theories of the original meaning of that equality component—the theories of John Harrison and Melissa Saunders—to show that they can be read as adopting something like a colorblindness approach.

These two theories are not merely the leading theories of the original meaning of the equality component, but also representative of most of the theories in this area.¹⁸¹ The two theories appeal to writers of different political stripes. Harrison's theory is popular among conservatives; Saunders's is popular among liberals. The two theories also derive the equality component from different textual sources. Harrison's theory finds the equality component in the Privileges or Immunities Clause; Saunders finds it in the Equal Protection Clause. Thus, a review of these two theories provides a significant indication of what the existing evidence suggests about the original meaning of the equality component of the Fourteenth Amendment.

Of course, I do not mean to suggest that all theories of the original meaning support a colorblindness approach. Certainly, the critics do not adopt this approach, and others may not as well. But that the two leading theories can be read to support a colorblindness approach suggests that there is some significant evidence for that approach in the historical materials.

A. *John Harrison's Interpretation of the Privileges or Immunities Clause*

In an important article, John Harrison argues that the Fourteenth Amendment prohibits laws that discriminate as to a limited group of basic

181 Harrison's theory has been relied upon by various works on the original meaning of the equality component of the Fourteenth Amendment. See, e.g., 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) [hereinafter Green, *Pre-Enactment History*]; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 220 (2009) [hereinafter Green, *Subsequent Interpretation*]; McConnell, *supra* note 168. Saunders's view has had a significant influence on, among others, Jack Balkin. See JACK BALKIN, *LIVING ORIGINALISM* (2012).

rights on the basis of race and other caste-like categories.¹⁸² Harrison believes that this nondiscrimination rule applies equally to laws that either benefit or harm individuals based on their race and therefore prohibits affirmative action.

Harrison's theory interprets the Fourteenth Amendment differently than most approaches. Harrison believes that the Amendment's general nondiscrimination rule does not derive from the Equal Protection Clause, which he views as applying merely to remedial matters signified by the "Protection of the Law," but instead from the Privileges or Immunities Clause. Harrison criticizes the ordinary reading of the Equal Protection Clause on the ground that the text does not provide for the "protection of equal laws," but instead for the "equal protection of the laws."¹⁸³ In other words, the noun here is the "protection of the law"—which refers to the protective function of the laws that traditionally involved remedial matters such as enforcement of the law and remedies. The adjective—"equal"—modifies "protection of the law" and thereby requires that the protection of the law be provided equally. Harrison argues that the protection of the law was a traditional concept and that protecting it equally would have been an important purpose of the Fourteenth Amendment, as it would have assured that state sheriffs and other officials could not ignore lynchings of blacks, but would have to protect them from unlawful acts.¹⁸⁴

Instead of emanating from the Equal Protection Clause, Harrison sees the general equality component of the Fourteenth Amendment deriving from the Privileges or Immunities Clause.¹⁸⁵ According to Harrison, the term "abridge" in the Clause prohibits states from passing caste-type laws, which include as a core component race-based discrimination. Harrison argues that the term "abridge," when applied to rights that are subject to the control of the state such as common law rights, meant to deny based on caste-based reasons.¹⁸⁶ He also argues that this caste-based understanding of abridge conforms to contemporary Republican ideas of equality. And Harrison notes that some members of Congress at the time used the language as he describes.¹⁸⁷

182 John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

183 *Id.* at 1390.

184 *Id.* at 1435–36; see also Green, *Pre-Enactment History*, *supra* note 181; Green, *Subsequent Interpretation*, *supra* note 181.

185 Harrison, *supra* note 182, at 1414.

186 *Id.* at 1420–22. Harrison claims that the term "abridge" in Section 2 of the Amendment, which penalizes states that abridge the right to vote of male citizens over the age of twenty-one, had a similar meaning.

187 *Id.* at 1422–23. For example, Harrison quotes Representative Samuel Shellabarger who stated in 1871 that the Privileges or Immunities Clause "requires that the laws on their face shall not 'abridge' the privileges or immunities of citizens. It secures equality toward all citizens on the face of the law. It provides that those rights shall not be 'abridged;' in other words, that one man shall not have more rights upon the face of the laws than another man. By that provision, equality of legislation, so far as it affects the rights of

Harrison argues that the privileges or immunities of citizens of the United States refer to a class of rights known at the time as civil rights. Those rights, which were listed in various documents, such as the Civil Rights Act of 1866 and Justice Washington's opinion in *Corfield v. Coryell*,¹⁸⁸ include mainly private common law rights and public protection rights. Thus, they include the common law rights to own property and make contracts as well as the rights to sue and to testify in court.¹⁸⁹ Under Harrison's view, then, the Privileges or Immunities Clause protects equality for a large but not unlimited group of basic rights.

