ANALYZING THE TEXT OF THE EQUAL PROTECTION CLAUSE: WHY THE DEFINITION OF "EQUAL" REQUIRES A DISPROPORTIONATE IMPACT ANALYSIS WHEN LAWS UNEQUALLY AFFECT RACIAL MINORITIES

Christopher J. Schmidt†

† J.D., Widener University School of Law, 2001; B.A., University of Maryland, 1998;n member of the Pennsylvania bar. This article is written in loving memory of my mother, Mary DeSales Schmidt, and my brother, James Todd Schmidt. I would like to thank my father and friend, Eugene Gerald Schmidt, my sister, Mary Jean Schmidt, and Lisa Blackwell for all their support. Many thanks to Michael Farlow for reviewing a prior draft of this article. Thanks to Renee Gimski, Michael Guilbault, Alda Monsen, Christine Paolini, Rebecca Street, Gregg Tabachow, and Jean Winstead; without their assistance this article would not have been possible. Let there be peace and tranquility between all races throughout the world. blackwellschmidt@hotmail.com.

INTRODUCTION

The text of the Equal Protection Clause of the Fourteenth Amendment requires the adoption of a disproportionate impact analysis when deciding if a law, based on its effect, violates racial minorities' equal protection rights. Yet the U.S. Supreme Court mandates a different jurisprudence. The Court's elimination of disproportionate impact analysis inappropriately ignored the plain meaning of "equal" within the Equal Protection Clause. The text of the Equal Protection Clause clearly requires a disproportionate impact analysis to satisfy the requirements of *equal* protection.

Part I of this article discusses the current standard for evaluating equal protection challenges based upon disproportionate impact. In the last quarter-century, disproportionate impact analysis has been diminished, if not extinguished, in federal equal protection law. A review of past cases that rely on disproportionate impact analysis rebuts the idea that disproportionate impact analysis has not, and should not, in and of itself be used to evaluate the constitutionality of a law under the Equal Protection Clause. These holdings, while consistent with the meaning of "equal," have been inappropriately pushed aside for a present-day juris-

prudence that ignores their proper adoption of a disproportionate impact analysis to invalidate unequal laws.[1]

Part II discusses how the meaning of "equal" requires a disproportionate impact analysis. I propose a hybrid textualist approach to begin the analysis of whether a disproportionate impact analysis is constitutionally warranted. This approach combines past and present dictionary definitions to determine the meaning of "equal." I do not advocate a purely textualist or even a partially textualist approach to equal protection jurisprudence; what I advocate is an analysis that begins with the law, or in this case, the constitutional amendment in question. If the text provides a resolution that has been adopted in case law, law review articles, and elsewhere, then I see no reason to expand my analysis. The meaning of "equal" corroborates the view that a disproportionate impact analysis was commanded at the Fourteenth Amendment's enactment in 1868. The gradual evolution of the word "equal" creates a more definitive meaning, one that reinforces the word's mandate of a disproportionate impact analysis. After a review of past and current dictionary definitions of the word "equal," a careful and critical study of case law follows that shows how judges, at many levels and times, have appropriately used a disproportionate impact analysis.

Part III analyzes law review articles, and a few other sources, that scrutinize or redefine equal protection law. The intellectual spectrum of equal protection ideals illustrates the wide variety of arguments in this regard. I place these arguments into three groups: (1) race and equal protection, (2) intent and equal protection, and (3) progressive, culturally driven ideas of equal protection. While these proposals ultimately foster similar thought in protecting racial minorities from unequal laws, almost all of them begin their analysis with something other than the text of the Equal Protection Clause, and some make arguments opposite from what the meaning of "equal" requires. The adoption of a disproportionate impact analysis will satisfy the requirements of equal protection and answer many concerns of other scholars. This approach will consolidate the vast number of arguments surrounding equal protection jurisprudence into one cohesive machine with substantially more influence. Once that appropriate foundation is laid, those arguments reinterpreting equal protection law can flourish.

Part IV addresses possible, if not certain, counterarguments to my position. An argument has been made that the text is not the proper starting point for a legal analysis. This ideal skips step one of legal discourse and places an over-emphasis on precedent, rather than the text such precedent is based upon. Next, I address the differing definitions of

[1] I have excluded from this article any disproportionate impact analysis authorized by statute, such as by Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e.

"equal." While some definitions require only proportionality, more specific definitions affirm that the meaning of "equal" commands uniformity in operation or effect of a law. I then provide a discussion of stare decisis and current equal protection law. Through case law, I conclude that stare decisis cannot save the flawed equal protection jurisprudence as it currently exists and that the accepted use of the disproportionate impact analysis warrants stare decisis treatment. I rebut the commonly held position that invoking a disproportionate impact analysis will improperly overturn endless laws and create an absurd result for society. That stance is constitutionally inaccurate and based on unproven fears.

Finally, after reviewing the entire body of material, I contend that a revisionist perspective on equal protection law is the most appropriate way to prevent unequal laws from having a disproportionate impact on racial minorities. This approach to equal protection jurisprudence is constitutionally sound and creates a neutral starting block for equal protection dialogue. By adding a disproportionate impact analysis, current equal protection law will comply with the meaning of *equal* protection and appropriate precedent.

I. THE DEVELOPMENT OF CURRENT EQUAL PROTECTION LAW REGARDING THE DISPROPORTIONATE IMPACT OF LAWS ON RACIAL MINORITIES

A. THE PURPOSEFUL AND INTENTIONAL RACIAL DISCRIMINATION. STANDARD.

In 1976, the U.S. Supreme Court determined when, if at all, a disproportionate impact analysis may be used in equal protection cases alleging racial discrimination.[2] Black police officer candidates claimed their due process rights were violated, in part, by a written personnel test that excluded a disproportionately high number of black applicants.[3] Because the alleged discrimination involved the District of Columbia's Metropolitan Police Department, a federal government employer, the Fifth Amendment Due Process Clause triggered the equal protection analysis. "[T]he Due Process Clause . . . contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."[4] The majority quickly avoided the textual meaning of "equal" in relation to a disproportionate impact analysis when it said in the next sentence, "our cases have not embraced the proposition that a law or other official act, without regard to whether it re-

[2] Washington v. Davis, 426 U.S. 229 (1976).

[3] *Id.* at 232–33.

[4] *Id.* at 239 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

flects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[5]

The Court relied on a long list of prior equal protection cases to support its position. It required that a discriminatory purpose must be present, as in the systematic exclusion of eligible jurors of one race or in an unequal application of the law to such an extent as to show intentional discrimination.[6] A New York congressional apportionment statute was constitutionally valid because the challengers failed to prove that "'[the legislature] was either motivated by racial considerations or in fact drew the district on racial lines.'"[7] Predominantly black and predominantly white schools in a community do not violate the Equal Protection Clause unless de jure segregation is "a current condition of segregation resulting from intentional state action."[8] The purpose or intent to segregate schools is the key factor.[9] The disproportionate racial impact of the Social Security Act was upheld because "'[t]he acceptance of [that] theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment may be.'"[10]

To invalidate a facially neutral law under the Equal Protection Clause, the challenger must prove that the law was motivated by a discriminatory intent or purpose.[11] "Proof of discriminatory intent or purpose requires *more*, however, than showing that the legislature relied on anecdotal evidence, that the legislature's action is of doubtful wisdom, or that the legislature was aware that the law might 'affect a greater proportion of one race than of another.'"[12] There must be a showing that the legislature enacted a particular statute "'because of' not merely 'in spite of'" an anticipated racially discriminatory effect.[13]

[5] *Id.* at 239; *see also* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (holding that official action will not be held unconstitutional solely because it results in a racially disproportionate impact).

[6] *Davis*, 426 U.S. at 239 (quoting Akins v. Texas, 325 U.S. 398, 403–04 (1945)); *see also* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the burden shifts to the state to provide a race-neutral justification after a defendant establishes a prima facie case of racial discrimination in striking jurors with peremptory challenges).

[7] *Davis*, 426 U.S. at 240 (quoting Wright v. Rockefeller, 376 U.S. 52, 56 (1964)).

[8] *Id.* at 240 (quoting Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205 (1973)).

[9] *Id.* (citing *Keyes*, 413 U.S. at 208).

[10] *Id.* at 240 (quoting Jefferson v. Hackney, 406 U.S. 535, 548 (1972)).

[11] *Id.* at 239–48; *see also* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481 (1997) (requiring proof of racially discriminatory intent or purpose to show a violation of the Equal Protection Clause) (citing Mobile v. Bolden, 446 U.S. 55, 62 (1980)); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

[12] State v. Russell, 477 N.W.2d 886, 896 (Minn. 1991) (Coyne, J., dissenting) (quoting *Davis*, 426 U.S. at 242).

[13] McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

B. *DAVIS* AND DISPROPORTIONATE IMPACT ANALYSIS.

The Court did not completely eliminate the disproportionate impact analysis from equal protection jurisprudence. Discriminatory racial purpose need not be express or appear on the face of the statute.[14] A lawès disproportionate impact is not irrelevant in deciding constitutional-based claims of racial discrimination.[15] However, the Court qualified the use of disproportionate impact analysis, stating, "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.ë[16]

The Court conceded that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[17] Moreover, the Court stated that a racially disproportionate impact may for practical purposes "demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[18] The Court then took an abrupt turn and concluded, "[n]evertheless, we have not held that a law, neutral on its face . . . is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.ë[19]

C. PRIOR JUDICIAL DECISIONS USING DISPROPORTIONATE IMPACT. ANALYSIS.

In *Yick Wo v. Hopkins*,[20] a city ordinance gave supervisors the righte to grant people permits for operating laundries in wooden buildings. The facially neutral law led to all Asians being denied permits and almost all whites receiving permits.[21] The Court wrote:

> [I]n all cases where the [C]onstitution has conferred ae political right or privilege, and where the [C]onstitution has not particularly designated the manner in which thate right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations . . . [N]evertheless,e such a construction would afford no warrant for such ane exercise of legislative power as, under the pretense ande

[14] *Davis*, 426 U.S. at 241.
[15] *Id.*
[16] *Id.* at 242.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] 118 U.S. 356 (1886).
[21] *Id.* at 374.

> color of regulating, should subvert or injuriously restrain, the right itself.[22]

The Court continued:

> For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the [F]ourteenth Amendment to the [C]onstitution of thee United States. Though the law may be fair on its face,e and impartial in appliance . . . if it is applied and administered by public authorities with an evil eye and an unequal hand, so as practically to make unjust and illegale discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the [C]onstitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor of New York*, 92 U.S. e 259; *Chy Luny v. Freeman*, 92 U.S. 275; *Ex parte Virginia*, 100 U.S. 339; *Neal v. Delaware*, 103 U.S. 370;e and *Soon Hing v. Crowley*, 113 U.S. 703.[23]

Similarly, in *Gomillion v Lightfoot*,[24] the Alabama legislature altered the shape of a city from a square to a twenty-eight-sided figure and, in effect, removed almost all of the 400 black voters from the district, while not removing a single white. The Court stated that: "Acts generally lawful may become unlawful when done to accomplish an unlawful end . . . and a constitutional power cannot be used by way of condition to attain an unconstitutional result."[25] The accomplishment of the state's purpose "is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment."[26]

22 *Id.* at 370–71 (citing Capen v. Foster, 12 Pick. 485, 488 (Mass. 1832)).

23 *Id.* at 373–74.

24 364 U.S. 339 (1960).

25 *Id.* at 347–48 (quoting W. Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918)).

26 *Id.* at 349 (Whittaker, J., concurring) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)); Cooper v. Aaron, 358 U.S. 1 (1958).

In *McCleskey*,[27] the Court admitted that *Gomillion* and *Yick Wo* were "examples of those rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation."[28] However, the Court continued incorrectly to emphasize that "statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent."[29] In fact, the Court also conceded that in jury-selection cases, a constitutional violation can occur without such an extreme disproportionate impact.[30]

In *Griffin v. County School Board of Prince Edward County*,[31] the Court held that a state cannot close public schools in one county while funding private segregated schools in that same county.[32] Virginia law, *as applied*, treated the schoolchildren where the public schools were closed, Prince Edward County, differently from the children of all other localities.[33] Children residing in Prince Edward County were forced to attend a private segregated school or none at all, while children of all other localities could attend public schools.[34] The policy bore more heavily on black children in Prince Edward County because whites could attend private schools, while blacks had no private schools to attend.[35] "[T]he *result* is that Prince Edward . . . children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support."[36]

Justice Black used a similar disproportionate impact analysis, dissenting in *Colgrove v. Green*.[37] The Illinois legislature had not reapportioned election districts for forty years, resulting in election districts that ranged from 900,000 people to 112,000 people.[38] The vote of a person in a 900,000-person district is "much less effective than that of each of the citizens living in the district of 112,000. And such a gross inequality in the voting power of citizens irrefutably demonstrates a complete lack of effort to make an equitable apportionment."[39] This would lead to "indefensible discrimination against appellants and all other voters in heavily populated districts. The [E]qual [P]rotection [C]lause of the

27 481 U.S. 279.

28 *Id.* at 293 n.12.*e*

29 *Id.* at 293 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

30 *Id.* at 294 (citing *Arlington Heights*, 429 U.S. at 266 n.13).*e*

31 377 U.S. 218 (1964).*e*

32 *See id.*

33 *See id.* at 230.

34 *Id.*

35 *Id.*

36 *Id.* at 230–3*d* (emphasis added).*e*

37 328 U.S. 549, 566–74 (1946) (Black, J., dissenting).*e*

38 *Id.* at 569.*e*

39 *Id.*

Fourteenth Amendment forbids such discrimination."[40] Black concluded:

> No one would deny that the [E]qual [P]rotection [C]lause would also prohibit a law that would expresslye give certain citizens a half-vote and others a full vote.e The probable *effect* . . . in the coming election will be that certain citizens, and among them the appellants, will in some instances have votes only one-ninth as effectivee in choosing representatives . . . . Such discriminatory legislation seems to me exactly the kind that the [E]qual [P]rotection [C]lause was intended to prohibit.[41]

D. . THE PRESENT STATE OF DISPROPORTIONATE IMPACT ANALYSIS.

In current equal protection jurisprudence, a prima facie case of purposeful discrimination can be made when the totality of circumstances give rise to an inference of discriminatory purpose.[42] Once the defendant establishes a prima facie case, the burden shifts to the state to rebut that presumption.[43] The state must show that the challenged racial effect was part of "permissible racially neutral selection criteria."[44] To summarize and clarify this process, the test contains three consecutive steps. First, the petitioner is required to establish that he or she is a member of a distinct class singled out for different treatment.[45] Second, the petitioner must show a substantial degree of differential treatment.[46] Third, the petitioner must show that the allegedly discriminatory procedure is susceptible to abuse or is not racially neutral.[47] As the Court has explained:

> Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face . . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as *Gomillion* and *Yick Wo*, impact alone is not determinative and the Court must look to other evidence.[48]

40 *Id.*

41 *Id.* (emphasis added).

42 McCleskey v. Kemp, 481 U.S. 279, 351–52 (1987) (Blackmun, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. 79, 93–94 (1986)).

43 *McCleskey*, 481 U.S. at 352.

44 *Id.* (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

45 *Id.* at 352 (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

46 *Id.* (quoting *Castaneda*, 430 U.S. at 494).

47 *Id.* at 352–53.

