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IF THE EYE OFFEND THEE, TURN OFF THE COLOR

*John Harrison**

THE COLOR-BLIND CONSTITUTION. By *Andrew Kull*. Cambridge: Harvard University Press. 1992. Pp. x, 301. \$35.

Although both groups produce a great many words, students of the Fourteenth Amendment are at a disadvantage compared to the infinitely large collection of monkeys who set out to produce *Hamlet* by typing random keystrokes. The monkeys are bound to produce their tragedy. But despite splendid contributions like Andrew Kull's *The Color-Blind Constitution*,¹ Fourteenth Amendment scholars are unlikely to come up with a canonical account of either the original meaning of the amendment or its subsequent adventures as a doctrine of the Supreme Court.

Lacking the word-crunching capacity of the infinite monkeys, Kull uses a technique more suited to finite but intelligent creatures. He has taken as his organizing theme the idea that the Constitution is or should be color-blind — that it should flatly forbid governments from considering race or color in making decisions. The story he develops on that theme is something like *Hamlet*, in that the protagonist is ultimately undone. According to Kull, although the idea of color blindness has been in play throughout the history of American race law in general and the Fourteenth Amendment in particular, it has consistently been rejected. The framers of the amendment, he says, considered a ban on the consideration of race in government decisionmaking (what we usually call classification by race), and instead adopted the Equal Protection Clause, which forbids, not racial classifications per se, but arbitrary or unreasonable classifications. The Supreme Court, in applying the amendment, has flirted with color blindness but has instead repeatedly endorsed various forms of the ban on unreasonable classifications.

Kull's subject matter is rich enough that a reviewer is tempted to set his own collection of monkeys loose on the book, saying everything that comes to mind on the theory that some of it will be interesting. Instead, because readers have finite time and patience, I will discuss in detail two of the most significant aspects of Kull's story. The first

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1. Andrew Kull is an Associate Professor of Law, Emory University.

concerns his account of the framing of the Fourteenth Amendment, in which he concludes that the Reconstruction Republicans deliberately adopted an amendment that contained not the rule of color blindness, but a ban on unreasonable classifications. Kull's conclusion is more debatable than he supposes because the Republicans may not have thought that Section 1 of the Fourteenth Amendment means what we now take it to mean. They may have thought that they *had* banned the use of race in certain defined areas of government activity, even though their amendment does not mention race.

Second, I will try to use Kull's story of Supreme Court equality doctrine to make a point about the way constitutional provisions operate. As Kull describes it, the struggle between color blindness and reasonable classification is the struggle over whether to remove questions of race from politics because a reasonable classifications regime requires that political choices still be made, albeit by the courts. My observation is that Kull, without saying so, has made the case for formalism in constitution drafting: his narrative presents an instance in which an issue was not removed from politics, but instead simply transferred from legislatures to courts, because the constitutional provision was insufficiently rigid — was not enough a *rule* and too much a *principle*.

At the end, after discussing some history and some theory, I will present one last thought about the monkeys.

I. KULL'S STORY

Kull's story begins in earnest with a case that arose under a state constitution which, unlike the original federal Constitution, explicitly mentioned equality, although not race or color. The Commonwealth of Massachusetts proclaimed that "[a]ll men are born free and equal,"² but in the 1840s Boston operated separate schools for white and non-white children. In 1848 Sarah Roberts, denied admission to the white school nearest her home, brought suit against the city of Boston.³ Her attorney was Charles Sumner, antislavery firebrand and future U.S. senator. Sumner argued that the constitution made all people equal before the law, and that equality before the law was inconsistent with race discrimination (pp. 41-48).

Sumner urged a rule of color blindness, but he had to wring it out of general language of equality that made no mention of race or color. The Supreme Judicial Court of Massachusetts, per Chief Justice Lemuel Shaw, rejected Sumner's claim. As Kull describes it, Shaw's analysis is an eerie preview of the next 150 years of American race law. His approach is by now familiar to everyone who has survived an intro-

2. MASS. CONST. art. I, § 1 (1780).

3. See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850).

ductory course in American constitutional law. Shaw conceded that under the Massachusetts Constitution all were equal before the law, but thought the very universality of that principle kept it from forbidding racial classifications per se. After all, said Kull's Shaw, "government must classify in order to legislate" (p. 50). Some classifications, such as those according to age, are clearly permissible (p. 50). The principle of equality before the law, then, requires that "the classifications by which the individual's rights are 'settled and regulated' . . . be reasonable ones" (p. 50). The court then decided that the racial classification, whether or not desirable policy from the judges' point of view, was a reasonable one in light of the prejudices of the community (pp. 50-51). Boston's schools remained segregated.

From *Roberts*, Kull derives the leading figures of his Manichean universe. On one side is the rule of color blindness, espoused by Sumner. On the other is Shaw's doctrine that reasonable classifications are permissible. Shaw's approach is equal protection orthodoxy as we know it.⁴ Thus, when Kull refers to the requirement of reasonable classification, he means to contrast it with a requirement of color blindness. Reasonableness includes all the current "levels of scrutiny," from minimum rationality to strict scrutiny. The term *reasonable classification* as Kull uses it means anything that is not strict color blindness; it does not merely mean minimum rationality.

The next, and far more important, encounter between color blindness and reasonableness took place during the drafting of the Fourteenth Amendment by the Thirty-ninth Congress, which convened in December 1865. Almost immediately, arch-Radical Representative Thaddeus Stevens proposed a constitutional amendment that would require total color blindness: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."⁵ The next day, a more moderate Republican, Representative John Bingham of Ohio, introduced a forerunner to Section 1 of the Fourteenth Amendment; his proposal would have empowered Congress "to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in

4. "If we have difficulty in understanding what Shaw is talking about — the problem of reconciling the principle of legal 'equality' with the political fact of unequal treatment — it is because modern constitutional theory has so thoroughly incorporated Shaw's solution that we no longer recognize the problem." P. 50.

5. P. 67 (footnote omitted). Kull suggests that Stevens' proposal may have been influenced by two constitutional amendments put forward by antislavery leader Wendell Phillips during and shortly after the Civil War. In December 1863, Phillips proposed both a constitutional ban on slavery and an amendment providing that "no State shall make any distinction among its citizens on account of race and color." P. 58 (footnote omitted). In July 1865 the *National Anti-Slavery Standard*, then under Phillips' editorial direction, began to display the following proposed constitutional amendment at the head of its editorial column: "No State shall make any distinction in civil rights and privileges among the naturalized citizens of the United States residing within its limits, or among persons born on its soil of parents permanently resident there, on account of race, color, or descent." P. 62 (footnote omitted).

their rights [of] life, liberty, and property."⁶ As Kull tells the story, the first session of the Thirty-ninth Congress, which adopted the Civil Rights Act of 1866 and proposed the Fourteenth Amendment, was a struggle between Stevens' color blindness rule and Bingham's language of general equality. Repeatedly, according to Kull, color blindness lost and general equality won.

This happened, he says, in the drafting of the pivotal Civil Rights Act of 1866.⁷ The Act was designed to eliminate the Black Codes, under which provisionally reconstructed southern states had limited the basic rights of freed slaves, qualifying their capacity to make contracts, own property, and use the court system.⁸ As originally proposed, the 1866 Act included a general ban on race discrimination with respect to "civil rights or immunities" as well as a specific list of rights with respect to which discrimination was forbidden.⁹ After the Senate passed the bill, Republicans in the House expressed the fear that the general language might be thought to include political rights, especially suffrage (pp. 77-79). The bill was amended to eliminate the offending phrase and passed over President Johnson's veto (p. 79). As adopted, it provided that citizens of "every race and color, without regard to any previous condition of slavery or involuntary servitude" would have, with respect to specified subjects, "the same right[s]" as white citizens.¹⁰ Says Kull, "When the issue was joined, an unqualified rule of nondiscrimination mustered no measurable support in the Thirty-ninth Congress."¹¹

Then we come to the main event, the Fourteenth Amendment. In February 1866, the House of Representatives debated but ultimately postponed a precursor amendment, drafted by Bingham, that would have given Congress power to eliminate the Black Codes.¹² Kull gives

6. P. 67 (footnote omitted).

7. As Kull recognizes, it is hard to overstate the importance of the Civil Rights Act for understanding Section 1 of the Fourteenth Amendment. "It was the demonstrable consensus of the Thirty-ninth Congress that section 1 of the Fourteenth Amendment 'constitutionalized' the Civil Rights Act of 1866." P. 75.