Harrison argues that the meaning of the Privileges or Immunities Clause is greatly informed by the Civil Rights Act of 1866. He maintains that a principal objective of Section 1 of the Fourteenth Amendment was to constitutionalize this Act and that only the Privileges or Immunities Clause can do so. Under Harrison's view, the Act's prohibition on racial discrimination as to civil rights is placed into the Constitution under the Privileges or Immunities Clause.¹⁹⁰

According to Harrison, the Privileges or Immunities Clause would forbid both laws that harm blacks and those that benefit them.¹⁹¹ First, Harrison argues that both of these types of laws would have violated the Civil Rights Act of 1866. The Civil Rights Act provided that United States citizens "shall have the same right[s] . . . 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."¹⁹² This provision would certainly prohibit laws that discriminate against non-white citizens, because such nonwhites would not "have the same rights as white citizens."¹⁹³ But Harrison persuasively argues that it would also prohibit laws that discriminate in favor of nonwhite citizens. Under such laws, nonwhites would enjoy more rights than whites and therefore would not "have the same rights as white citizens."¹⁹⁴

In arguing for the symmetry of the Privileges or Immunities Clause, Harrison does not merely rely on the Civil Rights Act of 1866. He also argues that this symmetrical understanding was reflected even more clearly in other statutes enacted at the time.¹⁹⁵ Moreover, he maintains that this symmetrical

citizenship, is secured." Harrison, *supra* note 182, at 1423 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 71 (1871)).

188 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

189 Harrison, *supra* note 182, at 1416–20.

190 *Id.* at 1389–92.

191 *Id.* at 1458.

192 Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981–82 (2006)).

193 Harrison, *supra* note 182, at 1458.

194 *Id.*

195 Harrison notes that the Civil Rights Bill as originally introduced "did not use white citizens as a baseline; rather its only reference to race . . . banned all discrimination on those grounds thus prohibiting race discrimination as to whites." *Id.* at 1458 n.276. Sena-

understanding of equality conformed to the general understanding of equality that Republican political theory employed.¹⁹⁶

One important question in applying Harrison's interpretation of the Privileges or Immunities Clause to modern affirmative action is how broadly the Clause applies. Harrison argues that the Clause applies to what at the time were called civil rights—the core of which were private common law and public protection rights. But Harrison also explores the periphery of the concept. One question is whether government benefits count as a privilege or immunity. While it might be argued that no government benefits are privileges or immunities, Harrison claims that view is mistaken since there are

tor Trumbell said of that version of the legislation that it was a bill “to secure equal rights to all citizens of the country, a bill that protects a white man just as much as a black man.” See CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866). Harrison notes also that the Second Freedmen's Bureau Act, which applied only in the “rebel states,” provided that a list of similar rights to those in the Civil Rights Act “shall be secured to and enjoyed by all citizens of such State or district without respect to race or color, or previous condition of slavery.” Harrison, *supra* note 182, at 1458 n.276 (quoting Act of Jul. 16, 1866, ch. 200, 14 Stat. 173, 176–77) (internal quotation marks omitted). Finally, Harrison notes that the Civil Rights Act of 1875 banned discrimination on the basis of race as to public facilities and jury selection. *Id.*

196 Harrison's analysis of caste-based abridgements turns out to be complex. He maintains that Republican understandings of caste-based abridgements involve two types of caste legislation. One type involves laws that allocate rights based on certain impermissible criteria that the Republicans treated as being unrelated to the content of the rights. See *id.* at 1457. Harrison argues that race, former condition of servitude, religion, political belief, and probably sex, are the primary candidates for this type of caste legislation. The second type involves what he terms ad hoc castes—legislation based on animus for a group that “represent[s] a division of the citizenry into classes for reasons unrelated to the content of . . . [the] right[.]” *Id.* at 1459. Unlike the first type of caste legislation, legislation of this sort would have been constitutional if it were not based on the animus. See, e.g., *id.* at 1457.

This analysis suggests that state laws that provide benefits to former slaves would be unconstitutional for employing an impermissible criterion. For the reasons that I discuss earlier as to the Freedmen's Bureau Acts, see Section III.A, I do not believe that Harrison is correct about this, even within his own theory. Harrison believes that caste-based legislation involves the application of criteria that is unrelated to the content of the benefits that the laws confer. See, e.g., Harrison, *supra* note 182, at 1457. While applying matters such as race, political belief, or religion might be deemed categorically to be unrelated to the content of the benefits, this is not true of former condition of servitude, as I have argued previously as to the Freedmen's Bureau Acts. See *supra* notes 111–15 and accompanying text. Instead, Harrison should treat former condition of servitude under the second category of ad hoc caste based laws. If enacted as a subterfuge for race by, for example, the former Confederate states, these laws would constitute ad hoc castes and be unconstitutional. Significantly, Harrison argues that the ad hoc caste category should be applied to cover subterfuges. See Harrison, *supra* note 182, at 1464. While Harrison appears to have included previous condition of servitude in the categorically impermissible category because it was prohibited by the Civil Rights Act of 1866, and Harrison sees the Act as an important indication of the meaning of the Amendment, I have explained why this aspect of the Civil Rights Act should not be fully incorporated into the Fourteenth Amendment. See *supra* text accompanying note 115.

many examples of government benefits that would very likely have been treated as privileges or immunities, including both the use of the public roads and the protection of the laws.¹⁹⁷

Harrison is not sure how to analyze the matter of public benefits. His suggestion is to follow the heavily Lockean flavor to the nineteenth century analysis of privileges or immunities. Under a Lockean approach, individuals have natural rights that they bring into society and the purpose of government is to secure those rights by defining them and protecting them with the coercive power of the state. Privileges or immunities, then, are those rights and benefits that are either natural rights or are rights that are conferred by the state in their place. According to Harrison, when the government provides something that individuals have a natural right to acquire, and the government “either monopolizes its provision or forces citizens who obtain the benefit privately to pay for it a second time by taxing them for its public provision, then the benefit so provided is a privilege of citizens.”¹⁹⁸ The idea is that such benefits would have been provided in place of natural rights. Under this view, “most government benefits with which we are familiar will be privileges [or immunities] because most of them are supported by general taxation.”¹⁹⁹ One important government benefit of this kind is public schooling.