48 Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977); *see also* Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

If there is impact as stark as is presented by *Gomillion* and *Yick Wo*, then impact alone may be sufficient to show discriminatory purpose.[49] "Thereby, the United States Supreme Court presumes a discriminatory purpose in such 'stark' cases and places the burden on the government to show 'no intent.'"[50]

E. . THE STANDARD OF REVIEW IN EQUAL PROTECTION JURISPRUDENCE.

Unfortunately, "the . . . Supreme Court has been unwilling to applye the strict scrutiny standard to facially neutral legislation without proof the challenged law is discriminatory both in effect and in purpose."[51] Only "purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment."[52] Absent such purpose, review of an equal protection challenge under the rational basis test requires (1) a legitimate purpose for the challenged legislation, and (2) a reasonable basis for the lawmakers to believe that use of the challenged classification would promote that purpose.[53] Therefore, "differential impact is subject only to the test of rationality."[54] Under the most deferential form of the rational basis test, the Court does not ask whether the legislature had a rational basis for the law but whether it could have had a rational basis.[55] In a few areas, the burden shifts, requiring the government to provide nondiscriminatory explanations for actions that disproportionately burden a disempowered minority.[56] Burden-shifting based on a showing of disparate impact is required in cases involving statutory claims of discrimination, constitutional challenges to jury selection, and remedial challenges to school segregation.[57]

The application of the strict scrutiny standard in reviewing stark disproportionate impact cases would not guarantee a ruling that invalidated a law under the Equal Protection Clause. While strict scrutiny will almost always result in the revocation of the challenged statute, the government still could prove that the law is narrowly tailored to meet a

49 J. Scott Perkins, Case Comment, United States v. Robinson, 1 RACE & ETHNIC ANC. L.J. 72, 75 (1995).

50 *Id.* at 75–76.n

51 *Id.* at 73 (citing Jeffery A. Kruse, *Substantive Equal Protection Analysis Under* State v.nRussell, *and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV.n 1791, 1797 (1993)).

52 Perkins, *supra* note 49, at 72 (citing Rogers v. Lodge, 458 U.S. 613 (1982)).

53 State v. Russell, 477 N.W.2d 886, 887 (Minn. 1991) (citing W. & S. Life Ins. Co. v. State Bd. of Equalization, 45n1 U.S. 648,n668 (1981)).

54 Perkins, *supra* note 49, at 73 (citing *Rogers*, 458 U.S. at 617).

55 David H. Angeli, *A Second Look at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1229–30 (1997) (citing R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980); New Orleans v. Dukes, 427 U.S. 297,n305 (1976)).

56 Angeli, *supra* note 55, at 1230.

57 *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424,n432 (1971); Batson v. Kentucky, 476 U.S. 79, 97 (1986); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 25 (1971)).

compelling interest, thereby upholding the constitutionality of the statute.[58] This creates a failsafe wherein the Court can uphold an appropriate law even if it creates a disproportionate impact.

F. INCONSISTENCIES AND INADEQUACIES IN *DAVIS*

The Court never specifically defined "equal," nor did it adequately address prior cases that used a disproportionate impact analysis before it hastily concluded that a disproportionate impact could not be the sole determining factor of whether a law violates the Equal Protection Clause. The definition of "equal" and the holdings allowing for a disproportionate impact analysis are synonymous, while eliminating the disproportionate impact analysis contravenes the definition of "equal."

The Court attempted to square prior holdings that used the disproportionate impact analysis with its conclusion that the disproportionate impact analysis cannot, on its own, invalidate a law under the Equal Protection Clause. The Court stated, "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."[59] However, the Court concluded that a disproportionate impact does not trigger the strictest scrutiny and is only justifiable by the weightiest of considerations.[60] If the Court concluded in one breath that a neutral law cannot be applied so as invidiously to discriminate based on race, how could it say in its next breath that a showing of disproportionate impact warrants a standard of review lower than strict scrutiny? The majority then conceded that *Palmer v. Thompson*[61] "warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of law rather than its purpose is the paramount factor."[62] The Court then nevertheless limited that holding by stating, "[w]hatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences."[63] The Court's abrupt discarding of *Palmer* showed its willingness radically to limit and narrowly categorize past decisions supporting a disproportionate impact analysis. This sentiment runs through the opinion as the Court must then reconcile decisions like *Yick Wo*[64] and *Gomillion*.[65] By

58 Kruse, *supra* note 51, at 1796.

59 Washington v. Davis, 426 U.S. 229, 241 (1976) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

60 *Davis*, 426 U.S. at 242 (citing McLaughlin v. Florida, 379 U.S. 184 (1964)).

61 403 U.S. 217 (1971) (finding that the city's closing of five racially segregated swimming pools, instead of keeping them open and integrated, was constitutional).

62 *Davis*, 426 U.S. at 243.

63 *Id.*

64 118 U.S. 356 (1886).

65 364 U.S. 339 (1960).

painting into a corner holdings that use a disproportionate impact analysis or at least those that mention that one is constitutionally appropriate, the Court technically followed precedent while raising the standard needed to trigger a disproportionate impact analysis so high that it will be virtually nonexistent in the equal protection landscape.

Amazingly, the Court made a textualist separation of powers argument for avoiding a disproportionate impact analysis, while failing to follow the text and meaning of "equal" in the Fourteenth Amendment itself. It stated:

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary . . . that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. However this proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as this.[66]

The Court's interpretation of "equal" creates a lower standard of review for constitutional questions than statutory questions, even though, as will be shown, the meaning of "equal" requires a disproportionate impact analysis. Thus, constitutional questions should have to be reviewed under a strict scrutiny test when racially disparate treatment occurs. Furthermore, since the Court recognized that a disproportionate impact analysis has been used in past judicial opinions to invalidate laws, it is remarkable that it subjects subsequent equal protection claims based on a disproportionate impact to a lower standard of review. This exemplifies the Court's continuing attempt to place sound constitutional law upholding the disproportionate impact analysis into extremely confined arenas that, in reality, can almost never be used by a challenger who attempts to invalidate a law because of its disparate racial effect. In es-

[66] *Davis*, 426 U.S. at 246–47 (citation omitted).

sence, the Court follows precedent supporting a disproportionate impact analysis while virtually eliminating any plausible claim under it. This smells of judicial activism, as the Court appeared to reach a desired result while finding a way to comply with binding precedent that contradicts its conclusion.

II. THE MEANING OF "EQUAL" AND ITS RELATIONSHIP TO DISPROPORTIONATE IMPACT ANALYSIS

A. THE STARTING POINT FOR EQUAL PROTECTION JURISPRUDENCE

The Constitution's Preamble states: "'We the People of the United States .e. . do ordain and establish this Constitution . . .'"[67] "Before [the Constitution] . . . tells us anything else, it tells us why we should sit up and take notice — why, indeed, the document deems itself supreme."[68] Elsewhere, the Constitution provides: "'This Constitution . . . shall be the supreme Law of the Land . . . . [J]udicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution . . .'"[69] "With these words, the Constitution crowns itself king; judges and other officials must pledge allegiance to the document."[70] Thus, legal analysis begins with the constitutional text speaking to the precise question.[71] "The text itself is an obvious starting point of legal analysis. Is it even possible to deduce the spirit of a law without looking at its letter?"[72] Therefore, in any debate about equal protection, the evaluation necessarily begins with the text of the Equal Protection Clause of the Fourteenth Amendment. According to the text of the Equal Protection Clause, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[73] From that

67 U.S. CONST. Preamble, *quoted in* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 34 (2000).

68 Amar, *supra* note 67, at 34.

69 U.S. CONST. art. VI, cls. 2–3, *quoted in id.* at 33.

70 Amar, *supra* note 67, at 33.

71 Printz v. United States, 521 U.S. 898, 905 (1997).

72 Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1143 (1998).

73 U.S. CONST. amend. XIV; *see also* Washington v. Davis, 426 U.S. at 229, 239 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)) ("'[T]he Due Process Clause [of the Fifth Amendment] . . . contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups'"). The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The conclusion that the Fifth Amendment contains an equal protection component is a textual leap. Instead of incorporating the Equal Protection Clause into the Fifth Amendment, so as to prevent the United States from denying the equal protection of the laws, the Supreme Court should have concluded that the United States cannot deny the equal protection of the laws since it is an unenumerated right retained by the people under the Ninth Amendment. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *see also*

short, somewhat vague statement, the text determines what the Constitution requires.

If there is no constitutional text on point, then the answer will be "sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of . . . [the Supreme] Court."[74] However, "it is always possible in American constitutional discourse to appeal behind the broader 'Constitution's' elements of practice and precedent to the document itself, to challenge current wisdom in the name of what once was written."[75] Nonetheless, due to the Equal Protection Clause's general wording, it is a provision that demands interpretation and is most subject to a change of meaning, whether change is viewed as development or degeneration.[76] Manipulation of the Fourteenth Amendment or its amenability to change is well known and one of the major sources of controversy in contemporary discourse.[77] Accordingly, starting an analysis of the Equal Protection Clause with the definition of "equal" eliminates much of the degenerative change in the meaning of the clause. By starting an analysis with the clausees text, the interpretive element in equal protection discourse is preserved through a review of materials generated after its ratification. Change and manipulation is sufficiently limited when equal protection jurisprudence begins and complies with its own words. The meaning of "equal," however, is not static. It must be viewed with flexibility to allow for definitional progression. This promotes the developmental aspect of the Equal Protection Clause, while preventing incorrect interpretations that fail to fulfill the meaning of "equal".

Regardless of what judicial precedent has been adopted to interpret the Equal Protection Clause, if that jurisprudence is inapposite to the constitutional text of the Equal Protection Clause itself, then that precedent should be overturned as clear error. That precedent, while made in an attempt to interpret and apply the meaning of the Equal Protection Clause, simply does not promote what the clause says. Thus, a return to the words of the Equal Protection Clause of the Fourteenth Amendment is commanded under an analysis beginning with the text.

Justice Scalia has used a similar approach when interpreting Federal Rule of Evidence 801(d)(1)(B). "[I]t is the words of the [Federal] Rules [of Evidence] that have been authoritatively adopted," he states.[78] "Like

Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, U. BALT. L. REV. (forthcoming Spring 2003).

74 *Printz*, 521 U.S. at 905.

75 H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 697 (1987).

76 *Id.* at 696.

77 *Id.* at 697.

78 Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring).

a judicial opinion and like a statute, the promulgated [Federal] Rule [of Evidence] says what it says."[79] This form of legal analysis uses the text as the starting point for legal analysis. Justice Scalia's concurrence in the Courtès holding is particularly important to the position advanced in this article because the proposed approach here will often lead to an end similar to those of other scholars who criticize *Davis*.[80] However, my proposed jurisprudence adopts a different means — using the words of the Equal Protection Clause as the starting point and foundation of analysis.

B. THE HYBRID TEXTUALIST APPROACH TO DEFINING "EQUAL"

The word "equal" must be understood and defined. A consensus of the definition of "equal" at the time of the Fourteenth Amendment's enactment would provide an accurate meaning of the word when enacted. That information helps illustrate what the Equal Protection Clause requires. However, defining a word written in a different era sometimes requires translation.[81] A translator is needed for the 1787 Constitution and the first twelve amendments because those "were written and ratified by people whose intellectual universe was distant from ours in deeply significant ways."[82] The Equal Protection Clause, however, falls outside that boundary in the Fourteenth Amendment. Nevertheless, there is still significant "historical distance"[83] between 1868 and 2002. Essentially, "wrinkles arise when the faithful interpreter tries to apply the [Constitution's] . . . precepts to a world that is in many respects different from the world that generated the constitutional texts in question."[84] Therefore, even though the Fourteenth Amendment falls outside the first twelve amendments, I believe a form of translation is needed when analyzing it. "[T]his 'translation' is no easy task; even interpreters who fundamentally agree . . . about the dictates of the [Constitution] . . . as written and amended may disagree . . . about how best to apply those dictates to a changed world."[85]

I believe the best way to translate "equal" is through its ordinary meaning. Generally, there are two main strands to this type of textualist

79 *Id.* at 168.

80 426 U.S. 229 (1976).

81 Powell, *supra* note 75, at 672–73. The language gap between the present and the time of the enactment of the Constitution is not the main reason for requiring a "translator" to read the Constitution. The Founders spoke and wrote modern English. However, the Founders' purposes, intentions, and concerns took place in a world only of ideas and were conducted in a political language distinct from our own. *Id.*

82 *Id.* at 673.

83 *Id.*

84 Amar, *supra* note 67, at 53.

85 *Id.* (citing Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993)).

analysis.[86] "A plain-meaning textualist might look to today's dictionaries to make sense of a contested term . . . , whereas an original intent textualist might look to eighteenth century dictionaries."[87] I propose fusing these forms of textualism together, into what I call a hybrid textualist approach. The most appropriate and balanced method to start the study of the meaning of "equal" is to define it in 1868. A progression of the definition to its current meaning allows the text of the Equal Protection Clause some flexibility, for the meaning of the Constitution is best understood when it does not remain rigid or fixed.[88]

The hybrid textualist approach, to at least start the analysis of the meaning of "equal," creates a constant foundation on which judges can base their equal protection analysis. It would be unwise to shelter our analysis completely in the thoughts and words of a different era. That wholly textualist form of jurisprudence provides the weakest restraints on judges and is an inappropriate invitation to judicial creativity: broadly phrased terms allow judges to use those provisions however they desire.[89] To alleviate that burden, I propose using the definition of a word as an evolving form of precedent, somewhat like the legal world's use of judicial opinions. The most recent judicial decision is the most important in determining precedent. For our purposes, the meanings of "equal" in 1868 and modern times are united in a continuum through the development of its dictionary definition. This analysis, again, begins with the past and current definitions of the text; supplementing judicial opinions, legal writings, and other relevant information is acceptable as long as they do not conflict with the text. This avoids the problem of "ruminating on the 'ordinary meaning' of the words of the text"[90] to determine the Equal Protection Clause's meaning.

Davis[91] is inapposite to the meaning of "equal" as it was understood in 1868 and is understood currently. The 1868 definition provides the original meaning of the Equal Protection Clause, while current definitions bridge the gap between two vastly different eras. Without applying this combined approach, we either place ourselves wholly outside mainstream society by only adopting a previously recognized definition or we drift too far from equal protection's roots by ignoring its original meaning.

---

86 Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999).

87 *Id.* at 788–89.

88 Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

89 David A. Strauss, *The New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1153–57 (1998).

90 Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 735 n.534 (2000).

91 426 U.S. 229 (1976).

C. THE MEANING OF "EQUAL"

"Equal," and similar words, are defined in only a few pre-1868 dictionaries. In 1696, "equal" existed in the definition of equation.[92] "Equation" was defined as "making equal, even or plain."[93] In 1818, "equal" was defined, in part, as, "[t]o recompense fully; to answer in full proportion."[94] The meaning of "equality" included "[e]venness; uniformity; constant tenour; equability."[95] "Equally" meant "evenly; equably; uniformly."[96] A consensus of these definitions shows that the word "equal" encompassed a proportionality and uniformity requirement when the Fourteenth Amendment was enacted. Therefore, the original meaning of the Equal Protection Clause requires a law to be proportionate and uniform.

The evolution of the word "equal" in the late 1800s shows the word's proportionality and uniformity requirement becoming more specific. Uniformity and proportionality are constants in the meanings of "equal" and "equality."[97] Definitions of words similar to "equal" promote concepts paralleling proportionality and uniformity. The definition of "equality" was, in part, "[t]he condition of being equal in quantity, amount, value, intensity, etc."[98] "Equalize" meant, "[t]o make equal in magnitude, number, degree of intensity, etc."[99] "Equal" was "just, exact,"[100] and "equilibrium" was "even, balancing, evenly balanced."[101] Many of these definitions, while not exactly using uniformity or proportionality to define words related to "equal", build upon those concepts by providing similar definitions focusing on magnitude, degree, and balance.

The early 1900s illustrates both the concise meanings of "equal" and the trend toward a more detailed meaning. The definitions once again varied, but the proportionality and uniformity concepts re-

92 ENGLISH DICTIONARY: EXPLAINING THE DIFFICULT TERMS THAT ARE USED IN DIVINITY, HUSBANDRY, PHYSICS, PHILOSOPHY, LAW, NAVIGATION, MATHEMATICS, AND OTHER ARTS AND SCIENCES (1696).

93 *Id.*

94 2 JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE (1818); 3 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 253 (1897) (illustrating the definition of "equal" using an example as "[t]o proportion," dating back to 1618).