8. See 6 CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88*, at 110-17 (1971); see also S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. (1867) (collecting Black Codes).

9. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

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

11. P. 79. Kull is correct if he means to say that Congress declined to ban race discrimination with respect to all legal rights. But the suggestion Kull seems to make, that in adopting the Civil Rights Act of 1866, Congress rejected a ban on race discrimination in favor of something vaguer, p. 69, is astonishing. The 1866 Act referred in so many words to race, color, previous condition of slavery, and the rights of white citizens.

12. It provided:

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

CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

credit for Shavian prescience to Representative Robert Hale, Republican of New York, who during the debate on Bingham's draft foresaw (Kull says) the modern doctrine of equal protection. According to Kull, Hale argued that because "the entire legal system is necessarily a fabric of inequalities and discriminations, of categories and classifications," an equal protection provision "if it is not to destroy altogether the possibility of government, can mean only 'equal treatment for those who should be treated equally' " (p. 81).

Kull then describes how the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, rejected explicit bans on race discrimination in favor of more general language, including the second sentence of Section 1.¹³ The Republicans were unwilling to mention race explicitly, Kull suspects, because they feared political disaster should their proposal "hold out the prospect of Negro suffrage, immediate or prospective" (p. 86). Instead, they declined to mention race.

The effective way to secure the equality of the races before the law was to impose a rule of nondiscrimination. Contemplating the consequences of such a rule in 1866, Republicans decided that what they wanted after all was only a selective and partial equality before the law. The way to achieve this, they discovered, was to guarantee "equality," leaving it to others to determine what "equality" might entail. [p. 87]

Stevens had lost and Bingham had won.

From then on, the meaning of equality was up to the courts, and Kull next describes the pre-*Plessy* judicial interpretation of the Fourteenth Amendment and related state constitutional provisions. The Supreme Court's early decisions encouraged the friends of color blindness.¹⁴ The state courts, however, generally upheld segregated schools on the grounds that separation was permissible as long as the two

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

U.S. CONST. amend. XIV, § 1. The Joint Committee considered and ultimately rejected a ban on race discrimination with respect to civil rights, a ban on race discrimination with respect to the suffrage that would take effect on July 4, 1876, and a provision reducing the basis of representation in the House of Representatives for any state that, prior to that date, disenfranchised its citizens on the basis of race. P. 83. In addition to the race-free language of Section 1, the Fourteenth Amendment as proposed by the Joint Committee, submitted by Congress, and ratified by the states contains a race-free suffrage provision. Section 2 reduces a State's representation in the House to the extent that suffrage "is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime . . ." U.S. CONST. amend. XIV, § 2.

14. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), although effectively erasing the Privileges or Immunities Clause, emphasized that the Fourteenth Amendment was aimed at race discrimination. Pp. 89-90. *Strauder v. West Virginia*, 100 U.S. 303 (1880), invalidated race discrimination in jury selection, while *Railroad Co. v. Brown*, 84 U.S. (17 Wall.) 445 (1873), read an antidiscrimination statute that arguably permitted separate-but-equal facilities as forbidding them. Pp. 91-94.

racess were equally subject to it.¹⁵

Those decisions set the stage for the now infamous *Plessy v. Ferguson*,¹⁶ which Kull sees as the font of modern equal protection jurisprudence: "[I]n its broad holding as opposed to its particular application, *Plessy* has never been overruled, even by implication. On the contrary, it announced what has remained ever since the stated view of a majority of the Supreme Court as to the constitutionality of laws that classify by race" (p. 113). Having shocked us with this observation, Kull ascribes to the Court in *Plessy* a two-part doctrine of equal protection. The first part, derived from the historical context of the Fourteenth Amendment rather than its text, banned a "limited class of racial classifications — those that created an explicit legal inequality" (p. 114). Such classifications the Court was prepared to eradicate root and branch, without ever explaining why the text required this action.¹⁷

By the time of *Plessy* the southern states had repealed the Black Codes: the first part of the doctrine thus was of little practical consequence. The burning question was the status of race-respecting laws that treated people of different races symmetrically and, hence, in ostensibly equal fashion. Segregation was the classic instance, although antimiscegenation statutes provided another important example. The second part of the *Plessy* doctrine required that such classifications, like all others, be reasonable.¹⁸

The really interesting issue in *Plessy*, Kull suggests, is the confrontation between the majority's two-tier approach and Justice Harlan's color blindness rule. Especially noteworthy is Justice Harlan's extratextual rationale for his proposal. The Court's second tier was a

15. The Supreme Court of Ohio sustained school segregation, explaining that because, at most, "the 14th amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the State," separate schools were permissible: "a classification of the youth of the State for school purposes, upon any basis which do[es] not exclude either class from equal school advantages, is no infringement of the equal rights of citizens." P. 95 (quoting *State ex rel. Barnes v. McCann*, 21 Ohio St. 198, 211 (1871)). Finding that the school facilities were equal, the court upheld the segregation. Similarly, the New York Court of Appeals sustained school segregation in Brooklyn, finding that "[e]quality and not identity of privileges and rights is what is guaranteed to the citizen." P. 111 (quoting *People ex rel. King v. Gallagher*, 93 N.Y. 438, 455 (1883)). It is not clear whether Kull thinks that the courts that upheld segregation applied a reasonable classification requirement or instead a variant of the color blindness rule that forbade unequal race-respecting laws but permitted racial laws that ostensibly retained equality. He does not discuss the difference between the two possible requirements for race-respecting laws in any depth.

16. 163 U.S. 537 (1896).

17. "Laws that created an express inequality between the races, exemplified by the southern Black Codes, were the one indisputable instance of what the equal protection clause was intended to eradicate; and the Court never hesitated to give it that much effect." P. 115.

18. Pp. 115-16. The reader who remembers that there is a constitutional doctrine, other than equal protection, according to which all classifications — indeed, everything the government does — must be reasonable, has come upon one of the most fascinating aspects of the history of equal protection law. (The doctrine is substantive due process.) That would be a good subject for another review of Kull's book, or indeed for another book.

reasonableness test.¹⁹ The problem with that, Harlan said, was that judges generally had no business passing on the reasonableness of public policy.²⁰ Aware that some may find Harlan's argument naively pre-Realist, Kull reformulates it in a passage that epitomizes his book:

If we ought to refuse to let judges distinguish the reasonable from the unreasonable racial classifications, it is largely because history, *Plessy* included, shows that the courts are not to be trusted on the subject and that we would be better off with a per se prohibition. If on the other hand, when all is said and done, we are willing or even relieved to let judges decide these matters, then Harlan's syllogism falls, and much of the argument for a color-blind Constitution falls with it. [p. 124]

Who will decide on the reasonableness of the reasonableness-deciders?

Insofar as it stands for the proposition that "those racial classifications will be constitutional that a majority of the Supreme Court considers to be 'reasonable,'" Kull makes *Plessy* the *Marbury* of modern equal protection law.²¹ But as a practical matter, he notes, the case had no generative force; it merely constrained what the Court could do in moving toward an elimination of segregation. After *Plessy*, the Court waged an undeclared war on race-based laws, ostensibly permitting "equal" race classifications but actually treating all race-respecting laws as if they "went against the constitutional grain" (p. 143).

Toward the end of this period, in the face of a declared world war, the Court sustained a racial classification in a case to which the Fourteenth Amendment did not even apply only after admitting that such groupings were "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."²² The stage

19. Reasonableness entered the picture in response to hypothetical cases urged by counsel and Justice Harlan, who sought to prove that, by permitting some forms of race-conscious laws, the Court admitted absurdity. Justice Brown, after reciting some of these hypotheticals, such as a law requiring that people of different colors walk on different sides of the street, said: "The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion [of] the public good, and not for the annoyance or oppression of a particular class." 163 U.S. at 549-50.

20. Harlan, after adducing the parade of horrors (which presumably had to proceed down one side of the street or the other, depending on the color of the horrors), said this of the Court's assurance of reasonableness in all exercises of the police power:

A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable.

163 U.S. at 558.

21. P. 118. Kull never makes much of the disappearance of *Plessy*'s first-tier ban on racially unequal laws. Such a doctrine would decide many of our hardest cases, and, if it really was in *Plessy*, it is still good precedent, as it was certainly never overruled. I will have to leave this issue for the monkeys.

