# ORIGINALISM AND THE FOURTEENTH AMENDMENT

*Bret Boyce*[*]

*In recent years, constitutional scholars have deployed originalist arguments both to attack and to defend the vast twentieth-century expansion of constitutional civil rights under the Fourteenth Amendment. Remarkably, few of these scholars have attempted a coherent justification of originalism itself. The radically different results that these scholars have reached highlight the indeterminacy of the historical record, which, the author argues, does not permit satisfactory answers to the crucial questions of modern equal protection and due process jurisprudence. The author concludes that the currently dominant common-law approach to constitutional adjudication provides far broader and more determinate protection than originalism for individual rights and democratic institutions.*

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* Forrester Fellow, Tulane Law School. B.A., Yale University, Ph.D., Brown University, J.D., Northwestern University School of Law. This Article originated out of a series of discussions with Professor Michael J. Perry, whose comments and criticism were invaluable. I would also like to thank Akhil Amar, Raoul Berger, Stephen G. Calabresi, Michael Kent Curtis, Stephen M. Griffin, Andrew Koppelman, Earl M. Maltz, and Ann Woolhandler for helpful comments on earlier versions of this Article. Special thanks to Tony Q. Scott for his encouragement and support. The views expressed in this Article, as well as any errors, are solely my own.

## INTRODUCTION

Originalism,[1] the doctrine that the Constitution should be interpreted as originally understood at the time it was adopted, has gained increased prominence in recent years.[2] During the Reagan

1. The term "originalism" has been most commonly used since the middle 1980s and was apparently coined by Paul Brest *in The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980). Earlier discussions often used the term "interpretivism" to denote theories that sought to derive meaning from the constitutional text alone ("textualism"), or from the intentions of the originators ("intentionalism"). *See*, *e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980) ("interpretivism"); Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) ("interpretive model"); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) ("intentionalism"). Current discussions have tended to reject the labels "interpretivism," which often embraces nonoriginalist textualism, and "intentionalism," which suggests reliance on subjective intentions rather than objective meaning. *See* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION 146 n.3 (1992); Richard B. Saphire, *Enough About Originalism*, 15 N. KY. L. REV. 513, 515 n.7 (1988); *see also infra* Part I.A.

2. The emergence of modern originalism as a consistent theory of constitutional interpretation is a relatively recent reaction to legal realism. *See* BASSHAM, *supra* note 1, at 7-15. Originalism became a political issue in 1968 with Richard Nixon's promise to appoint only "strict constructionists" to the Supreme Court. *See* 2 STEPHEN E. AMBROSE, NIXON, THE TRIUMPH OF A POLITICIAN 1962-1972, at 201 (1989). With Nixon's appointment of William

and Bush administrations, originalism was the focus of considerable public attention and debate. In a series of public statements, Reagan's attorney general Edwin Meese III criticized recent Supreme Court decisions as incoherent and called upon the judiciary to adopt a "Jurisprudence of Original Intention."[3] With the appointment of judges such as Robert Bork, Antonin Scalia and Clarence Thomas, originalism gained an increasingly vigorous voice on the federal bench.[4]

In the legal academy, originalists attacked the vast expansion of constitutional civil rights undertaken by the Warren Court, beginning with the school desegregation decision of *Brown v. Board of Education*.[5] The Fourteenth Amendment, which lies at the heart of modern judicial doctrines and academic theories of constitutional civil rights,[6] was naturally the focus of this debate. Raoul Berger,

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Rehnquist to the Supreme Court and Robert Bork as Solicitor General, originalism gained a powerful presence in the federal bar and bench. *See* BASSHAM, *supra* note 1, at 13; *cf.* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698-99 (1976) (discussing the difficulties of a theory of a "living constitution").

3. Attorney General Edwin Meese III, Address before the American Bar Association (July 9, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9 (1986); *see also* Edwin Meese, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 925-33 (1996). Meese's remarks provoked an unusual public response from the liberal wing of the Court. Justice Brennan rejected the call for deference to the intentions of the framers as "little more than arrogance cloaked as humility." Associate Justice William J. Brennan, Jr., Remarks to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE, *supra*, at 14. "Typically," Brennan argued, "all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality." *Id.* In Brennan's view, the Court could not be bound to the precise contours of the framers' intentions; rather, the Court's task, according to Justice Brennan, was to preserve individual freedoms against encroachment from a government vastly more powerful than it was in the framers' time. *Id.* at 16-20; *see also* William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 26 S. TEX. L. REV. 433 (1986).

4. *See* Richard H. Fallon, Jr., *The Supreme Court 1996 Term, Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 59 n.19 (1997); Richard E. Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 350 (1995).

5. 347 U.S. 483 (1954).

6. During the second half of the twentieth century the Supreme Court has construed the Equal Protection Clause of the Fourteenth Amendment to prohibit not only racial discrimination, but many other forms of discrimination as well. *See*, *e.g.,* Plyler v. Doe, 457 U.S. 202, 215 (1982) (discrimination based on alienage); Craig v. Boren, 429 U.S. 190, 204-05 (1976) (discrimination based on sex); Stanley v. Illinois, 405 U.S. 645, 649 (1972) (discrimination based on illegitimacy); Reed v. Reed, 404 U.S. 71, 75-77 (1971) (discrimination based on sex). Over the course of the twentieth century, the Court has also construed the Fourteenth Amendment's Due Process Clause to incorporate most of the guarantees of the Bill of Rights as limits on state power. *See*, *e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (right to jury trial in criminal cases); Mal-

whose 1977 book on the Fourteenth Amendment paved the way for much subsequent originalist scholarship, argued that most of the Warren Court's civil rights jurisprudence was illegitimate, including the desegregation, reapportionment, and voting rights decisions, the incorporation doctrine applying the Bill of Rights to the states, and the decisions prohibiting sex discrimination and recognizing fundamental rights of privacy and personal autonomy.[7] Other originalists reached similar, if somewhat less sweeping, conclusions.[8] For many nonoriginalists, the claim that originalism was incompatible with *Brown* furnished a powerful argument against originalism.

However, unlike Berger, most modern constitutional scholars are unwilling to discard entirely the civil rights decisions of the last half-century. Recent years have seen many attempts to reconcile Warren Court jurisprudence with originalism.[9] Michael McConnell has argued that the school desegregation decisions are fully consistent with the original understanding of the Fourteenth Amendment.[10] John Harrison has defended much of modern equal protection jurisprudence as consistent with the original understanding.[11] Michael Curtis and Akhil Amar have defended the incorporation

loy v. Hogan, 378 U.S. 1, 6 (1964) (same); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (right to counsel); Robinson v. California, 370 U.S. 660, 667 (1962) (prohibition of cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (freedom from unreasonable searches and seizures); Everson v. Board of Educ., 330 U.S. 1, 14-15 (1947) (prohibition of establishment of religion); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (free exercise of religion); Near v. Minnesota, 283 U.S. 697, 707 (1931) (freedom of the press); Gitlow v. New York, 268 U.S. 652, 666 (1925) (freedom of speech). The Court has also interpreted the Due Process Clause to protect unenumerated rights such as the right to privacy. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 164 (1973) (right to abortion); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (right to contraception).

7. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. Liberty Fund 1997) (1977) (arguing that most of the Warren Court's civil rights jurisprudence was illegitimate).

8. *See*, *e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169-70, 329-30 (1989) (claiming that modern privacy rights and sex discrimination jurisprudence are inconsistent with the original understanding); EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 109-13, 118-20 (1990) (arguing that the Fourteenth Amendment as originally understood did not compel school desegregation or confer the right to vote on blacks).

9. For a general discussion of the "turn to history" in liberal constitutional scholarship, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 139-246 (1996).

10. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (claiming that the school desegregation decisions are fully consistent with the original understanding of the Fourteenth Amendment).

11. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (arguing that modern equal protection jurisprudence is consistent with the original understanding).

doctrine on originalist terms.[12] Michael Perry, formerly one of the most prominent nonoriginalist theorists of the Fourteenth Amendment, has now elaborated originalist arguments supporting the Court's decisions barring sex discrimination and guaranteeing the right to abortion, and urging expansion of the Court's antidiscrimination jurisprudence to cover discrimination based on sexual orientation.[13] These various projects of reconciling original understanding with Warren Court developments might broadly be grouped under the rubric of "liberal originalism," although they have attracted both liberals seeking to use originalism to justify expansive protection of individual rights,[14] and conservatives seeking to rehabilitate originalism by showing that it would guarantee basic constitutional rights now taken for granted.[15]

This Article argues that both the conservative and "liberal" originalist projects have been a failure. Remarkably, few originalist scholars have attempted a coherent theoretical defense of originalism, and many simply assume that current constitutional jurisprudence is essentially rooted in original understanding. In fact, however, originalism is difficult to reconcile with democratic principles, and a nonoriginalist approach lies at the core of actual constitutional practice, if not current constitutional ideology and academic discourse.

Originalism has proven especially unsatisfactory as a basis for Fourteenth Amendment jurisprudence. In interpreting the Amendment over the last fifty years, the Supreme Court has wrestled with and largely answered fundamental questions of constitutional civil rights: What rights are protected? Are those rights protected absolutely or only against certain types of discrimination? What types of discrimination (other than racial discrimination) are prohibited? Originalism offers few firm or satisfactory answers to these questions. Scholarly attempts to recover the original understanding of the Fourteenth Amendment have proven at best inconclusive; at worst, the original understanding appears at odds with modern broad constitutional protections of civil rights.[16] In particular, originalism does not provide a satisfactory basis for the desegregation, voting rights, and incorporation decisions which are to-

12. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163-214 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 145 (1986).

13. MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 149-55, 174-89 (1994).

14. *See generally id.* For a discussion of the use of semantic originalism by liberal scholars see *infra* text accompanying notes 42-48.

15. *See, e.g.*, BORK, *supra* note 8, at 81-82 (arguing that the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), was consistent with the original understanding).

16. *See infra* Part IV.

day constitutional bedrock.[17] Originalism's legitimacy as a method of constitutional interpretation is therefore seriously undermined.

This Article begins by discussing in Part I the principal issues that define the various modern forms of originalism. Part II then outlines the various arguments that have been made to justify the originalist approach. Part III presents the arguments against originalism. To the extent that the Constitution as originally understood sought to entrench the power of oligarchic constituent minorities, its authority in a modern democratic society is problematic. Insofar as it presupposed the continuation of eighteenth-century social and economic systems, it cannot form the basis for a just or workable system of constitutional interpretation in the twentieth century. Descriptively, it cannot account for the existing constitutional order. Moreover, because of its historical indeterminacy, the original understanding offers little guidance to judges seeking to interpret the Constitution. Originalist judges are therefore likely to find that the Constitution validates their own policy choices.

Part IV examines recent attempts to recover the original understanding of the Fourteenth Amendment. These attempts have reached radically divergent results and highlight the problem of historical indeterminacy. The legislative history of the Fourteenth Amendment and the public debates surrounding its ratification do not provide satisfactory answers to any of the crucial questions of modern "equal protection" and "due process" jurisprudence. The historical record can be and has been manipulated to reach whatever result is thought to be desirable. The current body of equal protection doctrine that has built up by gradual accretion since the Amendment was ratified forms a far more determinate and satisfactory basis for constitutional adjudication than the historical search for an elusive original meaning.

This Article concludes with a brief discussion of the jurisprudence of the Supreme Court's originalist Justices. The Court's originalists, it is argued, have failed to apply a consistent originalist methodology, wavering instead between public-meaning textualism, strict intentionalism, and nonoriginalist conventionalism. Moreover, they have failed to elaborate a coherent theory of stare decisis, a fatal problem for all originalist theories.

Unlike their originalist brethren, most of the Justices on the Supreme Court have taken and should continue to take a conventionalist or common-law approach to constitutional adjudication. The body of constitutional doctrine that has evolved over the past two centuries provides a far more determinate basis for judicial review and thus a sounder constraint on judicial discretion than recourse to the framers' understanding. The original understanding is the historical starting-point for the Constitution's meaning, and

17. *See infra* Part IV.

may often be intrinsically worthy of respect. But it is not the only or even the primary source of the Constitution's meaning. Unlike the Constitution as originally understood, our modern common-law Constitution is consistent with a modern administrative state and a truly national economy. Moreover, our common-law Constitution provides far broader and more determinate protection for individual rights and democratic institutions.

## I. THE ORIGINALIST APPROACH TO CONSTITUTIONAL ADJUDICATION

Although all originalists share a common belief that the Constitution's meaning was fixed at the time of its adoption, they differ among themselves on a number of important questions. Some have spoken broadly of the original "intent" of the Constitution's Framers,[18] while others insist that only the original "public understanding" should be considered in interpreting a given provision.[19] Originalists have also differed over whose understanding (or intent) should be considered relevant: in the case of the 1789 Constitution, for example, some would argue that only the understanding of the ratifiers is relevant, while others would consult the intentions of the framers in Philadelphia as well.[20] Once the relevant authoritative group has been identified, a further problem arises when, as often happens, there were several different understandings of a given provision among different members of that group. This is the problem of summing disparate intents. Perhaps the most difficult of all is the problem of the level of generality: How broadly or narrowly should constitutional provisions be construed? May a broad constitutional concept be applied in such a way that contradicts the adopters' specific expectations? Finally, there is the problem of stare decisis: To what extent should past decisions inconsistent with originalism be adhered to? This Part takes up each of these problems in turn. In each case, where one answer appears stronger and more consistent with the fundamental premises of originalism, it will be noted; where no "best answer" emerges, we must be content merely to set forth the alternatives.

### *A. Public Understanding Versus Intent*

Recent discussions of originalism have paid considerable attention to the question of "public understanding" versus subjective "intent." Some originalists, like Raoul Berger, have held that the meaning of the Constitution is to be found in the subjective inten-

18. *See, e.g.,* BERGER, *supra* note 7, at 401-27.

19. *See, e.g.,* BORK, *supra* note 8, at 144.

20. For a discussion of the difficulty associated with determining which historical statements provide a true source of original intent, see *infra* Part III.E.1.

tions of the framers.[21] Others, like Robert Bork, have argued that the meaning is to be found in the original public understanding of a given constitutional provision.[22] To confuse matters further, the term "original intent" has become so ingrained that even adherents of the "public understanding" approach sometimes refer to that understanding as "original intent" and to their approach as "intentionalism."[23]

Bork outlines the argument for the "public understanding" approach as follows:

> Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this. The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest . . . . Thus, the common objection to the philosophy of original understanding—that Madison kept his notes of the convention at Philadelphia secret for many years—is off the mark . . . . His notes of the discussions at Philadelphia are merely evidence of what informed public men of the time thought the words of the Constitution meant.[24]

There are a few problems here. It is not immediately clear why the ratifiers' understanding "must be taken to be" the understanding of the public as a whole. Furthermore, as Gregory Bassham has pointed out, if the understanding of the public as a whole is what counts, one must choose among various proposed definitions of "the public," which have ranged from "the well-informed" to "voters" to "citizens, whether enfranchised or not" to "inhabitants of the United States."[25] Finally, if private understandings or intentions are evi-

21. *See e.g.,* BERGER, *supra* note 7, at 401-27.

22. *See e.g.,* BORK, *supra* note 8, at 144.

23. *See, e.g.*, PERRY, *supra* note 13, at 44-45.

24. BORK, *supra* note 8, at 144.

25. BASSHAM, *supra* note 1, at 176 n.166 (1992). As Bassham persuasively argues, public-understanding originalism has not avoided the problem of summing conflicting understandings, as has sometimes been claimed:

> If the object is to determine how the American people as a whole originally understood a given provision, it is necessary to examine *evidence* of what the American people *as a whole* actually thought; it is not enough simply to consult dictionaries or common-law authorities or to invoke patently fictive bromides about the people's "presumptive" knowledge of congressional and state legislative constitutional debates. A public-understanding originalist must determine, for example, whether the term "person" in the Fourteenth Amendment was publicly understood in its customary legal sense, as apply-

dence of public understandings, it is not clear why all this matters. Only in the relatively rare cases where the evidence supplied by a private understanding is refuted by specific evidence of a contrary public understanding will the public-understanding interpretation of a provision differ from the subjective-intention interpretation.

