

# THE LOST HISTORY OF GOVERNANCE AND EQUAL PROTECTION

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## ABSTRACT

*Constitutionalists believe that the Equal Protection Clause died during the early decades of the twentieth century. We aim to correct the record on this claim and, in the process, demonstrate equality's long-held aspirations to political theory. Decades before Professor John Hart Ely and public choice, equal protection aspired to be a principle of governance as much as a principle of classification or discrimination. This tradition was not limited as is modern equality law to race, sex, or even caste, but aimed to tie equality to the duties of representatives to govern for all, not simply for some. This Article argues that early twentieth-century equal protection law strove in imperfect ways for a theory of abusive representation; it naïvely hoped that the generality of legislation could bind majorities to minorities. To resurrect and articulate an analogous modern theory would require far more than law-office history; it would require fleshing out what the old theory of equality failed to do: to construct a convergence-forcing method that would tie the fate of legislative majorities to that of minorities. In that spirit, we offer a proposal that emphasizes (à la the*

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*new governance literature) the power of “embedded constitutionalism,” a proposal that combats abusive representation by forcing the active consideration and deliberation of constitutional values in more powerful institutions—in this case, legislatures.*

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#### INTRODUCTION

It is one of the great historical tropes of constitutionalists that the Equal Protection Clause died in the late-nineteenth century. If what one means by that claim is that the Equal Protection Clause afforded little protection to groups now protected, that is correct. But it is wrong to believe that the idea of equal protection was moribund in the early part of the twentieth century. Too many constitutionalists,<sup>1</sup>

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1. See, e.g., Norman Dorsen, *Equal Protection of the Laws*, 74 COLUM. L. REV. 357, 358 (1974); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 48 (1972) (citing *Buck*’s “usual last resort” proposition as true of an earlier day); Philip P. Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 638 (1970) (same). This is also the message of the most influential equal protection article of the twentieth century. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949) (stating in the first paragraph that the Equal Protection Clause had suffered “eighty years of relative desuetude” and quoting Holmes’s statement for support). This view remains an assumption of those who engage constitutional history, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 119 (1991); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 214 (1991) (citing *Zablocki v. Redhail*, 434 U.S. 374, 395

have fallen for the pithy saying of Justice Holmes who, in the infamous *Buck v. Bell*<sup>2</sup> decision of 1927, wrote that the “equal protection clause” was the “last resort” of the constitutional lawyer.<sup>3</sup>

In this Article, we correct the record that Justice Holmes’s aphorism obscures and show that a constitutional common law of equal protection existed in the early part of the twentieth century. In correcting the historical record, we do not aim to resurrect an enchanted past. The equal protection law of the early decades of the twentieth century is, from a modern perspective, a tragedy: the law repeatedly avowed its commitment to equality in a world that mocked its realization.<sup>4</sup> But legal history seeks not only to judge the past but also to reveal the present. Even tragedies present learning opportunities if they suggest a different way of addressing old problems.<sup>5</sup> History is an important tool for criticizing and destabilizing intellectual dependence on concepts born in the present. This truism is particularly important here as the history of equality examined in this Article is intertwined with the history of substantive due process, a highly controversial doctrine associated with judicial activism because it strikes down state laws as violating substantive rather than procedural rights.<sup>6</sup>

This Article uses history to challenge modern constitutionalists’ ideas of equality, teasing out a strain of thought that once struggled to reflect notions of political theory and governance. In Part I, we

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(1978) (Stewart, J., concurring); (*Buck v. Bell*, 274 U.S. 200, 208 (1927)), as well as those simply considering modern issues, see Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1493 n.8 (2002) (citing *Buck* for the proposition that equal protection was once the “last resort” of equality arguments); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 494 (2004) (same).

2. *Buck v. Bell*, 274 U.S. 200, 207–08 (1927) (upholding the constitutionality of forced sterilization).

3. *Id.* at 208.

4. In a sense this should not be surprising, as the structure of litigation tends to prefer the repeat play of the “haves.” See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 123 n.72 (1974).

5. Precedent requires lawyers to look for the present in the past in the following sense: lawyers are taught to look for cases “on point.” In the case of equal protection, lawyers look for cases involving modern problems of sex, race, and gay rights, and finding nothing, conclude that there is no law of equal protection. History, in our view, is essential to disrupt this precedential fallacy. For a demonstration of just how relentlessly presentist the modern system of precedent is and how it requires reading the present into the past, see VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 15–16, 151–52 (2008).

6. Gunther, *supra* note 1, at 42 (equating substantive due process with the “repulsive connotation” of value-based judicial review).

document the lost history of equal protection in federal and state courts, focusing on two conflicting ideals—one of classification and the other of governance—demonstrating that the Equal Protection Clause was not moribund during these decades. In Part II, we use this history to challenge three scholarly truisms: first, the basic doctrinal notion that equal protection has always been about classification simpliciter; second, the idea that representational or political-process theories are modern, post–World War II ideas; and third, the more recent claim by historians that the early law of equal protection resolves the *Lochner* substantive due process problem. Each of these claims, we argue, is incorrect.

In Part III, we urge that the history of equal protection invites the reader to imagine the possibility of a postidentity, postformal equality law based on a robust theory of political representation. We evaluate recent attempts by some scholars and courts to revive a version of the equal protection law from this period known as “class legislation.”<sup>7</sup> We argue that simply transferring the old doctrine of class legislation to the present will fail if scholars and judges do not articulate a sustained theory of equal governance. In Part IV, we conclude by suggesting that, in its ideal state, equal governance requires a convergence-forcing mechanism—one which catalyzes *legislative* rather than judicial action. Drawing from corporate and agency law, we argue that the state should embrace its duty to protect minority interests. We show in this Part that a governance theory of equality may generate new solutions to old problems, such as Congress’s decades-long refusal to address gross racial disparities between crack and powder cocaine penalties.<sup>8</sup>

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7. Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 855 (2007) (“[L]imits on abortion are a form of class legislation . . .”); Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 MICH. L. REV. 245, 334 (1997) (suggesting that class legislation can aid resolving voting rights cases); see also Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer’s Social Statics*, 88 MICH. L. REV. 1366, 1387 (1990) (exploring “the idea that the historical concept of equal protection, rooted in the nineteenth-century commitment to equality under law and animus to class legislation, is fully applicable to discrimination on the basis of sex”).

8. While this Article was in press, Congress did make changes to the crack cocaine penalties, but after more than a decade of calls to change the rules by commentators and the Sentencing Commission. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY EXECUTIVE SUMMARY xiv (1995), available at <http://www.ussc.gov/crack/execsum.pdf> (recommending revision of the “100-to-1” sentencing disparity between crack and powder cocaine); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1306–11 (1995).

## I. TWO STRANDS OF EQUAL PROTECTION

The history of equal protection law from the late-nineteenth century until the mid-twentieth century has largely been lost. In part, this is because legal scholarship is relentlessly normative and the cases of yesteryear disappoint normative expectations: modern scholarship looks back with disdain at the thin veil of legal equality that rationalized massive racial segregation and the political exclusion of over half the population (women)—and yet pronounced itself devoted to equality.<sup>9</sup> From the perspective of the present, the equality law of old was a tragedy of formalism: the law proclaimed its faithfulness to equality openly and often but did nothing to attack massive and real inequalities of race and sex. Given this well-known tragedy, it is tempting to believe that Justice Holmes was correct when he pronounced equality's death. But Holmes was wrong: equal protection doctrine was not dead in 1927 when he claimed it was the “usual last resort” of the constitutional lawyer.<sup>10</sup> As close attention to his words suggests, it was a “usual” argument,<sup>11</sup> a frequent claim in the first three decades of the twentieth century, and its history is intertwined with a doctrine largely forgotten—a doctrine called “class legislation.”

Constitutionalists have forgotten the “old” equal protection law at least in part because contemporary equality doctrine is relentlessly traitist, a kind of adjective law that limits its ideal of equality to characteristics, such as sex and race, of individuals and groups.<sup>12</sup> This history shows that equality was not always imagined as false stereotype or group generalization; instead, it was an ideal of democratic governance, an ideal that aimed to honor laws only when they joined the haves and have-nots within the legislative process. This tradition has been obscured by the fact that many of the cases

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9. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding “separate but equal” laws); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (upholding the disfranchisement of women); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 137–39 (1872) (upholding a state law prohibiting women from practicing law).

10. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

11. *Id.*

12. E.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (racial classifications); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (racial classifications); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (gender classifications); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445–46 (1985) (denying heightened scrutiny for a classification of the mentally handicapped); see also *Brown*, *supra* note 1, at 1500–05 (discussing the Supreme Court's approach toward “issues of unequal treatment on the basis of race or other group characteristics” and “protection of liberty”).

espousing the ideal arose in what are normatively unexpected and unattractive situations: equal protection arguments were used as often as a sword to sustain privilege as a shield against oppression. In our haste to distance ourselves from equality's tragic past, however, we have lost something in the translation: we have lost an inchoate strand of thought which aimed, but failed, to articulate equality as more than formal classification, as a theory of governance.

During the great heyday of what is known as *laissez-faire* constitutionalism,<sup>13</sup> equal protection was often wielded by powerful corporations. By contrast, in the post-World War II world, equality is associated with powerless minorities. But law's ideals are often used for purposes antithetical to its aspirations. The important point is not, then, the doctrine's results; the point is its intellectual content and aspiration. For if this history is correct, equality once dealt with class<sup>14</sup> and governance in ways thought impossible by contemporary constitutionalists.

The first thing to appreciate is that there *was* a history of equal protection from 1880 until 1937, even though so many

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13. This term is not necessarily an accurate description. It was widely believed by the run-of-the-mine scholar of the early twentieth century that the *laissez-faire* period was limited to the *nineteenth* century. Professor Charles Burdick, for example, wrote,

Until the latter part of the nineteenth century the public mind was suspicious of governmental encroachment, hostile to governmental regulation, and bent upon the preservation of the largest possible degree of individual freedom. . . . [T]he opinions of the Supreme Court . . . have in recent years shown a change of emphasis, as a result of which the constitutional limitations upon state action have been liberally construed in favor of a wide power of governmental control.

CHARLES K. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* § 196, at 469 (1922). Scholars and historians know that the *laissez-faire* aspiration is one that each generation aims to reimagine. For the widespread presence of law and regulation in the nineteenth century, see generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). Even students and seeming advocates of the *Lochner* era know that, until the 1920s, the Court consistently upheld regulation. See David E. Bernstein, *Lochner's Legacy's Legacy*, 82 *TEX. L. REV.* 1, 62–63 (2003) (recognizing that there were discontinuities in this period).

14. It is hornbook constitutional law that class or wealth is not a characteristic that triggers strict scrutiny. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 374 (1996) (“[W]ealth discrimination alone [does not] provid[e] an adequate basis for invoking strict scrutiny . . .” (first alteration added) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973))). In fact, the Court has struck down laws involving wealth discrimination in some contexts. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (holding that a statutory prohibition of welfare benefits to residents of less than a year was unconstitutional); *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956) (striking down legislation that denied indigents free trial transcripts); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding unconstitutional a statute that sterilized chicken thieves but not embezzlers).

constitutionalists have written that there is no history.<sup>15</sup> In fact, one might argue that, during this period, equality was at least as doctrinally important, and controversial, as substantive due process.<sup>16</sup> To give one a rather crude empirical measure of this phenomenon, test the relative use of the term “equal protection” and that of the terms most conventionally associated with this period of law—“right to property” or “right to contract”—and one will actually come up with *more* references to equal protection. From 1900 through 1930—a period when equal protection is thought to have died in the Supreme Court—approximately 100 cases referred to “right to property” or “right to contract,” and 745 referred to “equal protection.”<sup>17</sup> Indeed, close reading reveals that decisions now known for completely unrelated principles, including *Lochner v. New York*,<sup>18</sup> *Muller v.*

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15. See *supra* note 1 and accompanying text.

16. We recognize that, for some historians, the term “substantive due process” is anachronistic. It is true, as Professor G. Edward White has shown, that this term was not used during the *Lochner* period in the caselaw. G. Edward White, *Revisiting Substantive Due Process and Holmes’s Lochner Dissent*, 63 BROOK. L. REV. 87, 88–89 (1997). The absence of a particular term should not, however, obscure the fact that there was a good deal of discussion during this period about whether the Due Process Clause addressed not only “procedure but also . . . substantive law.” Robert P. Reeder, *The Due Process Clauses and “the Substance of Individual Rights,”* 58 U. PA. L. REV. & AM. L. REG. 191, 191 (1910).

17. LEXIS, U.S. Supreme Court Cases, Lawyers’ Edition, search between January 1, 1900, and December 31, 1930, with the terms “right to property” or “right to contract.” The disparity was not as extreme in the state courts. In the state court database for this same period, for example, 2,196 cases referred to “right to property” or “right to contract,” 1,371 referred to “class legislation,” and over three thousand referred to “equal protection.” LEXIS, State Court Cases, Combined, search between January 1, 1900, and December 31, 1930, with the terms: “right to property” and “right to contract”; “class legislation”; and “equal protection.” One caveat is important here: although the terms “right to property” and “right to contract” are the terms one uses today to view the *Lochner* period, these terms were not always expressed in this fashion, and so this set of numbers may undercount the number of cases that dealt with property or contract in some way. Our point is not to fetishize a particular number; it is to emphasize that equal protection was a far more common argument than is typically imagined.

18. *Lochner v. New York*, 198 U.S. 45, 54–55 (1905). *Lochner* has come to be known as a case about the right to liberty or contract, not equal protection, but was argued as a case about class legislation. For a sustained argument on the importance of class legislation to *Lochner*, see White, *supra* note 16, at 97. For the conventional account focusing on the right to contract, see Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 824–25 (2008) (“This period was high noon for freedom of contract under the regime of *Lochner v. New York*.”); J. Harvie Wilkinson III, *Toward One America: A Vision in Law*, 83 N.Y.U. L. REV. 323, 325 (2008) (“*Lochner v. New York* advanced the notion of a personal freedom of contract as part of the liberty protected by the Fourteenth Amendment.”).

*Oregon*,<sup>19</sup> and *Whitney v. California*,<sup>20</sup> were once argued at least in part as equal protection cases.

To be sure, far more equal protection claims failed than succeeded, yet they were successful enough of the time that the arguments did not die. During the first decades of the twentieth century, two conflicting strands of thought informed equal protection. One strand we call the “textualist” strand, focusing on classification. Under the *lingua franca* of the police power, the courts affirmed the right, and indeed the necessity, of classification. Ultimately, this would become the core of modern equal protection law.<sup>21</sup>

The other strand of equal protection, a strand called “class legislation,” was not limited to classification simpliciter. Legislative generality was its touchstone. The constitutionalist Justice Cooley, the intellectual patron saint of this doctrine, explained,

[E]very one has a right to demand that he be governed by general rules . . . . Those who make the laws “are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plough.”<sup>22</sup>

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19. *Muller v. Oregon*, 208 U.S. 412, 419 (1908). *Muller* is known for its use of the so-called Brandeis brief written by future Justice Louis Brandeis on actual labor conditions, not equal protection. *See id.* at 419 & n.1.

20. *Whitney v. California*, 274 U.S. 357, 369–70 (1927). The *Whitney* case upheld the application of California’s criminal syndicalism law to a member of the Communist Party. *Id.* at 372. The case is most remembered for Justice Brandeis’s passionate defense of free speech in his concurring opinion:

They [the Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

*Id.* at 375 (Brandeis, J., concurring). *See generally* Vincent Blasi, *The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988) (offering historical background on the *Whitney* case).

21. *See* Tussman & tenBroek, *supra* note 1, at 343. For a critique of this textualist strand of thought, see *infra* Part IV.

22. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 559 (Boston, Little, Brown, & Co., 7th ed. 1903) (1868) (quotation error in original) (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 363 (Peter Laslett ed., Cambridge Univ. Press, rev. ed. 1988) (1690)).

These arguments predated the Fourteenth Amendment and in part legitimated civil rights reforms. One of the more important post-Civil War arguments against the Black Codes was that they created a special class of persons and thus violated the rule against class legislation.<sup>23</sup> The idea lived on long past the Fourteenth Amendment. As University of Chicago Professor Ernst Freund would explain in 1904, constitutional equality required a “general public law binding upon all the members of the community, and not partial or private laws affecting the rights of private individuals or classes of individuals.”<sup>24</sup>

As a number of historians and legal commentators have shown, the class-legislation ideal emerging in the post-Civil War period had ancient roots.<sup>25</sup> The colonists brought with them from England the notion of the “common” wealth, an idea aimed to resist the king’s grant of special favors and monopolies. John Locke’s *Second Treatise*, which was highly influential in America, declared that there should be “one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough.”<sup>26</sup> Not surprisingly, new state constitutions incorporated these ideas, declaring that government was instituted “for the common benefit, protection and security of the people . . . and not for the particular emolument or advantage of any single man, family, or sett of men, who are a part only of that community.”<sup>27</sup>

The idea lived on through the early Republic. Jeffersonian Republicans resisted the Federalists on the ground that they were granting legislative benefits to the few; the Jeffersonians made “‘equal rights for all, special privileges for none’ a central plank of

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23. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 43–44 (1988) (reporting that Northerners objected to the Black Codes in part out of fear “that if the South were ‘reconstructed upon the principle that the rights of any class . . . depended upon *race* or *color*, we may well expect that the two opposite principles will produce constant agitation and struggle for supremacy, until it culminates in a resort to arms” (internal quotation marks omitted)); Collins Denny, Jr., *The Growth and Development of the Police Power of the State*, 20 MICH. L. REV. 173, 189 (1921).

24. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 611, at 633 (1904).

25. For documentation of this history, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 22–33 (1993); NELSON, *supra* note 23, at 176–77; Saunders, *supra* note 7, at 255–58.

26. LOCKE, *supra* note 22, at 363. Justice Cooley would later use Locke’s phrase in his own treatise. See *supra* text accompanying note 22.

27. PA. CONST. of 1776, art. V (Decl. of Rights), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 278 (William F. Swindler ed., 1979); *see also, e.g.*, VT. CONST. of 1777, art. VI (adopting language identical to the Pennsylvania Constitution of 1776).

their platform.”<sup>28</sup> This philosophy would reach its height at the creation of the modern Democratic Party, which was founded on Andrew Jackson’s insistence that government should “shower its favors alike on the high and the low, the rich and the poor.”<sup>29</sup> The emergence of a legal doctrine reflecting these sentiments was one of “the chief constitutional development[s] of pre-Civil War America.”<sup>30</sup>

As one editorialist explained in 1834, “[A]ll acts of partial legislation are undemocratic . . . and, in their final operation, build up a powerful aristocracy, and overthrow the whole frame of democratic government.”<sup>31</sup> Relying on “law of the land” clauses in their state constitutions, state courts developed doctrinal rules striking down laws that were not “general and public” and that did not “operat[e] equally on every individual in the community.”<sup>32</sup> As one court explained the rule of generality, “[T]he minority are safe, [if] the majority, who make the law, are operated on by it equally with the others.”<sup>33</sup> The tradition would live on after the Civil War: as the Michigan Supreme Court would put it in 1870, “[t]he State can have no favorites,” for its business is “to give all the benefit of equal laws”

28. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 318 (1985).

29. Andrew Jackson, Veto Message (July 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 1139, 1153 (James D. Richardson ed., 1896).

30. Yudof, *supra* note 7, at 1375 (citing F.A. HAYEK, THE CONSTITUTION OF LIBERTY 188 (1960)).

31. William Leggett, Editorial, *Monopolies*, N.Y. EVENING POST, Nov. 29, 1834, reprinted in 1 WILLIAM LEGGETT, A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT 83, 85 (Theodore Sedgwick, Jr., ed., New York, Taylor & Dodd, 1840). See generally Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”: A Reconsideration*, 53 J. AM. HIST. 751 (1967) (discussing Justice Cooley’s views on partial legislation).

32. Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 605 (1831). Other leading cases include: Regents v. Williams, 9 G. & J. 365, 412 (Md. 1838); Holden v. James, 11 Mass. (11 Tyng) 396, 402 (1814); Wally’s Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554, 555 (1831); Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260, 270 (1829) (Catron, J., concurring); Ward v. Barnard, 1 Aik. 121, 123 (Vt. 1825). For a discussion of the early cases, see RODNEY L. MOTT, DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE “LAW OF THE LAND” 256–74 (1926).

33. *Cooper*, 10 Tenn. (2 Yer.) at 606; see also *Ward*, 1 Aik. at 123. In *Ward*, counsel argued, “If the legislature have power to select any individual, as the object of particular legislation, and exempt him from obligations to which all others are subject, it may be the instrument of the grossest favouritism; or, in times of political excitement, of the most cruel persecution.” *Id.*

and not “make discriminations in favor of one class against another.”<sup>34</sup>

We call this the “governance” model of equal protection because it looks beyond anticlassification and antidiscrimination simpliciter and imagines unequal laws as violating fundamental governmental premises and democratic aspirations.<sup>35</sup> The idea is not simply that the law has misclassified or used spurious generalizations (modern notions of equality); the idea is that general laws are superior to special ones because of what they do *within* the legislative process—they link representatives to those they represent. Those who legislate generally find themselves the subjects of the law they impose and are far less likely to oppress when they risk the law’s application along with everyone else. If the many must legislate not only for themselves but also for the few, their fates are linked; special laws, on the other hand, raise the specter of aristocracy, a rule of the courtier over the countryman.

Generality is in this sense an “embedded egalitarianism” (a form of “embedded constitutionalism”<sup>36</sup>) that aims to resist simultaneously the excesses of majorities and minorities by prophylactically aligning their interests in the legislative process. It may seem naïve or even fallacious to believe that a doctrinal standard could achieve such an effect, but what drove class legislation was an inchoate and often

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34. *People ex rel. Detroit & Howell R.R. Co. v. Twp. Bd.*, 20 Mich. 452, 486–87 (1870); *see also, e.g.*, *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255–57 (C.C.D. Cal. 1879) (striking down special legislation against aliens); *Ex parte Westerfield*, 55 Cal. 550, 551 (1880) (en banc) (striking down a Sunday law); *Lombard v. Antioch Coll.*, 19 N.W. 367, 370 (Wis. 1884) (rejecting a class-legislation argument); BRITTON A. HILL, *LIBERTY AND LAW, OR, OUTLINES OF A NEW SYSTEM FOR THE ORGANIZATION AND ADMINISTRATION OF FEDERATIVE GOVERNMENT* vi (St. Louis, G.I. Jones and Co., 2d rev. ed. 1880) (decrying the “tyrannies of money-power, of monopolies, and of class legislation”).

35. One might argue that both standards address governance. The principal distinction we are making here is between a standard that focuses on the textual virtues of logical symmetry and a standard that focuses outside the judiciary to concern itself with the legislature and with judicial-legislative interaction.

36. Embedded constitutionalism refers to a constitutionalism that is maintained not by judicial action but by institutions other than the courts. The term was first used, we believe, by Professors Joanne Scott and Jane Holder in their article *Law and New Environmental Governance in the European Union*. Joanne Scott & Jane Holder, *Law and New Environmental Governance in the European Union*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 210, 238–39 (Gráinne de Búrca & Joanne Scott eds., 2006). Professor Anuj Desai has argued that the First Amendment sustained itself in early America because the post office adopted, in essence, First Amendment values, thus embedding the amendment within an institution other than the courts. Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *STAN. L. REV.* 553, 557 (2008).

poorly expressed democratic theory—a theory which might be described as one of the “forced convergence” of majorities and minorities.<sup>37</sup> To enunciate this theory is not, we emphasize, to suggest that it was successful as a judicial standard; indeed, the history of class legislation reflects equality’s use as a sword to protect privilege as much as a shield to reverse oppression. But before the idea can be evaluated, it must be remembered, which is where we now turn.

#### A. *The Equality Canon before Lochner*

Any understanding of the equality law of the early twentieth century must begin with a triad of late-nineteenth-century cases that formed a kind of canon<sup>38</sup>: *Barbier v. Connolly*,<sup>39</sup> *Yick Wo v. Hopkins*,<sup>40</sup> and *Holden v. Hardy*.<sup>41</sup> We consider each of these cases in turn to show the limits and purposes of the doctrine.

*Barbier* announced the classic statement of the basic equal protection principle: “Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application” may withstand scrutiny.<sup>42</sup> This statement merely summarized ideas that could be found littered throughout the pages of federal<sup>43</sup> and, even more

37. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

38. In the text, we have emphasized U.S. Supreme Court decisions, but as the footnotes demonstrate, the doctrine of class legislation was widely accepted throughout the United States in state courts.

39. *Barbier v. Connolly*, 113 U.S. 27 (1884).

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

41. *Holden v. Hardy*, 169 U.S. 366 (1898).

42. *Barbier*, 113 U.S. at 32.

43. Many federal cases during this period invoked the class-legislation principle. *E.g.*, *Gulf, Colo. & Santa Fé Ry. Co. v. Ellis*, 165 U.S. 150, 155–56 (1897) (“The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.” (quoting *State v. Loomis*, 22 S.W. 350, 351 (Mo. 1893))); *Marchant v. Pa. R.R. Co.*, 153 U.S. 380, 390 (1894) (citing and applying *Barbier*, 113 U.S. at 32); *McPherson v. Blacker*, 146 U.S. 1, 39 (1892) (describing class legislation as “[t]he inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws” and explaining that it was “designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation”); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 29–30 (1889) (citing and applying *Barbier*, 113 U.S. at 32); *Hayes v. Missouri*, 120 U.S. 68, 72 (1887) (same); *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) (“What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment . . .”).

insistently, state reporters.<sup>44</sup> Justice Cooley's treatise, *Constitutional Limitations*, was repeatedly cited as the source of this claim. "[E]very one has a right to demand that he be governed by general rules," wrote Cooley:

[A] special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.<sup>45</sup>

As one court explained, the "legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions"—the "law of the land" is a "general public law, binding upon all the members of the community."<sup>46</sup> "Class legislation, founded upon any distinctions of rank or wealth, is contrary to the genius of our institutions."<sup>47</sup>

The idea was to distinguish between legislation for the common benefit and legislation that benefited or burdened the few. The notion of common benefit and generality was more, however, than simply a

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44. See, e.g., *Hawkins v. Roberts & Son*, 27 So. 327, 332 (Ala. 1899) (quoting *Barbier*, 113 U.S. at 32); *In re Morgan*, 58 P. 1071, 1081–82 (Colo. 1899) ("The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions." (quoting *Ritchie v. People*, 40 N.E. 454, 456 (Ill. 1895))); *Ritchie*, 40 N.E. at 456 ("The 'law of the land' is 'general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals, or classes of individuals.'" (quoting *Millett v. People*, 7 N.E. 631, 633 (Ill. 1886))); *State v. Haun*, 59 P. 340, 344 (Kan. 1899) ("The rights of every individual must stand or fall by the same rule of law . . . ." (quoting *State v. Goodwill*, 10 S.E. 285, 286 (W. Va. 1889))); *Leavitt v. Canadian Pac. Ry. Co.*, 37 A. 886, 887–88 (Me. 1897) (quoting *Barbier*, 113 U.S. at 32); *Messenger v. Teagan*, 64 N.W. 499, 501 (Mich. 1895) (same); *People v. Bellett*, 57 N.W. 1094, 1094 (Mich. 1894) ("By class legislation, we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another, in like case, offending."); *Low v. Rees Printing Co.*, 59 N.W. 362, 364 (Neb. 1894) (quoting COOLEY, *supra* note 22, on class legislation); *Brim v. Jones*, 39 P. 825, 826 (Utah 1895) (quoting *Barbier*, 113 U.S. at 32); *Va. Dev. Co. v. Crozer Iron Co.*, 17 S.E. 806, 807–08 (Va. 1893) (rejecting a class-legislation challenge because *Barbier* allows class legislation that falls within the police power); *Peel Splint Coal Co. v. State*, 15 S.E. 1000, 1005 (W. Va. 1892) ("Class legislation, founded upon any distinctions of rank or wealth, is contrary to the genius of our institutions."); *Goodwill*, 10 S.E. at 286 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the fourteenth amendment." (internal quotation marks omitted) (quoting *The Civil Rights Cases*, 109 U.S. at 24)); *Bittenhaus v. Johnston*, 66 N.W. 805, 806 (Wis. 1896) (quoting *Barbier*, 113 U.S. at 32); *In re Garrabad*, 54 N.W. 1104, 1106–07 (Wis. 1893) (same).

45. COOLEY, *supra* note 22, at 391–92.

46. *Ritchie*, 40 N.E. at 456 (quoting *Millett*, 7 N.E. at 633).

47. *Peel Splint Coal Co.*, 15 S.E. at 1005.

question of textual classification or public value. It was an appeal to notions of reciprocity in governance: law's generality was important, not simply in a formal sense, but because it forced lawmakers to stand in the shoes of those they represented. The principle of class legislation was terraced in both directions—it not only aimed to prevent class privilege but also invidious oppression:

The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances . . . . Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law, by another.<sup>48</sup>

*Barbier v. Connolly* may have been the case most cited for rejecting legislative class favoritism,<sup>49</sup> but this was not because of its holding. The claim in *Barbier* was that San Franciscans were targeting the Chinese with an ordinance that prohibited nighttime laundering.<sup>50</sup> The claim failed because the Court found no discrimination: the law was “general” and did not apply only to the Chinese.

A different result would soon appear in the next class-legislation decision, *Yick Wo v. Hopkins*. *Yick Wo* has come to stand for the proposition that a general law applied against a protected class may violate equal protection.<sup>51</sup> In fact, the opinion was seen at the time as an application of *Barbier*'s class-legislation principle.<sup>52</sup> The ordinance at issue in *Yick Wo* required laundry owners to obtain a permit from San Francisco's board of supervisors but exempted laundries housed in brick or stone buildings from the permitting requirement.<sup>53</sup> Unlike

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48. *Haun*, 59 P. at 344 (quoting *Goodwill*, 10 S.E. at 286).

49. *Barbier*, 113 U.S. 27, was cited 175 times in state and federal courts before 1900; by 1935, it had been cited over 900 times in state and federal courts. LEXIS, Federal and State Cases, Combined, search between January 1, 1884, and December 31, 1899, with the *Barbier* citation; and search between January 1, 1884, and December 31, 1934, with the *Barbier* citation.

50. *Barbier*, 113 U.S. at 29.

51. See 11 JAY HAKIM & STEVEN MINTZ, A HISTORY OF US: SOURCEBOOK AND INDEX 172 (1999) (“This case established the principle that a law that appears to be racially neutral on the surface is unconstitutional if it is applied in a discriminatory manner.”).

52. See, e.g., *Dobbins v. Los Angeles*, 195 U.S. 223, 240 (1904) (declaring that police power does not justify discrimination against a “class” and citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); BURDICK, *supra* note 13, § 279, at 593 (citing *Yick Wo* with *Barbier* and its classic statements against “class legislation”); JOHN S. WISE, A TREATISE ON AMERICAN CITIZENSHIP 211–12 (1906) (citing *Yick Wo* with *Barbier* and stating that the case stood for the principle that “to deny to a class” equal protection violated the Fourteenth Amendment).

53. *Yick Wo*, 118 U.S. at 357.

in *Barbier*, however, there was evidence that the supervisors had applied the ordinance to favor some and disfavor others:

No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions.<sup>54</sup>

In practice, the law divided the “owners or occupiers into two classes . . . by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure.”<sup>55</sup> It was the arbitrariness of the governing body’s (the supervisors’) decisionmaking (depriving people of work because they were Chinese subjects) that defeated the law under the class-legislation principle.

*Holden v. Hardy*<sup>56</sup> completes the triad. State courts were struggling mightily with whether regulations singling out particular employments could survive equal protection scrutiny. In the last decade of the nineteenth century, some state courts had struck down an odd assortment of laws on equal protection grounds, from laws aimed at regulating the payment of workers to those regulating the Sabbath to those regulating hours of work.<sup>57</sup> In *Holden*, the question

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54. *Id.* at 374.

55. *Id.* at 368. Although *Barbier* was much more frequently cited, *Yick Wo* was considered a class-legislation decision. *See, e.g., Bailey*, 219 U.S. at 223 (citing *Yick Wo* as a class-legislation case); *Giles v. Harris*, 189 U.S. 475, 478 (1903) (reprinting the statement of Wilford H. Smith, counsel for the appellant).

56. *Holden v. Hardy*, 169 U.S. 366 (1898).

57. *See, e.g., Ex parte Jentzsch*, 44 P. 803, 805 (Cal. 1896) (striking down a law barring barbers from working on Sundays as class legislation); *In re Morgan*, 58 P. 1071, 1072, 1084 (Colo. 1899) (striking down a law that limited the workday of smelters and miners working in underground mines to eight hours as class legislation); *In re Eight-Hour Law*, 39 P. 328, 329 (Colo. 1895) (per curiam) (striking down a law prohibiting mining and manufacturing companies from contracting with their employees for a workday longer than eight hours as “manifestly in violation of the constitutional inhibition against class legislation”); *Eden v. People*, 43 N.E. 1108, 1111 (Ill. 1896) (same); *State v. Haun*, 59 P. 340, 346 (Kan. 1899) (striking down a law that required workers to be paid in money rather than scrip for creating a class distinction); *State v. Granneman*, 33 S.W. 784, 785 (Mo. 1896) (striking down a law barring barbers from working on Sundays as class legislation); *Low v. Rees Printing Co.*, 59 N.W. 362, 368 (Neb. 1894) (striking down a law prohibiting mechanics, servants, and laborers—not

was whether Utah could limit the hours of workers in the mining industry.<sup>58</sup> The case was argued both as a due process and an equal protection challenge.<sup>59</sup>

In this, *Holden* was far from unusual. Although today equal protection and due process arguments are considered quite separate,<sup>60</sup> equal protection and due process once went hand-in-hand. Both were part of the police-power rhetoric of the day which held that the rights could be overcome by the state's interest in health and safety—as long as the law was not arbitrary.<sup>61</sup> Inequality was one possible manifestation of arbitrariness. As Professor Ernst Freund would put it in his treatise on police power, “[T]he two ideas [equal protection and due process] are closely associated in the minds of the courts” and, in fact in some cases, have been treated as almost the same thing.<sup>62</sup> The class-legislation argument made in *Holden* was simple: the legislature had no power to single out one industry for regulation and to leave other industries unregulated.<sup>63</sup> Doing so imposed a burden on one set of citizens not shared by others. Although such an argument might seem odd to a twenty-first century reader, it was successful in various state courts prior to *Holden*.<sup>64</sup>

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including farm or domestic laborers—from working more than eight hours per day). For a contemporary description of the case law in greater detail, see generally Henry R. Seager, *The Attitude of American Courts Towards Restrictive Labor Laws*, 19 POL. SCI. Q. 589 (1904).