22. *Hirabayashi v. United States*, 320 U.S. 81, 100-01 (1943). Kull says that *Hirabayashi* and its successor, *Korematsu v. United States*, 323 U.S. 214 (1944), represent a triumph for the color blindness principle:

There is, realistically, no constitutional guarantee that is not subject to qualification if a majority of the Court conceives that the country faces imminent peril. If racial distinctions are "irrelevant" and therefore inadmissible in all but such extreme circumstances as "the

was set for race distinctions to be repudiated and eradicated, for *Plessy* to be overruled, and for Justice Harlan to be vindicated.

Instead, the Court decided *Brown v. Board of Education*.²³ As Kull puts it, "when the Court was finally prepared to declare that 'racial segregation as such' was unconstitutional, it found itself incapable of explaining why" (p. 150). It is no secret to students of American constitutional law that the Court in *Brown* did not say race discrimination was impermissible, it did not say segregation was unlawful, and it did not even straightforwardly overrule *Plessy*. Instead, the Chief Justice simply said that in the area of education separation was inherently unequal.²⁴

The story of *Brown* is at once uplifting and disappointing, and Kull tells that story in a way that captures both aspects while emphasizing the latter. Although he praises the Court for having "finally come to grips with the enduring moral and political problem of the nation," he is disappointed that "[t]he opinion written to mark this watershed in the nation's history was designed not to illuminate but to disguise the road being traveled" (p. 155). The Court did not approach desegregation cases after *Brown* with very much candor either. Instead, the Court struck down segregation in public facilities other than schools on the authority of *Brown* without ever explaining why a case that was so clearly about education suddenly was about everything else too (pp. 159-63).

But while *Brown* turned out to have outlawed segregation, it did not outlaw race-respecting laws. Although the Court flirted with that possibility during the early 1960s, the romance was never consummated (pp. 164-70). Instead, the Court produced the doctrine elaborated (slightly) in *Loving v. Virginia*,²⁵ which finally invalidated an antimiscegenation law. Chief Justice Warren indicated that "invidious racial discriminations" are forbidden and that "state statutes drawn according to race" bear a "very heavy burden of justification."²⁶ Evidently, a racial classification is not invidious if, under scrutiny, it is "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."²⁷ The upshot is that there are

crisis of war and of threatened invasion," the Constitution may fairly be described as color-blind.

P. 144.

23. 347 U.S. 483 (1954). "What we thought / Is not confirmed and what we thought not god / Contrives. And so it happens in this story." Euripides, *Medea*, in *THE COMPLETE GREEK TRAGEDIES: EURIPEDES* 108 (David Grene & Richmond Lattimore, eds. & Rex Warner trans. 1959).

24. 347 U.S. at 495.

25. 388 U.S. 1 (1967).

26. 388 U.S. at 8-11.

27. 388 U.S. at 11.

good racial classifications and bad ones, and the Court must look very carefully to tell them apart. "In place of a rule of color blindness, *Loving* announced a pledge of the Court's assiduous oversight of the politics of race" (p. 171).

Kull suggests that the Court jilted the color blindness principle because it decided that the nation's public schools did not need an end to the overt use of race in pupil assignment, but rather something more like practical racial integration.²⁸ With the federal administrative apparatus in the lead, the standard for success in implementing *Brown* became the actual creation of racially mixed public schools (pp. 177-81).

After describing the political victory of the color-blind principle in the Civil Rights Act of 1964, Kull maintains that the principle was almost immediately abandoned.²⁹ Instead, according to Kull, judges and administrators, acting without any political mandate, erected a system of race-based preferences that abandoned the color-blind principle without doing any appreciable good for poor blacks.³⁰ Kull discusses three instances: school desegregation, economic preferences, and voting rights.

With respect to schools, the judges and especially the justices pursued their goal of integration to the extent that they thought it politically feasible, fudging the legal analysis as necessary (pp. 191-200). "The results were incoherent as constitutional law, but the policy

28. Pp. 171-72. Kull gives two reasons:

The first was the rapid development of the argument that the benefits of racially integrated education might be claimed as an affirmative constitutional right. The second was the gradual discovery . . . that "desegregation" even in its original meaning could scarcely be achieved unless recalcitrant school boards were ordered to assign pupils on the basis of race.

P. 174.

29. Kull's language suggests that the title of his last chapter, "Benign Racial Sorting," p. 182, is missing a pair of sneer-quotes:

The color-blind consensus, so long in forming, was abandoned with surprising rapidity. By the end of the first Nixon administration, a significant part of the "civil rights" being enforced by the federal government could be described more plainly as a system of compensatory preferences for racial and ethnic groups. The transformation was accomplished without resumption of the great national convention on civil rights that produced the 1964 act after eighty-three days of Senate debate. It was brought about instead by judges and administrators, who gave effect to a profound and sudden change in the views of liberal policymakers regarding the utility of race-specific government action. It is ironic but understandable, in retrospect, that this revolution took place just when Charles Sumner's vision of "equality before the law" had finally become the law of the land.

P. 183.

30. Kull attributes this change of course to the inner-city riots of the mid-1960s and the Viet Nam buildup, which together convinced policymakers to pursue equality of results between blacks and whites with measures that would work immediately and impose no costs that would show up on the federal budget, because "[t]here was no time; there would be no money." P. 188. The accuracy of this claim would be a good subject for a review by someone who, unlike me, is equipped to evaluate it. Kull stresses that the means available to courts and administrators (as opposed to Congress) are far too weak to confront a problem as enormous as black deprivation in America. Pp. 189-90. Courts and agencies emphasize enforcement "not because illegal discrimination is central to the nation's profoundest racial problems — it is not — but because these are the only policies that courts and agencies can carry out by themselves." P. 190.

limits established by the Court in this difficult area were no more arbitrary than the comparable lines necessarily drawn by the overtly political branches of government" (p. 200).

The new tools of economic preference included government contracting policies that encouraged employers to achieve a certain racial composition within the workforce. To similar effect was the interpretation of discrimination under Title VII of the Civil Rights Act of 1964 as including the use of job criteria that result in an undesirable allocation with respect to race — what we now call a "disparate impact."³¹ These new incentives created a problem. Employers could most easily reach affirmative action goals and avoid disparate impact problems through race-conscious decisions. Title VII, however, appears to prohibit race discrimination.³²

The Supreme Court helped resolve this tension in *United Steelworkers v. Weber*,³³ in which a white worker was denied admission to a training program because of his race.³⁴ According to Kull, Justice Brennan, writing for the Court, did not deny that the language of Title VII forbade the discrimination to which Weber had been subjected, or that Congress had intended such a prohibition: "His central contention was rather that the color-blind means chosen at the time did not serve the underlying congressional objective, which he identified as the desire to improve the economic position of black workers. It followed that the statute's true purpose would be served by refusing it enforcement" (p. 207). So much for statutes.

The last form of economic preference, government largess distributed on a racial basis, takes the Court back to familiar territory — the infinitely malleable Constitution that, unlike the Civil Rights Act of 1964, does not forbid race discrimination by name (other than with respect to voting). Some preferences have been upheld, some struck down, in a blizzard of phrases, such as "compelling governmental interest," "important governmental interest," "narrow tailoring," and "substantial relationship," that have lost contact with reality as Kull knows it: "the result of such deliberations is 'constitutional law' only by default" (p. 210).

Discussing the revolution in politics under the Voting Rights Act

31. Pp. 200-06. The case normally cited as the source of disparate impact doctrine is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

32. It is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

33. 443 U.S. 193 (1979).

34. A Title VII provision deals specifically with training programs. The Act declares it an unlawful employment practice "to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." 42 U.S.C. § 2000e-2(d) (1988).

of 1965, Kull maintains that the courts and the U.S. Department of Justice in effect have required states to promote the electoral representation of blacks and Hispanics.³⁵ Such a regime results in cases like *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,³⁶ in which a number of Hasidic Jews from Brooklyn maintained that a districting scheme designed to ensure a certain level of representation for blacks "diluted" their political influence by dividing the electorally cohesive Hasidim between two different districts — a step allegedly taken because the Hasidim were not black (pp. 216-20). Kull complains that the Court's standard for what it called "benign racial sorting," as explained most lucidly in Justice Brennan's concurring opinion, was no more than a requirement that benefits be maximized and costs minimized, both as measured by the Justices (p. 220).

Despite his obvious distaste for what the courts and the executive have done in the past thirty years, Kull's endorsement of the color-blind principle is hesitant. He is gravely disturbed by the possibility that America is coming to evaluate social outcomes primarily by their racial and ethnic pattern, and frustrated by the inability of race-conscious affirmative action programs to help the poor people who are most in need of help (pp. 221-23). Still, the claim that preference for the descendants of American slaves works "rough justice — unjust, but less unjust than doing nothing — cannot easily be dismissed" (p. 223).