95 JOHNSON, *supra* note 94.

96 *Id.*

97 *Id.*; 3 A NEW ENGLISH DICTIONARY, *supra* note 94, at 252 (defining "equal" as "[t]o proportion"); A DICTIONARY OF ENGLISH SYNONYMES AND SYNONYMOUS or Parallel Expressions 148 (Boston Books 1893) (1891) (defining "equal" as, "[u]niform, even, regular, equable . . . [p]roportionate, commensurate"; and defining "equality" as "uniformity, evenness").

98 3 A NEW ENGLISH DICTIONARY, *supra* note 94, at 253.

99 *Id.*

100 CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 136 (4th ed. 1898).

101 *Id.*

mained.[102] However, these concepts were more explicitly mentioned, particularly in reference to the more resultant or effect-oriented aspects of those terms. The definition using different terminology corroborated the proportionality and uniformity ideals, thereby ensuring that the meaning of "equal" continued to contain a proportionality and uniformity requirement.[103]

The constant presence of the "[t]o proportion"[104] definition is found in the Oxford English Dictionary. This unwavering, succinct definition of the proportionality requirement of "equal" dates back to a 1618 example and creates a solid foundation to explore the more definitive definitions of "equal" in contemporary dictionaries. In modern dictionaries the proportionality concept remains. In that regard, "equal" means "evenly proportioned or balanced,"[105] "of just proportion,"[106] and "showing or having no variance in proportion, structure, or appearance."[107]

Uniformity also has had a constant place in the meaning of "equal." The most persuasive and pertinent definitions of "equal" relating to the effect of laws are found in the definitions incorporating the long-standing uniformity concept. In that context, "equal" means "uniform in operation or effect: *equal laws*"[108] or "uniform."[109] The first definition of "equal" in the prior sentence is strong support for a disproportionate impact analysis in equal protection jurisprudence. Equal laws were chosen as the example to describe how something has to be uniform in operation or effect to meet the meaning of "equal". If a law is not uniform in its operation or effect, it cannot be an equal law, thus, it violates equal pro-

[102] 3 THE CENTURY DICTIONARY AND CYCLOPEDIA (rev. ed. 1911) (defining "equal", in part, as "[t]o be or become equal to; be commensurate with . . . [t]o make equivalent to; recompense fully; answer in full proportion"; "equality" contained "evenness; uniformity; sameness in state or continued course").

[103] AN ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 198 (rev. ed. 1909) ("equal" contained "on a par with, even, just").

[104] 3 THE OXFORD ENGLISH DICTIONARY 253 (1969); 5 THE OXFORD ENGLISH DICTIONARY 347 (2d ed. 1989); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 420 (1984); *see also* A NEW ENGLISH DICTIONARY, *supra* note 94, at 252.

[105] THE Random House College Dictionary 446 (unabridged ed. 1975).

[106] ALLWORDS.COM-DICTIONARY, GUIDE, COMMUNITY AND MORE (2002), *at* www.allwords.com; *see also* DICTIONARY.COM (2002), *at* www.dictionary.com (2002) (quoting WEBSTER'S REVISED UNABRIDGED DICTIONARY (1996)); HYPERDICTIONARY (2002), *at* www.hyperdictionary.com (citing WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913)).

[107] THE American Heritage Dictionary of the English Language (4th ed. 2000); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY of the English Language Unabridged 766 (1993); WEBSTER'S NEW WORLD DICTIONARY of the American Language, Second College Edition 472 (1984); WEBSTER'S NEW COLLEGIATE DICTIONARY 382 (1981).

[108] DICTIONARY (2002), *at* www.infoplease.com; *see also* THE Random House Dictionary of the English Language 665 (2d ed. unabridged 1987).

[109] HYPERDICTIONARY, *supra* note 106 (citing WEBSTER'S REVISED UNABRIDGED DICTIONARY, *supra* note 106); *see also* WORDSMYTH, THE EDUCATIONAL DICTIONARY-THESAURUS (2002), *at* www.wordsmyth.net.

tection. With that said, the plain meaning of the word "equal" prescribes an effect test, or a disparate impact test, or a disproportionate impact analysis. Regardless of criticisms that have been leveled at such a form of jurisprudence, modern-day support for it is found in the meaning of "equal."

Similar operation or effect-oriented definitions of "equal" confirm that the meaning of the word mandates a disproportionate impact analysis. Some of those definitions overlap with the uniform definitions described. The other effect-oriented definition is described as "regarding or affecting all objects in the same way."[110] The affected object of a law, particularly a criminal law, is a person or people. Under this meaning of "equal," a law cannot affect him in a way different from another person, thereby preventing one race of people from being disproportionately affected by a law.

It is clear that the definition of "equal" requires laws to be neutrally intended and drafted. This article does not dispute current equal protection jurisprudence on that point. The legislature is not free to make punishment turn on "an unjustifiable standard such as race, religion, or other arbitrary classification."[111] A law cannot, on its face, discriminate against racial minorities.[112] For example, Congress could not pass a law stating, "blacks will receive a five-year minimum mandatory sentence for possessing five grams of cocaine base; whites will receive a one-year minimum mandatory sentence for possessing five grams of cocaine base." Moreover, a facially neutral law cannot be drafted with a racially discriminatory intent.[113] For example, assume Congress passes the following law: "Any person possessing five grams of cocaine base receives a five-year minimum mandatory sentence; any person possessing five hundred grams of powder cocaine receives a five-year minimum mandatory sentence." That law would be unconstitutional under the Equal Protection Clause if the members of the House of Representatives and the Senate who voted for the law stated that the legislative intent of the bill, particularly the disparity between the minimum mandatory sentences for cocaine base and powder cocaine, had as its purpose to punish blacks more severely because blacks are more prone to use cocaine base than whites, who are more likely to use powder cocaine.[114]

[110] WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 107, at 382; *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (2002), *at* www.m-w.com; WEBSTER'S NEW WORLD DICTIONARY of the American Language, Second College Edition, *supra* note 107, at 472; WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, *supra* note 104, at 420.

[111] Oyler v. Boles, 368 U.S. 448, 456 (1962).

[112] *Id.*

[113] McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

[114] *Id.*

The plurality of definitions of "equal" also require that laws be evenly proportioned and, most importantly, uniform in operation or effect.[115] While the definition of "equal" naturally varies slightly as more and more dictionaries define the word, the proportionality and uniformity concepts are the most appropriate ways to define the meaning of "equal" with regard to the effect of a law, because those definitions were present before 1868 and remain in operation to this day. Furthermore, the definitions citing "equal laws"[116] as examples of the requirement that something be uniform in operation or effects, confirm that a determination of whether a law is equal or not has to include an analysis of how it operates and affects society and the individual or group in question. Therefore, it is explicitly clear under the definition of the word "equal" that a disproportionate impact analysis must be used to interpret whether a law violates the *Equal* Protection Clause. Current equal protection jurisprudence opposes the text, and meaning of, the word "equal." Thus, under the hybrid textualist approach used here, *Davis*[117] must be reversed as error.

The disproportionate impact analysis makes clear that present-day equal protection jurisprudence does not fully comply with the meaning of the word "equal." As stated above, "equal" requires that no law, on its face, discriminate against racial minorities.[118] The text and current equal protection jurisprudence is correct on that point. Further, as mentioned earlier, "equal" requires that no facially neutral law be drafted with the intent to discriminate against racial minorities.[119] Once again, the text and present day equal protection jurisprudence reach an appropriate conclusion. Where the text should disagree with current equal protection jurisprudence is the Supreme Court's rejection of the disproportionate impact analysis as the sole determination of whether a law violates equal protection.

A disproportionate impact analysis allows a court to strike down a law because its application, enforcement, or effects are disproportionately applied to a racial minority. This model of equal protection jurisprudence allows the court to appropriately determine if a law is evenly proportioned and uniform in operation or effect, as the meaning of the word "equal" requires.[120] Therefore, a disproportionate impact analysis meets the requirements prescribed in the text of the Equal Protection Clause. The current standard obviating the disproportionate impact anal-

115 *See supra* notes 94–97, 102, 104–09, and accompanying text.

116 *See supra* note 108, and accompanying text.

117 426 U.S. 229 (1976).

118 *See* Oyler v. Boles, 368 U.S. 448, 456 (1962).

119 *McCleskey*, 481 U.S. at 298.

120 *See supra* notes 94–97, 102, 104–09, and accompanying text.

ysis fails to fulfill the meaning of the very word "equal" in the constitutional amendment it is meant to interpret.

Under a hybrid textualist approach, we are all bound by the words of the Constitution. "It is the words of the Constitution that have been authoritatively adopted."[121] If the founders of the Fourteenth Amendment did not desire that the proportionality or uniformity of a law be at issue, then they could have chosen a different word or wording from "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[122] If current federal and state legislators oppose the term, they could use a constitutional amendment to alter the analytical requirements.[123]

A review of current and past definitions of "equal" suffices and satisfies both prongs of the hybrid textualist approach, which are: (1) defining "equal" before the Fourteenth Amendment's enactment in 1868, and (2) tracing the evolution of its meaning to the present day. The intent of "equal" at its inception is preserved, and its adoption to modern life applies it appropriately to current issues. Since there is constitutional text on point, this evaluation of equal protection issues need only be supplemented with an historical understanding of the Constitution, jurisprudence of the Court, law review articles, and other relevant sources.[124]

D. THE (IR)RELEVANCY OF THE INTENT OF THE EQUAL PROTECTION CLAUSE'S FOUNDERS

Any analysis of what legislators intended the Equal Protection Clause to mean is irrelevant to the position advanced herein.[125] When the Constitution or a statute is interpreted, the original meaning of the text must be analyzed, "'not what the original draftsmen intended.'"[126] "The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it."[127] "The text's the thing. We should therefore ignore drafting history without discussing it, instead of after discussing it."[128] In other words, this article

121 Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring).

122 U.S. CONST. amend. XIV.

123 U.S. CONST. art. V.

124 *See* Printz v. United States, 521 U.S. 898, 905 (1997).

125 *See Tome*, 513 U.S. at 167 (Scalia, J., concurring).

126 Davies, *supra* note 90, at 740 n.555 (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997)).

127 Bank One Chicago v. Midwest Bank, 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (citing United States v. Public Util. Comm'n of Cal., 345 U.S. 295, 319 (Jackson, J., concurring)).

128 *Id.* at 283; *see also* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 205 n.31 (1999) (citing Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 n.† (1998) (Justice Scalia joins the entire opinion except the section discussing and rejecting a party's

contends that the objective meaning of the words, rather than the intent of the legislature, is what constitutes the law. Such a contention leads to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning.[129] Former Supreme Court Chief Justice Taney wrote:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*; and we must gather their intention from the language there used. . . .[130]

Thus, the views of Alexander Hamilton, a draftsman, bear no more authority than the views of Thomas Jefferson, not a draftsman, with regard to the meaning of the Constitution.[131] The rejection or limitation on use of legislative intent or drafting history to interpret a legal text is not limited to conservative jurists and scholars. Laurence Tribe concluded:

> [W]e ought *not* to be inquiring (except perhaps very peripherally) into the ideas, intentions, or expectations subjectively held by whatever particular persons were, as a historical matter, involved in drafting, promulgating, or ratifying the text in question. To be sure, those matters, when reliably ascertainable, might shed some light on otherwise ambiguous or perplexing words or phrases — by pointing us, as readers, toward the linguistic frame of reference within which the people to whom those words or phrases were addressed would have "translated" and thus understood them. But such thoughts and beliefs can never substitute for what was in fact *enacted as law*.[132]

In the end, Tribe believes "that it is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law."[133]

appeal to legislative history)); Assoc. Commercial Corp. v. Rash, 520 U.S. 953, 955 n.* (1997) (Justice Scalia joins the entire opinion except the footnote discussing and rejecting legislative history to construe a statute).

129 SCALIA, *supra* note 126, at 29–30.

130 Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845) (emphasis added), *quoted in id.* at 30.

131 Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring).

132 SCALIA, *supra* note 126, at 65 (quoting Laurence H. Tribe, Comment, *in id.* at 6).

133 *Id.* at 66.

Furthermore, following the text of a statute, opposed to Congress's alleged intent, "has a claim to our attention simply because Article I, section 7 of the Constitution provides that since it has been passed by the prescribed majority (*with or without adequate understanding*), it is a law."[134] Legislative intent does not have such a mandate. The Constitution provides: "All legislative powers herein granted . . . shall be vested in a Congress of the United States . . . ."[135] This power is nondelegable.[136] Therefore, Congress cannot "'authorize' one committee to 'fill in the details' of a particular law . . . ."[137] Thus, for example, Advisory Committee Notes to a Federal Rule of Evidence bear no special authoritativeness to the work of its draftsmen.[138] In the end, the thoughts of a judge regarding what his opinion meant, or of a draftsman regarding what a rule he drafted meant, do not change the meaning the opinion or the rule would otherwise bear.[139]

A variety of attitudes and understandings may have existed among the different people (drafters, federal legislators, and commentators) who are considered the founders of the Fourteenth Amendment.[140] There is "no doubt that is a genuine difficulty for assessing the historical meaning of certain aspects of the Constitution or especially of the Fourteenth Amendment."[141] Because the Fourteenth Amendment "was passed at a time of pronounced political controversy, it seems unlikely that the framers of the Fourteenth Amendment shared any settled understanding of its meaning."[142]

How does the opinion of one founder at that time weigh against that of another? How do we resolve differing ideas, even slight ones, regarding what one founder feels equal protection means as compared with another? What about founders who did not voice a certain position or view? How do we, if at all, account for what they believed the intent of the Equal Protection Clause was? Instead of finding the original mean-

134 *Id.* at 35.

135 U.S. CONST. art. I, § 1, *quoted in id.*

136 *Id.*

137 *Id.*

138 *Tome*, 513 U.S. at 167.

139 *Id.* at 168.

140 Davies, *supra* note 90, at 723 n.505.

141 *Id.*

142 *Id.* at 735 n.535; *see* Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention"*, 74 GEO. L.J. 1719, 1721, 1722 (1986) (describing the uncertainty in the Founders' intent behind the Constitution: "[T]he Constitution was not ratified by a single actor with clear motivations, but by many participants, most of whom left little or no record of their intentions") (citing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 98–110 (1962) (asserting that the intention of the Constitution's Founders cannot be ascertained with finality)); Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 96 (1987) (explaining that there were many Founders in Congress and the ratifying assemblies, speaking at many times).

ing of "equal", a fishing expedition begins, creating more confusion and complexity. The Equal Protection Clause says what it says, regardless of the intent of its drafters,[143] for it is the word "equal" that was adopted in the Fourteenth Amendment.[144] That is the word that was chosen and remains to this day. We are bound by that word, regardless of what anyone associated with the debating and drafting of the Equal Protection Clause proclaimed the intent and purpose of the clause was.[145] The meaning of "equal" is the one constant we can all point to and indiscriminately define without allowing any conscious or unconscious biases or prejudices to alter our legal analysis.

This, however, is not the same as present-day scholars' attempts to interpret what they believe the Equal Protection Clause requires. Such scholars are attempting to shift equal protection law to a place they think it should have been at its inception. They are bound, as are we all, by words. A subsequent explanation of our words' meaning carries less authoritative weight than the original words themselves.

E. AN HISTORICAL VIEW OF THE EQUAL PROTECTION CLAUSE

While the specific intent of the founders bears no weight in this analysis, we should remain cognizant of what "equal" meant in relation to the historical events that led to the Fourteenth Amendment's passage. This helps reflect the climate of that time. After the Civil War, Reconstruction amendments were ratified. The Thirteenth Amendment eliminated slavery, and the Fifteenth Amendment guaranteed all races the right to vote.[146] The Equal Protection Clause, within the Fourteenth Amendment, fits with these amendments. Therefore, to comply with the prevention of racial discrimination enunciated in the Thirteenth and Fifteenth Amendments, the Equal Protection Clause's original concern was racial equality.[147] The amendment originally was prompted by concern with the status of blacks,[148] because the Civil War dramatized the need to limit abusive states.[149]

With that said, the disproportionate impact analysis parallels the historical view that the Equal Protection Clause was to protect blacks from government discrimination. The protection of freed slaves, and the assurance of their basic constitutional rights, attempted to provide them with equal protection of the law. A disproportionate impact follows that

143 *See* Tome v. United States, 513 U.S. 150, 168 (1995).