An important question as to what government benefits are privileges or immunities under Harrison’s approach involves government employment and public contracting. Harrison, again, is unsure how to analyze this matter. He writes that “[i]f we regard services provided by general taxation as privileges of citizens, we must then ask whether eligibility to be among those who provide the services also constitutes a privilege.”²⁰⁰ While not certain, Harrison’s “thought is that the taxpayer’s money purchases the service, not the opportunity for employment.”²⁰¹ The idea is that the taxpayer’s money is being used to provide the service, so that the privilege extends to receiving the service, not to the opportunity to provide the service. If this is true, then the opportunity to compete for government employment and contracts would not be a privilege of citizenship.

One might, however, apply Harrison’s theory differently. One might conclude that the money extracted from citizens through taxes supplies not only the service, but also the opportunity to provide the service. The opportunity to compete to provide services to the government would certainly have been recognized as valuable, even in the nineteenth century, and it might therefore have been treated as an important ingredient of citizenship.²⁰² In that event, the exclusion from this opportunity on the basis of race or other

197 Harrison, *supra* note 182, at 1455.

198 *Id.* at 1456.

199 *Id.*

200 *Id.* at 1464.

201 *Id.*

202 The importance of employment provided by government entities such as the Post Office was well recognized during the early part of the nineteenth century.

characteristics unrelated to the right might have been regarded as an abridgement of privileges or immunities. Under this view, government employment and contracts as well as services, such as state education, would count as privileges or immunities.

Overall, then, Harrison's theory provides significant support for the claim that many forms of affirmative action are unconstitutional. The theory maintains that the Privileges or Immunities Clause prohibits discrimination in favor of both whites and blacks. The main open question for modern affirmative action issues is the scope of the Fourteenth Amendment. Under Harrison's tentative view, the Privileges or Immunities Clause extends to most government benefits, including the provision of state education, but not to government employment or contracts. This position would mean that some forms of affirmative action, such as admissions to schools and colleges, would be unconstitutional, but that other forms, such as for government employees and contractors, would not be, since the Clause would not cover such matters. By contrast, under an alternative interpretation of Harrison's theory, the Clause extends to both government services and the opportunity to provide such services. This version of the theory would extend to all of the modern forms of affirmative action that have been challenged.

The broader version of Harrison's theory would fully support the colorblind Constitution view of the originalist Justices. The narrower version on its own, however, would support the theory only as to certain areas, but not to others. One way that the originalist Justices could extend the colorblind Constitution to these additional areas would be through the use of precedent. I believe there is a strong argument, which I discuss in the margin, that the precedent of *Brown v. Board of Education*²⁰³ and its progeny would allow the Justices to apply the symmetrical understanding of the Fourteenth Amendment to areas not covered by the original meaning.²⁰⁴ Thus, overall, there is a reasonable originalist basis for the colorblind Constitution pre-

203 347 U.S. 483 (1954).

204 The originalist Justices could apply precedent to extend the Fourteenth Amendment to areas beyond the original meaning. *Brown* and its progeny have been understood to extend the Fourteenth Amendment beyond a narrow understanding of civil rights to all nonpolitical laws. See, e.g., *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (per curiam) (prohibiting segregation as to public beaches and bath houses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (prohibiting segregation as to public golf courses). One question is how the originalist Justices could follow *Brown's* extension of the Amendment to non-civil rights, but not other precedents, such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), that allowed affirmative action. One way that the Justices could do this is by choosing to apply precedents that are widely accepted, such as *Brown* and its progeny, but not those strongly contested, such as *Grutter*. It should be noted that while some originalists reject precedent, many do not, including apparently the Supreme Court Justices. See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. Rev. 803 (2009) (arguing that the original meaning allows precedent to be followed as a matter of common law). For a longer discussion explaining how the originalist Justices could apply precedent to extend the Fourteenth Amendment beyond its original meaning, see Michael B. Rappaport, *Affirmative Action, Precedent, and Original Meaning* (on file with author).

mised either on the alternative version of Harrison's theory or Harrison's preferred version combined with precedent.