58. *Holden*, 169 U.S. at 367.

59. *Id.*

60. See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 610–11 (2005) (explaining the difference between the equal protection and due process concerns involved in the case).

61. See, e.g., *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (“Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence . . . and what such regulations shall be . . . are questions for the State to determine, and their determination comes within the . . . police power . . . unless the regulations are so utterly unreasonable and extravagant . . . that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law . . .”). For other citations of this rule, see *infra* note 85.

62. FREUND, *supra* note 24, § 611, at 632. Indeed, this understanding lived on for quite some time. As Chief Justice Taft would later explain, in 1921, it was “customary” for the two arguments to be considered together. *Truax v. Corrigan*, 257 U.S. 312, 331–32 (1921).

63. *Holden*, 169 U.S. at 397–98.

64. *In re Eight-Hour Law*, 39 P. 328, 329 (Colo. 1895) (per curiam) (striking down a law prohibiting mining and manufacturing companies from contracting with their employees for a workday longer than eight hours as “manifestly in violation of the constitutional inhibition against class legislation”); *Low v. Rees Printing Co.*, 59 N.W. 362, 368 (Neb. 1894) (striking down a law prohibiting mechanics, servants, and laborers—not including farm or domestic laborers—from working more than eight hours per day).

The Supreme Court in *Holden* recognized that, if this was what class legislation meant, then very few laws would survive equal protection scrutiny.<sup>65</sup> Singling out could not be the sole measure of laws that violate equal protection because almost all law singles out, and it often singles out, not for reasons suggesting inequality, but simply out of the necessity of dealing with the particular needs or dangers of an industry. The Court upheld the regulation: under the police power, the state had the right to enact any law—even a law that interfered with existing rights—for the purposes of protecting the public health and safety.<sup>66</sup> In *Holden*, the Court determined that protection of miners was protection of the public.<sup>67</sup> Put in other words, the Court found that any statutory underinclusion served a public purpose; it was for the common benefit. That rationale was sufficient to defeat the class-legislation argument.

*Holden*, however, did not defeat the efforts of big business to use equality doctrine to attack regulation. These efforts persisted in part because a number of Justices, not to mention lawyers, held onto the class-legislation idea. One can see this in a case decided a year after *Holden*—*Atchison, Topeka & Santa Fé Railroad Co. v. Matthews*.<sup>68</sup> *Matthews* involved a Kansas statute that changed common law negligence rules in cases in which a railroad caused fire damage.<sup>69</sup> The railroad argued that it was being exempted from the common law rule: everyone except railroads was protected by the negligence requirement.<sup>70</sup> Following *Holden*'s police-power analysis,<sup>71</sup> the Court rejected the class-legislation claim.<sup>72</sup> Special burdens were “often necessary for general benefits.”<sup>73</sup> The railroad posed a special risk of fire,<sup>74</sup> and regulating the railroad served the public good.

Even as it upheld regulation and rejected the railroad's equality argument, the Court insistently restated the class-legislation principle: “[T]he equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon

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65. See *Holden*, 169 U.S. at 388.

66. *Id.* at 398.

67. *Id.* at 396–97.

68. *Atchison, Topeka & Santa Fé R.R. Co. v. Matthews*, 174 U.S. 96 (1899).

69. See *id.* at 97.

70. See *id.*

71. *Id.* at 105.

72. *Id.* at 106.

73. *Id.* at 103–04.

74. *Id.* at 101.

him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact” rules not applicable to similarly situated persons.<sup>75</sup> Citing *Yick Wo v. Hopkins*, the *Matthews* Court explained that, “[e]ven where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed.”<sup>76</sup> The Court went on to explain that this analysis required it to move beyond the surface of the statute, noting that in *Yick Wo v. Hopkins*, the Court “looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished.”<sup>77</sup>

The majority consistently restated the police power principle to persuade the four dissenting Justices, including Justice Harlan, who argued that the exemption from the common law rule was in fact a violation of equal protection.<sup>78</sup> The dissenters relied on *Gulf, Colorado & Santa Fé Railway v. Ellis*,<sup>79</sup> which involved a Texas statute permitting litigants to recover attorneys’ fees from a railroad when the railroad had lost a suit.<sup>80</sup> The argument in *Ellis* was that the railroad was, in effect, being exempted from rules applicable to other debtors; that it did not enter “courts upon equal terms” with other debtors.<sup>81</sup> Relying on *Ellis*, the dissenters in *Matthews* argued that the law exempting the railroad from common law rules violated the Equal Protection Clause.<sup>82</sup>

*Matthews* reveals three central facets of class-legislation analysis: First, the rule tended to focus on arguments in which “singling out” existed on the surface of the statute—in other words, on exemptions.<sup>83</sup>

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75. *Id.* at 104.

76. *Id.* at 105.

77. *Id.*

78. *Id.* at 110 (Harlan, J., dissenting).

79. *Gulf, Colo. & Santa Fé Ry. v. Ellis*, 165 U.S. 150 (1897).

80. *Id.* at 151–52.

81. *Id.* at 153.

82. *Matthews*, 174 U.S. at 110–11 (Harlan, J., dissenting).

83. The focus on exemption was part of the general understanding of “class legislation.” See, e.g., *United States v. Sugar*, 243 F. 423, 430 (E.D. Mich. 1917) (“It is therefore unnecessary to consider the questions whether such exemptions are such arbitrary discriminations as to render such statute class legislation . . . .”); *Kendall v. People*, 125 P. 586, 587 (Colo. 1912) (“[S]uch exemption rendered the act special or class legislation inhibited by the Constitution of Colorado . . . .”); Alpheus T. Mason, *The Labor Clauses of the Clayton Act*, 18 AM. POL. SCI.

Second, even if state courts found it initially a plausible way to strike down regulation, the United States Supreme Court tended to reject the argument. Contrary to common belief, far more regulation was actually upheld during the so-called laissez-faire period than was struck down<sup>84</sup>: rights during this period were in fact rather weaker protections than are thought because the state could rely on a strong police power argument.<sup>85</sup> Third, the class-legislation principle was not

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REV. 489, 509 (1924) (“[T]he principle against class legislation would not permit [Congress] to give to laborers, or any other particular class, special exemptions under the antitrust laws.”).

84. A number of historical investigations have established this, beginning with that of Professor Charles Warren. See Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294–95 (1913); see also Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944 (1927) (“[S]ince 1920 the Court has passed on [cases involving substantive legislation of a social or economic character] in fifty-three cases, and has held against the legislation in fifteen of them.”); Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 454 (1998) (“[I]t is widely recognized that the old Court rejected more substantive due process challenges than it granted . . . .”); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B., SUPREME COURT HIST. SOC’Y 53, 69 (“In areas of maximum hours and minimum wages, employer liability and workmen’s compensation, and state child labor regulation, the Court during the Progressive era nearly always supported reform efforts.” (footnote omitted)); Charles Warren, *A Bulwark to the State Police Power—The United States Supreme Court*, 13 COLUM. L. REV. 667, 669 (1913) (“‘Due process’ and the ‘police power’ both being indefinite terms, the Court has exercised a wide discretion in enlarging the scope of both in favor of the State.”). These empirics are controversial on two grounds. First, numbers are not everything, and, as critics rightly claim, numbers do not reflect the degree to which a decision was legally or politically controversial and thus shed a negative shadow on legislatures or important public affairs. In fact, as one of us has argued elsewhere, the Supreme Court’s labor decisions were extremely controversial and had an enormous impact on the right to unionize and to strike. Victoria F. Nourse, *A Tale of Two Lochners*, 97 CAL. L. REV. (forthcoming 2009) (manuscript at 48–53, on file with the *Duke Law Journal*). Second, critics have urged that the numbers reflect a purely internalist, doctrinal view, which is historically misleading. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 1019 (2000) [hereinafter Friedman, *History of the Countermajoritarian Difficulty*] (noting public criticism of the doctrine). For a critique of the numbers, see Paul Kens, *The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900–1937*, 35 AM. J. LEGAL HIST. 70, 72 (1991). For the most balanced view of this period, see generally LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 44–79 (2002) [hereinafter FRIEDMAN, *AMERICAN LAW*]. For clarification of the figure of “over two hundred” laws struck down, which appears in textbooks, see Nourse, *supra* (manuscript at 47–48).

85. Some of the more infamous cases of the 1920s tend to leave the impression that an absolute property or contract right existed. See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525, 546 (1923) (“[F]reedom of contract is, nevertheless, the general rule and restraint the exception . . . .”). But classic cases often leave a false impression of the general run-of-the-mine doctrine. At the time, the general rule was that rights, even personal rights, could be trumped by the common welfare. See, e.g., *Schmidinger v. City of Chi.*, 226 U.S. 578, 587 (1913) (“The right of state legislatures or municipalities acting under state authority to regulate trades and callings in the exercise of the police power is too well settled to require any extended discussion.”); *Chi.*,

only a principle of classification simpliciter, but carried with it inchoate, and sometimes changing, notions of governance.<sup>86</sup>

*B. Class Legislation and the Lochner Decision: 1900–1910*

The period from 1900 through 1910 is known as the *Lochner* era based on the infamous 1905 decision in *Lochner v. New York*. *Lochner* struck down a New York statute limiting the working hours of bakers. In the modern era, *Lochner* has been reviled as the quintessential example of the dangers of substantive due process, with all its “repulsive connotation of value-laden” judicial review.<sup>87</sup> To emphasize the point, *Lochner* has been dubbed the twin of the most controversial decision of the end of the twentieth century,<sup>88</sup> *Roe v. Wade*.<sup>89</sup> The conventional view is that the *Lochner* Court originated substantive due process by creating the right to contract. In fact, as

Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911) (“There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision . . . the making of contracts . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.”); Williams v. Arkansas, 217 U.S. 79, 90 (1910) (“It is a principle which underlies every reasonable exercise of the police power that private rights must yield to the common welfare.” (quoting Williams v. State, 108 S.W. 838, 840 (Ark. 1908))); Manigault v. Springs, 199 U.S. 473, 480 (1905) (“[T]he police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is *paramount* to any rights under contracts between individuals.” (emphasis added)); Smith v. Command, 204 N.W. 140, 142 (Mich. 1925) (“[N]o citizen has any rights superior to the common welfare. Acting for the public good, the state, in the exercise of its police powers, may always impose reasonable restrictions upon the natural and constitutional rights of its citizens.”); see also NOURSE, *supra* note 5, at 16 (“Before World War II, what we now consider basic civil rights were often weak, easily overcome by the needs of the common welfare, then called the ‘police power.’”); Nourse, *supra* note 84 (manuscript at 2–3) (“[R]ights could be trumped easily by claims of the general welfare . . .”).

86. See, e.g., Gilbert E. Brach, *Is There Danger Ahead?*, 6 MARQ. L. REV. 152, 155 (1921) (stating that when a body or group, such as laborers or farmers, combines to legislate its economic superiority, then “democracy is lost”); John F. Dillon, Property—Its Rights and Duties in Our Legal and Social Systems, Address Before the New York State Bar Association (Jan. 15, 1895), in 29 AM. L. REV. 161, 173 (1895) (“The one thing to be feared in our democratic republic, and therefore to be guarded against with sleepless vigilance, is class power and class legislation.”); Thomas R. Marshall, *The Enemies of Free Government in America*, 5 B.U. L. REV. 153, 156 (1925) (arguing that class legislation and the “class idea” will destroy democracy).

87. Gunther, *supra* note 1, at 42; see also Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249, 250 (1987) (“*Lochner* . . . is still shorthand in constitutional law for the worst sins of subjective judicial activism.”).

88. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 939–40 (1973).

89. *Roe v. Wade*, 410 U.S. 113 (1973).

historians know, this view is caricatured.<sup>90</sup> *Lochner* did not invent a right in the modern sense of the term because the idea of right at the time was different from today's concept of right-as-trump.<sup>91</sup> Neither *Lochner* nor most other cases during this period used the term "substantive due process."<sup>92</sup> *Lochner* was argued, although not decided, as a class-legislation case (because the law applied only to bakers).<sup>93</sup>

Whatever one's position on *Lochner* and its claims of right, it should not diminish the argument we make here that equal protection arguments were alive and well at the turn of the twentieth century.<sup>94</sup> As Professor Ernst Freund put it in 1904, "The principle of equality is relied upon more and more to check the exercise of governmental powers."<sup>95</sup> Behind the focus on class legislation lay the great battles of labor and capital of the day; although *Holden* had upheld regulation of mines,<sup>96</sup> doubts remained about whether that holding would apply elsewhere because state courts had reached contrary conclusions and because the Court's own equivocation in *Matthews* suggested otherwise. By 1904, Freund would write that the Supreme Court had traditionally "leaned strongly against allowing the plea of a violation of the equal protection of the laws," but "recent decisions show a tendency to subject statutory classification to a more rigid test."<sup>97</sup> He was referring to two cases: *Cotting v. Kansas City Stock Yards*<sup>98</sup> and

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90. See, e.g., GILLMAN, *supra* note 25, at 1; G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 241–68 (2000).

91. Nourse, *supra* note 84 (manuscript at 2–3, 44–46).

92. White, *supra* note 16, at 87 n.2.

93. See *id.* at 93–103. Some believe that *Lochner* is in fact consistent with the class-legislation tradition. See, e.g., GILLMAN, *supra* note 25, at 132. We believe that this claim is exaggerated. *Lochner* was a standard police-power case of the day. See Nourse, *supra* note 84 (manuscript at 17–21); *infra* Part II.C.

94. In fact, the incidence of the term increased substantially from the last decade of the nineteenth to the first decade of the twentieth century. In the period from 1900 until 1910, the term "class legislation" appeared in federal and state court opinions 410 times, whereas the same search yielded 221 opinions in the period from 1890 through 1900. Those numbers likely underestimate the incidence of the doctrine as, in state courts, it often went by the name of "special legislation" as well. LEXIS, Federal and State Cases, Combined, searches between January 1, 1900, and December 31, 1910, and between January 1, 1890, and December 31, 1900, using the "opinion" segment to avoid "counsel" references, with the term "class legislation."

95. FREUND, *supra* note 24, § 610, at 631.

96. *Holden v. Hardy*, 169 U.S. 366, 398 (1898).

97. FREUND, *supra* note 24, § 610, at 632.

98. *Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79 (1901).

*Connolly v. Union Sewer Pipe Co.*<sup>99</sup> In their day, both were more common citations than *Lochner v. New York*.<sup>100</sup>

*Cotting* involved the regulation of stockyards.<sup>101</sup> The Kansas City Stock Yards challenged the regulation on the ground that it was general in form only, applying to one business—the Kansas City yard.<sup>102</sup> The majority found a violation of equal protection as well as due process (the stockyard’s property had been “taken”). Six Justices “assent[ed] to the judgment of reversal” on the ground that the statute applied “only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denie[d] to that company the equal protection of the laws.”<sup>103</sup>

In retrospect, *Cotting* seems a rather odd case, but, at the time, the Supreme Court considered it of “profoundest significance.”<sup>104</sup> The case raised fears that majorities would use regulations to target business unfairly, raising fears of an incipient socialism:

Is it true in this country that one who . . . succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? We cannot shut our eyes to well-known facts.<sup>105</sup>

*Cotting*’s fear of majorities contradicts contemporary constitutional sensibilities, which tend toward majoritarian deference. Yet it is difficult to deny that the theory of equality applied by the Court was based on an implicit political theory rather than a theory of formal classification. Fear of the “legislative scalping knife” was fear of improper governance—of majorities leading the country toward socialism and communism. To be sure, *Cotting* used equality as a shield against apparent legislative confiscation of property, not as a sword to fight social oppression. But whatever the result of the case,

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99. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

100. From 1905 to 1930, *Lochner* was cited 264 times, *Cotting* was cited 343 times, and *Connolly* was cited 523 times. LEXIS, Federal and State Cases, Combined, search between January 1, 1905, and December 31, 1930, for the *Lochner* citation (“198 U.S. 45”), the *Cotting* citation (“183 U.S. 79”), and the *Connolly* citation (“184 U.S. 540”).