144 *Id.*

145 *Id.*

146 U.S. CONST. amend. XIII; U.S. CONST. amend. XV.

147 Donald E. Lively and Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1310 (1991).

148 *Id.* at 1319.

149 Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1224 (2002).

mandate as it protects racial minorities from the unequal application of the laws against them. To now allow the Equal Protection Clause to accept the racially discriminatory application of the laws against racial minorities runs antithetical to the clause's initial confrontation with racism.

The focus here is not specifically on that historical analysis because it is only a subsequent component of legal reasoning. It may provide support for the meaning of the Equal Protection Clause, but it must play a subsidiary role. A narrow historical view of the Equal Protection Clause is analytically inaccurate. Even if:

> The [Fourteenth] amendment's adopters . . . were concerned with a single overriding purpose, the protection of the recently freed slaves . . . this type of argument reverses the logical order of concern by simply disregarding the possibility that the clause's wording, its place in the amendment and in the text as a whole, and its role in the broader 'Constitution,' invite or require a different conclusion from the one based on history. What is fundamentally wrong here is that the interpreter is treating the Constitution itself as an empty shell, a container into which the founders originally poured meaning that we now extract by historical investigation. . . . A legitimate interpretation of the scope of the [E]qual [P]rotection [C]lause must make sense of the clause's words and of its context, and not simply disregard them because of the interpreter's reconstruction of intentions not incorporated in the text and context. History's proper role in the clause's interpretation is to render the interpretation of the clause fuller and more convincing, not to supplant it. 'This history is at best only a clue to what the text says; the text is not supposed to be used as a clue to this history.'[150]

In the end, history helps illustrate why the word "equal" was chosen, but it does not explain the meaning of the word.

F. THE TEXTUAL PROBLEMS WITH THE CURRENT EQUAL PROTECTION STANDARD

Current equal protection jurisprudence inappropriately contrasts the disproportionate impact analysis with the concept of a law being unequal only if it is discriminatory on its face or facially neutral with a discrimi-

[150] Powell, *supra* note 75, at 667–68 (citations omitted).

natory intent.[151] "This standard not only places a virtually insurmountable burden on the challenger . . . but it also defies the fundamental tenets of equal protection."[152] The Minnesota Supreme Court adopted Laurence Tribe's view, which explains:

> This overlooks the fact that minorities can also be injured when the government is "only" indifferent to their suffering or "merely" blind to how prior official discrimination contributed to it and how current acts will perpetuate it.
>
> . . .
>
> If government is barred from enacting laws with an eye to invidious discrimination against a particular group, it should not be free to visit the same wrong whenever it happens to be looking the other way. If a state may not curb minorities with its fist, surely it may not indifferently inflict the same wound with the back of its hand.[153]

To meet this mandate, the disproportionate impact analysis should be added to equal protection jurisprudence. This leads to an approach that encompasses the full meaning of the word "equal." For an example of how inapposite current equal protection jurisprudence is to the text and precedent supporting the disproportionate impact analysis, consider *United States v. McMurray*.[154] Black defendants challenged federal crack cocaine laws, alleging that the defendants were denied equal protection of the law because of the racially disparate impact of the laws on them.[155] One gram of crack cocaine, or cocaine base, carries the same penalty as 100 grams of powder cocaine.[156] More than 90% of federal crack cocaine defendants were black.[157] "[B]lacks are more frequently and disproportionately penalized under the harsh 'crack' guidelines than are whites, while whites are more frequently charged with powder cocaine violations which produce comparatively lighter sentences."[158] The *McMurray* court concluded "the legislative history of congressional ef-

[151] Washington v. Davis, 426 U.S. 229 (1976).

[152] State v. Russell, 477 N.W.2d 886, 888 n.2.

[153] *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1518–19 (2d ed. 1988)).

[154] 833 F. Supp. 1454 (D. Neb. 1993), *aff'd*, 34 F.3d 1405 (8th Cir. 1994), *cert. denied*, 513 U.S 1179 (1995).

[155] *McMurray*, 833 F. Supp. at 1459–60.

[156] U.S. SENTENCING GUIDELINES, DRUG QUANTITY TABLE, 18 U.S.C. § 2D1.1(c) (1996) (making clear that possessing fifty grams of crack cocaine or cocaine base with intent to distribute receives the same ten-year mandatory minimum sentence as possessing 5000 grams of powder cocaine with intent to distribute); 21 U.S.C. § 841(b)(1)(A)(iii) (1999); 21 U.S.C. § 841(b)(1)(A)(ii)(II) (1999).

[157] *McMurray*, 833 F. Supp. at 1460.

[158] *Id.* at 1461 (citations omitted).

forts to stop the flow of 'crack' strongly suggests that Congress was aware that blacks would be 'disproportionately' prosecuted for 'crack' violations."[159] Nevertheless, the court held, "there is no evidence of racial animus towards blacks in the adoption of the crack penalties by Congress."[160] However, under the definition of "equal" and holdings such as *Yick Wo*[161] and *Gomillion*,[162] there was no need for the court to take a further analytical step after determining that a law has disproportionately affected a racial minority. Once disproportionate impact occurs, equal protection cannot exist unless a law is narrowly tailored to meet a compelling interest.

Again, the selective prosecution of blacks for federal crack cocaine violations provides a perfect illustration of how the current equal protection standard is inapposite to the meaning of "equal." Whites use 65% of crack, but blacks suffer 88% of crack trafficking law convictions.[163] Blacks on average received sentences over 40% longer than whites.[164] "Evidence tending to prove that black defendants charged with distribution of crack . . are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that district."[165] An intake coordinator at a drug treatment center reported that "an equal number of crack users and dealers were [C]aucasian as belonged to minorities."[166] The severity of crack penalties heightens the danger of arbitrary enforcement and the need for careful scrutiny of any colorable claim of discriminatory enforcement.[167]

The Court has conceded that *Yick Wo*[168] prevents exclusive administration of a law against a particular class of people.[169] Yet the Court quickly shows the inconsistency in its equal protection jurisprudence when it held that it will undertake an ordinary equal protection analysis, consisting of determining whether the defendant can prove that the prosecution had a discriminatory effect *motivated* by a discriminatory purpose.[170] The motivated-by-a-discriminatory-purpose standard is not

159 *Id.* at 1464 (citations omitted).

160 *Id.* at 1467.

161 118 U.S. 356 (1886).

162 364 U.S. 339 (1960).

163 United States v. Armstrong, 517 U.S. 456, 480 (1996) (Stevens, J., dissenting).

164 *Id.* at 480 (citing BUREAU OF JUSTICE, STATISTICS: SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 6–7 (Dec. 1993)).

165 *Armstrong*, 517 U.S. at 480.

166 *Id.* at 480–81.

167 *Id.* at 483 (Stevens, J., dissenting) (citing McCleskey v. Kemp, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting)).

168 118 U.S. 356 (1886).

169 *Armstrong*, 517 U.S. at 464–65 (citing *Yick Wo*, 118 U.S. at 373).

170 *Armstrong*, 517 U.S. at 465 (emphasis added) (citing Wayte v. United States, 470 U.S. 598, 607–08 (1985)).

contained in either the plain meaning of "equal" or *Yick Wo*. It is as if the Court realized that since *Yick Wo* is good law, it must at least mention it before it completely abandons it or fails to apply it to any case before it. The majority's only support for its discriminatory purpose requirement is that the plaintiff in *Yick Wo* somehow inferred a discriminatory purpose by showing that similarly situated whites were not denied permits to operate laundries while asians were.[171] The Court again looked to only a portion of *equal* protection when it focused on giving an effect analysis no latitude regarding intent and that there should be certainty to every intent.[172] The Court's requirement that defendants produce evidence that a similarly situated person of another race was not prosecuted shows its unyielding intent analysis. It cloaks its acceptance of *Yick Wo* in an intent analysis that is not needed. Discriminatory impact violates equal protection, as does discriminatory intent.

The effect of crack cocaine laws is not in doubt; they have a disproportionate impact on blacks. However, it is very difficult for a black defendant to prove that a similarly situated white crack cocaine offender was not prosecuted. In *Yick Wo*, it was easier to identify whether a service industry, such as a laundry, was being operated in the structure of a wooden building. It was also plain to see what race of people was granted lawful permits to operate those facilities. A black defendant cannot easily identify a white crack user or dealer and show that he has not been prosecuted. This entails a great deal. A defendant would have to act as a vigilante and provide hard evidence that a white person possessed crack and was not prosecuted. The reasonable and constitutionally appropriate manner to prove that type of equal protection violation is to provide statistical data and testimony as to the overall operation or effect of a law. The meaning of "equal" does not mandate that a person denied equality must produce an exact counterpart of another race that was treated better than he was. Conversely, "equal" requires that the law, as pertaining to the person it affects, is proportionate and uniform in operation or effect.[173] When a statistical showing disproves that requirement, equal protection is violated unless the law in question survives strict scrutiny.

Finally, there should be no debate over whether to adopt the current standard or adopt the disproportionate impact standard — both are necessary in interpreting the *Equal* Protection Clause. Often those forms of analysis may be used in separate settings, but that depends on what portion of the meaning of "equal" is at issue. The potential segregation of these doctrines does not create a confusing or ambiguous standard when

[171] *Armstrong*, 517 U.S. at 466 (citing *Yick Wo*, 118 U.S. at 374).
[172] *Armstrong*, 517 U.S. at 466 (citing Ah Sin v. Wittman, 198 U.S 500, 508 (1905)).
[173] *See supra* notes 94–97, 102, 104–09, and accompanying text.

resolving equal protection issues because both doctrines meet the meaning of the word at issue: "equal". If a law violates any portion of "equal," it is unconstitutional. The separate analytical doctrines simply develop a concrete method or methods, based on the meaning of "equal," to ensure that no law violates a person's *equal* protection rights.

G. CONTEMPORARY JUDICIAL OPINIONS DISCUSSING THE DISPROPORTIONATE IMPACT ANALYSIS

The disproportionate impact of crack cocaine laws on blacks is unconstitutional under principles of equal protection in the Minnesota constitution.[174] Minnesota's constitution does not contain an equal protection clause, but it does provide that "[n]o member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen."[175] This clause "embodies principles of equal protection."[176] There is a right to "equal and impartial laws which govern the whole community and each member thereof."[177] "[P]ersons similarly situated are to be treated alike unless a sufficient basis exists for distinguishing among them."[178]

The laws in question created more severe penalties for possessing substantially less crack cocaine as opposed to powder cocaine.[179] Blacks suffered more severe penal consequences, as 96.6% of those charged with possessing crack cocaine were black, and 79.6% of those charged with possessing powder cocaine were white.[180] The Minnesota Supreme Court uses the following heightened rational basis test to review the laws in question:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions

174 State v. Russell, 477 N.W.2d 886, 896 (Minn. 1991).

175 *Id.* at 893 (Simonett, J., concurring specially); MINN. CONST. art. 1 § 2.

176 *Russell*, 477 N.W.2d at 889 n.3 (citing State v. Forge, 262 N.W.2d 341, 347 n.23 (Minn. 1977)).

177 *Russell*, 477 N.W.2d at 893 (Simonett, J., concurring specially) (quoting Thiede v. Town of Scandia Valley, 14 N.W.2d 400, 405 (Minn. 1944)).

178 *Russell*, 477 N.W.2d at 893 (Simonett, J., concurring specially) (citing Bernthal v. City of St. Paul, 376 N.W.2d 422, 424 (Minn. 1985)).

179 *Russell*, 477 N.W.2d at 887 (noting that the possession of three grams of crack cocaine carried a penalty of up to twenty years in prison, while possessing an equal amount of powder cocaine carried a penalty of up to five years in prison; and that the presumptive sentence for possession of three grams of crack was an executed forty-eight months imprisonment, while the presumptive sentence for possessing an equal amount of powder cocaine was a stayed twelve months of imprisonment and probation).

180 *Id.* at 887 n.11 (data from 1988).

> and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.[181]

The court found no rational basis under the above test to validate the laws in question, thereby ruling them unconstitutional under the state constitution.[182] While the decision appropriately applies a disproportionate impact analysis to invalidate a racially discriminatory law under state equal protection parameters, it still fails in its application of a rational basis test. Even though the test is a heightened rational basis test, it still does not fully comport with the meaning of "equal." When a law is discriminatory on its face, or has a discriminatory intent or purpose, strict scrutiny review attaches.[183] Since the meaning of "equal" encompasses the prevention of a disproportionate impact of a law, then any law examined via a disproportionate impact analysis also warrants strict scrutiny review. Applying anything less than strict scrutiny still provides the current loophole wherein facially discriminatory laws and purposeful and intentional discriminatory laws presume inequality, while impact-based discriminatory laws presume equality. Without the adoption of a strict scrutiny review for impact based discriminatory laws, the true meaning of "equal" in the Equal Protection Clause will not be effectuated.

The *Russell* decision influenced federal courts still bound by precedent regarding the disproportionate impact analysis. One gram of cocaine base carries the same penalty as one hundred grams of cocaine powder.[184] Ninety-seven percent of defendants prosecuted for crack cocaine offenses in the Western District of Missouri between 1988 and 1989 were black.[185] The Eighth Circuit held that the 100-to-1 ratio does not currently violate equal protection; however, "[w]ere we writing from a clean slate . . . we might accept as valid appellants' contentions relating to the disproportionate penalty."[186] The court recognized the *Russell* de-

181 *See id.* at 888.

182 *Id.* at 889; *see also* Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 154 (1994) (suggesting that state constitutions should provide equal protection guarantees that invalidate drug laws that disproportionately affect non-whites).

183 Perkins, *supra* note 49, at 75 (citing Rogers v. Lodge, 458 U.S. 613, 617 (1982)).

184 U.S. SENTENCING GUIDELINES, DRUG QUANTITY TABLE, 18 U.S.C. § 2D1.1(c) (1996) (making clear that possessing fifty grams of crack cocaine or cocaine base with intent to distribute receives the same ten-year mandatory minimum sentence as possessing 5,000 grams of powder cocaine with intent to distribute). 21 U.S.C. § 841(b)(1)(A)(iii) (1999); 21 U.S.C. § 841(b)(1)(A)(ii)(II) (1999).

185 United States v. Simmons, 964 F.2d 763, 767 (8th Cir. 1992).

186 *Id.*

cision, but it followed the lead of two federal Court of Appeals opinions that declined to follow *Russell.*[187]

Similarly, a black defendant lost an equal protection challenge regarding federal crack cocaine laws in *United States v. Willis.*[188] Two judges out of a three judge panel joined an opinion stating, "I concur in the court's opinion, but only because I am bound by our prior decisions that hold there is no merit in Willis' equal protection argument."[189] "Crack raids focus on black homes; suburban and greater Minnesota police have not engaged in as many drug raids against white suspects."[190] The war on drugs is a war on minorities.[191] "[P]arts of our society view the young black male as a figure of social disruption, and will seek to punish him more harshly than his white suburban counterpart."[192]

Both of those opinions exemplify how the incorrect federal precedent in place inappropriately confines federal District Court judges and Court of Appeals judges to the *Davis* decision. Without a return to the root of what *equal* protection means, lower federal court judges who agree that certain laws should be unconstitutional because of their disproportionate impact will still be bound by current equal protection lawes precedent. Once a redefining of equal protection occurs, those judges will be able to apply the analysis they previously gave; only this time they will be majority opinions that will be affirmed.

H. THE REAL-WORLD CONSEQUENCES OF RACIALLY DISPARATE LAWS

The horrific effect of the disproportionate sentence imposed against Willis is shown in the following passage:

> Willis, age 21 when sentenced, will be in prison for about 17 years. During this time he is unlikely to receive drug treatment or helpful job training. . e . Willis will be a middle-aged man when he emerges from the prison system with little prospects for meaningful employment.
>
> If there were any evidence that our current policies with respect to crack were deterring drug use or distribution the extreme sentence might be justified. Unfortunately,

187 *Id.* (citing United States v. Watson, 953 F.2d 895, 898 n.5 (5th Cir. 1992); United States v. Galloway, 951 F.2d 64, 66 (5th Cir. 1992)).