B. Melissa Saunders's Interpretation of the Equal Protection Clause

In another important article, Melissa Saunders takes a different approach to the original meaning of the equality component of the Fourteenth Amendment.²⁰⁵ Saunders argues that the original meaning of the Equal Protection Clause imposes a prohibition on partial or special laws. This prohibition forbids "the state to single out any person or group of persons for special benefits or burdens without an adequate 'public purpose' justification."²⁰⁶

Under this understanding, laws that draw distinctions based on race are not necessarily unconstitutional. Instead, it is laws that single out persons or groups for special benefits or burdens without an adequate public purpose that are unconstitutional. Because many laws that draw racial distinctions do so without a sufficient public purpose, such laws end up being unconstitutional under the Clause. According to Saunders, this doctrine prohibiting special laws inevitably results in judicial discretion to determine when an adequate public purpose exists.

Saunders roots this understanding of the Equal Protection Clause in the development of a doctrine against special laws that emerged during the Jacksonian period.²⁰⁷ Such prohibitions grew out of a distaste for allowing advantages to some persons at the expense of others.²⁰⁸ According to Saunders, this focus on selective advantages for some also extends to laws that impose selective disadvantages, because advantages on some amount to disadvantages on others.

While this doctrine first grew to prominence during the Jacksonian period, Saunders writes that it eventually was embraced by the Republicans.²⁰⁹ As a Republican principle, it became extremely influential politically as a means of attacking what the Republicans referred to as the Democrats' slave power.²¹⁰ The Republicans claimed that the Democrats used their advantages in the political process to confer special privileges on slave owners and the institution of slavery.²¹¹

During the Jacksonian period, the doctrine against special laws was not applied to laws that harmed blacks.²¹² But after the Republicans adopted the doctrine, Saunders contends that it came to be understood as applying to

205 Saunders, *supra* note 80.

206 *Id.* at 248.

207 *Id.* at 251–63.

208 *Id.* at 253.

209 *Id.* at 249.

210 *Id.* at 265–66.

211 *Id.* at 249.

212 *Id.* at 264–65.

laws that subjected blacks to special disadvantage.²¹³ Saunders maintains, though, that the Republicans did not hold this belief because they saw race “as irrelevant to any legitimate governmental objective.”²¹⁴ Instead, they did so because they saw it as a “logical application of [the] broader principle . . . that government should not use its power to create favored or disfavored classes of citizens.”²¹⁵ Thus, some laws that draw racial distinctions might be constitutional.

Saunders believes that much of modern Equal Protection Clause doctrine can be rooted in this interpretation of the Clause. In particular, Saunders argues that the system of suspect classifications can be seen as consistent with the original understanding of the Equal Protection Clause. While she does not believe the Clause was specially focused on the impermissibility of racial distinctions, she argues that treating racial distinctions that harm blacks as involving a suspect classification that requires strict scrutiny is really just “an evidentiary device[] designed to facilitate judicial identification of instances of special treatment that lack an adequate public purpose justification.”²¹⁶ When the state draws a distinction based on racial grounds, courts legitimately apply a presumption that these distinctions are impermissible “because our common experience tells us that they are situations in which the special treatment is particularly likely to be motivated by prejudice or favoritism rather than by a legitimate desire to further the overall public good.”²¹⁷

While Saunders does not discuss the issue much, she recognizes that the doctrine of special laws might also operate to prohibit affirmative action. She writes:

[T]he antebellum case law does not tell us when, if ever, the need to compensate for the effects of past official discrimination can justify so-called “reverse discrimination.” While the antebellum state courts made clear that discrimination cannot be justified on the grounds of simple favoritism or hostility, they never addressed the question whether compensating for past discrimination was a legitimate public purpose justification.²¹⁸

For Saunders, then, it all depends on whether judges believe that such laws, designed to benefit groups who have been harmed in the past, constitute laws for a public purpose. Thus, Saunders’s view might lead one to conclude both that strict scrutiny applies and that affirmative action fails this test. More specifically, the courts might draw a distinction between laws that benefit a whole racial group, which would be impermissible class legislation, and laws that benefit those individuals who were discriminated against, which

213 Saunders argues that the Clause was a compromise between the Radical and the Moderate (formerly Democrat) wing of the Republican Party. *Id.* at 292.

214 *Id.* at 267.

215 *Id.* at 268.

216 *Id.* at 307.

217 *Id.* at 308.

218 *Id.* at 300 n.248.

would not be class legislation.²¹⁹ Of course, according to Saunders, courts might conclude that laws that benefit previously discriminated-against groups would be justified by a public purpose. But the basic point is that judges might conclude that the original meaning prohibited affirmative action.

While Saunders's article offers a generally plausible interpretation of the Equal Protection Clause, some revisions need to be made to her argument to render it fully defensible. Once those revisions are made, however, her approach will be even stricter as to race-based discrimination. The ultimate objective of Saunders's article²²⁰ is to criticize the Supreme Court's opinion in the racial gerrymandering case of *Shaw v. Reno*.²²¹ Saunders believes that *Shaw* fails to appreciate an important distinction between laws that draw racial distinctions and laws that racially discriminate. Saunders argues that the Fourteenth Amendment does not treat as problematic laws that merely draw racial distinctions but do not racially discriminate (by singling out a group for special disadvantages because of their race).²²²

Saunders's objective here colors her analysis in two important ways. First, she mistakenly assumes that the Equal Protection Clause applies to voting.²²³ This assumption is important, because whether or not the Clause applies to voting greatly influences how one interprets other evidence as to how strictly the Fourteenth Amendment scrutinizes racial distinctions and racial discrimination. Second, her concern to reject the idea that the Equal Protection Clause prohibits all laws that draw racial distinctions leads her to understate the extent to which laws that either drew racial distinctions or racially discriminated were deemed problematic.