101. *Cotting*, 183 U.S. at 79–80.

102. *Id.*

103. *Id.* at 114–15.

104. *Id.* at 104.

105. *Id.* at 104–05.

the ideas implicit in the decision emphasized ancient equality doctrine, citing Judge Catron's nineteenth-century decision in *Vanzant v. Waddel*<sup>106</sup>: "Every partial or private law, which directly proposes to destroy or affect individual rights . . . is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."<sup>107</sup>

If *Cotting* demonstrated that class legislation had not died in the twentieth century, so too did one of the most important equal protection decisions of that era—*Connolly v. Union Sewer Pipe Co.* Although *Connolly* has faded from memory, it addressed one of the most prominent issues of the day—antitrust. As Professor Owen Fiss has explained, an antitrust case was once the equivalent of a civil rights case, with antitrust symbolizing the progressive assault against concentrated economic power.<sup>108</sup> An exemption once again triggered the equal protection claim: the law at issue in *Connolly* explicitly exempted farmers and laborers.<sup>109</sup>

The Supreme Court reasoned that the exemption violated the Equal Protection Clause and struck down the statute in its entirety. The implicit argument was precisely the same as in *Cotting*: that the "exempted" majority in Kansas had legislated a burden on others while preferring themselves. As the Court explained, a group of farmers could conspire to set agricultural prices, and, under the statute, nothing could be done; only nonagricultural businesses were targeted for regulatory burdens.<sup>110</sup> The Court viewed the exemption

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106. *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260 (1829).

107. *Cotting*, 183 U.S. at 105 (quoting *Vanzant*, 10 Tenn. (2 Yer.) at 270).

108. OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 158–65 (1993).

109. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 554 (1902) ("The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." (quoting 1893 Ill. Laws 182)).

110. The Court observed,

We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State.

*Id.* at 560. It concluded, "[W]e must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution." *Id.* at 565.

as problematic because it reflected a partial exercise of political power; farmers, predominant in the legislature, were self-dealing.

With the passage of time, it is easy to characterize *Connolly*, like *Cotting*, as using equal protection as a sword to strike down business regulation in the service of a laissez-faire regime. For our purposes, however, the important point is the form, not the result, of the argument. The equality argument was not about classification simpliciter but about political favoritism. Although corporations no longer seem similarly situated to political minorities, this is precisely the implication of the Court's opinions in *Connolly* and *Cotting*.<sup>111</sup> The same class-legislation principle that aimed to secure the Chinese minority in *Yick Wo* was applied in *Cotting* and *Connolly* to protect a stockyard and a railroad on the theory that they were, in effect, politically disadvantaged minorities. This reflected embedded and often inarticulate fears, not of logic or classification, but of governance generally—that mob-like majorities would turn the country toward socialism or communism.<sup>112</sup> The fear may have been exaggerated, but it was not a fear of classification alone, but a fear of governance.

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111. See WHITE, *supra* note 90, at 246 (“One example of such tyranny or corruption was legislation that violated the ‘anti-class’ principle by failing to demonstrate that it was an appropriately ‘general’ use of the police powers, as distinguished from an inappropriately ‘partial’ one. That type of legislation amounted to the favoring of one class or interest above another . . .”).

112. The reference to communism and socialism was a common one. See, e.g., C.G. Haines, Note, *Minimum Wage Act for District of Columbia Held Unconstitutional*, 2 TEX. L. REV. 99, 100–01 (1923) (“All such legislation has as its design to level inequalities of wealth, is socialistic in its trend, and leads to the dangers of bolshevism and revolution. ‘The tendency of the times,’ said [Justice Van Orsdel], ‘to *socialize property* rights under the subterfuge of police regulations is dangerous, and if continued will prove destructive to our free institutions.” (quotation error in original) (emphasis added) (quoting *Children’s Hosp. v. Adkins*, 284 F. 613, 622 (D.C. Cir. 1922))); see also *Mountain Timber Co. v. Washington*, 243 U.S. 219, 223 (1917) (reporting plaintiff’s counsel’s argument that “[t]he Fourteenth Amendment was adopted to preclude such philanthropic interference with the liberty of a self-reliant race. If the centralized advantages of *communism or socialism* are deemed preferable, the Constitution provides a method of amendment resulting in certainty of right” (emphasis added)); *United States v. Joint Traffic Ass’n*, 171 U.S. 505, 546 (1898) (reporting the solicitor general’s argument that “[u]ndoubtedly there is unrest, dissatisfaction, tendencies to *anarchy and socialism*, but these result not from competition, but the throttling of competition by trusts and combinations” (emphasis added)); *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 674 (1895) (Harlan, J., dissenting) (“It was said in argument that the passage of the statute imposing this income tax was an assault by the poor upon the rich, and by much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of *socialism*.” (emphasis added)).

Because of *Cotting* and *Connolly*, class legislation loomed large by the time the Court, in 1905, was asked to decide *Lochner v. New York*.<sup>113</sup> Indeed, as historians have shown, *Lochner's* innovation was its embrace of the right to contract rather than equal protection.<sup>114</sup> *Lochner* rejected the litigants' class legislation argument. When Justice Holmes, in his *Lochner* dissent, wrote that the majority had relied on "an economic theory which a large part of the country does not entertain,"<sup>115</sup> he was emphasizing what might have been clearer if the Court had emphasized class legislation and legislative favoritism. For Holmes, both class legislation and right to contract were reflections of laissez-faire ideology, which violated the first principle of judicial review: courts should defer to legislatures.<sup>116</sup>

By the time *Lochner* was decided, the class-legislation doctrine was already showing itself to be a difficult line to follow. As Justice Holmes would eventually write, there had always been a strain of class-legislation rhetoric that appeared to equate the doctrine with textual classification, which was a purely formal doctrine, not one based on assumptions about legislative favoritism.<sup>117</sup> Classification,

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113. See *supra* notes 87–93 and accompanying text.

114. See, e.g., GILLMAN, *supra* note 25, at 128 (noting that the majority opinion did not "explicitly rely on the language of unequal, partial, or class legislation in striking down the New York act" but rather focused on the right to contract); White, *supra* note 16, at 100 ("The Court's majority decision in *Lochner* . . . has been characterized as an example of judicial invocation of the doctrine of 'liberty of contract' . . .").

115. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Holmes's famous reference to Herbert Spencer's *Social Statics*, see *id.*, was to a by-then outmoded political theory: the best state is the state that governs the least, see HERBERT SPENCER, SOCIAL STATICS: OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED 321 (New York, D. Appleton & Co. 1850) ("Thus, if we regard government as a means of upholding the social state, we find that . . . there are several subsidiary ways in which the assumption of additional functions endangers the fulfilment [*sic*] of its original function.").

116. On Holmes's devotion to deference to legislatures, see FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 31 (1938).

117. See, e.g., *Buck v. Bell*, 274 U.S. 200, 208 (1927) ("[T]he law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."); *Dominion Hotel, Inc. v. Arizona*, 249 U.S. 265, 268 (1919) ("The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. . . . It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact."); *Keokee Consol. Coke Co. v. Taylor*, 234 U.S. 224, 227 (1914) ("[W]hile there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the

courts repeatedly insisted, was by its nature inequality; if legislation was to be pursued at all, it would have to be pursued unequally. Based on this rationale, and with the aid of the police-power justification, *Cotting* and *Connolly* turned out to be the exceptions that kept equality arguments going, even if they failed far more often than they succeeded. Equal protection arguments in the Supreme Court were, at the time, a dime a dozen, but they were easily met by claims—much like claims of personal right—that legislatures had the police power to regulate.<sup>118</sup>

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legislature to judge unless the case is very clear.”); *Cent. Lumber Co. v. South Dakota*, 226 U.S. 157, 160–61 (1912) (“If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.” (citing *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 411 (1905))).

118. A simple search for “equal protection” during this timeframe resulted in 275 cases. LEXIS, U.S. Supreme Court Cases, Lawyers’ Edition, search between January 1, 1900, and December 31, 1910, with the term “equal protection.” The results included numerous instances of the Court rejecting equal protection claims. *E.g.*, *Mobile, Jackson & Kan. City R.R. Co. v. Turnipseed*, 219 U.S. 35, 40 (1910) (holding that a Mississippi statute abrogating the common law “fellow-servant rule as to ‘every [employee] of a railroad corporation’” did not violate equal protection and noting that the Court “has never . . . construed the limitation imposed by the Fourteenth Amendment upon the power of the State to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy because it may happen that the classification includes persons not subject to a uniform degree of danger” (quoting MISS. CODE of 1892, § 3559)); *Griffith v. Connecticut*, 218 U.S. 563, 571 (1910) (holding that a statute exempting banks or trust companies and bona fide mortgages from a different statute prohibiting more than 15 percent interest on loans did not violate equal protection); *Moffitt v. Kelly*, 218 U.S. 400, 405–06 (1910) (holding that the Court did not have the power to review an equal protection challenge to a statute subjecting a wife’s inheritance to community property laws); *District of Columbia v. Brooke*, 214 U.S. 138, 152 (1909) (holding that a law making resident owners of property criminally liable for failing to connect to the city sewer but assessing damages against the property of nonresident owners did not violate equal protection); *Welch v. Swasey*, 214 U.S. 91, 107–08 (1909) (holding that a Massachusetts law limiting the height of all buildings to 125 feet above the grade of the street, enacted under the police power, did not violate equal protection); *Mobile, Jackson & Kan. City R.R. Co. v. Mississippi*, 210 U.S. 187, 205 (1908) (rejecting an equal protection challenge to a statute requiring railroads to broaden and standardize a narrow-gauge road and stating “[t]hat it denies the companies the equal protection of the law, we may say, is without any foundation” and “[n]o discrimination against them is pointed out”); *Thompson v. Kentucky*, 209 U.S. 340, 348 (1908) (holding that a law taxing distilled spirits in bonded warehouses did not violate equal protection); *The Employers’ Liability Cases*, 207 U.S. 463, 503–04 (1908) (rejecting a railroad’s equal protection challenge to a wrongful death statute); *Atl. Coast Line R.R. Co. v. N.C. Corp. Comm’n*, 206 U.S. 1, 25 (1907) (concluding that the North Carolina Corporation Commission’s order that a railroad restore a principal connection between the eastern and western parts of the state did not violate equal protection); *Gatewood v. North Carolina*, 203 U.S. 531, 542–43 (1906) (rejecting an argument that classifications in a North Carolina law prohibiting the operation of a “bucket shop” rendered the law unconstitutional); *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (holding that a Missouri statute precluding life insurance companies, domestic or foreign, from asserting a defense based on the false and fraudulent statements in the application

*C. Class Legislation and the Police Power: 1910–1920*

After *Lochner*, one might have thought equal protection would die. In fact, it lived on in both state and federal courts; citation to “class legislation” remained relatively steady during the next decade, 1910–1920.<sup>119</sup> As one Tennessee court said in 1911,

We are of opinion that for this discrimination this act is arbitrary and vicious class legislation; that it denies all corporations doing business in Tennessee the equal protection of the laws, and is in contravention of the Constitution of this State and of that of the United States, and void.<sup>120</sup>

Literally dozens, if not hundreds, of cases in the state courts of this period dealt with class legislation as an equal protection argument.<sup>121</sup> Most frequently, these claims failed on the theory that

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did not violate equal protection); *St. John v. New York*, 201 U.S. 633, 636–37 (1906) (holding that a statute distinguishing between producing and nonproducing vendors of milk did not violate equal protection); *McChord v. Louisville & Nashville R.R. Co.*, 183 U.S. 483, 495 (1902) (rejecting an argument that a Kentucky statute setting railroad rates violated equal protection); *Murdock v. Ward*, 178 U.S. 139, 147 (1900) (rejecting an allegation that an internal revenue tax violated equal protection).

119. References in federal and state opinions to “class legislation” from 1910 through 1920 hovered at about four hundred, as they did from 1900 through 1910. LEXIS, Federal and State Cases, Combined, search between January 1, 1910, and December 31, 1920, and between January 1, 1900, and December 31, 1910, using the “opinion” segment to avoid “counsel” references, with the term “class legislation.”

120. *State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911).

121. See, e.g., *State v. McGuire*, 167 N.W. 592, 594 (Iowa 1918) (rejecting an argument that an Iowa statute made an unconstitutional distinction between owners of male horses and owners of bulls and boars offered for sale); *Schulz v. Parker*, 139 N.W. 173, 178–79 (Iowa 1912) (rejecting an argument that a statute prohibiting railway companies from giving free passes constituted class legislation); *Hubbell v. Higgins*, 126 N.W. 914, 916 (Iowa 1910) (rejecting an argument that a statute providing for inspection of hotels accommodating ten or more guests was unconstitutional class legislation and stating that “[c]lassification must be reasonable and based upon real differences in the situation, conditions, and tendencies of things” because “[i]f there is no real difference between persons, occupations, or property, the state cannot make one in favor of some persons over others”); *McGuire v. Chi., B. & Q. R. Co.*, 108 N.W. 902, 906 (Iowa 1906) (“That legislation imposing upon railway companies special restrictions, obligations, and liabilities not generally applicable to other persons or corporations is not a denial of the equal protection of the laws has been so often decided as to be no longer a debatable question.”); *Mier v. Phillips Fuel Co.*, 107 N.W. 621, 625 (Iowa 1906) (“Nor do we think this statute open to the criticism that it is class legislation. Its object is the protection of landowners against subsurface encroachments. It extends to all who operate coal mines, at least, and protects all from whose land coal is taken without their consent. Such classification is uniformly upheld for not only all persons brought under its influence are treated alike under the same conditions but all are brought within its influence who are under the same conditions.”); *Iowa Mut. Tornado Ins. Ass’n v. Gilbertson*, 106 N.W. 153, 156 (Iowa 1906) (rejecting a class-legislation argument); *Gano v. Minneapolis & St. L. R. Co.*, 87 N.W. 714, 719 (Iowa 1901)

there was a general police-power justification for the statute. Those who hoped to resist regulation were often quickly disappointed, as in *Payne v. Kansas*,<sup>122</sup> in which the Supreme Court upheld a law requiring those selling farm products to have a license.<sup>123</sup> The Court summarily rejected the claim that the regulation was class legislation distinguishing between some farmers and others stating that there was a general reason for the law: “Manifestly, the purpose of the state was to prevent certain evils incident to the business of commission merchants in farm products by regulating it.”<sup>124</sup>

As these claims became increasingly repetitive and easily resolved by the police power, they began to sound almost modern—equating equality to classification simpliciter. Repeatedly, courts invoked the state’s “large discretion to classify.”<sup>125</sup> As the Ninth

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(holding that a statute requiring railroad companies exercising the power of eminent domain to pay landowners reasonable attorneys’ fees incident to condemnation proceedings or appeals was not unconstitutional as class legislation because the burden imposed applied equally to all of a certain class exercising the power granted); *State v. Garbroski*, 82 N.W. 959, 960 (Iowa 1900) (holding that a statute requiring certain peddlers to obtain a license was invalid and stating that “[t]he classification here attempted rests solely on a past and completed transaction, having no relation to the particular legislation enacted”); *Rambo v. Larrabee*, 73 P. 915, 918 (Kan. 1903) (“It is entirely competent for the Legislature to adapt its laws, general in their nature, to general classifications either of individuals, surroundings, or conditions; but such classification must always be a natural one, not an arbitrary or fictitious one.”); *State v. Smiley*, 69 P. 199, 208 (Kan. 1902) (rejecting a class-legislation argument); *Criswell v. State*, 94 A. 549, 551 (Md. 1915) (holding that a statute requiring a license fee of individuals working as barbers at the time the statute was enacted was not unconstitutional); *Groesbeck v. Detroit United Ry.*, 177 N.W. 726, 737–38 (Mich. 1920) (rejecting a class-legislation argument over a strong dissent); *Seamer v. Great N. Ry. Co.*, 172 N.W. 765, 770 (Minn. 1919) (“The constitutional prohibitions of class legislation are the same now as then. A marked change, however, has come in the view taken by the courts of the different states, and by the Supreme Court of the United States, and by our own, upon the question of what is a proper classification for legislative purposes. More and more the question is felt to be a legislative one which it is presumed the Legislature has rightly determined.”); *Halsell v. Merchants’ Union Ins. Co.*, 62 So. 235, 236 (Miss. 1913) (“Stripped of details, and of its regulation, supervision, and license features, we find an effort to confer special immunities and privileges upon certain defined associations, engaged in the ordinary business of loaning money. This is to be accomplished by naming the preferred class building and loan associations. The law fixes the contractual limit of interest charges, and it was not within the power of the Legislature to exempt, by special act, the associations and corporations defined from the general law, under the guise of an artificial and purely imaginary special classification of the preferred class.”); *Mo., K. & T. Ry. Co. v. Braddy*, 135 S.W. 1059, 1060 (Tex. Civ. App. 1911) (“[I]t is insisted that said article is unconstitutional because it is class legislation . . . . This assignment must be sustained.”).