188 967 F.2d 1220 (8th Cir. 1992).

189 *Id.* at 1226 (Heaney, J., concurring).

190 *Id.*

191 *Id.* (citing MINN. DEP'T OF PUBLIC SAFETY, OFFICE OF DRUG POLICY, REPORT TO THE 1991 MINNESOTA LEGISLATURE 11 (1990)).

192 *Willis*, 967 F.2d at 1226 (Heaney, J., concurring) (citing Martha Myers, *Symbolic Policy and the Sentencing of Drug Offenders*, 23 LAW & SOC'Y REV. 295, 310, 312 (1989)).

> there is none. As one small time crack dealer is confined another takes his place. Until our society begins to provide effective drug treatment and education programs, and until young black men have equal opportunities for a decent education and jobs, a bad situation will only get worse. All of us and our children will suffer.[193]

That passage underscores the real-world consequences of unequal laws. This is of particular importance because we must realize the full ramifications of judicial and legislative decisions to correctly interpret the law. If we lose track of reality, equal protection jurisprudence may provide one set of law in textbooks and another to be practiced. The damning consequences of disproportionately applied laws do not just affect the accused or offender in question. The reciprocal effect of unequal laws burdens the accused or offenderès friends, family, and other associates, leaving a trail of problems that can create the possibility for more crime, social upheaval, and tarnished lives in the black community.[194]

An example of this damning process follows. If a child's father is in and out of prison for crack cocaine offenses and does not receive rehabilitative treatment during his extremely long sentences, then that childès mother may have to resort to prostitution to provide for the childès welfare.[195] The father most likely will continue using crack when he leaves the penal system, and the mother of his child may be coerced into other illegal activities in order to support her child and herself.[196] In the end, unequal laws hinder society as a whole; thus, a constitutional jurisprudence preventing them can benefit all.

I. THE *CLARY* DECISION

In *United States v. Clary*, a federal District Court judge presented a "novel legal analysis of the adverse disparate impact on blacks resulting from the imposition of [crack cocaine law under] 21

193 *Willis*, 967 F.2d at 1226–27 (Heaney, J., concurring).

194 *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1303 n.85 (1995) (citing MARC MAURER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 4 (1990) (arguing that increased incarceration in the black community risks the possibility of writing off an entire generation of black men from having an opportunity to lead productive lives)); Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215, 230–32 (1994) (describing how the subordination of the black community is reinforced through federal crack cocaine sentences); Steve Rickman, *The Impact of the Prison System on the African Community*, 34 HOWARD L.J. 524, 526 (1991) (describing how high incarceration rates threaten the social fabric of black communities).

195 See CITY HIGH, *What Would You Do?*, *on* CITY HIGH (Interscope Records) (2001).

196 *Id.*

§ 841(b)(1)(A)(iii)"[197] that was reversed on appeal.[198] The District Court concluded that 21 U.S.C. § 841(b)(1)(A)(iii) violates the Equal Protection Clause and that the prosecutorial selection of cases was unconstitutional to the defendant at bar.[199] "98.2 percent of defendants convicted of crack cocaine charges in the Eastern District of Missouri between the years 1988 and 1992 were black. Nationally, 92.6 percent of the defendants convicted during 1992 of federal crack cocaine violations were black and 4.7 percent . . . were white."[200] "Despite the fact that a law may be neutral on its face, there still may be factors derived from unconscious racism that affect and infiltrate the legislative result."[201] Judge Cahill described the history of racism in criminal punishment, particularly drug laws, from 1697 to the present.[202] "The terror of long prison terms has little deterrence for [urban blacks] — their life is already a prison of despair."[203] "Without consideration of the influences of unconscious racism, the standard of review set forth in *Washington v. Davis* . . . is a crippling burden of proof."[204] "Although intent *per se* may not have entered Congress' enactment of the crack statute, its failure to account for a foreseeable disparate impact which would affect black Americans in grossly disproportionate numbers would, nonetheless, violate the spirit and *letter* of equal protection."[205] The effect of the crack statute creates a necessary inference that the law has an unconstitutional racial intent.[206] Racially disparate impact is fostered because the "subliminal influence of unconscious racism has permeated federal prosecution throughout the nation."[207] "A law which burdens blacks disproportionately and whose influence has been traced to racial considerations, even if unconscious, warrants the most rigorous scrutiny."[208] The crack statute's application creates a de facto suspect classification, and strict scrutiny applies.[209]

On appeal, the Eighth Circuit Court of Appeals cited a litany of cases upholding federal crack cocaine laws.[210] The court showcased an

197 21 U.S.C. § 841(b)(1)(A)(iii) (1999).

198 United States v. Clary, 846 F. Supp. 768, 771 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

199 *Clary*, 846 F. Supp. at 797.

200 *Id.*

201 *Id.* at 774.

202 *Id.* at 774–76.

203 *Id.* at 778.

204 *Id.* at 781 (citing Batson v. Kentucky, 476 U.S 79 (1985)).

205 *Clary*, 846 F. Supp. at 782 (emphasis added).

206 *Id.* at 787 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1986)).

207 *See Clary*, 846 F. Supp. at 791.

208 *Id.*

209 *Id.*

210 United States v. Clary, 34 F.3d 709, 712 (citing United States v. Maxwell, 25 F.3d 1389 (8th Cir. 1994); United States v. Simms, 18 F.3d 588 (8th Cir. 1994); United States v.

anti-textual approach when it wrote, "we observed that even if a neutral law has a disproportionate adverse impact on a racial minority, it is unconstitutional only if that effect can be traced to a discriminatory purpose."[211] It bears repeating that the definition of "equal" requires that a law be proportionate and uniform in operation or effect.[212] Accordingly, once the Court found a disproportionate impact, there was no need to explore whether a discriminatory purpose exists since the law is already unequal. The court admitted that a stark disparate impact can, on its own, invalidate a law, but it failed to find a stark disparate impact in the case before it.[213] How much more stark can the disparate impact be? Ninety-eight percent of defendants convicted of crack cocaine charges in the Eastern District of Missouri between 1988 and 1992 were black.[214] On the national scale, 92.6% of those convicted of crack cocaine charges were black.[215] Judge Cahill, who is black, was right. There cannot be a penalty, as he put it, for "JUST USE"[216]

III. THE SCHOLARLY CRITICISM OF *DAVIS*

A. RACE AND EQUAL PROTECTION JURISPRUDENCE

Many scholarly pieces critiquing *Davis* pronounce varying concepts of how race and equal protection should interrelate. Certain pieces specifically address race and its correlation to equal protection. A "belief in color-blindness and equal process . . . would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued to the present day."[217] Race consciousness is a "central ideological and political pillar upholding existing social conditions; race consciousness . . . must be taken into account in efforts to understand

Parris, 17 F.3d 227 (8th Cir. 1994); United States v. Johnson, 12 F.3d 760 (8th Cir. 1993); United States v. Echols, 2 F.3d 849 (8th Cir. 1993); United States v. Womack, 985 F.2d 395 (8th Cir. 1993); United States v. Williams, 982 F.2d 1209 (8th Cir. 1992); United States v. Lattimore, 974 F.2d 971 (8th Cir. 1992); United States v. Willis, 967 F.2d 1220 (8th Cir. 1992); United States v. Simmons, 964 F.3d 763 (8th Cir. 1992); United States v. Hechavarria, 960 F.2d 736 (8th Cir. 1992); United States v. McDile, 946 F.2d 1330 (8th Cir. 1991); United States v. Johnson, 944 F.2d 396 (8th Cir. 1991); United States v. House, 939 F.2d 659 (8th Cir. 1991); United States v. Winfrey, 900 F.2d 1225 (8th Cir. 1990); United States v. Reed, 897 F.2d 351 (8th Cir. 1990); United States v. Buckner, 894 F.2d 975 (8th Cir. 1990)).

211 United States v. Clary 34 F.3d 709, 712 (1977).

212 *See supra* notes 94–97, 104–09, and accompanying text.

213 *Clary*, 34 F.3d. at 713 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. at 255–56 (1977); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1986)).

214 *Id.* at 797.

215 *Id.*

216 *Clary*, 846 F. Supp. at 796.

217 Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1345 (1988).

hegemony and the politics of racial reform."[218] Color-conscious, result-oriented remedies are favored over color-blind, process-oriented remedies.[219] Robert L. Hayman, Jr., adopted Patricia Williams's view, which provides:

> When segregation was eradicated from the American lexicon, its omission led many to actually believe that racism therefore no longer existed. Race-neutrality in law was the presented antidote for race bias in real life. With the entrenchment of the notion of race-neutrality came attacks on the concept of affirmative action and the rise of reverse discrimination suits. Blacks, for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be hired based on the color of our skin. Such is the silliness of simplistic either-or inversions as remedies to complex problems.[220]

The current equal protection perspective "is sensitive to only one mechanism of oppression: 'the purposeful affirmative adoption or use of rules that disadvantage the target group.'"[221] "By conditioning the availability of a remedy under the [F]ourteenth [A]mendment on proof that a decision maker purposefully set out to harm a person or group because of race, [the McKleskey majority] display minds trapped by visions of old conquests — the battles against de jure segregation and overt, intentional discrimination in the administration of statutes making no mention of race."[222] "They manifest views attuned only to the most blatant deprivations of . . . equal protection . . . and leave untouched deeper layers of racially oppressive official action."[223] Unconscious bias exists when a person believes that she is treating blacks and whites alike but is in fact treating them differently.[224] Whites may lack interaction and understanding with the black community, which leads to whites in power hav-

218 *Id.* at 1335.

219 *Id.* at 1346.

220 ROBERT L. HAYMAN, JR., THE SMART CULTURE 360 (1998) (quoting Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equality*, 87 MICH. L. REV. 2128 (1989)).

221 Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1424 (1988) (citing TRIBE, *supra* note 153, at 1518).

222 Kennedy, *supra* note 221, at 1419 (citing Brown v. Bd. of Educ., 374 U.S. 483 (1954); Louisiana v. United States, 380 U.S. 145 (1965)).

223 Kennedy, *supra* note 221, at 1419; *see also* Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (explaining that congressional comments, when put in historical context, show a racially discriminatory intent for passing federal crack cocaine laws).

224 David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 960 (1989).

ing little knowledge of the people most affected by the law. Essentially, "[whites] don't know who we [blacks] be."[225] Subsequently, unsubstantiated biases and prejudices create a sentiment of unconscious racism permeating legislation. "Process distortion exists where the unconstitutional motive of racial prejudice has influenced the decision."[226] A test looking at the cultural meaning of an allegedly discriminatory act is the best analogue and evidence of unconscious racism.[227] Charles R. Lawrence III concluded:

> If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the government action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decision makers. As a result, it would apply heightened scrutiny.[228]

Ian F. Haney Lopez argues that equal protection jurisprudence defines racism too narrowly and too broadly.[229] "Institutional racism easily occurs without conscious thought of race, and consciously considering race may stem from a desire to ameliorate rather than to perpetuate institutional racism."[230] His institutional analysis states that an effect-based approach is necessary to address past and current forms of institutional racism.[231] Unfortunately, he concedes too much and ignores the meaning of "equal" with, "[t]he Court need not, of course, constitutionalize an effects approach; yet, at a minimum, the Court must leave room for government to address discriminatory racial impact."[232] The meaning of "equal" in the Equal Protection Clause requires an effects test; thus, the Court does have to "constitutionalize"[233] such an approach. Merely leaving room for government to address discriminatory racial impact is not enough.[234] This is an incomplete proposal that ignores the plain meaning of "equal" and symbolizes how new forms of equal protection jurisprudence, which generally seem correct in one way or another, fail to require a disproportionate impact analysis. A theory of institutional racism

225 DMX, *Who We Be*, *on* THE GREAT DEPRESSION (Ruff Ryders/Interscope Records 2001).

226 Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 347 (1987).

227 *Id.* at 355–56.

228 *Id.* at 356.

229 Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1838 (2000).

230 *Id.*

231 *Id.* at 1840.

232 *Id.*

233 *Id.*

234 *See id.*

can, and should, include a disproportionate impact analysis to meet the meaning of *equal* protection.

Whites and blacks tend to disagree on whether unconscious racism exists.[235] Whites tend to think of racism as individual actions or attitudes of bigotry that are the exception rather than the rule.[236] Blacks tend to see racism as an ongoing and pervasive condition of American life.[237] Whites tend to support a requirement that constitutional violations be predicated on discriminatory intent, as the Court held in *Davis*.[238] Blacks put more determinative significance in disproportionate impact, even when direct proof of intent is lacking, as the Court held in *Yick Wo*.[239] The lack of a common definition of racial discrimination may make it more difficult for whites and blacks to seek solutions.[240]

Therefore, a return to the dictionary definition of "equal" creates a unifying, neutral presence with which both sides can agree to start their discussion of racial discrimination. The meaning of "equal," which was mostly defined in dictionaries by whites over time, specifically mandates that a law be proportionate and uniform in operation or effect;[241] thus, it supports the generally black perspective and the adoption of the disproportionate impact analysis. Prominent white jurists, including the *Yick Wo* and *Gomillion* courts, have accepted the more commonly held black perspective throughout history.[242] Likewise, scholars of all races regularly question and critique the narrow purposeful and intentional racial discrimination standard.[243] Thus, the more black perspective, less focused on specifically ascertainable intentional discrimination, has a long-standing foundation that has fostered a contemporary perspective accepted by a racially diverse legal community.

235 David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposefulness in The Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285, 315 (1998).

236 *Id.* at 315–16.

237 *Id.*

238 *Id.*; *see also* Washington v. Davis, 426 U.S. 229 (1976).

239 Crump, *supra* note 235, at 315; *see also* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

240 Crump, *supra* note 235, at 315.

241 *See supra* notes 94–97, 102, 104–09, and accompanying text.

242 *Yick Wo*, 118 U.S. 356 (1886) (deciding Justices were white); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (deciding Justices were white); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (deciding Justices were white); McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (three of four dissenting Justices were white); Colgrove v. Green, 328 U.S. 549 (1946) (dissenting Justice, Justice Black, was white); Palmer v. Thompson, 403 U.S. 217 (1971) (deciding Justices were white; Thurgood Marshall was joined by Justice Brennan and Justice White warning against grounding decisions on legislative purpose or motivation).

243 *See generally* Parts III.A–C (discussing the views of multiple scholars, of different races and gender, criticizing the *Davis* decision and its equal protection jurisprudence).

Race is not irrelevant until there is real, lived racial equality that makes race irrelevant.[244] If we reject the responsibility to re-make race, then we will be dying in denial, in the tomb of race.[245] Race must be conceived and portrayed consistent with history, science, and human experience.[246] With that said, "the problem of defining 'equality' remains."[247] That is precisely why a hybrid textualist approach to beginning equal protection jurisprudence makes sense. If we admit that race has transformed society and any clear notion of equality, then we must not only re-cognize race, but re-cognize equal protection law as well. Just as color-blindness leaves us improperly entombed in race, we are currently entombed in similarly inaccurate equal protection jurisprudence. Real, lived equality of the races cannot occur until we know what equality is. By returning to the meaning of equal we can begin to understand how to apply equality through the law.