In the remainder of this Section, I make several amendments to Saunders's argument and conclude that these amendments render her approach considerably less hospitable to race-based discrimination. First, I argue that

219 Saunders's derivation of the doctrine against special laws may provide additional support for concluding that providing benefits to a minority group is unconstitutional. It might be thought that providing benefits to a small group does not constitute a special law, since the majority would not harm itself without good cause. *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that laws aimed at certain minorities should not be afforded the presumption of constitutionality because such insular minorities lack the normal protections afforded by the American, democratic political process). But this is mistaken, since Saunders argues that the original version of the doctrine against special laws focused on special benefits to small, politically influential groups. *See* Saunders, *supra* note 80, at 253–54. Moreover, it is not necessary for the law to directly harm a group to be prohibited. In fact, Saunders argues that the doctrine against special laws initially focused on laws that benefited groups but that it also included laws that harmed groups, based on the idea that a law that benefits some necessarily harms others. Thus, the original focus of the doctrine on laws that benefited small groups makes it directly applicable to laws that benefit minorities.

220 *Id.* at 246–47.

221 509 U.S. 630 (1993) (holding that redistricting based on race must withstand a review standard of strict scrutiny under the Equal Protection Clause).

222 Saunders, *supra* note 80, at 311.

223 I say assumption because she does not really argue for the conclusion. *Cf.* Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998).

even under a Saunders-type approach to the Equal Protection Clause, the Clause does not apply to voting or other political rights. Next, once it is accepted that Section 1 of the Fourteenth Amendment does not apply to voting, the strongest evidence that Saunders presents for concluding that the Equal Protection Clause does not forbid all laws that discriminate on the basis of race is undermined. I then maintain that much in the history of the Fourteenth Amendment suggests that the Equal Protection Clause forbids all or most state laws that discriminate based on race.

1. The Scope of the Equal Protection Clause: Civil Rights and Political Rights

The first revision that must be made to Saunders's approach to the original meaning of the Equal Protection Clause is her assumption that the Clause imposes a prohibition on special laws as to voting. Saunders's view here may derive from a textual argument. The Clause's requirement that no "State . . . deny to any person within its jurisdiction the equal protection of the laws"²²⁴ appears to apply to all laws. But interpreting the original meaning of Section 1 of the Fourteenth Amendment in general, and the Equal Protection Clause in particular, to cover voting is surely mistaken for a variety of reasons. The text and history of the Amendment as well as the scope of the prohibition on special laws all strongly cut against it.

First, the text of the Fourteenth Amendment strongly suggests that voting is not covered. To begin with, the terms privileges or immunities, considered in isolation, are unlikely to cover voting. The privileges or immunities of citizens were generally understood as referring to civil rights as opposed to political rights.²²⁵ While the Equal Protection Clause might seem to have a more comprehensive scope, the history suggests even more strongly that equal protection was not understood to cover voting. Numerous leading Republicans indicated that it did not cover voting.²²⁶ Moreover, although the Privileges or Immunities Clause confers rights on citizens, the Equal Protection Clause extends to all persons—both citizens and noncitizens. If the Privileges or Immunities Clause does not cover voting rights, then the Equal Protection Clause is all the less likely to do so. Perhaps even more importantly, it seems unlikely that at a time when not all citizens voted, the Fourteenth Amendment would have extended the right to vote to all persons in the jurisdiction.

These indications of meaning are strongly reinforced by Section 2 of the Fourteenth Amendment. Section 2 provides that "when the right to vote . . .

224 U.S. CONST. amend. XIV, § 1.

225 See Harrison, *supra* note 182, at 1416–17 ("[N]ineteenth-century usage concerning political participation confirms the close connection between privileges and immunities and civil rights: neither was thought to extend to political rights, such as voting or serving on juries.")

226 See *id.* at 1438–40 (citing many contemporaneous statements by leading Republicans, including John Bingham, Jacob Bingham, and Henry Wilson, that the Equal Protection Clause did not cover voting).

is denied to any of the male inhabitants of such State, being twenty one years of age, and citizens of the United States, the basis of representation 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.”²²⁷ The most straightforward reading of this provision recognizes that restrictions on the right to vote are permitted by Section 1, but simply requires states that restrict that right to have their political representation proportionally reduced.

Nor can Section 2 be persuasively read, in conjunction with Section 1, as merely announcing the penalty for violating a right to vote protected in Section 1. Not only does the language of Section 1 fail to cover voting, but neither Section 1 nor 2 reads as conferring the right to vote. The draftsmanship would be extraordinarily poor (even for the Fourteenth Amendment) if Sections 1 and 2 were intended to confer the right to vote. When the Reconstruction Congresses wanted to confer a right to vote, they knew how to do so, as the Fifteenth Amendment makes clear.