Nonetheless, a public meaning approach is preferable in theory to one that privileges subjective intentions. Since a law is a public act, only its public meaning can have legal force. Thus in seeking the original understanding of a constitutional provision we must rely on contemporaneous public statements about its meaning. We should not presume, for example, that the views of the delegates at Philadelphia were part of the original public understanding absent a specific showing that those views were actually publicized at the time of ratification.

However, any attempt to reconstruct the understandings of the public at large must entail far more speculation based on far less evidence than is even available for the understandings of the framers and ratifiers.[26] Often the only practicable solution is to focus on the publicly manifested understanding of the latter.[27] This solution avoids the worst pitfalls of both Berger's and Bork's approaches. It escapes the theoretical incoherence of a purely subjective approach, which ignores the fact that constitution making is essentially a public process. At the same time it steers clear of the practical difficulties of the pure public-understanding approach, which seeks to ascertain the elusive understanding of the people at large, many of whom may have had no interest or involvement in the constitutional process.

Thus, whether for practical or theoretical reasons, most originalists would agree with Michael McConnell that the authoritative originators of a constitutional provision are "those with the authority to adopt [it] as law."[28] In the case of the original 1787 Constitu-

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> ing to corporations, or rather in one of its many nontechnical senses, as applying only to natural persons or to some subset of natural persons.

*Id.* at 57-58.

26. *See id.* at 58.

27. Sometimes in accordance with the practice of various writers this Article will resort to the convenient terminology of "intent" and "intentionalism." Unless otherwise indicated it should be understood that this language refers to intent in the objective sense of understanding publicly manifested at the time of ratification.

28. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1524 (1989) [hereinafter McConnell, *Democratic Politics*] (reviewing MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988)); s*ee also* BORK, *supra* note 8, at 144 (arguing that the public understanding of the Constitution at the time of its enactment should guide interpretation); Stephen G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994) (arguing that constitutional provisions should be interpreted as they were "objectively understood by the people who enacted or ratified them"); Michael W. McConnell, *The*

tion, the originators are the members of the majorities that voted for ratification in each of the ratifying conventions of the thirteen original states, or at least in the nine states required for the Constitution to go into effect.[29] In the case of constitutional amendments, the originators are the required two-thirds supermajorities in both the Senate and the House of Representatives and simple majorities in three-fourths of the state legislatures.[30]

### *B. Aggregating Understandings*

Having identified the authoritative originators, originalists must next devise a method for summing disparate understandings in the common situation where the originators do not all share the same understanding of a given provision. This problem has been most carefully analyzed by Richard Kay. Kay has argued that, where the originators do not share a common understanding of a provision, we must take as the original understanding of the group only such elements of the various understandings as are shared by a number of the provision's proponents sufficiently large to enact it into the Constitution.[31] For example, in the case of a constitutional amendment which is understood in different ways by different proponents in the Senate, the "original understanding" of the Amendment held by the Senate as a whole is the common core of understandings shared by a group of Senators voting for the Amendment constituting at least two-thirds of the full Senate. Similarly, the understanding of a state legislature as a whole may be obtained by seeking a common core of understanding held by a ratifying major-

*Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1278-79 (1997) (arguing that the Constitution's authority, and therefore its meaning, is rooted in the will of the framers). Scalia has wavered between two approaches, sometimes according authority to the understanding of the enactors, and sometimes to the public at large. *Compare* Harmelin v. Michigan, 501 U.S. 957, 975 (1991) (holding that "the ultimate question" in interpreting a constitutional provision is "what its meaning was to the Americans who adopted" it) *with* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 133 (1997) (privileging "the understandings of those to whom the text is promulgated"); *see also id.* at 17, 38 (discussing the impropriety of looking to the subjective intent of draftsmen or lawgivers).

29. Bassham and others have argued on practical grounds that the understanding of the delegates to the Philadelphia convention should also be deemed authoritative, since otherwise it will often be impossible to recover any original understanding at all. BASSHAM, *supra* note 1, at 63. But since only the ratifiers had the power to enact the Constitution into law, such an approach is inconsistent with the fundamental premises of originalism.

30. *See* U.S. CONST. art. V.

31. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 247-51 (1988). As the title of his article indicates, Kay refers to original "intent" rather than original "understanding," but the present discussion generally uses the latter term, which is preferred among modern originalists who reject reliance on subjective intent.

ity in the state; the understandings of the states may likewise be summed by identifying the common core of understanding held by three-fourths of the states; and finally, the authoritative original meaning of the Amendment itself may be found by identifying the common core among the understandings of the House, Senate, and the states determined as just described.

### *C. The Level of Generality*

Originalists have differed widely over the proper level of generality of constitutional interpretation. Raoul Berger, for example, has tended to interpret the Constitution at a very low level of generality, relying on a detailed examination of the specific intentions or expectations of the originators.[32] This is the approach that Paul Brest has called "strict intentionalism"[33] and Ronald Dworkin has labeled "expectation originalism."[34] This approach requires a judge interpreting a given constitutional provision "to determine how the [originators] would have applied [the] provision to a given situation, and to apply it accordingly";[35] in other words, it assumes that constitutional provisions "should be understood to have the consequences that those who made them expected them to have."[36] Under this approach, for example, if the originators of the Fourteenth Amendment did not believe that it prohibited racial segregation in public schools, then an originalist judge may not use that Amendment to strike down segregation.

At the opposite extreme are originalists such as Michael Perry, who tend to interpret constitutional provisions at a very high level of generality. Brest called this approach "moderate intentionalism"[37] while Dworkin has labeled it "semantic originalism."[38] This approach focuses on what the originators intended to say rather than what they expected to accomplish. It requires the judge to apply the Constitution's provisions in a manner "consistent with the [originators'] intent at a relatively high level of abstraction, consistent with what is sometimes called the 'purpose of the provision.'"[39] Thus, for example, in the case of the Fourteenth Amendment, Perry argues that the "directive" represented by the Privileges or Immunities Clause bars discrimination against a group "on the ground that the members of the group are inferior . . . *if the group is defined, explicitly or implicitly, in terms of a trait irrelevant to their status as*

32. *See, e.g.,* BERGER, *supra* note 7, at 401-27.
33. Brest, *supra* note 1, at 222.
34. RONALD DWORKIN, *Comment*, *in* SCALIA, *supra* note 28, at 115, 119.
35. Brest, *supra* note 1, at 222.
36. DWORKIN, *supra* note 34, at 119.
37. Brest, *supra* note 1, at 223.
38. DWORKIN, *supra* note 34, at 119.
39. Brest, *supra* note 1, at 223.

*human beings*."[40] Under this approach, since racial discrimination in public schools is "predicated on the view" that "nonwhites are inferior, as human beings, to whites," then an originalist judge must strike down such discrimination under the Fourteenth Amendment, regardless of the originators' specific expectations.[41]

Not only originalists, but also various liberal constitutional scholars who may broadly be termed neo-originalists[42] have embraced very generalized forms of semantic originalism. For example, Lawrence Lessig has argued that fidelity to the original meaning of the Constitution requires the interpreter to "translate" the original commands into commands that make sense in a modern context.[43] While Lessig assumes the necessity of a quasi-originalist approach almost as an axiom,[44] other neo-originalists are openly pragmatic. For example, Cass Sunstein has argued that because historical arguments are widely accepted, not only lawyers but judges may properly deploy a "stylized" or "useable past" to reach desired outcomes.[45] Similarly, Laura Kalman has recently argued that "[b]ecause we are stuck with originalism, the pragmatist would accept it on occasion."[46] For pragmatic reasons, Kalman suggests that liberals should deploy originalist arguments as a form of rhetoric,[47] and that there may be an appropriate role for romanticized or mythologized history in constitutional analysis.[48]

Scalia and Bork seem to occupy something of a middle ground between "semantic" and "expectation" originalism. Scalia has explicitly embraced "semantic originalism."[49] Similarly Bork seems to

40. PERRY, *supra* note 13, at 130.

41. *Id.* at 144-47.