B. WHAT IS INTENTIONAL RACIAL DISCRIMINATION?

Many scholars describe intentional racial discrimination by analyzing or redefining intent. The most fundamental and persuasive rebuttal of the intent requirement in equal protection law appropriately flows from the text of the Equal Protection Clause itself. Gayle Binion states:

> [T]he Constitution includes no reference to intent. The Equal Protection Clause states, "[N]or shall any State . . e deny .e. . the equal protection of the laws." The words themselves cannot be the source of the intent rule, nor is it implied by the words of the Equal Protection Clause. The conclusion is readily reached by even the casual reader of the Constitution that the rule must be the result of quite subtle interpretation. Because of the great importance of the rule, one is entitled to expect a persuasive judicial exposition and proof, but little has been forthcoming.[248]

If the Fourteenth Amendment read, "No State shall intend to deny to any person within its jurisdiction the equal protection of the laws," then the text would require an intent analysis. Without that type of wording, the clause must only be read to provide *equal* protection of the laws. A law that disproportionately affects a racial minority group violates equal

244 Robert L. Hayman, Jr., *Re-Cognizing "Race": An Essay in Defense of Race-Consciousness*, 6 WIDENER L. SYMP. J. 37, 45 (2000).

245 *Id.*

246 *Id.* at 43.

247 *Id.*

248 Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 409 (1984) (citation omitted).

protection, regardless of the law's intent. That law might not violate an *Intent* Protection Clause, but that clause does not exist in the Constitution.

"[T]he bare insistence on proof of intent suggests a rather odd preoccupation with the mindset of the discriminator and a concomitant disregard of the impact on the victim."[249] "The nature of contemporary discrimination . . . is more unconscious than conscious, more structural than individual."[250] Built-in biases guarantee disparate results.[251] In the end, "[r]equiring proof of intentional discrimination simply lets most discrimination be."[252] A disproportionate impact analysis will account for unconscious and structural racism that produces disparate results. This approach protects the victim and solves the problem of only relying on intent to determine when racial discrimination occurs.

David A. Strauss's Reversing the Groups Test proposes that "[t]he discriminatory intent standard requires that race play no role in government decisions. That is, the government decision maker must act as if she does not know the race of those affected by the decision; otherwise she violates the discriminatory intent standard."[253] The test asks: "suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent."[254] This well thought out approach states that the test is "the formula that best captures the definition [of intent]."[255]

It is worthwhile to attempt to define discriminatory intent. Strauss notes that the Supreme Court has spent almost no time on the question of what discriminatory intent means.[256] However, his definitional analysis is lacking because it does not start with the meanings of "equal" or "discriminatory" or "intent."[257] Starting with the definitions of those words, particularly "equal," would open up the discussion to include a dispro-

249 HAYMAN, *supra* note 220, at 193.

250 *Id.* at 193–94; *see also* Strauss, *supra* note 224, at 960 ("[Unconscious bias] may be . . . more common today than conscious bias) (citing Paul Brest, Palmer v. Thompson, *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. CT. REV. 95); Lawrence, *supra* note 226, at 339–44.

251 HAYMAN, *supra* note 219, at 194.

252 *Id.*; *see also* Kimberly Mache Maxwell, *A Disparity That Is Worlds Apart: The Federal Sentencing Guidelines Treatment of Crack Cocaine and Powder Cocaine*, 1 RACE & ETHNIC ANCESTRY L. DIG. 21 (1995) (explaining that the discriminatory purpose test, relying on blatant discrimination, will make it almost impossible for courts to find a law unconstitutional).

253 Strauss, *supra* note 224, at 956.

254 *Id.* at 957.

255 *Id.* at 956.

256 *Id.*

257 *See id.* at 956–59.

portionate impact analysis as well as a new interpretation of discriminatory intent. By failing to define "equal," a gap forms. A formulation of the definition of "discriminatory intent" occurs with no corresponding definition of disproportionate impact. Regardless of how accurate the definition of "discriminatory intent" is, it will not completely articulate the requirements of equal protection absent an equally powerful disproportionate impact analysis.

Pamela S. Karlan proposes an expansion of the definition of "discriminatory intent" to include "knowledge, recklessness, and negligence."[258] She contends that this would "serve the Constitution's twin goals of condemning socially offensive attitudes and protecting legitimate activity"[259] better than an effects test. In her view, an effects test (1) fails to condemn a policy for its immorality and (2) prevents our desire to remedy past purposeful and intolerable exclusion through policies like affirmative action.[260] Karlan thinks the effects test would "contribute nothing more than an intent requirement"[261] that could be justified through a compelling state interest. She proposes a mutually exclusive equal protection doctrine.[262] There should not be an "either or" or "one or another" equal protection jurisprudence regarding intent and impact. Expanding the definition of "intent" may prevent laws from unequally affecting racial minorities. This, however, should not preclude supplementing equal protection jurisprudence with a disproportionate impact analysis. Most important, since the meaning of "equal" requires that a law be proportionate and uniform in operation or effect,[263] a disproportionate impact analysis is required by the Fourteenth Amendment and supported by *Yick Wo*[264] and *Gomillion*.[265]

Invalidating a law for its disproportionate impact imposes a moral check on a law, its drafters, and those enforcing it. The determination that a law, in its effect, is unequal because it discriminates against racial minorities is a sound moral statement condemning a law as unconstitutional. Unconstitutional is unconstitutional, and it implicates moral judgment. Would a black man, who possessed one hundred times less cocaine than his white counterpart, be unsatisfied with the commutation of his sentence because a law was ruled unconstitutional for its impact, as opposed to its intent?

258 Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 126 (1983).

259 *Id.*

260 *Id.* at 126–27.

261 *Id.* at 127.

262 Lawrence, *supra* note 226, at 321.

263 *See supra* notes 94–97, 102, 104–09, and accompanying text.

264 118 U.S. 356 (1886).

265 364 U.S. 339 (1960).

An effects test would not just "be little more than a requirement that acts with disparate effects be subjected to heightened scrutiny."[266] Karlan passes over the important point — an effects test would trigger strict scrutiny review, in which the challenge almost always results in the revocation of the questioned statute.[267] Facially discriminatory laws or facially neutral laws with discriminatory intent are usually invalidated under strict scrutiny review.[268] Laws with a disproportionate impact would be invalidated as well. Currently, challenges to laws with a disproportionate impact almost always fail because they are reviewed under the rational basis test. Under that test, the questioned law only has to be "rationally related to a legitimate state interest."[269] For example, a number of cases have upheld federal crack cocaine laws under the rational basis test.[270] If those courts were forced to review those challenges under a strict scrutiny standard, the results would most likely be the direct opposite. Some commentators have even argued that if courts are unwilling to strictly scrutinize the federal government's crack cocaine sentencing scheme, the courts should nevertheless review the laws under a heightened rational basis test.[271] The standard of review employed by the Court is not comprehensive, but it is "[t]he most important aspect of a claim of legislative violation of the Equal Protection Clause."[272] An argument that leads to unequal laws reviewed under a strict scrutiny test or even a heightened rational basis test should be supported, not dismissed.

An effects test would not hinder social programs advancing minority rights or allow "no principled justification for affirmative action."[273] Programs such as affirmative action are specifically designed to have a proportionate impact. If minorities make up 30% of the population, they should have a chance at 30% of educational and employment opportunities.[274] A program allowing an equally qualified minority to gain an edu-

266 Karlan, *supra* note 258, at 127.

267 Perkins, *supra* note 49, at 73 n.19.

268 *Id.* at 75 (citing Kruse, *supra* note 51, at 1794).

269 Angeli, *supra* note 55, at 1229.

270 Sklansky, *supra* note 194, at 1303 (citing United States v. Clary, 34 F.3d 709 (8th Cir. 1994); United States v. Singleterry, 29 F.3d 733 (1st Cir. 1994); United States v. Byse, 28 F.3d 1165 (11th Cir. 1994); United States v. Thompson, 27 F.3d 671, 678–79 (D.C. Cir. 1994); United States v. Coleman, 24 F.3d 37 (9th Cir. 1994); United States v. Stevens, 19 F.3d 93, 96–97 (2d Cir. 1994); United States v. Bynum, 3 F.3d 769 (4th Cir. 1993); United States v. Chandler, 996 F.2d 917, 918–19 (7th Cir. 1993); United States v. Reece, 994 F.2d 277 (6th Cir. 1993); United States v. Easter, 981 F.2d 1549, 1558–59 (10th Cir. 1992); United States v. Frazier, 981 F.2d 92, 95 (3d Cir. 1992); United States v. Galloway, 951 F.2d 64 (5th Cir. 1992)).

271 Angeli, *supra* note 55, at 1229.

272 Perkins, *supra* note 49, at 73.

273 Karlan, *supra* note 258, at 127.

274 Christopher J. Schmidt, *Why Society Needs Affirmative Action*, WIDENER L. FORUM, Apr. 23, 2001, at 5.

cational or employment position over a white candidate, where the number of minorities present is disproportionately low, specifically provides for proportionality through a merit-based system as opposed to a "who you know system."[275] There is nothing disproportionate in that policy; thus, it does not violate the meaning of "equal." "The very Congress that promulgated the Fourteenth Amendment practiced race-based affirmative action on a number of occasions . . . ."[276] Congress's actions in the 1860s were such that a true believer in the text or original meaning of the Constitution would be obliged to conclude that race-based preferences were not outlawed by the Fourteenth Amendment.[277] This is not to say that the drafting history or legislative intent of these statutes are relevant. However, they are validly enacted laws from Reconstruction that speak for themselves. Thus, they provide an accurate historical view of race-conscious congressional legislation at that time.

Next, "no race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum."[278] The remedial use of racial criteria should be permissible under intermediate scrutiny if it is substantially related to a government interest.[279] Laws that disproportionately impact racial minorities are presumably unequal, thereby requiring the strictest standard of review. On the other hand, affirmative action allows racial minorities a proportionate opportunity when one does not exist in educational and employment settings so the goal of proportionality in that sense does not mandate the strictest of scrutiny. Accordingly, there should be a distinction between benign and invidious discrimination.[280] A critical difference exists between a decision to exclude a minority because of his or her skin color and a decision to in-

275 *Id.*

276 *See* Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1106–07 (1998) (citing Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–32 (1997)). A statute appropriated money for "destitute colored women and children." *Id.* at 430 (citing Act of July 28, 1866, ch. 296, 14 Stat. 310, at 317). A welfare statute for the District of Columbia in 1867 granted money to "colored" people in the nation's capital. *Id.* at 430–31 (citing Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20). Congress made special appropriations and adopted special procedures for awarding bounty and prize money to the "colored" soldiers and sailors of the Union army. *Id.* at 431 (citing Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 528; Act of Mar. 3, 1869, ch. 122, 15 Stat. 301, 302); Resolution of June 15, 1866, No. 46, 14 Stat. 357, 358–59.

277 Rubenfeld, *supra* note 276, at 1107; *see also* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

278 Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 296 (1986) (Marshall, J., dissenting).

279 *Id.* at 301–02.

280 *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1152 (1987) (citing Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steel Workers v. Weber, 95 ETHICS 86, 89 (1984)) (explaining that racial discrimination against the majority does not carry with it the problems of discrimination against an historically disfavored group); *see also* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974).

clude more members of the minority race.[281] "[T]he fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons."[282] The inclusion of minorities tends to dispel that illusion whereas their exclusion could only tend to foster it.[283] Finally, even if a pro-minority program were challenged under an effects test, strict scrutiny review could save it by showing that "past pervasive discrimination makes bringing blacks into the economic and professional mainstream 'a state interest of highest order.'"[284]

Theodore Eisenberg proposes impact analysis, coupled with a causation principle.[285] This analysis states, "uneven impact is suspect if it is reasonably attributable to race."[286] "If we are to attach constitutional significance to uneven impact, it seems reasonable to ask why that particular instance of uneven impact exists. The causation principle requires that inquiry to be made."[287] Eisenberg admits his idea "will require difficult judgments and may generate new uncertainties to replace those that now encumber the [E]qual [P]rotection [C]lause."[288] Moreover, he concludes, "[t]he constitutional role of disproportionate impact would have beenesimplified had the Court found all racially uneven impact to be suspect."[289] Eisenberg states that the Court's refusal to do so "is not beyond the range of responsible constitutional decision making."[290]

Eisenberg's theory does not meet the boundaries of the meaning of "equal." It ignores *Yick Wo*,[291] *Gomillion*,[292] and to a lesser degree *Arlington Heights*'s[293] position that, "absent a pattern as stark as *Yick Wo* and *Gomillion*, impact alone is not determinative."[294] Therefore, an impact analysis, on its own, can satisfy equal protection jurisprudence in the right scenario. A disproportionate impact analysis is necessary to comply with the Equal Protection Clause to ensure that a law is propor-

281 *Wygant*, 476 U.S. at 316 (Stevens, J., dissenting).

282 *Id.*

283 *Id.*; *see also* Hayman, *supra* note 244, at 44 (describing affirmative action as the direct opposite of Jim Crow laws).

284 Karlan, *supra* note 258, at 127 n.97 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J., dissenting)).

285 Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 169 (1977).

286 *Id.*

287 *Id.*

288 *Id.* (citing Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 J. PHILOSOPHY & PUB. AFF. 107, 144–45, 175 (1975)).

289 Eisenberg, *supra* note 285, at 168.

290 *Id.*

291 118 U.S. 356 (1886).

292 364 U.S. 339 (1960).

293 429 U.S. 252 (1977).

294 Perkins, *supra* note 49, at 75 (quoting *Arlington Heights*, 429 U.S. at 265–66).

tionate and uniform in operation or effect. A causal connection, placed after a disproportionate impact is found, is not necessary under the definition of "equal." The subsequent analysis of what caused a disproportionate impact falls into the trap of unnecessarily relying on intent to invalidate a law.

Neutrality is a much broader and more inclusive concept than the invidious intent standard.[295] This is the best standard put forth for analyzing intent and its relationship to impact. K.G. Jan Pillai stated:

> A law can be non-neutral without being discriminatory. If it disproportionately and unreasonably burdens or disadvantages an identifiable group, the law is non-neutral to the affected group. Discrimination, intentional or not, is a sufficient, but not a necessary, condition of non-neutrality. Intentional discrimination is the prototype of non-neutrality, but not all instances of non-neutrality are the product of intentional discrimination.[296]

This paradigm promotes an inclusive form of equal protection jurisprudence that allows for disproportionately applied laws to trigger the same analysis as discriminatorily intended laws. Therefore, the meaning of "equal" is fully contained within this ideal. Placing discriminatory impact and discriminatory intent on the same plane of neutrality prevents all forms of unequal protection, thereby eliminating the inaccurate notion that discriminatory intent must buttress a showing of disproportionate impact.

C. THE PROGRESSIVE, CULTURALLY ORIENTED EQUAL PROTECTION DOCTRINES

A number of scholars propose culturally driven equal protection ideals. The substantive core of equal protection is a principle of equal citizenship.[297] This guarantees that each person is a respected, responsible, participating member of society.[298] Weaker members of a political community are entitled to the same concern and respect from their government as the more powerful members.[299] The disproportionate impact of laws on racial minorities proves that powerful members of society and the government do not have the same concern and respect for them be-

295 K.G. Jan Pillai, *Shrinking Domain of Invidious Intent*, 9 WM. & MARY BILL RTS. J. 525, 587 (2001).

296 *Id.* at 587–88.

297 Kenneth L. Karst, *Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977), *quoted in* Sklansky, *supra* note 194, at 1298 n.72.

298 Karst, *supra* note 297, at 4.

299 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198–99 (1977), *quoted in* Sklansky, *supra* note 194, at 1298 n.72.

cause "[e]ither they don't know, don't show, or don't care about what's goin' on in the hood."[300] The Equal Protection Clause prohibits distributions that are not an effort to serve a public value but reflect the view that it is desirable to treat one person better than another.[301] Equal protection prohibits reinforcing the subordinate position of a disadvantaged group.[302] A law unjustly discriminates against a group if it is part of a pattern that denies those subject to it a meaningful opportunity to realize their humanity.[303] "The function of the Equal Protection Clause . . . is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves — or at least widespread elements of the constituency on which they depend for reelection."[304] Society is "far from understanding, let alone agreeing about, what true equality would mean."[305] "The essential content of equal protection remains so thoroughly up for grabs."[306]

Therefore, a return to the textual meaning of "equal" is in order. What better way is there to unify the numerous methods of interpreting the Equal Protection Clause? Instead of a progressive movement,[307] a revisionist movement may be necessary. To progress, or build upon a convoluted mass of differing equal protection ideals, will only add to the confusion. On the other hand, correcting the error of current equal protection jurisprudence through the text synthesizes the law through a unifying, stable principle.