But while Kull is not so sure whether strict color blindness is the ideal rule, he *is* sure about how government works. According to Kull, if we want to limit the way in which the political process, including the Supreme Court, uses race as a criterion, only a constitutional rule of color blindness will work. Requiring racial classifications to be reasonable merely ensures that the judges will assess them on political grounds. After quoting a passage from Harlan's dissent in *Plessy* that characterizes color blindness as "[t]he sure guarantee of the peace and security of each race,"³⁷ Kull concludes that Harlan's "judgment is essentially pessimistic: that tools of government we know to be capable of much harm, and that we cannot confidently use for good, should be abjured altogether. The experience of the intervening century has not yet proved Harlan wrong" (p. 224).

II. THE SANCTION OF THE FRAMERS

Kull does not much like the contemporary constitutional law of equality, but he blames its flaws as much on the framers of the Four-

35. "Since 1970, a combined effort by the three branches of the federal government has required states and municipalities to alter election districts and systems of representation so as to facilitate the election of black and Hispanic candidates." P. 210.

36. 430 U.S. 144 (1977).

37. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896).

teenth Amendment as on the Supreme Court. He maintains that the Republicans who proposed the amendment rejected a rule of color blindness and instead drafted the Equal Protection Clause, a ban on all unreasonable classifications by state governments under which the Supreme Court is the ultimate arbiter of reasonableness.³⁸ Kull's conclusion might be right, but his argument is not adequate. His attempt to blame the framers works only if they understood the Equal Protection Clause the way we do today. His case for that claim is doubtful.

A. *Shaw and Hale*

Kull thinks it fairly clear that in 1866 the Republicans had available to them a concept of general equality that required reasonable classifications but that did not flatly forbid race discrimination. Such a requirement of equality would permit reasonable classifications based on race. I think this is a much harder issue than Kull supposes; the evidence he presents is less persuasive than he thinks. First, we should take another look at Kull's proposed *locus classicus* for his concept of equality-as-reasonable-classification, Chief Justice Shaw's opinion in *Roberts*. Although Kull's account of Shaw is natural for most modern readers, a close study of the opinion casts doubt on Shaw's status as a modern.

Having stated the case and explained Sarah Roberts' claim, Chief Justice Shaw turned to the constitutional equality provision on which Roberts relied. Though agreeing that the provision means that "all persons . . . are equal before the law,"³⁹ he explained that

it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.⁴⁰

At first, this may sound like equal protection orthodoxy. Each person

38. Kull apparently means to assert that the framers of the Fourteenth Amendment knowingly adopted a requirement of reasonable classification that applies to all government decisions but that does not include a per se ban on race discrimination. He says that although Stevens sought to forbid all racial classifications, "Bingham wished to prohibit only the unreasonable ones" (p. 4), and Bingham's text ultimately prevailed. That claim, I will try to show, is very likely false, and, in any event, Kull has not dealt with the contrary evidence. It is also possible to argue that the Republicans made a serious conceptual error. Most importantly, it may be that they believed that there is a coherent notion of general equality — of giving all citizens the same civil rights — which includes a flat ban on race discrimination, but that they were wrong. That would be another book (and another review).

39. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1850).

40. 59 Mass. at 206.

must have the rights appropriate to that person's condition. The legislature may make adjustment for legitimate differences between people, such as those based on age, but must ignore differences that do not matter.

But that reading makes it extremely difficult to account for Shaw's statement that the equality requirement is limited to the *protection* of rights, as if protection were different from content, and for his statement that the allocation of rights according to people's different conditions depends on the laws. Those laws will come from the legislature, and although it may seem obvious to us that Shaw must have meant that the legislature is subject to constitutional constraints when it decides what people's rights are, he never said that. Instead, he seemed to limit the constitutional provision to the protection of rights, whatever those rights may be (and whatever protection may consist of).

In the next paragraph, Shaw at first seemed to take back the concession that the content of rights is up to the legislator, only to reaffirm it later.⁴¹ So we are back to looking at the law in order to determine Sarah Roberts' rights: "We must then resort to the law, to ascertain what are the rights of individuals, in regard to the schools."⁴² Shaw took some time to describe the discretion given to school boards and the various choices they had to make in deciding, for example, whether and how to assign their students into different districts.⁴³ He then came to the use of race in pupil assignment:

In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification; and when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive.⁴⁴

Shaw found that he could not "say . . . that their decision upon it is not founded on just grounds of reason and experience, and in the re-

41. Shaw said:

Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social, the question then arises, whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights.

Legal rights must, after all, depend upon the provisions of law; certainly all those rights of individuals which can be asserted and maintained in any judicial tribunal. The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of the legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make.

59 Mass. at 206-07.

42. 59 Mass. at 207.

43. 59 Mass. at 207-09.

44. 59 Mass. at 209.

sults of a discriminating and honest judgment."⁴⁵ He concluded that the regulation was neither unreasonable nor illegal.⁴⁶

Maybe *Roberts* is a harbinger of modern equal protection law, but I doubt it. Shaw went from the constitutional requirement of equality, which he said meant that the legal rights of all must be equally "protected," to an inquiry into Sarah Roberts' rights under the education statutes. Those statutes, he found, granted the school committee ample discretion. That discretion had been exercised reasonably, so Roberts had no ground for complaint. At no point did he say that the Massachusetts Constitution required reasonable classification. Rather, he inquired into reasonableness only after saying that he was interested in Roberts' *statutory* right to an education.⁴⁷ My best guess is that he thought the requirement of equal "protection" meant that the court, which has the job of protecting people's rights, must protect everyone's rights with the same zeal.⁴⁸ Once he had made sure that the plaintiff's statutory rights had been vindicated, his duty was done.

In short, Charles Sumner is an apt Laertes for Kull's dueling scene, but Chief Justice Shaw looks like the Prince of Denmark only when viewed in modern lighting. I do not think that he invented our equal protection law.

Neither, despite Kull's suggestion, did Representative Robert Hale employ the Court's modern doctrine during the debates in the Thirty-ninth Congress. Hale objected to Bingham's February proposal, which would have enabled Congress to secure to all persons equal protection in life, liberty, and property. Hale said that it would give Congress too much power. According to Kull, Hale's argument was that the amendment would give Congress plenary authority to displace state law because a power to ensure equal protection is a power over

45. 59 Mass. at 209-10. I do not know enough about Chief Justice Shaw to tell whether his use of the word "discriminating" was deliberately droll.

46. 59 Mass. at 210.

47. Similarly, Sumner claimed that segregation was unreasonable in the part of his argument that dealt with the statutory powers of the school committee. 59 Mass. at 202. According to Sumner, "[t]he regulations and by-laws of municipal corporations must be reasonable, or they are inoperative and void." 59 Mass. at 202. While Sumner probably also thought that the constitution required reasonable decisions, I doubt whether either Sumner or Shaw connected the constitutional question with the inquiry into reasonableness.

48. If this idea of protection seems completely bizarre, read on. Apparently it is too bizarre for Kull; if I am right, it is here that he goes most seriously astray in reading Shaw. According to Kull,

[w]hen [Shaw] says that "the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law," he is saying, among other things, that the classifications by which the individual's rights are "settled and regulated" must be reasonable ones.

P. 50. It is possible that if Shaw had meant that he would have said it. Kull may know he is engaging in anachronism here; shortly before the sentence just quoted, he explains that "Shaw's analysis, recast in modern terms, makes a readily acceptable account of the working of the equal protection clause." P. 50. A wheelbarrow makes a readily acceptable container for cold beverages if you recast it in modern terms by bolting a refrigerator to it.

all legislative classification, and all laws classify. Kull is right about the thrust of Hale's argument, but his account of Hale's reasoning is wrong.

Hale's primary claim was that Bingham's amendment would overthrow American federalism by giving Congress power "to secure to all persons in the several States protection in the rights of life, liberty, and property . . . with the simple proviso that such protection shall be equal."⁴⁹ Life, liberty, and property are the primary subjects of the common law. Such authority therefore would enable Congress to enact its own civil and criminal code, overthrowing the principle of enumerated powers reflected in Article I, Section 8 and the Tenth Amendment.⁵⁰

That was Hale's principal objection. He recognized, however, that Bingham and Thaddeus Stevens construed the proposal differently. They maintained that it was limited to authorizing Congress to redress inequalities in state laws.⁵¹ Hale thought that even that interpretation would "introduc[e] a power never before intended to be conferred upon Congress."⁵² After all, he explained, for good or for ill the laws of the states were riddled with inequality.⁵³ He gave as an illustration the widespread distinction in property rights between married women and *femmes sole*.⁵⁴

It was then that Thaddeus Stevens interrupted to say that a distinction between married women and *femmes sole* was not premised on inequality, but that one between two married women would be.⁵⁵ Hale responded that this was foolish. If you could treat married women differently as a class you could treat blacks differently as a class, which would make Bingham's proposal pointless. This meant that the distinction between married women and unmarried women would

49. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866). To emphasize the distinction between Bingham's proposal and the power to require equality in state laws — a power that would suffice to support the then-pending civil rights bill — Hale continued:

It is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms — a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.