42. The term "neo-originalist" is employed in EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 50 (1994). As Maltz has noted, some conservatives such as Richard Epstein have deployed versions of neo-originalism, although neo-originalist approaches are most prominently associated with liberals. *Id.*

43. Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997) [hereinafter Lessig, *Constraint*] (proposing and explaining a theory in which new readings of the Constitution may be true to the Constitution's original meaning and purpose); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (arguing that fidelity in the interpretation of the Constitution must account for both changes in text and context); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (same).

44. *See* James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1351 (1997).

45. Cass Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 601 n.3, 603-05 (1995).

46. KALMAN, *supra* note 9, at 238. In the face of conservative originalism, Kalman suggests, liberals may appropriately "fight fire with fire." *Id.* at 211.

47. Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 110-14 (1997).

48. KALMAN, *supra* note 9, at 208.

49. ANTONIN SCALIA, *Response*, *in* SCALIA, *supra* note 28, at 129, 144 [hereinafter *Response*].

endorse the "semantic originalist" approach when he writes that the original understanding of the Constitution provides the judge "not with a conclusion but with a major premise."[50] Bork insists that his approach "does not mean that judges will invariably decide cases the way the men of the ratifying conventions would if they could be resurrected to sit as courts."[51] However, in practice Scalia and Bork accord much more weight to the specific intent of the originators than does a full-fledged moderate intentionalist like Perry.

For example, in his treatment of the school segregation question, Bork begins by supposing that both segregation and equality were "aspect[s] of the original understanding."[52] By 1954, however, "it had been apparent that segregation rarely if ever produced equality."[53] Confronted with this dilemma, Bork argues, the Court had no choice but to "choose equality" over segregation since "equality" was the "purpose" of the Amendment.[54] Here Bork's methodology appears to lie somewhere between Berger's and Perry's. Berger begins by examining the specific intentions of the originators concerning the practices which they believed the Amendment banned (such as racial discrimination in contract or property rights) or permitted (such as segregation or political disfranchisement) and proceeds to reconstruct a carefully limited version of the equality principle that preserves these specific intentions.[55] Perry begins by constructing a general "directive" embodying the general purpose of the Amendment and to apply it to decide *de novo* questions that the originators might have resolved quite differently.[56] Bork evidently regards both the general purpose (equality) and the specific intent (segregation) as "aspect[s] of the original intention"; only where they are irreconcilably in conflict must one yield to the other.

However, elsewhere both Bork and Scalia seem to reject entirely the distinction between general purpose and specific intent. Both have rejected Dworkin's argument that the framers' "concepts" (i.e., general meaning) should trump their "conceptions" (specific intentions). Dworkin argued that if a parent tells her children to be fair, she would want them to be guided by "the concept of fairness, not by any specific conception of fairness [she] might have in mind."[57] The problem with this approach is that general concepts

50. BORK, *supra* note 8, at 162.
51. *Id.* at 162-63.
52. *Id.* at 81-82.
53. *Id.* at 82.
54. *Id.*
55. *See supra* notes 32-36 and accompanying text.
56. *See supra* notes 37-41 and accompanying text.
57. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977). In Dworkin's view, there are two reasons for this: she would want her children to apply the concept to situations she had not thought about (i.e., where she had no specific conception), and she might be "ready to admit that some particular act [she]

do not exist independently of an individual who holds them any more than do specific conceptions. The fact that we may regard many practices as unreasonable or inegalitarian which our nineteenth-century or eighteenth-century forebears did not indicates that not only our specific conceptions, but also our general concepts of reasonableness or equality are different from theirs. Bork makes this point against Dworkin (and unwittingly against his own semantic originalism as well):

> The distinction between a concept and a conception is merely a way of changing the level of generality at which a constitutional provision may be restated so that it is taken to mean something it obviously did not mean. Why should we think that the ratifiers of 1791 legislated a concept whose content would so dramatically change over time that it would come to outlaw things that the ratifiers had no idea of outlawing?[58]

In this passage, Bork is referring to the Cruel and Unusual Punishments Clause of the Eighth Amendment as applied to the death penalty. Similarly, Scalia has written that the Eighth Amendment's Cruel and Unusual Punishments Clause refers not to a general "moral principle of 'cruelty,'" but rather to "the existing society's assessment of what is cruel" in 1791, when the Eighth Amendment was adopted.[59]

But neither Scalia nor Bork has applied these ideas consistently. For example, Scalia has written that "if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses," an originalist federal judge would strike it down under the Eighth Amendment, even though it violated neither precedent nor the original understanding.[60] Similarly, although Bork decries the application of the Eighth Amendment to outlaw a practice (the death penalty) "that the ratifiers had no idea of outlawing,"[61] he is perfectly willing, as we have just seen, to apply the Fourteenth Amendment to outlaw another practice (school segregation) that the ratifiers likewise did not think they were outlawing.[62]

Although "expectation" and "semantic" originalists have reached radically disparate results, their quarrel is primarily one of method rather than of theory. Both seek to recover the original un-

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had thought fair. . . was in fact unfair, or vice versa" (i.e., where her conception was wrong). *Id.*

58. BORK, *supra* note 8, at 213-14. Dworkin has criticized Bork's inconsistency on the question of level of generality. RONALD DWORKIN, LIFE'S DOMINION 141-43 (1993).

59. *Response*, *supra* note 49, at 145.

60. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

61. BORK, *supra* note 8, at 214.

62. *Id.* at 82.

derstanding as a key to the principle or directive represented by the constitutional text. All originalists (although perhaps not neo-originalists) would no doubt agree with Bork that "a judge should state the principle at the level of generality that the text and historical evidence warrant."[63] Thus for originalists the question of the appropriate level of generality at which a given provision should be interpreted is an historical and not a theoretical one. Berger has argued for the strict intentionalist approach on the grounds that the common-law method of legal interpretation envisioned by the originators required the judge to resolve questions of application of a law as the legislators themselves would have resolved them.[64] In fact, however, as Gregory Bassham has shown, "this is an argument no side can win: the evidence is simply inconclusive."[65] Similarly, the historical evidence as to the appropriate level of generality for a given constitutional provision (and especially for the most important ones) will often be inconclusive. For example, if one were to ask the originators of the Fourteenth Amendment whether it represented a general equality principle, a prohibition of racial discrimination, or a guarantee of basic contract and property rights, they might well have been puzzled by the distinctions implicit in the question.

In formulating the equality concept of the Fourteenth Amendment at a high enough level of generality, "moderate intentionalists" like Perry and Bork risk substituting their own concept of equality for that of the ratifiers. Reference to the specific conceptions of the framers is necessary in order to define the contours of their general concept of equality. For example, the various statements of the Fourteenth Amendment's originators rejecting school desegregation or racial intermarriage consistently suggest that their principle of equality was far narrower than our own.[66] If Berger's approach is inflexible, Bork's and Perry's often seem implausible.

The dispute between "strict" and "moderate intentionalists" is ultimately factual and historical and cannot be resolved at a purely theoretical level. Both sides are agreed that constitutional directives should be interpreted at the level of generality that the his-

63. *Id.* at 149; *cf.* PERRY, *supra* note 13, at 41 (quoting Bork's statement with approval). *But see* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J., joined in this footnote only by Rehnquist, C.J.) (stating that a constitutional right should be interpreted at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified") For a critique of Justice Scalia's view, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

64. Raoul Berger, *'Original Intention' in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 298-308 (1986).

65. BASSHAM, *supra* note 1, at 51, 173 n.129.

66. *See infra* Part IV.A.

torical materials warrant. "Strict intentionalists" run the risk of enforcing specific conceptions of the framers inconsistent with the general concepts they enacted. "Moderate intentionalists," on the other hand, with their willingness to reject particular conceptions of the framers as inconsistent with their general concepts, risk misinterpreting the original nature of those general concepts.