122. *Payne v. Kansas*, 248 U.S. 112 (1918).

123. *Id.* at 113.

124. *Id.*

125. The leading case suggesting the state’s power to classify was *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (“A classification having some reasonable basis does

Circuit explained in *Johnston v. Kennecott Copper Corp.*,<sup>126</sup> in which the claim was that mining regulation was class legislation: “[t]he legislature possesses a wide scope of discretion in the exercise of its function of classification, and such legislation can be condemned as vicious only when it is without any reasonable basis, and therefore purely arbitrary.”<sup>127</sup> This language reflects a general trend: courts would continue to state the basic principle of class legislation but would quickly limit it. As the Delaware Supreme Court put it:

If such legislation amounts to class legislation as it is generally termed—that is, legislation that discriminates against some and favors others—it is prohibited by the amendment; but legislation, which in carrying out a public purpose is limited in its application, and within the sphere of its operation, affects alike all persons similarly situated, is not within the amendment.<sup>128</sup>

If class-legislation cases typically failed, when did they succeed? The answer is that they were more likely to succeed when a strong liberty interest was at stake. This served to cabin equal protection—equal protection did not cover all cases involving classification, only those in which something significant was at stake. It also had an implied, and inarticulate, political rationale: liberty provided a baseline from which deviation suggested abuse of legislative power.<sup>129</sup> As scholars have known for some time, without a common baseline, equality claims are largely empty, formal exercises.<sup>130</sup> A strong liberty interest can provide not only a common baseline but also a warning sign for political malfunction. If liberty means those things that everyone in society shares, exemption from the shared baseline

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not offend [equal protection] . . . [I]f any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.”)

126. *Johnston v. Kennecott Copper Corp.*, 248 F. 407 (9th Cir. 1918).

127. *Id.* at 413.

128. *Heffernan v. Chester-Cambridge Bank & Trust Co.*, 91 A. 385, 389 (Del. 1914). For similar state court cases during this period dealing with class-legislation arguments, see *Leonard v. Am. Life & Annuity Co.*, 77 S.E. 41, 42 (Ga. 1913); *State v. Horn*, 152 P. 275, 276–79 (Idaho 1915); *Casparis Stone Co. v. Indus. Bd.*, 115 N.E. 822, 822–23 (Ill. 1917); *People v. Gordon*, 113 N.E. 864, 865–70 (Ill. 1916).

129. BURDICK, *supra* note 13, § 279, at 593 (“It has been for the protection of civil rights that the equal protection clause has been resorted to . . .”).

130. See Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 *passim* (1985) [hereinafter Simons, *Equality*]; Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 *passim* (2000) [hereinafter Simons, *Egalitarian Norms*]; Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 883–902 (1987); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 *passim* (1982).

suggests abuse of power—that the majority is dealing itself benefits or exempting itself from burdens imposed on others. As Professor Rebecca Brown has put it, when majorities take away important rights, they do not do it across the board but tend to do it to others.<sup>131</sup> The very importance of the underlying interest—in cases of this period, the right to work—signaled something that should be shared from which some were excluded.

A typical case was *Truax v. Raich*,<sup>132</sup> in which the Supreme Court struck down a statute that discriminated against aliens.<sup>133</sup> Arizona had a law limiting how many aliens businesses could hire.<sup>134</sup> In 1915, the Supreme Court struck it down, citing *Yick Wo* for the proposition that aliens were in fact protected under the Fourteenth Amendment.<sup>135</sup> The loss of the right to work in the case was considered quite significant; this right was what the Fourteenth Amendment had been enacted to secure, insisted the Court, referring to the “free labor” ideology that influenced the passage of the Fourteenth Amendment.<sup>136</sup> But the Court did not end there, as one might expect if the right to work were a right as rights are viewed today (as a stand-alone due process violation). Instead, the Court explained that this serious deprivation triggered strong fears of unequal protection: if the right to work “could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.”<sup>137</sup>

*Raich* was an anomaly if one cares about results: during this period, as many scholars know, the Court’s civil rights decisions involving immigration and the rights of African Americans were, from contemporary perspectives, abysmal.<sup>138</sup> What is less well known

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131. Brown, *supra* note 1, at 1531.

132. *Truax v. Raich*, 239 U.S. 33 (1915).

133. *Id.* at 43.

134. *Id.* at 35.

135. *Id.* at 41.

136. On the influence of free-labor ideology, see generally NELSON, *supra* note 23, at 16; William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767.

137. *Raich*, 239 U.S. at 41.

138. See, e.g., *Gong Lum v. Rice*, 275 U.S. 78, 86–87 (1927) (upholding a state’s power to exclude children of Chinese descent from white schools); *Corrigan v. Buckley*, 271 U.S. 323, 327, 330 (1926) (upholding a racially restrictive covenant between individuals); *Porterfield v. Webb*, 263 U.S. 225, 232–33 (1923) (upholding a California law denying aliens ineligible for citizenship the right to lease or own land); *Terrace v. Thompson*, 263 U.S. 197, 217 (1923) (upholding a

is that this substantive failure to protect was accompanied by repeated statements that race could not be used as a matter of classification. There is nothing new about the divide between law's formality and its results; this gap yields scholars' routine condemnation of the period as a tragedy of equality law. Only when there was a well-established claim of liberty<sup>139</sup> did equality offer any protection for those who we would today call minorities. In *Buchanan v. Warley*,<sup>140</sup> for example, the Supreme Court struck down de jure racial segregation in the sale of property.<sup>141</sup> But the Court refused to intervene in education in *Gong Lum v. Rice*<sup>142</sup> and *Berea College v. Kentucky*,<sup>143</sup> because there was no similar claim of liberty and a pretense of equality (separate but equal).<sup>144</sup> Curiously, these results existed alongside pronouncements in northern and southern state courts (not to mention the Supreme Court) embracing a rule of formal equality: in a period when lynching was still a significant practice, courts proclaimed, for example, that "color, race, nativity, religious opinions, political affiliations, or the like . . . do not bear any just, reasonable or proper relation to the subject of the legislation like that in question."<sup>145</sup>

In retrospect, one wants to know why class legislation did not do more in race cases. In fact, plaintiffs used equal protection arguments in some cases. Class legislation was argued in segregated transportation cases and in peonage cases<sup>146</sup>—but it failed. The first

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Washington law denying the aliens the right to own land unless they have declared "in good faith" their intent to become citizens of the United States); *United States v. Bhagat Singh Thind*, 261 U.S. 204, 207 (1923) (allowing Congress to restrict the naturalization process to "white persons"); *Berea Coll. v. Kentucky*, 211 U.S. 45, 51, 57–58 (1908) (upholding a state law prohibiting corporations from teaching black children and white children in the same institution); MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 9 (2004) ("Scholars today tend to vilify the Court for its performance during this era.").

139. See *Raich*, 239 U.S. at 41 ("[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity . . .").

140. *Buchanan v. Warley*, 245 U.S. 60 (1917).

141. *Id.* at 82.

142. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

143. *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908).

144. *Gong Lum*, 275 U.S. at 85–86; *Berea Coll.*, 211 U.S. at 54.

145. *Wilson v. Edwards*, 32 Pa. Super. 295, 305 (Super. Ct. 1907).

146. See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 223 (1911) (argument for the United States) (peonage); *Hall v. De Cuir*, 95 U.S. 485, 508 (1877) (transportation); *Bowie v. Birmingham Ry. & Elec. Co.*, 27 So. 1016, 1020 (Ala. 1900) (transportation); *State v. Jenkins*, 92 A. 773, 773 (Md. 1914) (transportation); *State v. Mo. Pac. R.R. Co.*, 147 S.W. 118, 120 (Mo. 1912) (peonage);

problem was formal equality—if the law addressed both races, if it was formally separate and equal—then no equality problem appeared at issue.<sup>147</sup> The second problem was nature. Some courts held that natural classifications were not arbitrary,<sup>148</sup> and, in a period in which the races were considered biologically distinct,<sup>149</sup> classifications based on race were often considered classifications of nature. The third reason was the standard political theory of the day. The class-legislation argument had a number of potential strains to it, but one of its great motivating impulses was the fear that legislatures had been captured by factions, whether majorities or minorities. Although a reader in 2009 is likely to see racial legislation as a classic example of factionalism, this was not the political theory of the day, which was driven by fears of socialism and communism, not apartheid.<sup>150</sup>

#### D. Class Legislation Lives through the Taft Court: 1920–1930

Equal protection claims declined, but did not disappear, in the period from 1920 until 1930.<sup>151</sup> As Professor Charles Burdick explained in his constitutional law treatise in 1922, the “number of cases which . . . involved the right to classify under the police power [wa]s very great.”<sup>152</sup> The concept appeared in some of the most controversial cases of the 1920s. Indeed, it figured prominently in *Truax v. Corrigan*,<sup>153</sup> a case about one of the most hotly contested issues of the day—the labor injunction.<sup>154</sup> The argument was framed in

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*Chilton v. St. Louis & I. M. Ry. Co.*, 21 S.W. 457, 458–59 (Mo. 1893); *State ex rel. Davis-Smith Co. v. Clausen*, 117 P. 1101, 1114 (Wash. 1911) (peonage).

147. See, e.g., James F. Minor, *Constitutionality of Segregation Ordinances*, 18 VA. L. REG. 561, 564, 571 (1912) (arguing that such ordinances were constitutional “provided the accommodations [we]re equal,” there was no “discrimination” and despite the principle that “all legislation which discriminates against any particular race or class of persons is in violation of the Constitution of the United States”).

148. See *Tussman & tenBroek*, *supra* note 1, at 346 n.13 (citing examples).

149. *NOURSE*, *supra* note 5, at 17–37.

150. See *supra* notes 111–12 and accompanying text.

151. In the period from 1920 through 1930, the term “class legislation” appeared in state and federal opinions 322 times, as compared to the five hundred times it appeared in the earlier decades, see *supra* note 94. LEXIS, Federal and State Cases, Combined, search between January 1, 1920, and December 31, 1930, using the “opinion” segment to avoid “counsel” references, with the term “class legislation.”

152. *BURDICK*, *supra* note 13, § 282, at 604.

153. *Truax v. Corrigan*, 257 U.S. 312 (1921).

154. *Id.* at 321–22; see also *FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION* 154, 177–80 (1930) (detailing the labor dispute that led to *Corrigan* and the

terms of an exemption: businesses sought to use the injunction power against strikers, but the strikers invoked a law exempting labor actions from the general equitable injunction power.

Chief Justice Taft began by stating the by-then well-established rule that it was “customary” to consider the Due Process Clause and the Equal Protection Clause together, but then noted that the protections were not “coterminous.”<sup>155</sup> The Due Process Clause, the Court said, meant that all people should have their day in court and “the benefit of the general law.”<sup>156</sup> And, in this latter meaning, it tended to secure “equality” as a “minimum of protection for every one’s right of life, liberty and property.”<sup>157</sup> “Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. All men are equal before the law.”<sup>158</sup>

This due process principle, however, the Court explained, was simply a minimum of protection for equality. The “specific guaranty” of equality was “aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other.”<sup>159</sup> As in the past, this was tied to explicit exemptions and linked back to what has come to be known as a substantive right:

Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of . . . a larger class.<sup>160</sup>

The Court went on to cite *Yick Wo* for the proposition that laws were to be universal in their application “without regard to any differences of race, of color, or of nationality,”<sup>161</sup> noting the “frequency with which” such principles had been invoked.<sup>162</sup>

It would be left to Justice Holmes, in dissent, to illuminate the implicit political theory of the majority. Arguing against the majority,

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Court’s holding); FRIEDMAN, *AMERICAN LAW*, *supra* note 84, at 75–76 (“The labor injunction had terrorized organized labor for some forty years.”).

155. *Corrigan*, 257 U.S. at 332.

156. *Id.*

157. *Id.*

158. *Id.* (internal quotation marks omitted).

159. *Id.* at 332–33.

160. *Id.* at 333.

161. *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

162. *Id.* at 334.

he identified and conceded their premise, that labor had “the ascendancy that the exception seems to indicate,”<sup>163</sup> referring to labor’s power in the legislature to grant itself an exemption not granted to others. Having expressed the fear of labor’s ascendancy, Holmes rejected the argument on two grounds—one that did not meet the argument and one that did. The first was the by-then-routine claim of classification. Holmes’s *Truax* dissent opened with a well-known discussion of the “dangers of a delusive exactness in the application of the Fourteenth Amendment.”<sup>164</sup> By 1921, this was a standard reply to class-legislation arguments—but a reply that did not meet the objection. It assumed, instead, that class legislation implied precision of classification alone; to say that laws were difficult to write in precise ways said nothing about whether labor had obtained an unfair upper hand in the legislature, dealing themselves benefits denied others.

In the end, Holmes simply rejected the political fears of the majority<sup>165</sup>: he insisted that the Court could not treat majorities as factions if there was a reasonable claim that they had acted in service of the public. If reasonable persons could support labor’s claims, then the Court had to treat them as a majority, not as a special interest, seeking to legislate themselves benefits. “If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases.”<sup>166</sup> This embodies the police power—general purpose response to class legislation seen in *Holden*,<sup>167</sup> in *Matthews*,<sup>168</sup> and in so many other cases: there was a reasonable basis for the classification, and that was it.

*Corrigan* was one of the last significant cases involving class legislation, but it was not alone. Just as *Yick Wo* demonstrated, class legislation could provide benefits to minorities who were deprived of a right to work.<sup>169</sup> This occurred as late as 1926 in *Yu Cong Eng v. Trinidad (The Chinese Bookkeeping Cases)*.<sup>170</sup> The Supreme Court ruled in favor of a Chinese merchant in the Philippine Islands,

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163. *Id.* at 344 (Holmes, J., dissenting).

164. *Id.* at 342.

165. *Id.* at 344.

166. *Id.* at 343.

167. *See supra* notes 56–63 and accompanying text.

168. *See supra* notes 68–74 and accompanying text.

169. *See supra* notes 51–55 and accompanying text.

170. *Yu Cong Eng v. Trinidad (The Chinese Bookkeeping Cases)*, 271 U.S. 500 (1926).

enjoining enforcement of an act making it a crime to keep business records in anything except English, Spanish, or any local dialect.<sup>171</sup> The ruling was based both on due process and equal protection. Quoting *Holden v. Hardy*, the Court summarized the issue: “The question in each case is whether the legislature had adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class.”<sup>172</sup> In its final, concluding paragraph, the Court invoked *Truax v. Raich* as an analogous case:

As against the Chinese merchants of the Philippines, we think the present law, which deprives them of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, is a denial to them of the equal protection of the laws.<sup>173</sup>

*Corrigan, Raich, and The Chinese Bookkeeping Cases* were not the only cases that the Supreme Court heard and in which it struck down a classification as unjust discrimination during the 1920s. In *Quaker City Cab Co. v. Pennsylvania*<sup>174</sup> the Supreme Court, over strong dissents, struck down a tax on taxicab services organized as corporations on the theory that exempting some taxicab services organized as individuals or partnerships was arbitrary.<sup>175</sup> In *Power Manufacturing Co. v. Saunders*,<sup>176</sup> the Court struck down venue provisions allowing a corporation to be sued in a county where it did no business on the theory that the statute discriminated against foreign corporations.<sup>177</sup> In *Kansas City Southern Railway Co. v. Road Improvement District No. 6*,<sup>178</sup> the Court concluded that a property-assessment law discriminated in a “palpable” manner because it did not treat “railroad companies . . . like individual owners.”<sup>179</sup> There was

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171. *Id.* at 508, 524–25.

172. *Id.* at 526 (quoting *Holden v. Hardy*, 169 U.S. 366, 398 (1898)).

173. *Id.* at 527–28.

174. *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928).

175. *Id.* at 402 (“In effect § 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed, while those of natural persons and partnerships carrying on the same business are not. . . . The tax is imposed merely because the owner is a corporation.”).

176. *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927).

177. *Id.* at 494 (“So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary.”).

178. *Kan. City S. Ry. Co. v. Rd. Improvement Dist. No. 6*, 256 U.S. 658 (1921).

179. *Id.* at 661.

even an occasional case on racial discrimination: in *Nixon v. Herndon*,<sup>180</sup> the Court struck down the Texas white-primary law under the Fourteenth Amendment in ringing praise that reality mocked:

[T]he law in the States shall be the same for the black as for the white: that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.<sup>181</sup>

In this era, as was true of earlier eras, far more of these challenges were rejected than affirmed. In a vast number of cases, corporations, associations, and individuals claimed that rules and regulations violated their equal protection rights.<sup>182</sup> There were cases,

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180. *Nixon v. Herndon*, 273 U.S. 536 (1927).