Id. at 1063-64.

50. *Id.* at 1064.

51. *Id.*

52. *Id.*

53. On that point, Hale was unequivocal:

[P]robably every State in this Union fails to give equal protection to all persons within its borders in the rights of life, liberty, and property. It may be a fault in the States that they do not do it. A reformation may be desirable, but by the doctrines of the school of politics in which I have been brought up, and which I have been taught to regard was the best school of political rights and duties in this Union, reforms of this character should come from the States, and not be forced upon them by the centralized power of the Federal Government.

Id.

54. *Id.*

55. *Id.*

have to collapse when Congress wanted to eliminate it.⁵⁶ Hale then returned to his praise of federalism and rejection of any involvement by Congress in "matters of a municipal nature, or matters relating to the social or civil rights of citizens."⁵⁷

I think it difficult to conclude that Hale's point in the colloquy with Stevens was that an equal protection provision is a requirement of reasonable classification as opposed to a *per se* ban on various forms of discrimination. His concern was that equality extended beyond racial equality, that it forbade discrimination on grounds other than race, such as marital status or possibly sex. If his point had been that equality is an utterly protean concept, it is hard to imagine that he would have casually mentioned that the proposed new power was subject to the "simple" proviso that the legislation be equal, as if he knew what that meant. Rather, he would have stopped to argue that the power was subject to a restriction with no fixed meaning and, if he had been as modern as Kull indicates, that the content of this new power therefore would be up to the courts. But Hale had nothing of the sort in mind. He admitted that the equality power was narrower than total control over life, liberty, and property, while arguing that it was still too broad.

The Prince of Denmark has yet to appear on stage.

B. *Politics and Racial Equality in the History of the Fourteenth Amendment*

The foregoing discussion of Shaw and Hale undermines Kull's assumption that the Equal Protection Clause was understood in 1866 as the Supreme Court understands it today — as a general requirement of "reasonable classification" that applies to all government activities, permitting some race-respecting decisions and forbidding others. That assumption about the meaning of the clause, combined with the rejection of explicitly color-blind provisions in the drafting of the Fourteenth Amendment, leads Kull to conclude that the Republicans who framed the amendment did not mean to give us a rule of color blindness.

Now I want to present evidence about what the Framers' understanding of the Equal Protection Clause and Section 1 of the Fourteenth Amendment actually was. That evidence, and the reading of Section 1 that it supports, makes it possible to give an account of the politics underlying the framing of the Fourteenth Amendment, and in

56. The language of the section under consideration gives to *all persons* equal protection. Now, if that means you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.

Id.

57. *Id.*

particular of the rejection of explicit bans on the consideration of race and color, that undercuts Kull's conclusion.

The reading of Section 1 that I will use as the framework for this discussion was first enunciated in this century by David Currie.⁵⁸ It maintains that the main antidiscrimination provision of Section 1 is the Privileges or Immunities Clause, not the Equal Protection Clause, and that the Privileges or Immunities Clause performs the primary function of Section 1 by providing the constitutional basis for the Civil Rights Act of 1866. According to this view, the privileges and immunities of citizens of the United States include the privileges and immunities of state citizenship, such as the right to make contracts and hold property. To deprive one citizen of the privileges or immunities accorded to another is to abridge the former's rights in violation of the clause. The Black Codes thus violated the Privileges or Immunities Clause because they qualified the rights of freed slaves relative to those of others. By this reading, the Equal Protection Clause is limited to the "protection of the laws," those activities of government that secure primary rights against invasion. Taken together, privileges and immunities and the protection of the laws include the most important rights of everyday life, but they do not include all the rights a citizen might have; in particular, they do not include political rights.

For present purposes, I am not trying to convince the reader that Currie's and my view is correct so much as to present a little of the evidence that underlies it, and thereby call into question Kull's account of the drafting history. Because Kull does not confront this evidence, his account is incomplete, and his indictment of the framers for our doctrinal predicament is to that extent unpersuasive. One way of putting this is to say that Kull is too much the partisan of color blindness. His view of Reconstruction leaves out some of the colors of the rainbow and therefore prevents him from seeing and discussing evidence that is inconsistent with his assumptions.

1. *The Scope of Section 1*

First, Kull takes it virtually for granted that Section 1 of the Fourteenth Amendment, and indeed the Equal Protection Clause, apply to everything a state government does. As of 1866, at least, that was very likely false. On the contrary, it is likely that in 1866 most Republicans thought that the "protection of the laws" constituted a subset of the functions of government. Specifically, the protection of the laws consisted principally of those substantive provisions and government activities that shield people's rights from invasion. As Blackstone put it,

58. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 342-51 (1985). The evidence supporting this reading is presented at greater length, albeit by a less reliable source, in John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385 (1992).

the "remedial part of a law . . . is what we mean properly, when we speak of the protection of the law."⁵⁹ Similarly, the privileges and immunities of citizens referred to in the Privileges or Immunities Clause, although they encompass basic rights, like making contracts and owning property, were not generally understood as including all rights someone might have.⁶⁰ In particular, when the Fourteenth Amendment was adopted most people probably thought that neither privileges and immunities nor the protection of the laws included voting or other political rights.⁶¹

It is surprising that Kull does not consider this point, because the possibility that one could ban race discrimination with respect to a limited class of rights not including the franchise is well known to students of the Fourteenth Amendment, Kull included. As he explains, during the drafting of the Civil Rights Act of 1866, a provision including "civil rights or immunities" generally was deleted in order to avoid any implication that the franchise was covered.⁶² Antidiscrimination protection for a subset of people's legal rights was very much an option in 1866.⁶³

59. 1 WILLIAM BLACKSTONE, COMMENTARIES *56. Similarly, Chief Justice Marshall found that Marbury's right to his commission implied a remedy by which he might obtain it, because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This limited concept of the "protection of the law" is well known among students of the original understanding. See, e.g., CURRIE, *supra* note 58, at 348-50; Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966); Earl A. Maltz, *The Concept of Equal Protection of the Laws — An Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985); see also Harrison, *supra* note 58, at 1433-51.

60. See Harrison, *supra* note 58, at 1416-20. The principal privileges and immunities of citizens were those listed in the Civil Rights Act of 1866, although the concept is not necessarily limited to those rights. *Id.*

61. During the debates on the Fourteenth Amendment, John Bingham denied that it gave Congress any power over the suffrage. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). When he introduced the amendment in the Senate on behalf of the Joint Committee on Reconstruction, Senator Jacob Howard of Michigan said Section 1 did not give anyone, black or white, the right to vote. *Id.* at 2766. A few years later Howard again denied that the Fourteenth Amendment gave anyone the franchise. CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869). Specifically, Howard maintained that the privileges and immunities of citizens did not include voting, pointing to practice under the corresponding language of Article IV, which requires that States grant visiting Americans from other states the same privileges and immunities that they grant their own citizens, but which generally was thought not to apply to political rights. *Id.*; see Harrison, *supra* note 58, at 1417, 1438-40.

62. Pp. 76-79. This happened in the House. Representative James Wilson of Iowa, Chairman of the House Judiciary Committee, explained that the civil rights or immunities language had been deleted in an abundance of caution; he thought that there was a generally understood distinction between civil rights, such as owning property, and political rights, such as voting, but was prepared to remove the offending phrase in order to allay the fears of some of his colleagues. CONG. GLOBE, 39th Cong., 1st Sess. 1366-67 (1866).

63. At one point Kull suggests that the tendency in the nineteenth century to exclude the suffrage from the scope of the Equal Protection Clause rested on its legislative history and the existence of the Fifteenth Amendment, and not on its text. Pp. 263-64 n.7. The possibility that the "protection of the laws" does not include political rights seems never to have occurred to him. To be sure, this puts him in excellent company. See, e.g., William W. Van Alstyne, *The*

2. *The Concept of Equality*

There is another color in the Reconstruction rainbow to which Kull is blind. The principle of general equality, we have come to assume, must amount to a prohibition on unreasonable classifications; it cannot include a ban on race discrimination per se. Many Republicans, however, apparently subscribed to a principle of general equality that is unfamiliar to us, one that encompassed but was not limited to the elimination of racial distinctions. Consider, for example, a constitutional amendment proposed by Thaddeus Stevens, an amendment that Kull characterizes as being "in substantially the terms [Wendell] Phillips had recommended" (p. 67): "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."⁶⁴ Stevens seemed to think that the latter rule was an instance or application of the former.