David A. Sklansky adopts a " 'case-by-case, year-by-year resolution of the problem.' "[308] He argues that simplicity and consistency of equal protection block development.[309] In his view, this leaves "an equal protection law of great folly in detail, great overall order, and little capacity for growth."[310] The problem with equal protection law is not its simplicity and consistency; it is its inaccuracy. A return to the meaning of "equal" and the adoption of the disproportionate impact analysis will

300 BOYZ 'N THE HOOD (Columbia Tri-Star 1991) (quoting Doughboy).

301 Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 128 (1983), *cited in* Sklansky, *supra* note 194, at 1298 n.72.

302 Fiss, *supra* note 288, at 157.

303 Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1077 (1980), *cited in* Sklansky, *supra* note 194, at 1298 n.73.

304 Sklansky, *supra* note 194, at 1301 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 170 (1980)).

305 Sklansky *supra* note 194, at 1314–15.

306 *Id.* at 1314.

307 *See id.* at 1315.

308 *Id.* (quoting Karst, *supra* note 297, at 65).

309 Sklansky *supra* note 303, at 1315. (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 22–23, 179 (1921) (quoting MUNROE SMITH, JURISPRUDENCE 21 (1909))).

310 Sklansky, *supra* note 194, at 1315.

provide accurate equal protection results. Those proper results will breed simplicity and consistency as well, but in an appropriate manner.

Sklansky argues for a burden-shifting test to judge equal protection law.[311] He states that a challenger could use a disproportionate impact to shift the burden to the government to provide a non-discriminatory reason for the law.[312] The government would then be required to rebut the inference of conscious or unconscious racism with a neutral explanation for the distinction.[313] This is nothing more than a *Batson*[314] test. "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."[315] "'Except in the most egregious case, lawyers can almost always come up with a facially neutral explanation, and you have to accept it at its face value unless it flies in the face of everything you know.'"[316] The protection is illusory, and racial discrimination will continue.[317]

Sklansky contends that federal crack cocaine laws would be ruled unconstitutional under this approach.[318] How so? The state could supply myriad reasons that would be considered race-neutral. This is very similar to the low threshold the government has to meet in the current rational basis test that adjudicates constitutional challenges to federal crack cocaine laws.[319] In fact, Sklansky appropriately cites a list of Federal Circuit Court of Appeals decisions denying black defendants' equal protection challenges to federal crack cocaine laws via a rational basis test.[320] The unanimity of those decisions would extend to courts using his burden-shifting test. Providing a race-neutral reason for federal crack cocaine laws is synonymous with what happens under current rational

311 *Id.* at 1318.

312 *See id.* at 1319.

313 *Id.*

314 Batson v. Kentucky, 476 U.S. 79 (1986) (holding that, after a defendant establishes a prima facie case of racial discrimination in striking jurors with peremptory challenges, the burden shifts to the state to provide a race-neutral justification).

315 *Id.* at 106 (Marshall, J., concurring).

316 William C. Smith, *Challenges of Jury Selection*, 88 A.B.A. J. 34, 37 (Apr. 2002) (quoting Thomas Marten, J. U.S. District Court, District of Kansas).

317 *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring).

318 Sklansky, *supra* note 194, at 1319.

319 *See* State v. Russell, 477 N.W.2d 886,887 (Minn. 1991) (citing W. & S. Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648, 668 (1981)).

320 Sklansky, *supra* note 194, at 1303 n.93 (citing United States v. Clary, 34 F.3d 709 (8th Cir. 1994); United States v. Singleterry, 29 F.3d 733 (1st Cir. 1994); United States v. Byse, 28 F.3d 1165 (11th Cir. 1994); United States v. Thompson, 27 F.3d 671, 678–79 (D.C. Cir. 1994); United States v. Coleman, 24 F.3d 37 (9th Cir. 1994); United States v. Stevens, 19 F.3d 93, 96–97 (2d Cir. 1994); United States v. Bynum, 3 F.3d 769 (4th Cir. 1993); United States v. Chandler, 996 F.2d 917, 918–19 (7th Cir. 1993); United States v. Reece, 994 F.2d 277 (6th Cir. 1993); United States v. Easter, 981 F.2d 1549, 1558–59 (10th Cir. 1992); United States v. Frazier, 981 F.2d 92, 95 (3d Cir. 1992); United States v. Galloway, 951 F.2d 64 (5th Cir. 1992)).

basis review. The government cites any study, statistic, or comment tending to show how the law is rationally related to a legitimate interest. The reviewing court then upholds the law. A federal prosecutor could cut and paste a prior race-neutral rational basis argument and resubmit it to a burden-shifting court and receive the same result.

David H. Angeli proposes a better, more precise burden-shifting test.[321] His test states that if Congress acts on false assumptions and cannot state further objectives for a law, a prima facie case of a process defect arises.[322] "The burden would then shift to the government to rebut the presumption by showing the classification in question is in fact rationally related to its articulated purpose."[323] This eliminates the government's ability merely to show that the law *could* have a rational relationship to a legitimate interest.

This approach provides a more specific methodology in which to conduct a rational basis review. However, it remains to be seen whether scholars have their "minds trapped"[324] in the rational basis test. Laws with suspect classifications are subject to strict scrutiny.[325] Those suspect classifications that purposefully discriminate against minorities that have been historically subject to oppression are subject to strict scrutiny.[326] This can be shown through the discriminatory administration of an otherwise facially neutral law.[327] Accordingly, once a law is shown to have a disproportionate impact, the meaning of "equal" and *Yick Wo* correctly command that the law in question be reviewed under a strict scrutiny test. Just as a facially discriminatory law and a neutral law drafted with discriminatory intent are subject to strict scrutiny, a law violating the proportionality and uniformity portions of the meaning of "equal" also requires a strict scrutiny review.

Progressive or culturally oriented doctrines propose evaluating equal protection under the cultural meaning of a law or focusing on the objective, social meaning of an action. While our end result might be the same when analyzing laws that disproportionately impact a racial minority, what thought process will follow a clearer, more succinct roadmap

321 Angeli, *supra* note 55, at 1234.

322 *Id.*

323 *Id.*

324 *See* Kennedy, *supra* note 221, at 1419 ("By conditioning the availability of a decision maker purposely set out to harm a person or group because of race, Justice Powell and his colleagues display minds trapped by the visions of old conquests — battles against de jure segregation and over intentional discrimination in the administration of statutes making no mention of race.").

325 Lowney, *supra* note 182, at 154.

326 *Id.* at 154–55 (citing Graham v. Richardson, 403 U.S. 365 (1971); Levy v. Louisiana, 391 U.S. 68 (1968); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944)).

327 Lowney, *supra* note 182, at 155 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

that encompasses a full analysis of the Equal Protection Clause and creates long-standing precedential weight? The complexity and extension of doctrinal ideals beyond the text of the Equal Protection Clause is exhibited in the following passage. Charles R. Lawrence III, states:

> John Denvir, in advocating a similar hermeneutical approach to constitutional interpretation, notes that this approach avoids the critiques of formalism and objectivism advanced against the positivist approach as well as the critique of nihilism against those on the left who, in seeking to demystify constitutional law, often seem to reject the validity of all judicial review.[328]

The value of lengthy, obscure statements to equal protection discourse is questionable. The more confusing they become, the less likely they are to promote a positive change in equal protection jurisprudence. As that short passage above indicates, there are multiple modes of complicated constitutional thought fostering different interpretive theories and rebutting contradictory methodologies. Without wanting to deter thought or scholarship, we can reasonably ask, if the resulting impact of new equal protection thought only circulates within the confines of an enclosed circle of academics, then what effect do they really have on the law and society? What changes do they promote? That is why only an addition to current equal protection doctrine seems wise — the adoption of a disproportionate impact analysis, under strict scrutiny review, when laws unequally affect racial minorities. While redefining intent may be necessary, that is a secondary component to changing equal protection law. First, we must add a disproportionate impact analysis to conform to the text. Then, we need to re-sculpt intent and purpose.

A case-by-case or culturally driven doctrine constantly fluctuates. That type of broad jurisprudence provides little judicial restraint or predictability and does not ensure accuracy. Cultural settings and trends are just as susceptible to differing interpretations as any other form of legal jurisprudence. Applying the disproportionate impact analysis, under a strict scrutiny review, will inherently include any cultural or societal arguments that slip through the cracks of the current standard. A law motivated by unconscious racism or incorrect cultural or social mores will fall when its flaws are exposed in their disproportionate impact on minorities.

[328] Lawrence, *supra* note 226, at 385 (citing John Denvir, *Justice Brennan, Justice Rehnquist, and Free Speech*, 80 Nw. U. L. REV. 285, 290 (1986)).

D. WHY STARTING WITH THE TEXT IS BEST

The search for the answer to interpreting the Equal Protection Clause should at least start with the text. If the text, relevant case law, and other legal ideas satisfy what the clause mandates, then why muddy the waters with contradictory, individualistic interpretations that add another dart to a crowded dartboard looking for one bull's-eye? Besides, if the text of the Equal Protection Clause answers the dilemma, maybe we should check our intellectual egos at the door and accept the result.

It is not the intention here to propose that the meaning of the Constitution is "fixed."[329] "[T]he government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today."[330] In this instance, though, the plain meaning of "equal" helps solve the dilemma of how to change equal protection jurisprudence. Through the definition we can ensure minorities "win equality by law" by creating "new constitutional principles . . . to meet the challenges of a changing society."[331] A partially revisionist, partially textualist approach can nurture life into the Constitution.[332] Since the original meaning of "equal" is not implemented in equal protection law, a rebirth of its meaning will continue the Constitution's legacy as a living document.[333] The Equal Protection Clause can be born again through this approach because its analysis is no longer backward looking. It is backward starting, meaning we begin with the Fourteenth Amendment's Equal Protection Clause and define and follow it to the present day. The life of *equal* protection has been appropriately nurtured in case law by using the disproportionate impact analysis. That jurisprudence has been placed on life support with *Davis*[334] and *McCleskey*.[335] To save the life of equal protection, we must return to its foundation for the cure. Perhaps the cure offered here is the over-the-counter variety, lacking a new intellectual path and subscribing to basic dictionary definitions, but it may save equal protection law.

The battle currently being waged is based on a retreat from what equal protection requires. The scholarly pieces and judicial opinions promoting a new approach or a disproportionate impact analysis need only look to the text of the Fourteenth Amendment to start their analyses.

329 Marshall, *supra* note 88, at 2.
330 *Id.*
331 *Id.* at 5.
332 *Id.*
333 *Id.*
334 426 U.S. 229 (1976).
335 481 U.S. 279 (1987).

Surprisingly, case law and scholarly pieces, for the most part, only indirectly relate to the definition of "equal." As these equal protection dialogues become more complicated and expansive, the argument moves further from its genesis. Rarely is the Equal Protection Clause's text addressed in a constitutional law class, a casebook, or a legal brief.[336] Consequently, the word "equal" is probably not defined. Instead of jumping to stage two or three of the equal protection interpretation debate, we should return to stage one: the text of the Equal Protection Clause itself. It begins a journey that leads to a clear, succinct answer to equal protection law — a disproportionate impact analysis has to supplement the currently accepted Supreme Court's equal protection jurisprudence.

IV. REBUTTING POTENTIAL COUNTERARGUMENTS

A. SHOULD WE START WITH THE TEXT?

David A. Strauss argues that the text is not the obvious starting point for most legal analysis.[337] He argues that relying on the text infers that some people at some time got it right and that we must be bound forever by their words.[338] Strauss contends that the text does not provide judicial restraint because broad terms, such as those in the Fourteenth Amendment, can be interpreted to effectuate many differing ideals.[339] He believes precedent prevents judicial activism and binds judges to a certain form of thought.[340]

Akhil Reed Amar explained the views of doctrinalists like Strauss:

> [D]octrinalists . . . rarely try to wring every drop of possible meaning from Constitutional text, history, and structure. Instead, they typically strive to synthesize what the Supreme Court had said and done, sometimes rather loosely, in the name of the Constitution. For them, the elaborated precedent often displaces the enacted text.[341]

Amar further noted:

> What, then, is the proper role for judicial doctrine? A thorough . . . commitment to the document would leave vast space for judicial doctrine, but doctrine would ultimately remain subordinate to the document itself. Case

336 SCALIA, *supra* note 126, at 39.
337 *Cf.* Strauss, *supra* note 89, at 1154.
338 *Id.*
339 *Id.* at 1157.
340 *Id.*
341 Amar, *supra* note 67, at 26–27.

> law would work to concretize the Constitution, not to amend or eclipse it.[342]

It is true that the text alone, in isolation from precedents and traditions, cannot solve legal problems.[343] However, those precedents were, at some point, based on the text. Moreover, the use of precedent to restrain judges can be more harmful than utilizing the text as a starting point. The separate-but-equal doctrine of *Plessy v. Ferguson*[344] survived for more than fifty years due to precedent. That type of horrific, incorrect precedent can stand for long periods, while the text can always be used as a starting point to determine if subsequent precedent was accurate or not.[345] Amar shows how the document can cure the doctrine's error in this regard:

> [V]arious supporters of the Fourteenth Amendment stated that it would not prohibit segregation. How, then, can we read it to do . . . what they denied it would do? By not overreading the legislative history, or underreading the text. The text calls for equal protection and equal citizenship, pure and simple.[346]

The purpose of this very article, and many others discussed herein, is to advocate overturning the *Davis*[347] decision that stands due to precedent. Federal judges, with life tenure, and who appear at least sympathetic to adopting the disproportionate impact analysis, still hedge before using a disproportionate impact analysis to invalidate a law because of the presence of precedent.[348] Their caution is misplaced, though, because *Davis* is an example "where modern doctrine has diverged from the document."[349] To prevent judges from twisting broad constitutional terms to fit their ideology, we should start and comply with the text. To ignore the text is to forget the starting line; to rely solely on the text is never to finish the race.

B. DISTINCTIONS IN THE DEFINITION OF "EQUAL"

A counter analysis to my argument may include an attempt to distinguish the differing definitions of "equal." That argument may be par-

342 *Id.* at 78.

343 Strauss, *supra* note 89, at 1154.

344 163 U.S. 537 (1896). *But see* Brown v. Bd. of Educ., 347 U.S. 483 (racially segregrated schools invalidate the Equal Protection Clause).

345 Powell, *supra* note 75, at 667–68.

346 Amar, *supra* note 67, at 63–64.

347 426 U.S. 229 (1976).

348 *See* United States v. Simmons, 964 F.2d 763, 767 (8th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992); *see also* United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring).

349 Amar, *supra* note 67, at 76.

ticularly made in reference to dictionaries that define "equal" or similar words as proportionate,[350] as opposed to dictionaries that define "equal" or similar words as being uniform or uniform in operation or effect.[351] The latter more definitively illustrate how the operation or effect of a law must be proportionate. Those definitions explicitly state that "equal" encompasses a resultant operation or effect, not just a balanced or proportioned creation.[352] Therefore, a law must have a *proportionate* operation or effect to survive equal protection scrutiny. Those dictionaries that only define "equal" as proportionate or not showing variation in proportion do not explicitly define "equal" in the context of operation or effect.[353]

This distinction is minimal to the point that it is meaningless. A law is not a tangible item needing a proportionate amount, quantity or ratio of certain qualities that would enact the more basic proportionate analysis. The application of "proportionate" toward a law has to be an evaluation of the amount, quantities, and ratios of its enactment and application. Because other contemporary definitions more explicitly define how "equal" has to be uniform in operation or effect, it is clear that the proportionality meanings must be applied to a law's face, intent, and effect. There is no support for the idea that a proportionality analysis should only extend to a laws face and intent, thereby excluding a proportionality analysis regarding the impact of a law. To provide equal protection, a law must be equal, or in this case, proportionate on its face, in intent, and in application.