181. *Id.* at 541 (quoting *Buchanan v. Warley*, 245 U.S. 60, 77 (1917)).

182. This was true of cases in the federal courts. *See, e.g.*, *Herbring v. Lee*, 280 U.S. 111, 116 (1929) (reporting the petitioner's argument that a licensing requirement violated "class legislation"); *Whitney v. California*, 274 U.S. 357, 370–71 (1927) (rejecting the petitioner's argument that a criminal syndicalism statute was "class legislation"); *Twohy Bros. Co. v. Kennedy*, 295 F. 462, 465–67 (9th Cir. 1924) (rejecting a claim that a law holding an employer liable for injuries arising from conditions of a hazardous occupation violated equal protection); *Berlet v. Lehigh Valley Silk Mills*, 287 F. 769, 771 (3d Cir. 1923) (affirming the state supreme court's decision that a law giving a lien to "throwsters" of silk on silk thrown, retained, and returned was class legislation); *C. A. Weed & Co. v. Lockwood*, 266 F. 785, 791–94 (2d Cir. 1920) (involving a challenge to the Lever Act as unconstitutional "class legislation"); *Gloucester Seafood Workers' Ass'n v. Houston*, 35 F.2d 193, 196 (E.D. Va. 1929) (rejecting a class-legislation argument); *Liberty Highway Co. v. Mich. Pub. Utils. Comm'n*, 294 F. 703, 709 (E.D. Mich. 1923) (rejecting a class-legislation argument attacking regulation of common carriers). This was true as well in the state courts. *See, e.g.*, *Franchise Motor Freight Ass'n v. Seavey*, 235 P. 1000, 1003–04 (Cal. 1925) (upholding a class-legislation challenge to regulatory exemption); *Ex parte Rameriz*, 226 P. 914, 920 (Cal. 1924) (rejecting a class-legislation challenge to excluding aliens from gun ownership); *Montgomery v. Town of Branford*, 147 A. 9, 10–11 (Conn. 1929) (striking down a tax as violating the rule of equal protection and class legislation); *Territory v. Armstrong*, 28 Haw. 88, 93–97 (1924) (rejecting an argument that an adultery statute violated class legislation and equal protection because it treated men and women differently); *Ex parte Bottjer*, 260 P. 1095, 1096 (Idaho 1927) (rejecting an argument that a statute applying only to bankers was improper class legislation); *Smallwood v. Jeter*, 244 P. 149, 155 (Idaho 1926) (rejecting a challenge that exempting school buses violates class legislation); *People v. Sheldon*, 152 N.E. 567, 568–69 (Ill. 1926) (rejecting a class-legislation challenge to a concealed-weapon law); *Fountain Park Co. v. Hensler*, 155 N.E. 465, 468 (Ind. 1927) (striking down a statute that granted eminent domain power to a religious entity as improper class legislation); *City of Springfield v. Smith*, 19 S.W.2d 1, 7 (Mo. 1929) (striking down a statute barring the showing of motion pictures on Sundays as class legislation); *City of Seattle v. Gervasi*, 258 P. 328, 332 (Wash. 1927) (rejecting an argument that a statute that barred selling groceries on Sunday was class legislation).

like *Terrace v. Thompson*,<sup>183</sup> in which the Court seemed to defy its protection of aliens in *Raich*, ruling in favor of California's racist bans on Japanese land ownership (on the theory that the discrimination was supported by the police power, the potential harm being land ownership by noncitizens).<sup>184</sup> Indeed, there are cases that we today find inhumane, such as *Buck v. Bell*, in which the Supreme Court in 1927 upheld forced sterilization and rejected equal protection with the back of its hand<sup>185</sup>—even though equality was the best argument available against the sterilization statute and had influenced a number of state supreme courts to strike down such laws.<sup>186</sup> In *Buck*, Justice Holmes who was openly disdainful of a priori claims of right and equality, issued the famous line that equality was the “usual last resort” of constitutional lawyers,<sup>187</sup> not because there were no equality cases, but because there were too many.<sup>188</sup>

## II. HISTORICAL IMPLICATIONS

The legal history of judicial doctrine is always subject to the historian's skeptical nostrum that it is “law-office history.” But this is not the standard history of doctrine; it is the history of the average legal consciousness of the day, rather than the “leading” controversial case that colors the lenses of the practicing constitutionalist solving twenty-first-century problems. This history disrupts conventional scholarly wisdom that equal protection fell into “desuetude” for eighty years,<sup>189</sup> when in fact there were a surfeit of cases. As the great historian of science, Professor Thomas Kuhn, once admonished his students, it is precisely when the incomprehensible rears its head that time reveals how much has been forgotten.<sup>190</sup> It is only because of the

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183. *Terrace v. Thompson*, 263 U.S. 197 (1923).

184. *Id.* at 217.

185. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

186. NOURSE, *supra* note 5, at 28, 185 nn.35–36; Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 108, 124–31 (2005).

187. *Buck*, 274 U.S. at 208.

188. *See supra* notes 17, 94 and 118.

189. Tussmann & tenBroek, *supra* note 1, at 341.

190. *See* THOMAS S. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* xii (1977) (“When reading the works of an important thinker, look first for the apparent absurdities in the text and ask yourself how a sensible person could have written them. When you find an answer, . . . when those passages make sense, then you may find that more central passages, ones you previously thought you understood, have changed their meaning.”).

relentless presentism<sup>191</sup> of legal practice, which requires looking for cases with modern fact patterns (of race and sex and disability), that lawyers and scholars forget that different equality cases once existed.

As the United States' leading historiographer of law, Professor Bob Gordon, has explained, lawyers tend to "treat the past as existing on a timeless horizontal plane with the present: Past texts and practices are to be read exactly in their times as they are in ours . . . ."<sup>192</sup> This demands indifference to the past as well as the present; as Professor Reva Siegel urges, the past preserves itself through transformation.<sup>193</sup> We believe this operates as well in reverse: the present preserves itself in the past by recasting the past in its own image. Legal institutions cover and even erase the past to increase the authority of their pronouncements, to render law timeless and transcendent. One is tempted to think this is all a problem of the normative cast of legal scholarship, but we believe this phenomenon is structured presentism—a presentism demanded by and embedded within the system of precedent that requires that one find, in the past, words that quite literally precede themselves.

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191. Presentism, as used by historians, refers to the tendency to look at the past through contemporary eyes: for example, judging Henry Ford's Model T by the standards of modern 300-horsepower engines. As Professor Larry Kramer has quipped, no historical effort is ever immune from presentism. Larry Kramer, Response, 81 CHI.-KENT. L. REV. 1173, 1174 (2006) ("Historians are all and always presentist."). Yet, if a certain presentism is inevitable, historians are at least trained to be conscious of their own temporal biases; lawyers are trained to be oblivious to their temporal biases. The very structure of precedent makes presentism far more insistent for lawyers than for historians. Lawyers are taught to read cases as if they had no time, as if the words of 1861 could be immediately translated into the words of 1961. There are virtues to this, but there are also vices, and the vices include a structured forgetting of concepts that have no analogue in the present. It is precisely because judicial review is so taken for granted, for example, that no one would have thought, before Kramer's book, that the "people themselves" might have exercised this power. Resisting presentism in this sense can enable law to engage in discovery, asking new questions that the present cannot think to ask. See LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004) (noting that "final interpretive authority rested with 'the people themselves'" and surmising that by studying this period of popular constitutionalism, "we may find some reasons to reawaken our own seemingly deadened sensibilities in this respect").

192. Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1997).

193. We see the move here as bidirectional. Doctrinal change tends to preserve the past, as Professor Siegel has so compellingly documented. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997). But doctrine and precedent also tend to preserve the present in the past, tending to take present controversies and transforming them into past ones, even if the past is radically different. See Nourse, *supra* note 84 (manuscript at 3).

The history of class legislation is important for a number of scholarly controversies precisely because it disrupts the present's conventional wisdom of equality law's history. And, disrupting that history, it offers new insights about old debates. First, as we show, this history suggests that the most important scholarly contributions to modern equal protection law—such as the underinclusive and overinclusive rules of logical classification suggested by Professors Tussman and tenBroek's 1949 article<sup>194</sup>—depend on a false history. Equality law has not always been about classification simpliciter, as opposed to classification as a signal of some greater principle of governance. Second, this history corrects the record on recent historical debates: some have used the history of equality law, and in particular class legislation, to support a new revisionist history of substantive due process. If our history is correct, this effort has been misdirected and is based on a fundamental doctrinal confusion between equal protection and due process. Third, this history sees continuities where most assume discontinuity. Equality aspired to political theory long before Professor John Hart Ely, *United States v. Carolene Products Co.*,<sup>195</sup> and public choice theory;<sup>196</sup> since the Founding, equality has imbibed and reflected political theory (whether good, bad, or incoherent). Fourth, this history implies misdirection: the endless debates about the intentions of the framers of the Fourteenth Amendment may be misguided if equality is grounded in basic notions of governance predating the amendment.

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194. Tussman & tenBroek, *supra* note 1; *see also infra* notes 198–205.

195. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

196. Professor John Hart Ely is considered the author of a political-process theory of constitutional review that seeks to justify the use of judicial review to reinforce the representation of minorities. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87–88 (1980) (summarizing “three arguments in favor of a participation-oriented, representation-reinforcing approach to judicial review”). *Carolene Products*, 304 U.S. 144 (1938), set forth an early version of this view in the most famous footnote in constitutional law, which states that the Court may exercise greater powers of review when minorities do not have sufficient political power to make their views effective in the political process, *id.* at 153 n.4. Some constitutionalists, such as Professor Geoffrey Miller, have argued that class legislation reflected an early version of modern public choice theory, which posits that government exists to benefit special interests. *E.g.*, Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 85, 124–26, 127 n.277 (1989).

A. *Equality as a Matter of Classification*

One of the great tropes of equality law is that equality is a matter of classification and that legislatures have a large discretion in classification generally.<sup>197</sup> This implies a particular idea of equality as a matter of logic and language. This ideal was substantially reinforced by one of the most important articles on equal protection written in the twentieth century, Professors Tussman and tenBroek's 1949 article, *The Equal Protection of the Laws*. The basic concepts found in that article—of under- and overinclusive categories, of substantive equal protection, and forbidden or “suspect” classification—became the heart of equal protection analysis in the last half of the twentieth century.<sup>198</sup>

Professors Tussman and tenBroek reimagined equal protection law as a question of “fit” between the statute's purpose and its categories, offering what appeared a more sophisticated way to analyze statutory classifications (under- or overexclusion) and one that incorporated the legal process theories of the day that focused on the “purpose” of statutes.<sup>199</sup> And, yet, their account almost completely obscured the history we have recounted. The authors open with the claim we have shown to be false, that the Equal Protection Clause had, for eighty years fallen into “relative desuetude.”<sup>200</sup> At one point, the authors advert to “special” or class legislation but misstate the doctrine as one of “reasonable classification”; from there they move to a very modern idea, defining reasonableness as “the degree of [the statute's] success in treating similarly those similarly situated.”<sup>201</sup>

By offering a method (analysis of classifications) for equal protection cases, Professors Tussman and tenBroek obscured the inchoate, often conflicting, but nevertheless real attempts by courts to imbue equal protection with political theory. In place of links between majorities and minorities or oppressed and privileged minorities, Tussman and tenBroek gave scholars diagrams of traits and mischiefs.<sup>202</sup> In the place of liberty as a baseline from which exemptions seemed suspect was the notion that substantive equality

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197. See generally John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191 (1999) (tracing the history of equal protection).

198. Tussman & tenBroek, *supra* note 1, at 356.

199. *Id.* at 346–48.

200. *Id.* at 341.

201. *Id.* at 343–44.

202. See *id.* at 347 (diagrams).

was the “equality” version of the by-then highly discredited, substantive due process.<sup>203</sup> In the place of the fears of aristocracy or socialism, which once appeared near the surface of judicial opinions on equal protection,<sup>204</sup> came a diagnostic tool of seemingly great power aspiring to logical purity.<sup>205</sup> If our history is right, not only did Tussman and tenBroek recount a partial history, but they also missed the very importance of equal protection: its aspirations to political theory rather than formal classification.

### *B. Class Legislation as Political Theory*

If this history takes equal protection out of the shadows of modern fixations on classificatory logic, it also reveals something important about the history of equality law. Equality has always aspired to something larger than a logical system of classification. Long before *Carolene Products*, long before Professor John Hart Ely, courts and commentators worried about legislatures’ tendencies to deal out benefits to their friends and burdens to their enemies.<sup>206</sup> In this sense, class legislation is the oddly architected precursor to the political process theories of the late-twentieth century, whether theories of public choice or representation reinforcement. As Professor Michael Klarman has noted, political-process theories have been extraordinarily resilient.<sup>207</sup> What many have failed to appreciate is just how old they might be; indeed, they are prefigured in the doctrine of class legislation.

In hindsight, class legislation joined two otherwise potentially incompatible political prescriptions. On the one hand, it attempted to protect minorities from majorities, as in *Yick Wo v. Hopkins* or *Truax v. Raich*. This was a kind of antiaristocracy rule. On the other hand, courts saw no difference between deploying this concept as a sword

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203. *Id.* at 361–65.

204. *See supra* note 112.

205. Professors Tussman and tenBroek recognize at one point that there was a “theory of legislation and the state” at stake in equal protection but explicitly reject what they called “the pressure group theory,” urging that this theory was incompatible with equal protection. Tussman & tenBroek, *supra* note 1, at 350. One (although not the only) way of reading this otherwise opaque passage is that the authors were rejecting the use of equal protection to police the legislature against capture by concentrated interests. In short, to the extent that the authors recognized that larger claims were at issue, they rejected them.

206. *See supra* notes 22–34 and accompanying text.

207. *See generally* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 830 (1991) (“[P]olitical process theory is the only promising constitutional theory on the table . . .”).

against racial oppression and as a shield from business regulation. Class legislation helped to strike down at least some discriminations against minorities, but it also helped strike down laws that came to be associated with majorities. Some scholars dispute this, arguing that class legislation reflected a proto-public choice doctrine designed to prevent groups from legislating themselves monopolies, based on the assumption that most legislation is inefficient and therefore rent seeking.<sup>208</sup> But if one is in the business of picking future analogues, it is just as likely that class legislation was a precursor, in cases like *Yick Wo*, *Raich*, or *The Chinese Bookkeeping Cases*, to cases in which the Court limited its legislative supervision to monopolistic practices affecting insular minorities. In this latter sense, the doctrine can be seen as an early signal of what would flower in *Carolene Products*.

To be sure, analogizing class legislation to modern political theories poses risks of presentism. The very idea of class legislation, both in the doctrinal and the public sphere, changed radically over the period we have recounted. In its earliest manifestations, class legislation aimed to prevent legislatively granted monopolies. But these efforts quickly foundered: class legislation did not reliably pick out special interest legislation or even monopolistic legislation—if it had, *The Slaughterhouse Cases*<sup>209</sup> should have come out the other way. The blatant protectionism of the anti-margarine law upheld in *Powell v. Pennsylvania*<sup>210</sup> should have led to reversal if class legislation had been successful in striking down laws that reflected rent-seeking behavior.<sup>211</sup>

Early twentieth century equality law borrowed a variety of ideas that do not fit precisely within either the modern public choice or political-process formats. Courts did not distinguish between big business and minority groups as political players;<sup>212</sup> both could be “victims” of the political process.<sup>213</sup> For example, labor was often

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208. See, e.g., Miller, *supra* note 196, at 124–26, 127 n.277.

209. *The Slaughterhouse Cases*, 83 U.S. (16 Wall) 36 (1872) (rejecting a challenge to a New Orleans butcher monopoly).

210. *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

211. See Miller, *supra* note 196, at 85–86. Nor can one say that class legislation was invariably antiredistributive; much regulation was upheld under the notion that even if it classified, it fell within the police power. See *supra* Part I.

212. See *supra* Part I.B.

213. Political-process theories in constitutional law justify judicial review to protect minorities, see ELY, *supra* note 196, at 97–88; public choice theories urge that democracy is flawed because it allows minority interests to obtain benefits at the expense of latent majorities, see generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial*

painted as the great beneficiary of concentrated class politics. That belief reflects the truth that both majorities and minorities are, in fact, capable of acting as concentrated interests.<sup>214</sup> It also reflects the historical fact that when businesses invoked class legislation, they were claiming to be the victims of feared state socialism, of rule by the lower classes.<sup>215</sup> On the other side of the coin, however, the old class-legislation precedents were far more willing to evince disapproval of laws that classified based on wealth<sup>216</sup> (they frequently expressed the need for one rule for the rich and poor<sup>217</sup>) in ways that contemporary equal protection case law does not.<sup>218</sup>

Ultimately, the country would grow intolerant of business's claims of political victimization; during the Great Depression, there was a new acceptance of the harms to liberty from unemployment and social insecurity due to old age and infirmity.<sup>219</sup> With the twin pressures of a president attempting to pack the Court and a Congress trying to strip it of jurisdiction, the Supreme Court would adopt a deferential attitude toward economic matters.<sup>220</sup> As it would signal in 1938 in *Carolene Products*, the Court would limit its supervision of the legislative process to cases in which it could be more confident of majoritarian abuse—cases about free speech, religious bias, and the

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*Review?*, 101 YALE L.J. 31 (1991), reprinted in MAXWELL STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY 204, 206–12 (1997) (claiming that larger groups have a more difficult time overcoming the free-rider problem than “smaller groups with intensely interested members” who are “more likely to secure favorable government action”).

214. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 72–74 (1994).

215. See sources cited *supra* note 112.

216. See, e.g., *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 674 (1895) (Harlan, J., dissenting).

217. See sources cited *supra* note 112 (referring to laws that attempted to classify based on wealth).

218. It is hornbook law that wealth classifications do not trigger strict scrutiny. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.25, at 911 (7th ed. 2004) (“[Wealth classifications] have no relationship to values with constitutional recognition so as to merit active judicial review under the strict scrutiny-compelling interest standard.”).

219. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 178 (2001).

220. ACKERMAN, *supra* note 1, at 113–14 (noting that the New Deal Justices witnessed Congress's “popular repudiation” of the existing judicial understanding of the Constitution); WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 219 (1995) (“From 1937 on, the relationship among the branches of government shifted dramatically, as an era of ‘judicial supremacy’ gave way to deference by the Supreme Court to Congress.”); NOURSE, *supra* note 5, at 112–20 (describing the pincer movement of the president and Congress).

oppression of racial and ethnic minorities that loomed so large in the years immediately prior to and during World War II.<sup>221</sup>

### C. *Before the Fourteenth Amendment*

Much scholarship on equality in the late-twentieth century has struggled with the precise meaning of the Fourteenth Amendment.<sup>222</sup> A good deal of effort has been made to marshal evidence about the intent of the framers of the amendment to justify, for example, the fact that various aspects of law that seem settled in 2009 were in fact consistent or inconsistent with the history of the Fourteenth Amendment.<sup>223</sup> The history of class legislation disrupts this exercise by revealing that the equality tradition in American law is a good deal older than the Civil War.<sup>224</sup>

The idea that governance and equality are inextricably intertwined in a democracy reaches back to the Founding. The Declaration of Independence grounds its claims to political freedom on equality.<sup>225</sup> More importantly, a form of equality is embedded, quite literally, in the U.S. Constitution. A government “by the people”—one that rejects rule by aristocracy or monarchy—is a government built on the foundation of equal citizenship. Montesquieu once wrote that the love of democracy was the love of equality.<sup>226</sup> A government built on the sovereign power of the people assumes that, even if people are not equal to each other in attributes

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221. NOURSE, *supra* note 5, at 142–44.

222. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58–59 (1955); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 6 (1955).

223. See, e.g., Earl Maltz, *The Fourteenth Amendment as Political Compromise*, 45 OHIO ST. L.J. 933, 933 (1984) (discussing different positions on the original intent of Section 1 of the Fourteenth Amendment); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 *passim* (1995); Saunders, *supra* note 7, at 246–48 (arguing that, as it was originally understood, the Equal Protection Clause did not “giv[e] all persons a substantive constitutional right not to be dealt with by the state on the basis of their race” but rather “forbade the state to single out any person or group of persons for special benefits or burdens without an adequate ‘public purpose’ justification”).

224. See NELSON, *supra* note 23, at 13 (acknowledging a “popular ideology of liberty and equality [that] existed in antebellum America. . . from which section one of the Fourteenth Amendment was ultimately derived”).

225. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

226. 1 M. DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 45 (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) (“In monarchies and despotic governments, nobody aims at equality; this does not so much as enter their thoughts . . .”).

or fortune, that they are equal as citizens.<sup>227</sup> Class legislation sought to animate this ideal long before the Fourteenth Amendment was conceived.<sup>228</sup>

Because equality is embedded within the structure of the U.S. Constitution, in Articles I's and II's notions of representation, its spirit transcends the Bill of Rights. Equality is not limited to what Professor Robin West has called the "adjudicated Constitution," the rules that courts use to decide cases.<sup>229</sup> Equality is not only an individual right: because it is entrenched in the structure and operation of the political departments, representatives in the political branches—and the judiciary when it reviews them—have a duty to promote equality. As the history of class legislation demonstrates, equality is a matter of *legislation* as much as of adjudication.

#### D. *The Lochner Debates*

Since 1990, *Lochner* revisionism has generated a veritable cottage industry of claims about equal protection as the real, and more palatable, explanation for the Court's *Lochner*-era substantive due process decisions.<sup>230</sup> This approach was inspired by Professor Howard Gillman's book, *The Constitution Besieged*, which argues that courts were seeking neutrality and generality in imposing substantive due process, a position grounded in ideas of class legislation.<sup>231</sup> A variety of historians and legal scholars, such as Professor G. Edward White, have gone so far as to suggest that *Lochner* itself can be described as a class-legislation decision (they are right that it was in

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227. Brown, *supra* note 1, at 1497; Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 751–52 (1999) (positing the vertical relation of citizen to government is the central engine of the separation of powers); V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 840 (2004) (extending that argument).

228. See, e.g., *Vanzant v. Waddell*, 10 Tenn. (2 Yer.) 260, 263–64 (1829); see also GILLMAN, *supra* note 25, at 22 (describing measures designed to stop special interest legislation a century before the *Lochner* era); NELSON, *supra* note 23, at 13–21 (describing efforts to legislate class equality at federal and state levels in the mid-nineteenth century); Saunders, *supra* note 7, at 285 (referencing “the antebellum state constitutional principle against partial or special laws”).

229. Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1129 (2006).

230. For a review of some of the revisionism, see generally Bernstein, *supra* note 13; Friedman, *History of the Counter-majoritarian Difficulty*; Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221 (1999). In the historical literature, this move begins a good deal earlier.

231. GILLMAN, *supra* note 25, at 10 (“[I]t is my contention that the [*Lochner*-era decisions] represented a serious, principled effort to maintain . . . [a] distinction between valid economic regulation . . . and invalid ‘class’ legislation . . .”).

fact argued as a class-legislation case, although not decided as one).<sup>232</sup> Some assert that this is the accepted view among historians (even if most lawyers and even most constitutionalists would never know it).<sup>233</sup> These claims have in turn generated counterrevisionist arguments, such as that by Professor Barry Friedman, that these historians have simply found their “friends” and forgotten the ways in which critics saw *Lochner* at the time.<sup>234</sup> In short, commentators have spilled a good deal of ink on the assumption that class legislation is a doctrine of substantive due process that has the potential to rescue *Lochner* from doctrinal infamy.

Much of this debate depends on the claim that class legislation was a doctrine of substantive due process. That categorical judgment is too simple. Class legislation was also a very important doctrine of equal protection. This descriptive reality has largely been ignored by historians in the great *Lochner* debates and it is a serious omission, particularly from those who claim to be providing a “descriptive” account of the doctrine.<sup>235</sup> Put in other words, the political scientists and historians who have adopted the class-legislation theory of substantive due process risk confusing what constitutionalists view as a basic doctrinal distinction between due process and equal protection. To be sure, these doctrines were intertwined in the early part of the twentieth century, but lawyers and judges believed that there were important constitutional differences.<sup>236</sup> This leaves some residue of due process unexplained by class-legislation theory. At the very least, this history calls into question any historical quick fix to modern substantive due process dilemmas. Professor David Bernstein may be right that historians and political scientists take this view to be gospel,<sup>237</sup> but it seems highly unlikely that constitutionalists (who will make no mistake between an equal protection and a due process

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232. White, *supra* note 16, at 101–03.

233. Bernstein, *supra* note 13, at 19.

234. Friedman, *History of the Countermajoritarian Difficulty*, *supra* note 84, at 1402–28.

235. Among the vast number of articles debating *Lochner*, there is one exception to this omission: David E. Bernstein, *Essays: Fifty Years After Bolling v. Sharpe: Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253 (2005).

236. See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 331–39 (1921) (discussing the doctrines of equal protection and due process, and the distinctions between them).

237. See Bernstein, *supra* note 13, at 13–15.

claim) will be easily persuaded that a theory of equal protection can somehow solve the *Lochner* problem.<sup>238</sup>

### III. MODERN EQUALITY THEORY AND PRACTICE

If the early-twentieth-century history of equality law disrupts the conventional history, it also has implications for equality theory and practice. A number of constitutionalists, most recently Professor Jack Balkin, have sought to revive class legislation as an equal protection ideal.<sup>239</sup> There are many wise reasons for this shift in rhetoric, but we caution those invoking the term that the history of this idea was one of both promise and failure. To successfully reinvigorate class legislation, scholars would have to develop its supporting governance theory in a way earlier advocates never did. As we explain, the “new” class legislation must imagine itself as part of a much richer theory of abuse of legislative power. It must become a rule of *legislation* rather than *adjudication*. In that spirit, we offer a proposal for a “convergence-forcing” view of equal protection.

#### A. A More Attractive Ideal?

Many constitutionalists believe that equality law is unraveling.<sup>240</sup> Scholars have been relentlessly critical of the Supreme Court’s requirement that, in facially neutral cases, the claimant must show “intent” to discriminate.<sup>241</sup> Complaints about the conventional tiered model of equal protection—which requires a high level of judicial scrutiny in some cases whereas only an intermediate or low level in others—are legion and growing;<sup>242</sup> so are significant departures from

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238. One of us has the view, expressed elsewhere, that the *Lochner* “problem” has been made into a problem for moderns based on a false view of the nature of right; moderns read back into the past a contemporary notion of right that cannot fairly describe the average doctrinal consciousness of the early part of the twentieth century. See Nourse, *supra* note 84 (manuscript at 2–3, 44–46).

239. See Balkin, *supra* note 7, at 855 (“[L]imits on abortion are a form of class legislation . . . .”); Saunders, *supra* note 7, at 301 (arguing that important aspects of the Equal Protection Clause’s background were lost to modern interpreters).

240. See generally Goldberg, *supra* note 1 (questioning whether the three-tiered equal protection framework is still needed); Siegel, *supra* note 193 (describing the stratifying effects of facially neutral state action).

241. See, e.g., Goldberg, *supra* note 1, at 494; Siegel, *supra* note 193, at 1113; Sklansky *supra* note 8, at 1306–11.

242. See, e.g., Goldberg, *supra* note 1, at 484 (“[T]he problems with the three-tiered framework for judicial scrutiny are sufficient to warrant immediate consideration of an alternative standard for review.”); Wilson Huhn, *The Jurisprudential Revolution: Unlocking*

the standard doctrine, as the gay rights cases of *Romer v. Evans*<sup>243</sup> and *Lawrence v. Texas*<sup>244</sup> demonstrate.<sup>245</sup> Most constitutionalists know that the doctrine they teach is in large part false: it is hornbook law that wealth classifications do not yield heightened scrutiny,<sup>246</sup> yet it is also true that wealth can be enough to strike down a law that deprives one of the right to vote<sup>247</sup> or the right to an appeal;<sup>248</sup> similarly, distinctions that do not merit strict scrutiny, such as mental retardation,<sup>249</sup> can in fact trigger stringent review.<sup>250</sup> The gay rights cases, as most constitutionalists know, signal a major shift in constitutional doctrine away from the traitist model.<sup>251</sup> Indeed, *Romer* signals that class legislation may be a part of the future of a new equal protection.<sup>252</sup>

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*Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65, 104 (2003) (noting that *Lawrence* and *Grutter* call into question the stability of traditional equal protection standards of review); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 970 (2004) (observing that “[w]e are now uncertain about the utility” of traditional equal protection classifications). For early criticism, see generally Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 163 (1984) (“[T]he system of multi-level scrutiny has suffered serious strains, which may reveal that it is fundamentally flawed and destined to collapse.”).

243. *Romer v. Evans*, 517 U.S. 620 (1996).

244. *Lawrence v. Texas*, 539 U.S. 558 (2003).

245. Neither of the two most important gay rights cases of the past decade used standard tiered analysis. See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (arguing that the majority applied an “unheard-of form of rational-basis review”); *Romer*, 517 U.S. at 640 (Scalia, J., dissenting) (accusing the majority of failing to employ “normal ‘rational basis’ analysis”); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (recommending a single standard because, “[i]n fact, our cases have not delineated three—or even one or two—such well-defined standards” and arguing that, “[r]ather, our cases reflect a continuum of judgmental responses to differing classifications”); *id.* at 460 (Marshall, J., concurring and dissenting in part) (“I have long believed the level of scrutiny employed in an equal protection case should vary with ‘the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.’” (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting))). For an argument that equality law has been subsumed under the idea of liberty, see generally Brown, *supra* note 1.

246. See *supra* note 218.

247. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[C]lassifications which might invade or restrain [voting rights] must be closely scrutinized . . .”).

248. See *Griffin v. Illinois*, 351 U.S. 12, 13, 19–20 (1956) (holding that indigent persons must be furnished with free copies of trial transcripts necessary to file an appeal).

249. See *Cleburne*, 473 U.S. at 442 (declining to apply heightened scrutiny to review laws dealing with mental retardation).

250. See *id.* at 447–50 (refusing to defer to the state’s proffered rationales and instead probing the strength and reasonableness of those rationales).

251. See, e.g., Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 136–38 (2007) (noting a trend away from equal protection categories); see also Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1104 (2004)

At least in part in response to these problems, a few lonely and brave scholars have attempted to revive the class-legislation ideal as a solution to modern equality problems. Professor Melissa Saunders has argued that class legislation could resolve modern voting rights cases;<sup>253</sup> Professor Mark Yudof has invoked class legislation to understand sex discrimination case law.<sup>254</sup> And, most provocatively, Professor Jack Balkin has argued that class legislation is likely to inform the Supreme Court's reproductive rights jurisprudence: that equality, in class-legislation form, could help resolve the seemingly great constitutional issue of the early twenty-first century, abortion.<sup>255</sup>

There are many reasons to believe that class legislation is in fact a much more attractive idea of equal protection than the standard antidiscrimination and anticlassification models offer. First, class legislation scrutinizes laws that establish hierarchies among groups, which follows intuitive ideas of equality better than perfect proxies<sup>256</sup> or levels of scrutiny. This mirrors the terracing that makes subordination a much more attractive equality model than a standard that demands sameness simpliciter (sameness in what respect?). Second, class legislation has more of the look of a disparate-impact standard than one might suspect: the analysis not only considers actual (as opposed to linguistic) burdens but also asks whether those burdens are justified by a public purpose (the police-power inquiry).<sup>257</sup> Third, class legislation shifts the debate away from the notion of an equality law limited to some special sets of persons marked by race, sex, or illegitimacy. Traitism (the tendency to reduce equality to particular physical or social traits) invites repetitive arguments about special rights and resentment by those who do not appear to share the

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(contending that *Lawrence* “mark[s] the emergence of a new approach in substantive due process analysis”).

252. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment.” (quoting *The Civil Rights Cases*, 109 U.S. 3, 24 (1883))).

253. Saunders, *supra* note 7, at 327.

254. Yudof, *supra* note 7, at 1387–407.

255. Balkin, *supra* note 7, at 855–63.

256. Cf. Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1455–77 (2000) (discussing ideals of perfect proxy conception).

257. The vast majority of cases in which class-legislation claims were made failed because there was a public purpose for the classification. This mirrors the inquiry in disparate impact cases about whether there is a common justification for the disparate impact. Special thanks to Professor Martha Fineman for making this point to us.

preferred traits.<sup>258</sup> More importantly, it forsakes the great ideal of equality law which protects all persons, not particular people or particular classes. In that spirit, the class-legislation idea holds out the possibility of moving beyond a particular list of strictly scrutinized traits to a postidentity, postformal inequality analysis.<sup>259</sup>

If class legislation has a number of attractive features, it also poses risks. If it becomes a standard focused on identifying instances of singling out, which the majority opinion in *Romer v. Evans* suggests,<sup>260</sup> then it is unlikely to do much. First, all law singles out. As the history of class legislation demonstrates, over time, this truth can easily swallow equality's larger aspirations. Second, singling out depends on a common baseline that may be highly contested (equality is an inherently comparative norm). The less-than-rosy history of class legislation indicates that the doctrine could repeat this pattern unless the appropriate baseline is elaborated.<sup>261</sup> As the work of Professors Cass Sunstein, Peter Westen, and Ken Simons on baselines in constitutional law has demonstrated,<sup>262</sup> one of the persistent problems in equality theory is the failure to describe the baseline from which one is making a comparison. As the history of class legislation developed, this baseline problem was solved in individual cases by using a liberty interest as the baseline, when liberty meant an activity universally shared (then, the claim of free labor). This union of liberty and equality may sound dangerous to some,<sup>263</sup> but, as Professors Kenneth Karst and Pam Karlan have argued,<sup>264</sup> the union of these claims may be stronger constitutionally

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258. We are thinking here of rhetoric surrounding affirmative action cases.