### *D. Stare Decisis*

Although originalist theory does not entail and is indeed difficult to reconcile with the doctrine of stare decisis, nevertheless, as Scalia has pointed out, almost every originalist does in fact adulterate originalism with stare decisis.[67] In Scalia's view, the decision whether to adhere to a past deviation from the original understanding should depend on whether the deviation has "succeeded in producing a settled body of law."[68] In practice, however, the ability to analogize or distinguish from settled precedent in virtually every constitutional decision gives the originalist judge far more latitude to decide cases in accordance with his personal predilections than a judge who simply regarded precedent as generally binding.[69] In Bork's view, the immunity of a judicial precedent from originalist judicial review is a function of its expediency and popularity.[70] But a judge who is an originalist only when originalism is expedient or popular is hardly an originalist at all. Moreover, once past deviations from original understanding based on compelling moral or practical reasons are allowed to stand, it is hard to explain why future deviations should not be allowed as well.

No originalist can allow stare decisis to trump the original understanding in all cases. The reason for this, as Bassham has argued, is that

> [b]ecause virtually every extensively litigated constitutional provision is now construed by the court in a manner inconsistent with the provision's original intent, any theorist who accepts all of these interpretations as settled law is by any prac-

67. Scalia, *supra* note 60, at 861.

68. Planned Parenthood v. Casey, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in part and dissenting in part); *cf. Response*, *supra* note 49, at 139-40 (1997).

69. For example, in *Harmelin v. Michigan*, 501 U.S. 957 (1990), Justice Scalia, speaking for himself and Justice Rehnquist, urged on originalist grounds that the Eighth Amendment does not require that a punishment be proportional to the crime. In *Harmelin*, Scalia distinguished eighty years of precedent mandating application of a proportionality principle on the grounds that some of them merely involved an alternative holding, or involved the death penalty rather than life imprisonment, or were recent and closely decided. *Id.* at 962-65, 990-94.

70. *See infra* notes 147-54 and accompanying text.

> tical test not an originalist. Simply stated, there would be too little left to be an originalist about.[71]

Thus an originalist who wishes to "adulterate" originalism with stare decisis is faced with the daunting task of specifying precisely when stare decisis should be allowed to trump the original understanding. Not surprisingly, no one has satisfactorily done so. In short, stare decisis is fundamentally inconsistent with originalism. To the extent that it embraces stare decisis, originalism admits its own inadequacy.

## II. ARGUMENTS FOR ORIGINALISM

Originalists have more often been concerned with the actual practice of originalist interpretation, or criticism of nonoriginalist interpretation, than with developing a theoretical justification for originalist practice. As a result, the theoretical underpinnings of originalism are often unclear. Nevertheless, three main types of arguments for originalism have been advanced. First, originalists have sought to ground the appeal to the original understanding in democratic or other legitimate authority.[72] Second, originalists have argued that originalism provides the only meaningful constraint on the practice of judicial review.[73] Third, originalists have argued that adherence to original understanding yields substantively desirable results.[74]

The first and most common argument proceeds from theoretical first principles and is rooted in the positivist notion of law as a command of the sovereign. This argument runs as follows. The Constitution, like any law, is the command of a sovereign with legitimate authority to bind future generations. Since the sovereign has authority to prescribe rules of conduct, those rules should be interpreted as the sovereign justifiably expected them to be interpreted; in other words, they should be interpreted as originally understood.[75]

71. BASSHAM, *supra* note 1, at 22.

72. *See* MALTZ, *supra* note 42, at 20.

73. *See* Scalia, *supra* note 60, at 863-64.

74. *See* PERRY, *supra* note 13, at 47.

75. For example, Robert Bork has written that "[i]f the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended . . . . There is no other sense in which the Constitution can be what article VI proclaims it to be: 'Law.'" BORK, *supra* note 8, at 145. Similarly, Edwin Meese has argued that "[t]he Constitution is the fundamental will of the people; that is the reason the Constitution is fundamental law." Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455, 465 (1986). As Earl Maltz has explained, "[t]he most plausible defense of originalism rests on a single axiom: The framers of the Constitution had legitimate authority to make political decisions that would bind future governmental decisionmakers until

This argument rests on at least two underlying assumptions. First, it assumes that part of the original understanding was a certain interpretive rule (or "metarule") as to how the substantive rules of the Constitution are to be interpreted. In particular, it assumes that the originators meant the original understanding of substantive constitutional rules to be binding. Thus, it is incompatible with the view that the originators intended substantive constitutional rules to have a meaning that would evolve over time, or that would be ascertained without regard to the original public understanding.[76] Second, it assumes that the originators of the Constitution did in fact have legitimate authority to promulgate binding constitutional rules.

Typically, the originators' authority is assumed to derive from some form of social contract.[77] The original understanding is said to be authoritative because it represents the will of the people. The problems with this view, however, are obvious. The people of 1787 cannot be equated with the people of the present day. Moreover, "the people" who ratified the 1787 Constitution were not a democratic majority in the modern sense but a narrow minority consisting of propertied white men. For this reason, Earl Maltz, one of the most thoughtful originalist theorists, has concluded that "the legitimacy of the Constitution . . . cannot be defended in terms of democratic theory."[78]

Maltz has therefore sought to defend the authority of the originators in purely formalistic terms. He has suggested that it might be grounded in the preexisting authority of the state governments, which, by calling ratifying conventions, agreed to a compact surrendering a portion of their power to the new national government.[79] As Maltz candidly admits, this approach as well is not without problems. The Federalists themselves tended to regard the Constitution as an act of the sovereign people rather than as a compact among the states.[80] Moreover, even if the preexisting authority of the states was legitimate,[81] the compact theory supposes that the

superseded by judgments made through the process specified in the Constitution itself." MALTZ, *supra* note 42, at 20.

76. For a more detailed examination of this point, see *infra* Part III.F.

77. *See*, *e.g.*, James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 7-9 (1991); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1482, 1495 (1985).

78. MALTZ, *supra* note 42, at 31.

79. *See id.* at 32. As Maltz notes, the Constitutional Convention in Philadelphia lacked the required legitimacy, since the Convention was probably not authorized to draft a new constitution and certainly not empowered to give it the force of law. *Id.* at 30.

80. *See id.* at 32; *cf.* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 102-07 (1996) (demonstrating that the framers of the Constitution rested its authority on the people rather than the states).

81. *See* MALTZ, *supra* note 42, at 33.

states could legitimately abrogate the amendment process to which they bound themselves in the Articles of Confederation.[82]

Other arguments ground the authority of the original understanding in the written nature of the Constitution itself. For example, Bork and McConnell have argued that legal interpretation of any written document is essentially a search for authorial intent.[83] Sometimes this argument is linked to the argument basing judicial review on the written nature of the Constitution.[84] These claims are even more radical than the attempts to ground the Constitution in the authority of the founding generation. They assume the authority of the original understanding as an axiom that needs no justification.[85]

The second argument for originalism, associated most prominently with Justice Antonin Scalia, rests on both theoretical and practical concerns about the proper role of judges in a constitutional democracy. Scalia's theoretical argument is that only originalism is compatible with the principle of constitutional judicial review, which presupposes

> that the Constitution, though it has an effect superior to other laws, is in its nature the sort of "law" that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a "law," but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? . . . Quite to the contrary, the legislature would seem a much more appropriate expositor of social values . . . .[86]

Underlying Scalia's theoretical argument are the assumptions that "the sort of 'law' that is the business of the courts" is fixed in meaning, and that the only alternatives in constitutional adjudication are originalism on the one hand and the application of "current societal values" on the other.

Scalia's practical argument is that originalism is the "lesser evil." According to Scalia, "the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace the original meaning, once that is abandoned."[87] This practical argument rests

82. *See id.*

83. BORK, *supra* note 8, at 144-45; McConnell, *Democratic Politics*, *supra* note 28, at 1525.

84. *See* BORK, *supra* note 8, at 145.

85. *See* Simon, *supra* note 77, at 1484 (discussing the argument that originalism is implicit in the concept of a written constitution, thus originalism is a "first principle not in need of justification").

86. Scalia, *supra* note 60, at 854.

87. *Id.* at 862-63.

on the assumptions that a consensus does exist among originalists concerning the "original meaning" of the Constitution and that the "original meaning" has not already been abandoned. Clearly, in Scalia's view, common-law constitutional doctrine is not "the sort of 'law' that is the business of the courts" and could not possibly serve as the basis for consensus about the Constitution's meaning.