This interpretation of Section 2 also makes perfect sense when read against the history leading up to the Fourteenth Amendment. Having ended slavery with the Thirteenth Amendment, the Republicans had created a political problem because the former Confederate states would now have representation based on blacks counting as a full person rather than the three-fifths representation that slaves were allocated. But if the former Confederate states refused to grant blacks the right to vote, this additional representation would provide even more power to the former Confederates. While guaranteeing the right to vote would eliminate this problem, the nation was unlikely at this time to support such a guarantee.²²⁸ As a result, Section 2 solved the problem for the Republicans by reducing the political power of the former Confederate states to the extent that they denied blacks the right to vote.

Finally, a strong argument exists that the doctrine prohibiting special laws that Saunders argues was incorporated into the Equal Protection Clause does not cover voting or political rights generally. The cases that Saunders cites from the Jacksonian period that helped establish the principle prohibiting special laws do not involve voting or other political rights.²²⁹ Moreover,

227 U.S. CONST. amend. XIV, § 2.

228 See Saunders, *supra* note 80, at 266–67.

229 Saunders does cite one case that arguably involved political matters. *Id.* at 260 n.66. In *Mayor of Baltimore v. State*, 15 Md. 376 (Md. Ct. App. 1860), the court questioned the constitutionality of a law that provided “no Black Republican, or endorser or approver of the Helper Book, shall be appointed to any office” within the jurisdiction of the Baltimore Board of Police. *Id.* at 379. In that case, a majority of the court questioned the constitutionality of the law based on the principle that it would be unconstitutional for a law to bar appointment based on someone’s political or religious opinions. *Id.* at 468. A concurring opinion questioned its constitutionality based on the law “add[ing] to the disqualifications for office prescribed by the Constitution.” *Id.* at 484. But neither of these bases appear to have been derived from a principle against special laws. Instead, Section 34 of the Maryland Constitution of 1851 barred the adding of qualifications for any state “office of trust

the discussions in these cases rejecting special laws also seem inconsistent with covering voting rights, since the right to vote was not enjoyed by all people during this period, but the doctrine against special laws is framed in terms of protecting all persons or citizens. These points suggest that the prohibition on special laws might have been thought of as being restricted to nonpolitical rights or even more narrowly simply to civil rights. Therefore, if the term equal protection incorporated that prohibition, it would not have covered voting or political rights. This would be true, even though the Clause's language might seem to refer to all laws, because the Clause would be incorporating a meaning that did not extend to voting.

It therefore appears clear that Section 1 of the Fourteenth Amendment did not cover voting rights. This conclusion is important, because it bears directly on what might otherwise be strong evidence that the Amendment does not impose strict limits on racial discrimination.

2. Race Discrimination and Special Laws

Saunders also argues that the enactors of the Equal Protection Clause did not intend that all laws that either distinguish or discriminate on the basis of race should be necessarily unconstitutional.²³⁰ Instead, she believes that these enactors intended to prohibit only special laws and that such laws do not include laws that merely distinguish on the basis of race and do not necessarily include all laws that discriminate on the basis of race.

Saunders first attempts to support this claim based on the argument that the Congress that proposed the Fourteenth Amendment repeatedly considered constitutional amendments that would have prohibited all racial distinctions or racial discriminations, but consistently rejected such amendments on the ground that they could not be ratified. Similar arguments against the colorblindness position are made by Andrew Kull and William Nelson.²³¹ While the Thirty-Ninth Congress may have opposed amendments that prohibited all consideration of or discrimination based on race, that does not mean that it did not strongly or even categorically oppose certain types of laws that discriminated based on race. Instead, it may have rejected these amendments only because they restricted discrimination as to political rights. The Congress clearly did not favor such prohibitions against discrimination, as the eventual Fourteenth Amendment makes clear. But the Congress's rejections of these prohibitions is consistent with it being strongly or even categorically opposed to laws that discriminated based on race as to civil rights or nonpolitical rights.

or profit." MD. CONST. of 1851, art. 34. Moreover, the Maryland Constitution also contained provisions protecting freedom of religion and of the press. See MD. CONST. of 1851, art. 33, 38.

²³⁰ Saunders, *supra* note 80, at 275–81.

²³¹ See ANDREW KULL, THE COLORBLIND CONSTITUTION (1992); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT (1988).

Saunders's review of the proposed amendments that the Thirty-Ninth Congress considered but did not adopt includes Representative Thaddeus Stevens's proposal prohibiting "racial distinctions" by the federal government or the states as to political or civil rights; Senator Richard Yates's proposal prohibiting racial distinctions as to civil and political rights; Senator William Stewart's proposal prohibiting racial "discrimination" as to suffrage or civil rights; Robert Dale Owen's proposal outlawing for the federal government and the states racial discrimination as to civil rights immediately and racial discrimination as to suffrage in ten years' time.²³² But in each of these cases the desire not to extend the prohibition to political rights is an adequate explanation for its failure to be enacted. Moreover, that Republicans believed that an amendment prohibiting racial discrimination as to voting could not be enacted provides additional support for this explanation.²³³