259. On the ambiguities of wealth classifications, see *supra* note 14.

260. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

261. The great debates about labor and capital often depended on a baseline of business victimization that most today would find strange.

262. See Simons, *Equality*, *supra* note 130 *passim*; Simons, *Egalitarian Norms*, *supra* note 130 *passim*; Sunstein, *supra* note 130, at 883–902; Westen, *supra* note 130 *passim*.

263. Professor Cass Sunstein, for example, argues that the clauses are aimed at different goals and that the analysis therefore must be independent. Cass R. Sunstein, Essay, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988).

264. See Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) (“[T]he ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other.”); Karst, *supra* note 251 *passim* (describing how egalitarian values furthered the development of substantive due process).

than their parts. The reason for that, we believe, is that it helps to solve the baseline problem.<sup>265</sup>

If class legislation is to provide anything but a classification standard, we believe scholars should take a more intensive look at the doctrine's aims and assumptions. Class legislation's ideals require courts to do what they never explicitly did—to elaborate a theory of unequal *legislation*. Based on an analogy to corporate law, we suggest a focus on majority abuse of legislative power. We propose a standard that asks courts to force legislatures to link the fates of majorities and minorities. We conclude by applying this model to the much-debated 100-to-1 disparity in crack and powder cocaine penalties.

### B. *Equality as a Convergence-Forcing Rule*

The central feature of early-twentieth-century equal protection doctrine was the desire to prevent favoritism in *legislation*: “the minority are safe, [if] the majority, who make the law, are operated on by it equally with the others.”<sup>266</sup> This reflects both ancient and modern common sense, as shown by work from a wide array of scholars from Professors Derrick Bell to John Rawls to Rebecca Brown. For majorities to protect minorities, they must see it in their interest, and, to see it in their interest, they must consider themselves in the shoes of the minority.<sup>267</sup> To make this a reality and more than a theory, however, there must be a “linkage-forcing” move.<sup>268</sup>

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265. It also makes sense, not as a principle of textual classification, but as a statement about the dynamics of the legislative process. Indeed, the notion that legislatures have the incentive to foist off burdens onto the few was predicted by the moderate New Deal warrior and opponent of *Lochnerism*, Justice Robert Jackson. See *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“The framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”).

266. *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 606 (1831); see also, e.g., *Ward v. Barnard*, 1 Aik. 121, 123 (Vt. 1825). In *Ward*, counsel argued, “If the legislature have power to select any individual, as the object of particular legislation, and exempt him from obligations to which all others are subject, it may be the instrument of the grossest favouritism; or, in times of political excitement, of the most cruel persecution.” *Id.*

267. See Bell, *supra* note 37, at 523 (describing this “interest convergence” in the context of school desegregation); Brown, *supra* note 1, at 1515–23 (describing this “communion of interest” and the role it played in late eighteenth-century America); John Rawls, *Justice as Fairness*, in *COLLECTED PAPERS* 47, 49–52 (Samuel Freeman ed., 1999).

268. By “linkage-forcing” move, we refer to a move that would force majorities to address what they are likely to be indifferent to—the fate of rules that are likely to affect only minorities.

The class-legislation ideal never had a coherent political theory (it was in some cases focused on monopoly, in others on mob-like majorities) but its original premise—that a democracy cannot have one rule for the rich and another for the poor, one for the majority and another for the minority—invites questions about the representational duties of a majority to a minority. More specifically, it invites an inquiry about abuse of majority representation.<sup>269</sup> Taking cues from standard principal-agent theory, and the duty of the principal to the agent, we propose an inquiry that would ask whether the majority had abused its power by deliberate indifference to the interests of minorities.

The linkage-forcing move comes from viewing equality as a duty, a fiduciary duty of the representative to *all* the representative's constituents. Just as a shareholder controlling the majority of votes may not adopt rules locking out minorities or burdening them at the expense of the corporation,<sup>270</sup> the political representative may not award benefits to a majority if the burdens are foisted entirely on a minority, unless the entire polity receives countervailing benefits. Similarly, in the elective sphere, one can characterize the representational relationship as raising a conflict of interest between majorities and minorities.<sup>271</sup> The principal (the representative) stands to benefit from supporting majority positions (by gaining reelection) and by locking out minorities. Assuming that the representative has a duty to represent all voters, just as corporate shareholders have a duty to represent the best interest of the corporation as a whole,

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269. In referring to an abuse of majoritarian power, we were inspired by the work of Professor Yasmin Dawood in the election context. Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L. REV. 1411, 1428–38 (2008).

270. See, e.g., *Zahn v. Transamerica Corp.*, 162 F.2d 36, 42 (3d Cir. 1947) (recognizing the fiduciary duty of majority shareholders to minority shareholders); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (setting out the test for regulating self-dealing transactions that benefit majority shareholders at the expense of minority shareholders); see also Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CAL. L. REV. 393, 396–97, 399–400 (2003) (explaining the fiduciary duty of a majority shareholder to minority shareholders and the rules governing self-dealing transactions that burden minority shareholders at the expense of the majority shareholder).

271. Professor Rebecca Brown has argued that courts should ask, in both liberty and equality cases, whether majorities would in fact apply the challenged rule to themselves (would majorities really want, for example, the police to enforce prohibitions on sexual acts in their own bedrooms, as opposed to someone else's bedrooms?). See Brown, *supra* note 1, at 1493 (describing the “principle of equality” as “[m]ake any rules you want, as long as they apply to everyone”). This proposal, we argue, reflects a larger concern for the potential for majority self-dealing; it should trigger the inquiry because it suggests majoritarian self-dealing.

lockouts of minority interests raise questions of fairness and common benefit. Corporate law addresses the self-dealing problem in several ways, in some cases by requiring minority approval or sometimes by requiring that the transaction be entirely fair to the whole.<sup>272</sup>

This approach would require courts to act as deliberative conscience: the aim would be to prevent entrenchment of majority positions, which is to say deliberate indifference to rules that protect majority interests at the expense of the liberty of minorities. Such an anti-entrenchment rule would ask whether a reasonable person in the burdened party's shoes could say that the majority was trying to entrench its status at the expense of the liberty of those to whom it was indifferent. The lesson to be taken from the history of early twentieth-century equality law is not a new moniker for what Professor Robin West has called the "adjudicated Constitution,"<sup>273</sup> but rather a movement toward an "embedded constitutionalism,"<sup>274</sup> one which seeks to force the active consideration and deliberation of constitutional values in more powerful institutions—in this case, in legislatures.

One might think of this as a vertical theory of equality in the following sense.<sup>275</sup> One is not trying, under equal protection, to create linguistic or classificatory symmetry, to target the bad motives of government actors, or to achieve equal outcomes. One envisions the harm differently; it is a harm that embraces majorities' abuses of power in failing to represent minorities. Majorities always have the incentive to self-deal, to garner benefits to themselves, and to dispense burdens on others. A burden on liberty is a cue, a signal that the law must be scrutinized to determine whether it is a guise to perpetuate or to create inequality among citizens. This is particularly important in cases in which the burden is imposed on those who have historically been designated as lesser citizens. The idea recalls the great Learned Hand formula in tort: multiply the likelihood of injury by the cost of avoidance to yield negligence;<sup>276</sup> here, multiply the likelihood of serious burden by a history of second-class citizenship

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272. See Goshen, *supra* note 270, at 396–97.

273. See *supra* note 229 and accompanying text.

274. On embedded constitutionalism, see Scott & Holder, *supra* note 36, at 238–40; Desai, *supra* note 36, at 590–94.

275. See, e.g., Nourse, *supra* note 227, at 759 (grounding the departments in their "vertical" relationships to the people).

276. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

and the inference grows that the governing majority has aimed to perpetuate and entrench its winning hand.

We also suggest that it may be more important for courts, in cases of democratic indifference, to act as catalysts<sup>277</sup>—to provoke representational responses rather than to strike down a law simpliciter. For example, in implementing this ideal, courts might be more successful developing a doctrine of “equality abstention.” Assume that one has a case involving a persistent and pervasive racial impact. In that case, the court would not strike down the law, but would refuse to apply it unless Congress came back with a finding that satisfied the general principal-agent standard: either the affected minority voted to support the law, or Congress produced persuasive evidence that the law was entirely fair to all, including the disadvantaged racial minority. The court would abstain until the legislature responded.<sup>278</sup> This abstention would put the onus on the legislature, where it belongs. It would lessen complaints of activist judicial review because it would be deliberation-forcing rather than inhibiting.<sup>279</sup> If the legislature did not deliberate within a reasonable time, then courts would not enforce the law (this sanction, in the case of the criminal law, would almost ensure that there would be some deliberation because criminal laws typically have strong majoritarian salience and prosecutors have incentives to communicate such decisions to Congress).<sup>280</sup>

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277. See, e.g., Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 570–71 (2007).

278. Imagine the situation in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the legislature had excluded itself (and other “high-class criminals”) from the scope of the law, *id.* at 537. The Court could have returned the law to the legislature, asking them to debate the exclusion and provide data on the claimed “genetic” distinctions between habitual political criminals and habitual chicken thieves. If the legislature failed to deliberate or failed to produce the information and simply passed the law again, the Court should strike it down as an abuse of majoritarian power.

279. Not all deliberation is good, as anyone who has ever been to a faculty meeting can attest. The point of this rule is structured deliberation to produce better participation and information. Closed groups tend to reaffirm the group’s views, increasing ill-informed and prejudicial decisions. See generally CASS R. SUNSTEIN, *INFOTOPIA* (2006) (describing the problems of decisionmaking by groups isolated from outside information).

280. This follows not from any abstract logical proposition but rather from the demands of crime politics. When, for example, an appellate court ruled that plea bargaining violated the bribery statute, *United States v. Singleton*, 144 F.3d 1343, 1357–58 (10th Cir. 1998) (decided July 1, 1998), *rev’d en banc*, 165 F.3d 1297 (10th Cir. 1999), Congress responded almost immediately with proposals attacking the decision, Effective Prosecution and Public Safety Act of 1998, S. 2311, 105th Cong. (1998) (introduced July 15, 1998) (noting the Tenth Circuit’s decision and indicating that the bill was introduced in response to that decision); Safe Schools,

Consider the example of the 100-to-1 difference in penalties applied to crack cocaine versus powder cocaine.<sup>281</sup> For some time, the Sentencing Commission and scholars have worried that the statutory difference results in significant racial impacts.<sup>282</sup> As one leading criminologist has explained,

No other feature of the Federal Sentencing Guidelines has been viewed more critically than the 100:1 crack-powder cocaine disparity built into the guidelines . . . . The disparity is particularly distressing because crack defendants are primarily black and powder defendants are primarily white and Hispanic, so the differential treatment can too easily be seen as a manifestation of racial discrimination. Thus, there have been efforts in many quarters to call attention to this concern and to drastically diminish or eliminate this disparity.<sup>283</sup>

Equal protection law, however, provides no real basis to attack the 100-to-1 ratio. Strict scrutiny does not apply because the law is facially neutral on the question of race, and disparate impact analysis only yields a finding of inequality if there is evidence that the law was passed with the specific intent to harm minorities (a very unlikely case today).<sup>284</sup> The ancient ideal of class legislation does little better: under the old rule, the question would be whether Congress had made one rule for the rich and another for the poor, one for the white

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Safe Streets, and Secure Borders Act of 1998, S. 2484, 105th Cong. § 2303 (introduced Aug. 16, 1998) (referring specifically to the decision in *United States v. Singleton* and offering findings supporting prosecutorial deal making). Ultimately, these proposals were mooted when the Tenth Circuit reversed itself when sitting en banc. See *Singleton*, 165 F.3d at 1297 (decided Jan. 9, 1999).

281. See *Kimbrough v. United States*, 128 S. Ct. 558, 566–68 (2007) (considering this sentencing disparity under the federal Sentencing Guidelines).

282. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (2007) [hereinafter 2007 REPORT], available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 102–03 (2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf); Sklansky, *supra* note 8, at 1288–89. The controversy has been going on at least since 1995, when the Sentencing Commission first proposed to change the crack-powder differential. See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074 (May 10, 1995) (relevant portions rejected by Congress in Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334).

283. Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us That It Is Time To Restore the Balance*, 16 FED. SENT'G REP. 87, 87 (2003).

284. *Washington v. Davis*, 426 U.S. 229, 240 (1976) (“[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”). On the difficulties with the original equal protection challenges, see Sklansky, *supra* note 8, at 1306–11.

and one for the black. However inviting that question may be, historically, the answers did not always favor those who would be favored in 2009. Under the class-legislation theory of old, the police power (the power to regulate general public safety, health, and welfare) could trump equality concerns. As we have indicated, although class-legislation ideals may confer some benefits, this case shows the potential pitfalls: the police power has been used to support a variety of practices viewed in 2009 as intolerable, such as racial segregation.<sup>285</sup>

We suggest a different inquiry: we would ask whether Congress had satisfied its fiduciary *duty* to both the majority and the minority. First, was there impartial evidence that Congress was deliberately indifferent to the interests of the minority? Second, assuming that there were such evidence,<sup>286</sup> was Congress's statutory scheme nevertheless justified by its entire fairness, or would the minority vote to approve the practice?<sup>287</sup> If minority voices in Congress subsequent to the court ruling voted for the statute, the inquiry would be over. If not, then the Congress should hold hearings to determine whether the statute was entirely fair to the minority.

In our crack-powder cocaine example, courts should refuse to apply the 100-to-1 penalty until Congress held a minority vote or passed a resolution explaining why the penalty was nonetheless fair to the minority. Because politicians consider crime very important and because prosecutors have ready access to legislators, it seems unlikely that legislators would ignore the threat of nonenforcement. At the least, the resulting debate would be an improvement over a jurisprudence that imagines equality as the "hostility" of legislatures<sup>288</sup>—because the real problem with entrenchment is

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285. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 549–51 (1896) (explaining that the police power would justify race discrimination unlike other discriminations, which were arbitrary); *id.* at 545 (stating that antimiscegenation statutes were "within the police power of the State").

286. There is a good deal of evidence, given the Sentencing Commissions's persistent efforts to change the rules, that Congress was deliberately indifferent to the effects of the rule on minority populations. See 2007 REPORT, *supra* note 282, at 6–9.

287. Cf. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (holding that "entire fairness" encompassed both "fair dealing" and "fair price").

288. Indeed, one of the great ironies of equal protection law is that it relies on an intent standard, see, e.g., *Davis*, 426 U.S. at 239–40, that elsewhere its advocates claim cannot exist; in the sphere of statutory interpretation, for example, it is commonly said that collective bodies like legislatures have no intent. Justice Scalia has argued that legislative intent does not exist, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 32 (1997), and suggests that "under the guise or even the self-delusion of pursuing unexpressed

structured indifference and abuse of majoritarian power. Had Congress been forced, on threat of holding the crack law unenforceable, to explain in a reasoned way its specific choice of penalties set at 100 to 1—as opposed to 50 to 1, or 20 to 1, or 3 to 1—in light of its racial impacts, the debate would have been framed as much in terms of equality as in soft and weak positions on crime. It would have also provided minorities an incentive to voice their approval or disapproval.

#### CONCLUSION

This Article has challenged the consensus position that the Equal Protection Clause was moribund at the beginning of the twentieth century. Equality arguments were once as banal to the average lawyer as claims based on the right to contract or property (what lawyers have come to call substantive due process claims). Most importantly, the ideal of equality was not, even in an era long before political-process theories, a matter of classification simpliciter. From before the Civil War, and even during the *Lochner* era, equality aspired to a theory of governance.

The lesson of the “lost” history of equal protection is not a form of modernist originalism in which one resurrects the past to reform the present. This is a history that aims to learn from the successes and the failures of the past. Most Americans, we suspect, believe in the ideal of class legislation: they believe that one rule should govern both the rich and the poor (even if a constitutional lawyer would have to explain that wealth classifications receive no special treatment). How then is such a principle to be implemented in a world in which courts believe equality is a matter of formal classification? The answer is to rethink the context of the rule as much as the rule itself, to rethink the ways in which this political ideal is institutionally embedded. The judiciary has never been a great bastion of equality. Indeed, this history shows that formal equality can protect those who seem the least deserving of protection.

If courts have failed, then it is time to turn to other institutions; it is time to consider something more than judicial review as the only way that courts provoke consideration of equality norms. Class legislation was not simply a different idea of equality; it assumed a

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legislative intents, common-law judges will in fact pursue their own objectives and desires,” *id.* at 17–18.

different idea of where inequality was most likely to be prevented—in the legislative process. Perhaps it is time that courts turned the question back to the legislature and exerted a form of equality abstention that forces legislatures to ask whether the majority has fulfilled its representational duties to the minority. The Supreme Court has always been leery of deciding matters of equality that depend on effects rather than intent, but this is all the more reason for the Court to place the burden on those who are responsible for the creation and the effects of legislation. This, and only this, would be a real theory of class *legislation*.