The third argument for originalism is pragmatic and result-oriented. This argument urges acquiescence in the original understanding of our particular Constitution because it regards the directives established by the originators as desirable in themselves. Thus Michael Perry, whose argument for originalism is inextricably bound up with his result-oriented argument for judicial review,[88] emphasizes that his

> connected arguments for judicial review and for the originalist approach . . . do not partake of ancestor worship, whether of a Burkean or of some other variety . . . . The point, rather, . . . is that "we the people" now living—who, after all, . . . are now politically sovereign—should protect the constitutional directives [that our "political ancestors"] bequeathed us for one of two reasons: First, some of the directives they issued are good directives, directives that were we drafting a constitution from scratch, we should want to include. Second, even if some of the directives they bequeathed us are not directives that . . . we should want to include . . . we should nonetheless protect such a directive *unless and until we can disestablish the directive in a way that is less problematic than the Court continuing to protect the directive*.[89]

By "a way that is less problematic," Perry appears to mean primarily the Article V amendment process.[90] Like Scalia, Perry seems to assume that the Court by and large does adhere to the original understanding, and that it would be problematic for it to cease doing so.[91] Moreover, Perry's argument that we should adhere to the original understanding because it yields a desirable result is open to question if another approach yields a better result. For example, if current Supreme Court doctrine yields a Constitution more desirable (because it is more just, more workable, and so on) than the Constitution as originally understood, then it would presumably be preferable and less problematic to reject originalism. In any case Perry's argument for originalism rests on the assumption that

88. PERRY, *supra* note 13, at 15, 47.
89. *Id.* at 49.
90. *Id.* at 24.
91. At one point, Perry does admit "the possibility that, depending both on the nature of a constitutional directive issued by our political ancestors and on the relevant peculiarities of context, it is less problematic, all things considered, for the Court unilaterally to discontinue protecting the directive . . . . But that possibility seems marginal." *Id.* at 23-24.

originalism as a model of constitutional adjudication is both descriptively accurate and prescriptively desirable.

## III. ARGUMENTS AGAINST ORIGINALISM

This Part examines in greater detail the premises underlying each of the rationales for originalism discussed in Part II. Subpart A examines the claim that the originators had legitimate authority to bind their own and subsequent generations. This argument from authority, which is the most common defense of originalism, is also the most easily disposed of. As a legal argument, it is dubious; as a moral argument, untenable. It rests on premises which can scarcely be reconciled with the Lockean philosophy prevalent in the eighteenth century, let alone the broader democratic principles dominant in the twentieth century.

Having discarded the argument from authority, we are left with pragmatic arguments of the sort made by Scalia and Perry. As we have seen, these arguments assume that originalism as a model of constitutional adjudication is both descriptively accurate and prescriptively desirable. Descriptively, both Scalia's argument (that original understanding should not be abandoned absent a consensus regarding its replacement) and Perry's argument (that the Court should continue to protect the original understanding until it is disestablished unproblematically) presume that in fact the Court has not already abandoned or disestablished the original understanding.

Subpart B argues that this presumption is incorrect. As most originalists themselves concede, originalism is inadequate as a descriptive model of constitutional adjudication. The vast bulk of current constitutional doctrine cannot be squared with the original understanding. The original understanding of separation of powers has been rewritten to permit the emergence of a modern administrative state; the original meaning of the commerce power has been swept aside to allow federal control over the economy; and constitutional civil rights have been expanded in ways completely at variance with the original understanding. Since few, if any, originalists are willing to repudiate these decisions, they have been forced to adulterate their originalist recipe with varying amounts of stare decisis. But as Subpart C argues, originalists have conspicuously failed to develop a coherent theory of precedent.

Prescriptively, Scalia and Perry have argued that the original understanding of the Constitution is to be preferred for the results it yields. Scalia has argued that the originalist approach yields a constitution that is more determinate and thus has a better claim to the title of "law."[92] Perry has argued that the originalist approach yields a constitution that is substantively better than a nonorigi-

92. Scalia, *supra* note 60, at 854.

nalist approach could yield.[93] Subpart D takes issue with these arguments. Above all, a democratic constitution must preserve the integrity of the democratic process and protect the rights of individuals and vulnerable minorities from oppression by the majority. Current Supreme Court doctrine, which has for the most part evolved pragmatically and incrementally through a process of common-law adjudication rather than by genuine investigation of the original understanding, serves these constitutional goals far better than originalism. Since originalists differ widely among themselves as to the original meaning of the Constitution, current doctrine is also far more determinate than the original understanding.

Subpart E explores further the practical difficulties of recovering the original understanding. Because the historical evidence is often inadequate and contradictory, the historical record rarely yields any clear answers to the most important questions of constitutional interpretation. The tasks involved are daunting: elucidating the original public understandings from the scanty and often contradictory record of individual statements, formulating these understandings at an appropriate level of generality, and summing them to yield a composite "original meaning." At every point in this process, the inevitable gaps in the historical record provide an opportunity for the originalist judge to pass off his own policy preferences as the commands of the framers.

Finally, Subpart F discusses the argument that the originators of the Constitution expected it to be construed without regard to extrinsic evidence of their own particular understandings of its provisions. In the earliest years of the Republic, pure textualist and natural-law approaches to constitutional interpretation were dominant, and recourse to originalist arguments was sporadic, controversial, and political rather than principled. By the time of the Reconstruction Amendments, originalist arguments were more widely accepted. However, the radical constitutionalists whose ideas animated the framers and ratifiers of the Fourteenth Amendment continued to reject originalism in favor of a natural-law approach to constitutional adjudication. Thus the originators themselves offer little support for originalism.

### *A. Inadequacy of the Argument from Authority*

The argument from authority, as we have seen, starts with the premise that the Constitution, like any law, is a command of a sovereign, which must be understood as the sovereign who issued it understood it. As an approach to statutory interpretation in a democracy, the originalist argument from authority is relatively un-

93. PERRY, *supra* note 13, at 28-53.

problematic.[94] If the will of the past majority that enacted the statute is at variance with the will of the present majority that is governed by it, the present majority may simply amend the statute to conform to its present will.[95] In the statutory context, then, originalism simply means that the people should be governed by laws established by the majority interpreted as the majority understood them.

But as an approach to constitutional interpretation, originalism is much more problematic. The pre-1920 provisions of the U.S. Constitution reflect the will of enfranchised minorities rather than majorities.[96] If the will of the past minority that ratified the provision (more precisely, the will of the majority of the representatives of the enfranchised minority) is at variance with the will of the present majority, the present majority may not simply amend the provision. This immunity from majority will may be taken as the de-

94. This is not to say that there may not be other good arguments for nonoriginalism in statutory interpretation. As discussed in note 95, the United States is not a perfect democracy, and the failure to amend a statute does not necessarily mean that a present majority approves of it. Moreover, even if Congress perfectly represented the popular will, it might not have time to review every statute currently on the books. Considerations of practicality and reliance furnish powerful arguments for a conventionalist approach to statutory as well as constitutional interpretation. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

95. In practice in the United States a simple majority may often not be able to amend or repeal a statute. Various procedural hurdles or "vetogates" such as parliamentary maneuvers on the floor or in committee, filibuster in the Senate and so forth may prevent a bill from ever reaching a vote even though it may be favored by a majority of the population. *See*, *e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP N. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 44-45 (2d ed. 1995). Similarly, legislative measures favored only by a minority of the population may be enacted because of the geographic basis for election to Congress and the Electoral College, the staggered terms and malapportionment of the Senate, the disproportionate influence of well-financed lobbying groups and so forth. *See*, *e.g.*, Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1071 n.98 (1988) ("The malapportionment of the United States Senate . . . drastically overrepresents the perspective of rural over urban America."); William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENTARY 159, 159-61 (1995). In other words, the United States is not a perfect democracy. In a perfect democracy, however, statutes are repealable by a majority; to the extent that the United States approximates a democracy, it is approximately true that a majority may amend or repeal statutes that it does not like.