Other Republicans also moved easily from the language of general equality — often the principle that all citizens should have the same rights — to language that disapproved of race discrimination, as if the latter was an application of the former. Senator Lyman Trumbull, introducing the Civil Rights Act of 1866, rested it on equal citizens' rights without referring to race discrimination per se. Speaking of the Black Codes, he explained "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited."⁶⁵ A few days later, Trumbull said of the proposed civil rights legislation that it "declares that all persons in the United States shall be entitled to the same civil rights."⁶⁶ Many Republicans derived a ban on race discrimination from a requirement that all citizens have the same rights.⁶⁷

Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 SUP. CT. REV. 33.

64. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865). While it is not entirely clear how to interpret Stevens' draft, it is certainly plain that, as far as he was concerned, some requirement that all citizens be treated the same — that the laws be "equally applicable to every citizen" — was closely connected to a prohibition on racial distinctions. Perhaps Stevens' use of "and" indicates that he thought the former did not include the latter, so that it was necessary to add an antidiscrimination provision to the general equality provision. Although such a reading is grammatically possible, it leaves us to wonder why Stevens included the first phrase at all. More likely he regarded the clause about race discrimination as an application or clarification of the general language.

65. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Trumbull was concerned with liberty and badges of servitude because he argued that Congress could pass the bill pursuant to the congressional power to enforce the Thirteenth Amendment's abolition of slavery.

66. *Id.* at 599.

67. Senator Henry Lane of Indiana argued that the Civil Rights Act of 1866, which explicitly banned race discrimination, should be adopted because the freed slaves were "entitled to all the privileges and immunities of other free citizens of the United States." *Id.* at 602. Representative Henry Raymond of New York explained that, although he doubted the Act's constitutionality, he supported its policy because he "was in favor of securing an equality of rights to all citizens of the United States." *Id.* at 2502. Representative William Lawrence of Ohio explained that the

While it is not easy to define this principle of equal citizens' rights, it almost certainly was not Kull's (and the Supreme Court's) requirement of reasonable classification, because the Republicans spoke as if it *included* a flat prohibition on race discrimination. For present purposes, all we need to know is that a principle of equal citizenship existed that included but was not limited to racial equality.

3. *The Political Picture*

With these new colors on the palette, we can paint a picture rather different from Kull's. He suggests that the Republicans, afraid to propose anything that would smack of black suffrage, retreated to a requirement of reasonableness in classification, albeit one that extended to all government decisions. The evidence I have just discussed, however, reveals the possibility that its drafters understood Section 1 of the Fourteenth Amendment as requiring the states to give the same privileges and immunities of citizenship and the same protection of the laws to all citizens. That regime would include, but not necessarily be limited to, a requirement that black and white citizens have the same rights in those two categories.

Such a provision would have two important political advantages for its proponents. First, it would not involve suffrage at all, so there would be no question of requiring black voting. In this it would resemble the Civil Rights Act. Second, it would enable the Republicans to embed their rule of racial parity in a more general rule of universal parity — the same privileges and immunities, the same protection, for all citizens. This second feature would be an excellent response to the frequent criticism that the Republican party was given to, and its Reconstruction program consisted largely of, special pleading for blacks.

Embracing a more general concept of equality would enable the Republicans to say that they were engaged not in narrow interest-group politics on behalf of an unpopular and largely disenfranchised interest group, but in securing equal rights for everyone. To understand the attraction of such a maneuver, suppose the leaders of a political party believed that economic recovery would best be served by a tax reduction for high-income Americans. Although people with high incomes are scarcely disenfranchised, saying they should have more money is rarely popular. The party in question then might decide that a tax reduction for everyone is ideal. They would embed the measure they most wanted in a more general provision, one with the politically attractive feature of including all voters. The fact that politics had driven them to a more general provision would not lead us to conclude that they had abandoned their original goal, as long as we know that there is a general provision that logically includes the goal.

Act required that "whatever of certain civil rights may be enjoyed by any shall be shared by all citizens." *Id.* at 1832.

This interpretation of Section 1 has two advantages over Kull's. First, it rests on a careful reading of the text of the Fourteenth Amendment as it was probably understood in 1866. Both privileges and immunities and the protection of the laws meant more specific things then than they mean to us today. Second, my reading matches what we know about the Republican program. One thing we know about the Fourteenth Amendment is that its drafters drew back from requiring black suffrage. Section 1 reflects this strategic choice; its subject matter does not include voting any more than that of the 1866 Act did. Not only would Section 1 as I read it accommodate the principal constraint under which the Republicans operated, it would also accomplish the principal object of Section 1 — making the Black Codes unconstitutional.

The same cannot be said for Kull's reading. On the one hand, if the Equal Protection Clause refers not to the "protection of the laws" as it was commonly understood in 1866, but rather to "equal protection" as we now understand it, then it extends to voting, and unreasonable classifications respecting the franchise are forbidden. So Congress or the Supreme Court might extend the suffrage to blacks. On the other hand, if the Reconstruction concept of equality was one of reasonableness, rather than a requirement of equal rights that included racial equality, then some later Congress or Court might decide that racial classifications with respect to property holding are reasonable and uphold a Black Code. If Kull is right, the Republicans neither met their constraint nor accomplished their purpose.

One possible objection is that I have underestimated the Republican fear of Northern racism, a fear that would have kept them from proposing anything that was understood to ban race discrimination, even if it also banned other kinds of discrimination. That argument ignores the Civil Rights Act of 1866, which explicitly forbids not unreasonable discrimination, but race discrimination.⁶⁸ When the Joint Committee on Reconstruction proposed the Fourteenth Amendment, the Republicans had recently enacted that law *over the President's veto*. Presidential vetoes and congressional overrides are the most public events known to the Constitution. The President must state his reasons for the veto, and, when the override vote is taken, "the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively."⁶⁹ A leading purpose of Section 1

68. The Act provided that American citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted" should have the same rights of property, contract, and so forth "as is enjoyed by white citizens." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. It was no defense to say that any difference in rights was reasonable. Kull may mean to argue that, to the Republicans, racial discrimination with respect to the rights listed in the 1866 Act was unreasonable, while discrimination with respect to other rights like voting would be reasonable. He presents no direct evidence for this claim, and I am aware of none.

69. U.S. CONST. art. I, § 7, cl. 2.

of the Amendment was to put the Civil Rights Act into the Constitution (p. 75). The Republicans were dead set on eliminating certain distinctions based on race and color. The suggestion that they would back away from proposing a constitutional amendment because it was understood to accomplish that very goal cannot be sustained.⁷⁰

Kull is quite right that the Republicans desired to establish only "a selective and partial equality" (p. 87), but he is quite wrong about how they thought they did it. They sought partial equality, not by replacing a ban on race discrimination with a vaguer equality requirement, but by banning discrimination, including race discrimination, only with respect to a limited set of rights—the privileges and immunities of citizens and the protection of the laws. If Kull means to accuse John Bingham and company of knowingly adopting modern equal protection jurisprudence, on the evidence he presents they would be acquitted. Whether they were negligent is another question.

III. FORMALISM, OF ALL THINGS

This, I think, is a good way of capturing Kull's overall argument: the purpose of a constitution is to take certain issues out of politics. But our form of constitutionalism relies heavily on judicial review, and judges act politically if given the chance. Accordingly, the only way really to constitutionalize an issue, to take it out of politics, is to formulate a constitutional provision that minimizes the judges' opportunity to read their own views into the law. A rule of color blindness would minimize judicial policymaking in the area of race, but a requirement of reasonable classification maximizes it. Whether one thinks that the Republicans actually intended to confer such discretion, or merely permitted it by bad drafting (or lazy thinking), is really beside the point.

In other words, for all his professed legal realism, when it comes to point and edge, Kull is a formalist.