The definitions stating that "equal" means that all objects have to be regarded or affected in the same way[354] provide authoritative support for the notion that any proportionality or uniformity analysis must be applied to a laws effect. In fact, nowhere in the meaning of "equal" does it say that proportionality or uniformity is only applied to one or two aspects of something. In this something, a law, there are three aspects (the face, the intent, and the impact) that require equal treatment.

The starting point for a proportionate analysis begins with, but does not end with, the face of a law. For example, a law stating, "Anyone who possesses five grams of cocaine base will receive a mandatory minimum sentence of five years, and anyone who possesses five grams of powder cocaine will receive a mandatory minimum sentence of five years," is proportionate on its face. Anyone possessing five grams of cocaine base is subject to the same penalty as someone possessing five

350 *See supra* notes 94, 104–07, and accompanying text.
351 *See supra* notes 95–96, 108–09, and accompanying text.
352 *See supra* note 108, and accompanying text.
353 *See supra* notes 94, 104–07, and accompanying text.
354 *See supra* note 110.

grams of powder cocaine. Under current law, the facially proportionate law's intent is also examined to ensure proportionality in that regard. However, that does not end the analysis of whether a law is truly equal, or in this case, proportionate. Without a further analysis into the operation or effect of the law, the evaluation of whether the application of the law is proportionate or not will never occur. The proportionate analysis will cease; thus, the determination of whether the law is truly equal will also end and a component of the definition of the word "equal" will not be fully incorporated.

C. DEFEATING ANY STARE DECISIS IN *DAVIS*

The doctrine of stare decisis cannot save current equal protection jurisprudence or uphold the *Davis*[355] decision. Stare decisis is not an inexorable command when interpreting the Constitution.[356] It is at its weakest in application to constitutional cases.[357] While the doctrine of stare decisis demands some special justification for a departure from longstanding precedent,[358] we must remember that:

> A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors have put on it.[359]

Thomas Lee adopted Justice Brandeis' view that:

> [I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this [C]ourt has often overruled its earlier decisions.

355 426 U.S. 229 (1976).

356 Dickerson v. United States, 530 U.S. 428,n443 (2000) (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)); *see also* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–08 (1932) (Brandeis, J., dissenting) (asserting that stare decisis is not a universal, inexorable command).

357 Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 704 (1999) (citing *Agostini*, 521 U.S. at 235–38 (1997)).

358 *Dickerson*, 530 U.S. at 443 (citing United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996)).

359 Lee, *supra* note 357, at 704 (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949), *quoted in* South Carolina v. Gathers, 490 U.S. 805, 824–25 (1989) (Scalia, J., dissenting)); *see also id.* at 704 n.318 (citing Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) (asserting that the only correct rule of decision is "the [C]onstitution and not what we have said about it")); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 29–30 (1994) (arguing that judicial power includes a structural inference that the Constitution is supreme over all competing sources of law); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 319 n.349 (1994) ("[J]udges are bound to interpret the law as they understand it, not as it has been understood by others").

> The Court bows to the lessons of experience and the force of better reasoning, recognizing the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.[360]

A number of legal sources, both past and present, sufficiently contradict current equal protection jurisprudence, thereby adequately decreasing the relevance of stare decisis in *Davis*. *Yick Wo*[361] and *Gomillion*[362] use a disproportionate impact analysis to prevent racial discrimination against minorities. The Supreme Court admits as such by stating, "absent a pattern as stark as Gomillion and Yick Wo, impact alone is not determinative."[363] Therefore, the Court concedes that the disproportionate impact analysis is appropriate and constitutionally sound.[364] This declaration establishes a window of opportunity for current and future courts to utilize a disproportionate impact analysis. The *Davis* decision stands, but under *Arlington Heights* it cannot stand for the proposition that a disproportionate impact analysis, used on its own, is precluded in equal protection jurisprudence. *Arlington Heights* requires that *Yick Wo* and *Gomillion*, two truly long-standing decisions, receive stare decisis treatment regarding the implementation of a disproportionate impact analysis. No decision can eliminate the use of a disproportionate impact analysis because it squares with the text of the Equal Protection Clause, case law, and common sense.

D. THE SLIPPERY SLOPE FALLACY

A disproportionate impact analysis cannot be refuted by the mischaracterization that its adoption will create endless rulings overturning otherwise valid statutes. This common argument has been regularly expressed. "When faced with a novel equal protection claim, particularly one based to any extent on racially disproportionate impact, the Court has tended to worry about the implications of its decision for the entire range of government action — and then to reject the argument."[365] *Davis* followed this mantra when it stated:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than an-

360 Lee, *supra* note 357, at 704–05 (quoting *Burnet*, 285 U.S. at 405–08 (1932) (Brandeis, J., dissenting)).

361 118 U.S. 356 (1886).

362 364 U.S. 339 (1960).

363 Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

364 *Id.*

365 Sklansky, *supra* note 194, at 1314 (citing Washington v. Davis, 426 U.S. 229, 248 (1976)).

> other would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[366]

A few years before *Davis*, Chief Justice Burger similarly opined:

> Unfortunately the growing burdens and shrinking revenues of municipal and state governments may lead to more and more curtailment of desirable services. Inevitably every such constriction will affect some groups or segments of the community more than others. To find an equal protection issue in every closing of public swimming pools, tennis courts, or golf courses would distort beyond reason the meaning of that important constitutional guarantee.[367]

In *McCleskey*,[368] the petitioner submitted a study showing that in Georgia blacks who kill whites are four times more likely to receive the death penalty than whites who kill blacks.[369] The Court denied the petitioner's equal protection claim, stating in part, "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[370] The Court argued that racial bias claims could then be brought based on other criminal penalties.[371] It also found that there may be disparities based on facial characteristics, attraction, or other arbitrary variables.[372]

This position fails for two reasons. First, the text and proper judicial precedent mandate a disproportionate impact analysis. We now know that "equal" means that a law has to be proportionate and uniform in operation or effect.[373] Furthermore, *Yick Wo* and *Gomillion* are good law. Unsubstantiated and unverified public policy questions and concerns cannot obviate a court from enforcing a constitutional amendment. Changing the meaning of the Constitution should be the deliberate choice of the people through a constitutional amendment.[374] The decision to

366 Sklansky, *supra* note 194, at n.160 (quoting *Davis*, 426 U.S. at 248).

367 Palmer v. Thompson, 403 U.S. 217, 228 (1971) (Burger, C.J., concurring); *see also Davis*, 426 U.S. at 248.

368 481 U.S. 279 (1987).

369 *Id.* at 287.

370 *Id.* at 314–15.

371 *Id.* at 315.

372 *Id.* at n.317.

373 *See supra* notes 94, 104–109, and accompanying text.

374 Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting).

enter it should be made only after a full debate by the people of this country.[375]

Second, the danger that a disproportionate impact analysis will question the principles that underlie our entire criminal justice system and create havoc within the law is not persuasive.[376] Justice Brennan noted the very premise of that argument "seems to suggest a fear of too much justice."[377] David Sklansky concluded, "[I]t is as though the Court has said to the parties raising these claims, 'Before we are willing to consider your argument about what equal protection means *here*, you must tell us, and convince us, what it means everywhere.'"[378] "The specter of the stopping place problem is no more easily cabined than the idea of Equality."[379] Justice Brennan concluded, "[I]f striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness."[380] The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.'"[381] "Race is a consideration whose influence is constitutionally proscribed."[382] A moral commitment, embodied in fundamental law, declares that race should not be the basis for allotting burdens and benefits.[383] A person's hair color is morally irrelevant.[384] The *McCleskey* majority's attempt to compare racial discrimination with hair color discrimination shows how far removed it is on how laws actually disproportionately impact racial minorities in society. Does *McCleskey*'s majority realize a black man considers it a "good day" because the "police rolled right past me"?[385] Evidence depicting striking correlations, not just ten-

375 *Id.* at 39.

376 *McCleskey*, 481 U.S. at 314–15.

377 *Id.* at 339 (Brennan, J., dissenting).

378 Sklansky, *supra* note 194, at 1314.

379 *Id.* at 1314 n.160 (citing Karst, *supra* note 297, at 50 (quoting Archibald Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966))).

380 *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

381 *Id.* (citing F. MAITLAND, PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER XXXIV (1884); 3 J. ELLIOT'S DEBATES ON THE CONSTITUTION 447 (1854)).

382 *McCleskey*, 481 U.S. at 340–41 (Brennan, J., dissenting).

383 *Id.* at 341.

384 *Id.*

385 ICE CUBE, *It Was a Good Day*, *on* THE PREDATOR (Priority Records 1992). Accompanying the album, a booklet explains, "Ice Cube wishes to acknowledge America's cops for their systematic and brutal killings of brothers all over the country (most of their stories never made it to the cameras). These actions committed by the police have provided me with some of the material for this album." *See also* NAS, *One Mic*, *on* STILLMATIC (Ill Will/Columbia Records 2001) ("Police watch us, roll up, and try knocking us"); JAY-Z, *Hard Knock Life*, *on*

dencies, eliminates nonracial explanations for a disparate impact.[386] A stringent standard of statistical evidence is unlikely to be satisfied with any level of frequency in future cases.[387] And a statistical showing would not automatically invalidate a law under strict scrutiny review. If the government could prove the law was narrowly tailored to meet a compelling interest, then the law would be constitutional. Therefore, the fear of too much justice is baseless.[388]

Armstrong[389] again provides a picture of judicial error. The majority mentions that 91% of convicted LSD dealers are white, supporting the proposition that all races do not commit all crimes uniformly.[390] The majority leaves two critical points out of its analysis. It does not mention what percentage of all LSD used or sold is connected to whites. It does not state that LSD is punished evenly according to its weight, no distinction is made between different forms of the substance.[391] If about 91% of all LSD sold or used is connected to whites, then the law is being proportionately applied. Recent statistical data supports this notion, as white high school seniors are nine times more likely to have used LSD than minorities.[392] Furthermore, drug users tend to buy from same-race dealers.[393] Thus, one may conclude that LSD is overwhelmingly used or sold by whites. Crack cocaine laws are much different. As stated above, the law overwhelmingly targets the group using less of the substance and implements against them the same sentence for possessing one hundred times less of the drug as their white counterparts.[394]

An analogous LSD hypothetical follows. Assume five grams of LSD contained in paper receives a five-year minimum mandatory sentence; five hundred grams of LSD contained in tablets receives a five-year minimum mandatory sentence. Let us further assume the following information: data show blacks use the majority of all forms of LSD. However, white users overwhelmingly use the paper LSD form. Blacks generally use the tablets. The law then prosecutes over 90% of its paper LSD cases against whites. This hypothetical would be analogous to the

VOL. 2 . . . HARD KNOCK LIFE (Roc-A-Fella/Def Jam Records) (1998) ("It's a hard knock life for us, 'stead of kisses we get kicked, 'stead of treated we get tricked").

386 *McCleskey*, 481 U.S. at 342 (Brennan, J., dissenting).

387 *Id.*

388 *Id.* at 339, 342.

389 517 U.S. 456 (1996).

390 *Id.* at 469; *see also* Sklansky, *supra* note 194, at n.126 (citing U.S. SENTENCING COMMISSION, ANNUAL REPORT (1993) (finding that more than 93.4% of federal LSD defendants were white)).

391 *See* 21 U.S.C. § 841(b)(1)(A)(v) (1999).

392 Tim Wise, *A New Round of White Denial: Drugs and Race in the 'Burbs*, RACE AND HISTORY 1–2 (Aug. 17, 2001), *at* www.raceandhistory.com/selfnews/viewnews.

393 *Id.* at 2.

394 *See supra* notes 158, 163.

disproportionate impact of federal crack and powder cocaine laws on blacks because the racial group using less of the entire substance is unevenly targeted for prosecution for possessing one hundred times less of the drug.[395]

What chaos will the disproportionate impact analysis bare? A much harsher law is disproportionately applied to racial minorities who commit lesser of the offenses. A law that provides better treatment for whites than blacks cannot be considered equal. What catastrophe does that create? The Court would rather cover its eyes and ears to the racially disproportionate impact of unequal laws than address the legal issues surrounding claims of racial discrimination. Ignorance as bliss seems to be its jurisprudence. It is as if to say that if we pretend unconscious or conscious racism does not exist, then maybe it really does not. If we create an impossible standard for a challenger to meet on a constitutionally based racial discrimination claim, then we will not have to actually work to determine what laws truly have an unconstitutional racial disproportionate impact and what laws do not. Instead of dealing with the reality of the situation, the Court ignores factual evidence of unconstitutional racial discrimination by adopting unproven hypothetical scenarios and unsubstantiated prognostications regarding the potential effect of adopting a disproportionate impact analysis. This is not an acceptable form of equal protection jurisprudence.

CONCLUSION

Davis[396] establishes a "Court-made code"[397] for how equal protection issues are analyzed. An entire phase of the meaning of the word "equal" is absent from current equal protection law. A disproportionate impact analysis complies with the text of the *Equal* Protection Clause and subsequent precedent. Anything short of that fails to fulfill the ten-

395 This article is not solely aimed at the distinction between crack and powder cocaine in federal law. However, because many of the sources and examples I use are based on that body of law, I feel compelled to refute the potential counterargument that crack cocaine is sufficiently different from powder cocaine to warrant different treatment under the law. The distinction between the forms of cocaine did not meet heightened rational basis scrutiny because (1) it did facilitate prosecution of street level drug dealers; (2) there is no hard evidence that crack is more addictive and dangerous than powder cocaine, and powder cocaine can be dissolved in water and injected into the body to reach the same desired effect from smoking crack; (3) there is insufficient evidence that crack cocaine is the cause of violence; (4) there is no statutory purpose for the distinction; (5) an illegitimate means is used to eliminate street level dealing since possession of crack presumes an intent to distribute, without the state having the burden of proving that criminal element. State v. Russell, 477 N.W.2d 886, 889–91 (Minn. 1991). Also, "crack and powder cocaine are really the same drug (powder cocaine is 'cooked' with baking soda for about a minute to make crack)." United States v. Clary, 846 F. Supp. 768, 770 (E.D. Mo. 1994).

396 426 U.S. 229 (1976).

397 Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting).

ets of equal protection. We cannot allow the celebrated *Davis* decision to remain on the books because it has come to stand for the proposition that the Supreme Court has the power to impose extra-constitutional constraints,[398] which eliminates a constitutionally required disproportionate impact analysis from equal protection jurisprudence.

The meaning of "equal" prescribed a concept of proportionality and uniformity when the Fourteenth Amendment was enacted. The growth of the meaning of "equal" specifically affirms that a law must be proportionate and uniform in operation or effect to pass equal protection muster. Throughout history, courts have correctly adopted a disproportionate impact analysis, and even the present-day majority quietly accepts it as constitutionally acceptable. But the quiet acceptance has turned into a whimper. The disproportionate impact analysis deserves to shout its presence on the equal protection landscape as loudly as the command that laws be neutrally drafted and intended. Only then will *equal* protection occur.

Many attempts have been made to attack current equal protection law. The criticism is mostly appropriate; however, it has created a life of its own away from the text. Battle cries are coming from numerous positions, while the most ferocious weapon in the arsenal has yet to be unleashed — the text of the Equal Protection Clause and proper precedent supporting its requirement of a disproportionate impact analysis when laws unequally affect racial minorities. Before we transform the neutrality and intent components of current equal protection jurisprudence, we must return to the root of equal protection law and correct its error. When that mistake is fixed, a clear foundation forms, allowing for subsequent dialogue on how to alter the paradigm. Unfortunately, critics of equal protection law are attempting to alter an unconstitutional analysis with new ideals, instead of restoring the analysis to a constitutionally proper place and building on it thereafter.

By returning to the text, we can trace the core of equal protection from its birth to the present day. This leads to a full and fair picture of what equal protection means. The meaning of the word "equal," correct precedent, and supporting thought all lead to the conclusion that the Equal Protection Clause requires a disproportionate impact analysis. Until a disproportionate impact analysis is adopted, *unequal* protection of the laws will persist.

398 *Id.*