96. *See* KIRK H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES (1971); *see e.g.,* Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989) (discussing the exclusion of the poor from the right to vote in early American history). Various suffrage restrictions based on race, sex, taxation, and age were eventually removed by constitutional amendment, *see* U.S. CONST. amends. XV, XIX, XXIV, XXVI, and by judicial action, *see*, *e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966) (concluding that voter qualification based on wealth or payment of taxes violated the Equal Protection Clause of the Fourteenth Amendment).

fining feature of a constitution.[97] Only a supermajority, following defined and often cumbersome procedures, may amend a constitution;[98] and in some cases constitutional provisions may not be amended at all.[99]

Thus Maltz is surely correct when he writes that "the legitimacy of the Constitution . . . cannot be defended in terms of democratic theory."[100] In fact, the common argument grounding originalism in the authority of the adopters is incompatible with democratic theory. The Constitution cannot derive democratic authority today from its status as a command of the "people" because the "people" who adopted it are not the people of today[101] and were only a tiny minority of the people of 1789.[102]

The political-moral philosophy underlying the argument from authority is in fact hostile to democracy, as Judge Richard Posner pointed out in a penetrating critique of Bork:

> Although Bork derides scholars who try to found constitutional doctrine on moral philosophy, it should be apparent by now that he is himself under the sway of a moral philosopher. His name is Hobbes, and he too thought that the only source of political legitimacy was a contract among people who died long ago. This may have been a progressive idea in an era when kings claimed to rule by divine right, but it is an incomplete theory of the legitimacy of the modern Supreme Court. There are other reasons for obeying a judicial decision besides the Court's ability to display, like the owner of a champion airedale, an impeccable pedigree for the decision, connecting it to its remote eighteenth-century ancestor.[103]

Like Hobbes, the originalist argument from authority presupposes a single exercise of the popular will in the remote past that precludes

97. *Cf.* PERRY, *supra* note 13, at 19 ("What is most distinctive about the constitutional strategy . . . is . . . the extreme difficulty of amending a constitution.").

98. *See, e.g.*, U.S. CONST. art. V.

99. *See id.* (right of states to import slaves until 1808 and to equal suffrage in the Senate).

100. MALTZ, *supra* note 42, at 31.

101. For discussion of the problem of rule by the "dead hand" of the framers, see Daniel A. Farber, *The Dead Hand of the Architect*, 19 HARV. J.L. & PUB. POL'Y 245, 245-49 (1996) (arguing that originalism conveys too much power to past generations) and Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263 (1996) (arguing that feigned deference to the past often disguises the promotion of a particular political agenda).

102. Women, nonwhites, and propertyless persons were excluded from the franchise. Since fewer than 20% of the population was eligible to participate in ratification elections, and only a fraction of those eligible did participate, it has been estimated that "roughly 2.5% of the population voted in favor of the Constitution's ratification." Simon, *supra* note 77, at 1498 n.44.

103. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1372 (1990).

subsequent exercises. Once the Founders have given birth to the constitutional Leviathan, it is thereafter the perpetual embodiment of the will of the people.[104]

Hobbesian absolutism is a curious basis for a popular government of limited powers. The argument from the authority of the adopters is one that the adopters themselves, steeped as they were in the liberal political philosophy of Locke, would likely have found repugnant. Although Locke was not troubled by a political order in which only free propertied males had civil rights, he did not consider later generations bound to a compact made only by their ancestors. Rather, he insisted that "whatever Engagements or Promises any one has made for himself, he is under the Obligation of them, but *cannot*, by any *Compact* whatsoever, bind *his Children* or Posterity."[105]

Thus if originalism is to be grounded in popular consent, then each generation must somehow consent anew to be governed by the Constitution as originally understood. Locke attempted in a rather confused and inconsistent way to develop a notion of tacit consent.[106] But philosophers from Hume's time to our own have criticized as incoherent the notion that individuals somehow tacitly or implicitly consent to a government simply by living under it.[107]

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104. *Cf.* HOBBES, LEVIATHAN 120 (ch. 17) (Richard Tuck ed., Cambridge Univ. Press rev. ed. 1996) (1651), in which Hobbes states:

> The only way to erect such a Common Power . . . is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will . . . . This is more than Consent, or Concord; it is a real Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such manner, as if every man should say to every man, *I Authorise and give up my Right of governing my selfe, to this Man, or to this Assembly of men* . . . . This is the generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God* . . . .

*Id.*

105. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 62 (ch. 8, § 116) (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

106. *Id.* at 347-49 (§§ 119-121). Locke argued that those not parties to the original compact may be bound to it either by express consent, or tacitly, by availing themselves of the physical territory of the "common-wealth." Express consent is irrevocable, but tacit consent ends when direct enjoyment of the land ends, for example by sale. *See id.* But in the following paragraph Locke apparently contradicts himself, arguing that "submitting to the Laws of any Country, living quietly, and enjoying Priviledges and Protection under them, *makes not a Man a Member of that Society* . . . . Nothing can make any Man so, but his actually entering into it by positive Engagement, and express Promise and Compact." *Id.* at 349 (§ 122).

107. *See generally* DAVID HUME, *Of the Original Contract*, *in* POLITICAL ESSAYS 163-201 (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1748) (asserting that "[t]he original establishment was formed by violence, and submitted to from necessity. The subsequent administration is also supported by power, and acquiesced in by the people, not as a matter of choice, but of obliga-

Moreover, it is not clear why, as some have argued, the version of the Constitution each new generation is deemed to consent to must be identical to the Constitution as originally understood.[108] For the most part, the only Constitution that the present generation is familiar with is the Constitution as it is understood today.

Maltz's formalist argument, which seeks to justify originalism by appeal to the legitimate authority of the *states*, rests only on the legal rather than moral authority of the adopters to bind future generations. This argument more closely reflects the state sovereignty theories of John Calhoun than the popular sovereignty ideologies dominant in 1787-89 or 1866-68.[109] Even as a purely legalistic argument it is highly problematic, as Maltz himself recognizes.[110] The assumption that the states themselves possessed legitimate authority to bind future generations merely begs the question. Moreover, any legalistic argument for legitimacy must somehow come to grips with the illegality of the 1787 Constitution under the 1777 Articles of Confederation, which provided:

> [T]he articles of this confederation shall be inviolably observed by every State, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.[111]

Attempts to ground originalism purely in the written nature of the Constitution are equally unsatisfactory. It will not do to say that only the written Constitution as originally understood is the "supreme Law of the Land" and that Supreme Court doctrine is not. The written Constitution cannot make itself the supreme Law by declaring itself to be so. To be the supreme Law, it must be accepted as such. By this test, for judicial purposes, only current Supreme Court doctrine, not the original understanding, is the supreme Law of the Land. Originalism cannot be adequately justified by dogmatic appeal to a general philosophical theory of interpretation.[112]

Arguments from authority are especially problematic as a basis for originalist interpretation of the Reconstruction Amendments. For, as Bruce Ackerman has pointed out, "[t]he Reconstruction

tion"). *See generally* J.W. GOUGH, THE SOCIAL CONTRACT 186-206 (2d ed. 1957) (discussing the decline of social contract theory).

108. For an attempt to elaborate such a theory, see Gardner, *supra* note 77, at 17-20.

109. *Cf.* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 15-17 (1982).

110. MALTZ, *supra* note 42, at 33.

111. ARTICLES OF CONFEDERATION, art. XIII, cl. 1.

112. *See* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1101 (1989).

Amendments—especially the Fourteenth—would never have been ratified if the Republicans had followed the rules laid down in Article Five of the original Constitution."[113] The Congress that proposed the Fourteenth Amendment had refused to seat the delegations of all the Southern states (except Tennessee), and "were it not for the purge of Southern Senators and Representatives, the 'Congress' meeting in June [1866] would *never* have mustered the two-thirds majorities required."[114] When the Fourteenth Amendment was originally submitted for ratification, thirteen Southern and border states rejected it (nine were sufficient to block the Amendment under Article Five). In response, Congress passed the Reconstruction Acts placing the Southern states under military rule and reconstituting their governments, and excluded them from representation in Congress until they agreed to ratify the Amendment.[115] Thus, an argument seeking to ground an originalist interpretation of the Fourteenth Amendment in the legal authority of the originators must confront the fact that the required supermajorities were obtained by force and in violation of the textual requirements of Article V.