The preceding sentence may amount to libel when written about an American law professor, but it nevertheless gives us an excellent way to understand Kull's critique of equal protection law. To reach that understanding, we first need a crash course in legal formality. Legal formality is a conceptual grid that assumes law consists of rules that are adopted for certain reasons.⁷¹ The first crucial claim of formality is that it is possible to distinguish between the content of a rule

70. It is also difficult to see how a requirement of reasonable classification would appease Northern racists, given that everyone knew that the principal example of an unreasonable classification was a Black Code. Kull's argument about politics, then, comes down to the claim that the Republicans were terrified to utter the words "race" or "color" in a constitutional provision, and that they thought that there was no way to forbid race discrimination without doing so.

71. A superb discussion of these issues is FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991). Also excellent is Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

and the reason for having the rule.⁷² A lemma of this claim is that rules usually do not serve their purposes perfectly, because they rest on generalizations that are not true in every case.⁷³

The second fundamental insight concerning legal formality is that provisions can be more or less rulelike. That is, the content of the rule can be more or less transparent to the reason underlying it. For example, the Constitution's rule that every state have two senators is opaque to the underlying purpose of protecting the smaller states. We need to know nothing about Delaware's relative political power in order to know that it gets two senators. Some legal provisions, by contrast, can be understood only through substantial inquiry into their underlying reason. For example, in order to tell whether some procedure constitutes due process under one of the Due Process Clauses, we need to inquire closely into the effectiveness of the procedure in securing fair adjudication, fair adjudication being the purpose usually posited for due process.⁷⁴ Legal provisions that are largely transparent to their reasons, such as the Due Process Clauses, are often called principles, in contrast to rules.⁷⁵

The lemma to this second observation is that opaque rules and transparent principles have characteristic advantages and disadvantages. The characteristic advantage of rules, which are normally formulated in terms that permit little debate as to their meaning, is relative certainty of application. The disadvantage is the inefficiency, the looseness of "fit," that derives from opacity: the Constitution prevents some mature thirty-four-year-olds from becoming President. Principles, too, have correlative strengths and weaknesses. A legal provision that is completely transparent to its purpose will serve that purpose perfectly, except that the uncertainty surrounding most principles often means they will serve the purpose of the person or institution that applies the principle, which may or may not be the purpose of the law.⁷⁶

The foregoing observations might be called *analytical formalism*,

72. To give a hoary example, most people think that the reason the Constitution requires that the President be at least 35 is to ensure maturity at the highest levels of state. But whether or not one is 35 is a different question from whether or not one is mature.

73. Thus, some 34-year-olds are mature, and some 36-year-olds are childish. But the Constitution cares about your birthday, not your moral ripeness. (At least, it does as far as most people are concerned.) Imperfect "fit" between rule and reason — or between classification and governmental interest — is, of course, one of the organizing principles of contemporary equal protection law. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

74. A rule-skeptic denies the autonomy of rules, thinking instead that all legal provisions must be interpreted in light of their purpose. An extreme rule-skeptic would say that there are no rules, only reasons.

75. For an important application of this way of thinking — albeit one that refers to "standards" rather than "principles" — see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24 (1992).

76. See SCHAUER, *supra* note 71, at 149-55, 158-62.

the main point of which is usually to emphasize the difference between rules and reasons or rules and principles. There is also *normative formalism*, a preference for rules over principles.⁷⁷ At least with respect to the constitutional law of race, Kull has substantial sympathy with normative formalism. Color blindness is much more rulelike than reasonable classification, and Kull maintains that the vice of our equal protection law is the characteristic vice of principles: substantial power transferred from the lawmaker to the case-decider.

Having recast Kull's argument in terms of legal formality, I now want to suggest that the contrast between color blindness and equal protection law presents the clashes between rules and principles and rules and reasons in their most extreme form. The clashes are extreme because the Constitution is a metalaw, a law about laws (or, more generally, about government action). As a result, the contrasts central to formality enter at two stages. First, the state decision targeted by the constitutional prohibition usually has a rule and a reason; second, the constitutional provision itself has both a rule and a reason, and it will be more or less opaque to that reason depending on whether it is taken to be a rule or a principle.

Viewed from this perspective, one of the most interesting aspects of equal protection law as the Supreme Court knows it is its rigorously antiformal character. The Court's Equal Protection Clause is a principle about reasons. To understand what I mean by this statement, we need to look past the doctrines that our common law Supreme Court has erected and examine what underlies them. That underlying approach has been well described by Professor Cass Sunstein: "As I read it, the function of the [Equal Protection] Clause is to prohibit unprincipled distributions of resources and opportunities. Distributions are unprincipled when they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another."⁷⁸

According to Sunstein and, I think, most of the Justices, what matters when we assess a law under equal protection is the value it attempts to serve, the view that it reflects. Values and views are reasons, not rules. Equal protection is antiformal at the level of the object law in that it is primarily about reasons, not rules. As a consequence, it is

77. I realize that the terminology is a little confusing, because, when we contrast rules with reasons, rules include any legal provision, whereas, when we contrast rules with principles, rules mean legal provisions that are relatively opaque to their underlying reason. Jurisprudence is not a science.

78. Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 128. A similar account of the clause is found in Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1030 (1979) ("[S]tate action predicated on the view that one person is by virtue of race inferior to another offends equal protection."). One of the deficiencies in Kull's analysis is that he is too much the Realist to take seriously the possibility that the Justices are using this approach, or one much like it, rather than simply following their own political views.

impossible ever to tell whether a law violates the Equal Protection Clause simply by looking at the law. Consider a federal statute requiring Americans of Japanese descent to report to concentration camps. If we believe the reasoning of *Korematsu*,⁷⁹ that statute would be permissible if it were based on national defense needs but not if it were based on hatred of Japanese Americans. By contrast, a federal statute disenfranchising Americans of Japanese descent would be unconstitutional, period. The Fifteenth Amendment is primarily about the content of legal rules.

A general color blindness rule such as Thaddeus Stevens' proposal would be like the Fifteenth Amendment. We would be able to say that race-respecting laws violate it without any inquiry into their purpose. To be sure, most constitutional provisions that are primarily about the content of legal rules have taken on penumbra, largely to deal with the evasive devices that the formal character of law makes possible. Because more than one rule can usually skin the cat of any specified purpose, if a constitutional provision addressed only rules, evasion might be easy.⁸⁰ Still, the mark of a constitutional limitation that primarily concerns rules is that some rules, some laws or statutes, are simply impermissible by their terms.

Contemporary equal protection regulates reasons rather than rules. Moreover, if we accept that the purpose of the Equal Protection Clause is to prevent what Sunstein calls unprincipled allocations — the Court calls them invidious and is forever scrutinizing for them — then the clause, as the Court reads it, is perfectly transparent to that purpose. It is utterly a principle and not at all a rule. If the maximally formal constitutional provision is a rule about rules, then equal protection law is its opposite: a principle about reasons.

In light of that conceptual characteristic of equal protection jurisprudence, its protean nature as described by Kull is not surprising. When it looks at a state law, the doctrine is all about the state's reasons and not at all about its rules. But who knows what those reasons are? Justice Brown said that the reason underlying Louisiana's segregation statute was not the oppression of a particular class. Such a thing may have been hard to say with a straight face, but it would have been even harder to say that the law did not take account of race.

Even if we think we understand a state's purpose, what does it

79. *Korematsu v. United States*, 323 U.S. 214 (1944).

80. The Fifteenth Amendment provides an excellent example. States that wanted to disenfranchise blacks often would adopt a stringent literacy test, with an exception for persons whose grandfathers had voted. Although such a law nowhere mentions race, and could be applied in a racially neutral fashion, its effect would be to disenfranchise many blacks and few whites, because illiterate whites would be able to take advantage of the "grandfather clause." The Court held that such devices violate the Fifteenth Amendment. *Guinn v. United States*, 238 U.S. 347 (1915). One serious student of the amendment maintains that it was originally understood to be so formalistic as to permit schemes like the grandfather clauses. EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 155-56 (1990).

mean for that purpose to be unprincipled or invidious? Certainly plenty of people think it unprincipled to deny a person a job because the person is white even if that denial reflects not the view that whites are bad, but a willingness to sacrifice the jobs of white workers in the service of other ends. For that matter, who said the reason underlying the Equal Protection Clause was the elimination of unprincipled allocations? The underlying reason could also plausibly have been to constitutionalize the Civil Rights Act of 1866, in which case the *principle* turns out to be colorblindness with respect to the privileges and immunities of citizens and the protection of the laws.