Saunders also discusses Representative John Bingham's early proposal to permit Congress to pass laws protecting the privileges or immunities of citizens and people's equal protection as to life, liberty, and property. Saunders writes that Bingham's proposal would not merely have protected against racial discrimination but also would have covered the rights of loyal white citizens.²³⁴ While Saunders argues that this provision cuts against reading the Fourteenth Amendment to strongly or categorically prohibit race discrimination, that is by no means clear. Rather, the fact that the Fourteenth Amendment might protect against other types of class laws does not mean that it does not treat most or all race-based discrimination as impermissible class laws.²³⁵

Perhaps Saunders's strongest argument that the enactors of the Fourteenth Amendment did not prohibit all racial discriminations as to nonpolitical rights is the comments by various supporters of the Civil Rights Act that it would not invalidate laws forbidding interracial marriage. Saunders notes that the justification given for this view was either that "both members of the interracial couple were subject to the same punishment" or "that members of both races were equally forbidden to marry outside their own race."²³⁶ Saunders concludes that this view shows that Republicans did not find consideration of race illegitimate so long as it did not single out certain persons for special disadvantage because of their race.²³⁷

Saunders is certainly correct that these comments show that some leading Republicans suggested that some laws that drew racial distinctions as to

232 Saunders, *supra* note 80, at 276–78.

233 *Id.* at 277.

234 *Id.* at 283.

235 For example, John Harrison argues that the Fourteenth Amendment prohibited all caste type legislation. He believes this category included not merely all racially discriminatory laws, but also a variety of laws that might not be based on race, such as laws based on political party or religion. See Harrison, *supra* note 182, at 1461. Also, Saunders argues that a higher percentage of race-based laws would be unconstitutional because race is normally not relevant to any legitimate public purpose. See Saunders, *supra* note 80, at 335.

236 *Id.* at 275.

237 *Id.*

nonpolitical rights were illegitimate. It is important to note, however, that all of these comments involved the Civil Rights Act and none concerned the Fourteenth Amendment. One might conclude from this that while the Civil Rights Act did not forbid laws against interracial marriage, the Fourteenth Amendment did.²³⁸

But even if one argued that these statements were applicable to the Fourteenth Amendment, the real question here is how to interpret them. While one could conceivably argue that this single example of interracial marriage should be read as simply the tip of an iceberg allowing laws that refer to or discriminate based on race, there are more plausible responses that either do not credit these statements or see them as a limited exception to a more general disapproval of racial discrimination.

First, it is entirely possible that these statements were deceptions on the part of the leading Republicans. Because interracial marriage was very unpopular in many circles at the time, opponents of the Civil Rights Act focused on the claim that the Act would invalidate laws prohibiting interracial marriage. It would not be all that surprising, however, if supporters of the Act did not answer this charge honestly to avoid giving ammunition to opponents of the Amendment. This evidence that the Civil Rights Act and the Fourteenth Amendment permit laws against interracial marriage is at most an interpretation and application of the law at the time by legislators. Especially under an original public meaning approach, it is the meaning of the provision that is binding, not the interpretations or applications voiced by some people at the time. While it is reasonable to treat these statements as evidence of the meaning, the weight of that evidence depends on a variety of factors, including how the application fits with the semantic meaning of the provision and the incentives and credibility of the authors of these applications. That the Republican leaders had a strong incentive to deny that the Civil Rights Act invalidated laws against interracial marriage—that it might even have caused the failure of the Act to pass—certainly counts against fully crediting their statements.²³⁹

Second, even if such statements were genuine, that does not mean they are entitled to strong weight. It is entirely possible that these Republicans, knowing that so much turned on the issue, persuaded themselves that the provision had this meaning, even though an unbiased interpretation would have reached an opposite conclusion.²⁴⁰

Third, even if one credits the argument that the original meaning of the Fourteenth Amendment did not invalidate laws against interracial marriage,

238 See David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause* 6–11 (unpublished manuscript), available at <http://ssrn.com/abstract=2240046>.

239 For other evidence that these provisions invalidated laws against interracial marriage, see Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393.

240 See, e.g., Harrison, *supra* note 182, at 1460 n.280 (“On this issue, the Republicans either deceived themselves or decided that the only thing for it was a round untruth.”).

one might still conclude that this was an exceptional case. One might conclude that the Equal Protection Clause was thought to express a strong preference against racially discriminatory laws, but that this preference could be overridden in exceptional cases. To put it in terms of modern doctrine, it might have been thought that laws against interracial marriage had to meet strict scrutiny. Given the strong distaste for interracial marriage in many quarters, it might have been thought that such a law was the least restrictive means of promoting a compelling state interest. Under this interpretation, there would be a strong preference against racially discriminatory laws, even though laws against interracial marriage would be permitted.²⁴¹

Finally, it is worth noting that even if laws against interracial marriage were permitted, they would not be directly relevant to the case of affirmative action. Laws prohibiting interracial marriage involve the question of segregation and equality—whether separate is equal as to marriage. By contrast, laws engaging in affirmative action do not involve segregation, but simply inequality. Put differently, even if a prohibition on interracial marriage were understood as being a general law rather than a special law, that does not mean that a government preference that was unequal, such as affirmative action, would have been thought to be a general law.