Principles tend to reflect the views of the people who apply them, and that probably goes double for principles about reasons. Much of Kull's book makes the case that this result is undesirable. But to get back to the process of assigning blame, if a constitutional provision really is a principle about reasons, then it is hard to criticize the judges too much. Rather, the responsibility rests with the constitutionmakers. With respect to the Equal Protection Clause, it is not at all surprising that the law is so antiformal. For one thing, the crucial word *equal* certainly sounds more like the name of a principle than a rule. Indeed, much of the history of equal protection doctrine shows the impossibility of applying that doctrine without a theory of the proper purpose of government — hardly a subject for rules.

It also seems natural for equality law, even antidiscrimination law, to concern reasons and not rules. If we adopt Sunstein's formulation of equal protection, then in order to tell whether a government action is principled we need to know the value or view underlying the action, and both of those are reasons. Indeed, even if we move from unprincipled allocations to discrimination based on, say, race, we are still dealing with reasons rather than rules. To discriminate on the basis of race is to do something with race as the reason. That is why we talk of "intentional discrimination" and debate whether the Equal Protection Clause has an "intent requirement."

Although I will not claim that Section 1 of the Fourteenth Amendment is the most formalistic part of the Constitution, I do want to suggest that a change in perspective can make it seem more formalistic than I have just made it out to be. First, the more we understand the Reconstruction concept of equality as a list of forbidden criteria, such as race and color, the more Section 1 itself seems like a rule. If race discrimination is forbidden, we do not need to know in any particular case whether some use of race was unprincipled or benign.

That observation, I realize, is of limited comfort. Even if the people who framed the Fourteenth Amendment thought that the concept of general equality included a *per se* ban on race discrimination, since then it has been the Devil's time figuring out what else that concept may have entailed. So here is another observation, this one about the

object on which the Fourteenth Amendment operates. We generally assume that object to be a decision by a government institution or officer, and when we ask whether that decision was based on race or was unprincipled (whichever formulation we are using), we are asking a question about intent or motivation that is much like the questions about intent or motivation we ask in ordinary life. Inquiry into even an individual's purpose can be difficult; inquiry into the purpose of a governmental institution is more difficult, even assuming that institutions have purposes. There is little room for formalism here.

My suggested change in perspective is that we move away from thinking about a person who makes a decision based on race, whatever that means exactly, and think instead of a decision process that applies rules — a computer program might be a good model. To say that a program takes race into account in reaching its answer is to say that at some point the program asks for an input about race. Programs may be written down so that we can all see them; determining the criteria they employ is much easier than identifying the purpose or intent of a human being.

In other words, it is easier to tell whether a rule takes race or color into account than to tell whether a person takes race or color into account when either of them makes a decision. So we could take as our paradigmatic example of race discrimination not a person who is motivated by race, but a rule that takes race into account. By this way of thinking, the archetypal case of race discrimination in law would be a Black Code, a legal rule that by its terms considers race. If we take the Black Codes as the classic evil at which the framers aimed Section 1 of the Fourteenth Amendment, equality law became more formalistic than we had thought. Whether rule or principle, it is, at least in its primary application, about rules, not reasons.

At this point, I cannot resist one more plug for the Privileges or Immunities Clause. It says that no "State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁸¹ By its terms, the clause is about laws, not government actions generally. If a Black Code is indeed a law that abridges the privileges or immunities of citizens, then the clause was aimed directly at the Codes. In any event, it is easy to understand that the clause relates primarily to the content of laws, that is to say, to rules. The clause reads as if we should be able to apply it to a law simply by reading the law, without any inquiry into its purpose or underlying value. If the Privileges or Immunities Clause were the primary source of our antidiscrimination jurisprudence, that jurisprudence would be more about rules and less about reasons.

Two more observations and we can exit formalism. First, looking

81. U.S. CONST. amend. XIV, § 1.

at contemporary race law through the lens of legal formality suggests that even Kull may be too optimistic. To be sure, he characterizes the requirement of color blindness as the counsel of those who are pessimists about the ability of American politics to sort out good from bad racial classifications. Nevertheless, Kull seems optimistic enough to believe that if the Constitution explicitly required color blindness — if Thaddeus Stevens' proposal had been adopted — then the Supreme Court would require color blindness. Such a faith is inexplicable in anyone who, like Kull, has read *United Steelworkers v. Weber*.⁸²

Weber is the true triumph of antiformalism. In American courts, formalism and antiformalism usually fight through proxies. The proxy for formalism is an emphasis on the constitutional or statutory text, which will often read like a rule. The proxy for antiformalism is legislative intent, which almost invariably turns out to be a reason. In *Weber*, the Court threw the text overboard in service of what the Court thought was the intent.⁸³ The especially troubling thing about *Weber* for Kull the optimist is that the statute at issue, Title VII of the Civil Rights Act of 1964, was an explicit rule of color blindness. But *Weber* says that Title VII permits race-conscious employment decisions.

The second observation is about the ambition of antiformalism, which aspires to brush aside rules and focus on reasons.⁸⁴ Its attraction is fairly clear: government is ultimately about reasons, not rules, so it is better for a constitutional limitation to regulate reasons than for it to regulate rules, and a provision improves the more its own reason is reflected in its content. But the problem with reasons and principles is that people rarely agree on their definition. The virtue of a rule is that, however well it serves its purpose, we can often tell whether someone, including a court, is following it. The attempt to have a perfect constitutional provision can lead to a constitution that is perfect only if you agree with the people who apply it.⁸⁵

82. 443 U.S. 193 (1979).

83. According to *Weber*,

[i]t is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.

443 U.S. at 201.

84. This is essentially a normative point, so I offer it to lawmakers, including judges who think that they are or must be lawmakers. Whether those judges are right is another question, one likely to be resolved only by the infinite monkeys.

85. The Socratic teaching appears to be that the perfect regime, a paradigm laid up in the heavens, cannot be achieved in the world and must be diluted in order for the philosopher to give advice that the statesman could actually follow. Compare Plato, *The Republic*, in JOHN L. DAVIES & DAVID J. VAUGHAN, *THE REPUBLIC OF PLATO* (1902) with Plato, *The Laws*, in THOMAS L. PANGLE, *THE LAWS OF PLATO* (1988).

IV. CONSTITUTIONAL TAUTOLOGIES

Maybe Chief Justice Shaw should be the founder of equal protection law after all. As Kull explains, a natural way to read the Equal Protection Clause, or any requirement that all be equal before the law, is as a requirement that likes be treated alike.⁸⁶ To continue the time-worn line of reasoning, such a requirement tells us nothing unless we know what criteria of likeness are permissible. The requirement of reasonable classification, the specific content of which varies with the prevailing view of the proper functions of government, is just one way of identifying the permissible criteria.

But the Equal Protection Clause mentions reasonableness no more than it mentions race, color, or previous condition of servitude. Read this way it supplies no criteria. If it truly means that government must classify correctly, that likes must be treated alike, then it is incomplete. It is reminder, not a rule, like a provision in the Constitution saying that the Constitution must be complied with.⁸⁷

If we really believed this, we would have to say that the Equal Protection Clause, because it does not tell us enough, cannot be law. It cannot limit governments and it cannot be the ground of decision of a court. At most, its function would be, as Chief Justice Shaw said of declarations of rights, "to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make."⁸⁸ In modern terms, the clause would be nonjusticiable.

To conclude with the monkeys, they can be relied on to type out a document that is identical with the tragedy of *Elsinore* except that it has no lines for the son of Gertrude. If the Equal Protection Clause really does mean that likes must be treated alike, then it is missing a crucial part, and it too is *Hamlet* without the Prince.

86. Kull says that Chief Justice Shaw solved the problem of general equality provisions in *Roberts* by "declaring, in effect, that legal equality consists in affording like treatment to those situated alike." P. 3.

87. Much modern equal protection thinking appears to assume that the clause is indeed best read as an empty statement of the principle of justice, but regards as absurd the implication that the clause is therefore not a rule of law. The solution to this absurdity is to make the clause "a rather sweeping mandate to judge of the validity of governmental choices." JOHN HART ELY, *DEMOCRACY AND DISTRUST* 32 (1980). To me, this looks like trading one absurdity for another. It might be silly to have a constitution that said "Do justice," but it would be really ridiculous to have one that said "Do whatever the Supreme Court tells you."

For what it is worth, I think that the entire enterprise of recasting the Equal Protection Clause as if it were an empty statement of the formal principle of justice is misconceived. Instead, we should be trying to understand what the nineteenth century meant by "class legislation" or by the statement that all citizens should have the same rights. I do not think that this latter inquiry will be easy; I am not even certain it will lead anywhere. I do think that the line of reasoning in which the clause means that likes must be treated alike leads not to reasonableness, but nowhere.

88. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206-07 (1850).