Thus, the evidence that Saunders presents for concluding that the Fourteenth Amendment enactors did not impose a strict limit on racial discrimination is considerably weaker than she suggests.

3. General Laws and Colorblindness

There is also additional evidence that Saunders neglects for concluding that the Equal Protection Clause strongly restricts racially discriminatory state laws. Several statutes at the time of the Fourteenth Amendment prohibited racial discrimination within the sphere they regulated. Most importantly, as I previously mentioned in discussing John Harrison's article, the Civil Rights Act of 1866 prohibited racial discrimination as to civil rights. Significantly, the Civil Rights Act did not simply prohibit laws that discriminated on the basis of race that did not have an adequate public purpose justification. Rather, it prohibited all such discrimination.²⁴²

This aspect of the Civil Rights Act is particularly important because one central purpose of Section 1 of the Fourteenth Amendment was to incorporate the Civil Rights Act into the Constitution so that a future Congress could not repeal the provision. Another significant purpose was to provide a constitutional basis for the Civil Rights Act to guard against claims that Congress did not have an enumerated power for enacting it.²⁴³ Thus, the Civil Rights

241 Another possible reason why marriage would not be covered by the Fourteenth Amendment is that it was regarded as a social right rather than a civil right.

242 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981–82 (2006)).

243 Under Saunders's theory, it is not clear that Congress would have an enumerated power to enact the Civil Rights Act under Section 5 of the Fourteenth Amendment. If the Equal Protection Clause does not prohibit all race-based discrimination, then what justifies

Act's categorical prohibition on race discrimination is particularly instructive in understanding the meaning of Section 1 of the Fourteenth Amendment.

Given the categorical prohibition in the Civil Rights Act on race-based discrimination (as to civil rights), how can this important statute be reconciled with Saunders's interpretation of the Equal Protection Clause as prohibiting class legislation? In my view, the best way of reconciling this statute with Saunders's approach is to argue that race-based distinctions are particularly pernicious and therefore that such distinctions are especially likely to be class or special laws. Put differently, the public purpose justification for justifying distinctions in the law will be extremely difficult to sustain for race-based distinctions. Thus, the race-based distinctions as to the civil rights covered by the Act will be categorically unconstitutional because no public purpose can justify them. While this allows Saunders to reconcile her approach with the important evidence of the Civil Rights Act, it also significantly weakens the claim that not all race-based discrimination, at least as to civil rights, would be special laws.

A second statute enacted at the time that provides similar evidence is the Freedmen's Bureau Act of 1866.²⁴⁴ Like the Civil Rights Act, the Freedmen's Bureau Act prohibited discrimination as to civil rights, although this Act was restricted to states that had rebelled:

the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery.²⁴⁵

Significantly, this provision categorically forbids laws that racially discriminate in favor of blacks or whites.²⁴⁶ Similarly, a third statute passed some years later, the Civil Rights Act of 1875, also categorically prohibited racial discrimination as to public accommodations, inns, theaters and other places of public amusement.²⁴⁷ Once again, the best way of reconciling

the Civil Rights Act's prohibition on all such discrimination? The statute would have to be based on the claim that Congress has enforcement discretion to prohibit all discrimination, even though the Amendment only prohibits some discrimination. This claim might or might not be consistent with the original meaning.

244 Act of July 16, 1866, ch. 200, 14 Stat. 173.

245 *Id.* at 176–77.

246 Interestingly, Section 14 of the Act goes on to provide that “no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law.” *Id.* at 177. While this might initially seem to simply bar penalties that harm blacks, it actually bars penalties that harm or benefit blacks, since it bars penalties “other . . . than the penalty . . . to which white persons may be liable by law.” *Id.*

247 Act of March 1, 1875, ch. 114, 18 Stat. 335.

these statutes with Saunders's theory is that race-based laws were especially problematic and deemed to constitute special laws.

4. Conclusion

While Saunders's own version of her theory imposes significant restrictions on racial discrimination, these revisions of her approach render it even less likely to permit laws that racially discriminate, including laws that specifically benefit blacks or other minorities. Although Saunders argued that Congress rejected several amendments that would have prohibited all racial discrimination, an alternative ground for Congress's actions, with a strong footing in the record, is that Congress rejected these proposed amendments, because they would have applied to voting. Moreover, understanding the Fourteenth Amendment as imposing a strong prohibition on racial discrimination is supported by several different statutes that the Congress passed at the time. Overall, then, Saunders's theory, as revised, provides significant evidence supporting something like strict scrutiny of state laws that racially discriminate.

CONCLUSION

In this Article, I have argued that the original meaning of the Fourteenth Amendment does not clearly establish the constitutionality of state government affirmative action. Rather, there is at least a reasonable case for concluding that the colorblind Constitution is the original meaning of the Fourteenth Amendment, and, in my view, the originalist case for the colorblind Constitution is stronger than that for the antidisubordination view. The federal statutes offered as supporting the constitutionality of race-based benefits for blacks constitute weak evidence for that conclusion. Moreover, there is a strong basis for the colorblind Constitution in the leading theories of the equality component of the Fourteenth Amendment.