### *B. Descriptive Inadequacy of Originalism*

If the argument from legitimate authority is inadequate, we are left with the sort of pragmatic moral arguments for originalism advanced by Perry and Scalia. These arguments proceed, as we have seen, from the assumption that the originalist model is at least by and large a descriptively accurate picture of the way the Court actually adjudicates constitutional questions.[116] Thus Perry argues

113. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 44-45 (1991).

114. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 102 (1998).

115. *See id.* at 110-11. As Ackerman has noted, Congress deemed these southern governments "legitimate enough to validate the Thirteenth [Amendment] but not legitimate when they refused to validate the Fourteenth." Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 502 (1989). Ackerman has nonetheless attempted to rescue the formal authority of the Fourteenth Amendment by arguing that it was an exercise of legitimate higher lawmaking outside the Article V framework. ACKERMAN, *supra* note 114, at 120-252. Ackerman's articulation of the problems surrounding the adoption of the Amendment is far more compelling than his elaborate attempted solution. As Suzanna Sherry has cogently argued, Ackerman's notion that the framers contemplated constitutional amendment outside the mechanisms of Article V is "unsupported and probably unsupportable." Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 923 (1992). Ackerman's highly idiosyncratic extratextual brand of originalism rests on a rigid and highly artificial distinction between normal and constitutional politics that "ultimately raises more questions than it answers because it provides inadequate criteria to identify the moments that have special constitutional importance." *Id.* at 918. As Sherry has pointed out, "[a] more persuasive model might characterize constitutional change as an ongoing process and the differences between normal and constitutional politics as a continuum." *Id.* at 933.

116. *See* PERRY, *supra* note 13, at 50.

that the Court should continue to acquiesce in the original understanding until it can be unproblematically disestablished (i.e., by the Article V amendment process); similarly, Scalia urges the Court not to abandon the original understanding.[117] In fact, the original understanding has already largely been disestablished and abandoned, and the originalist method has little to do with actual practice. The process of nonoriginalist constitutional evolution began almost as soon as the written Constitution went into effect. As Thomas Grey has pointed out, the practice of looking beyond the original understanding for unwritten values to guide judicial review is hardly an innovation of the twentieth century.[118] Justice Chase, speaking for the Court at the end of the eighteenth century, claimed the authority to strike down legislative acts that contravened the "vital principles in our free Republican governments" even though those acts were nowhere "expressly restrained by the Constitution."[119] Similarly, early in the nineteenth century, Chief Justice Marshall did not shrink from grounding a decision in "general principles which are common to our free institutions"[120] in case the written constitution did not adequately address the question presented.[121] From the mid-nineteenth century into the twentieth, the Court has justified decisions rooted in current social philosophy, whether the laissez-faire economics typical of Lochnerism or the interventionism characteristic of the New Deal era, by cursory and tendentious rhetorical appeals to the original understanding. Only rarely, however, has it engaged in the sort of searching historical inquiry demanded by modern originalist theory. However much the Court may use adherence to original understanding as a rhetorical or ideological trope to justify its decisions where convenient, the vast edifice of constitutional jurisprudence it has constructed over the past two centuries bears little relationship to the constitutional text as originally understood.

Thus, far from being problematic, nonoriginalism is an accomplished fact of constitutional practice. Originalists have inconsistently attacked nonoriginalism as both excessively and insufficiently democratic. For example, Justice Scalia has written that rejection of originalism will destroy individual rights: "If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants . . . . This, of course is the end of the Bill of Rights."[122] But in almost the same breath Scalia laments that the most notable feature of our "evolving" Constitution has been a vast

117. *See id.* at 51; *see also* Scalia, *supra* note 60, at 863.
118. Grey, *supra* note 1, at 715-17.
119. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).
120. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810).
121. *See* Grey, *supra* note 1, at 708-09 (discussing *Calder v. Bull* and *Fletcher v. Peck*).
122. SCALIA, *supra* note 28, at 47.

expansion, rather than reduction, of individual rights.[123] (The only major exceptions, to Scalia's chagrin, have been property rights and the right to bear arms.)[124] Judges interpreting the Constitution have generally been conscious of their role as guardians of pluralistic democracy.[125] The individual rights most integral to pluralistic democracy, such as the rights of free speech, freedom of thought, autonomy, privacy, and equal participation in society have received broad protection, while those that tend to reinforce preexisting social inequalities, such as property rights, have been read more narrowly.[126]

But paradoxically, originalists also attack nonoriginalist adjudication as undemocratic. For example, Scalia has repeatedly excoriated his nonoriginalist brethren for "siding . . . with the knights rather than the villeins"[127] or writing "the countermajoritarian preferences of the society's law-trained elite" into the Constitution.[128] But even if, as the originalist caricature suggests, nonoriginalist judges do little more than substitute their policy preferences for those of the framers, it is hard to see why in a democracy the value preferences of the representatives of the eighteenth-century and nineteenth-century elite minorities who largely created the Constitution should trump the preferences of a modern judiciary which at least indirectly represents recent democratic majorities.[129] Those principles that have developed and been repeatedly tested over time through common-law constitutional adjudication are more likely to express the highest and most fundamental values of our society than principles rooted only in the original understanding.[130] Moreover, constitutional law has departed so far from the Constitution as originally understood that a return to the original understanding would wreak unimaginable havoc. An originalist approach

123. *Id.* at 41-42.

124. *Id.* at 43.

125. *Cf.* ELY, *supra* note 1 (exploring representation-reinforcement as an underpinning of constitutional law); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 903-04 (1996) (discussing "preferred position" of certain provisions in constitutional adjudication).

126. *See* Strauss, *supra* note 125, at 903-04.

127. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

128. United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

129. All the members of the modern Court will have been appointed by a President and confirmed by a Senate representing a democratic majority at some time within the past generation, and are thus likely to be closer to the outlook of current majorities than were the framers of 1787. Even for a Court applying modern rather than original values, judicial review may entail frustration of the will of current majorities. In some cases an enactment counter to modern values would not violate the original values; in other cases the opposite would be true.

130. *See* Strauss, *supra* note 125, at 928-30.

to constitutional law in the modern era is neither desirable nor even feasible.

Karl Llewellyn recognized this fact more than sixty years ago in a time when the most significant departure from the original understanding, the vast administrative state that arose out of the New Deal, was barely in its infancy.[131] The written Constitution of 1789 as amended, Llewellyn argued, bore little relationship to the actual working constitution of his time; and it was "appalling" to think that it should.[132] Originalism provided at most a comforting ideology "for the guildsmen of the law and for the layman," an illusion of continuity in a changing world, and a "refuge from responsibility" for judges.[133] The working constitution is in large part extra-textual (e.g., the party system, judicial review) and where necessary, flatly contradicts the written text of the Constitution (e.g., the presidential war-making power).[134] In many cases, the relentlessly creeping process of interpretation has so changed the meaning of a constitutional provision as to alter it beyond recognition. Thus, the "money and borrowing powers have excused first a National Bank, then a national banking system, then a Federal Reserve System"; likewise the interstate commerce power has expanded to the point where it permits regulation of almost any form of economic activity.[135] "The unifying feature is not 'regulate commerce'—the verbal excuse—but 'things which seem to call for centralized regulation'—the fact."[136] Llewellyn urged that "once tails have come to dwarf and wag dogs, 'dog' ceases to be a convenient or significant concept."[137] To the extent that anything remains of the original understanding, "[i]t is institutions which validate the Words, not the Words which validate the institutions."[138]

Today Llewellyn's critique of originalism as a model of actual practice is more compelling then ever. Originalism as a legitimating ideology is still very much with us: Like a dead hand reaching forth from the grave, it retains as tight a grip over constitutional rhetoric as it did in Llewellyn's time. Yet modern scholars have continued to recognize the disparity between ideology and actual practice. Henry Monaghan, surveying the development of constitutional law into the late twentieth century, concluded that origi-

131. Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

132. *Id.* at 3.

133. *Id.* at 4-5.

134. *See id.* at 13-15.

135. *Id.* Llewellyn was writing before this development reached its logical conclusion when the Supreme Court expressly extended the reach of the Commerce Clause to "production not intended in any part for commerce." Wickard v. Filburn, 317 U.S. 111, 118 (1942).

136. Llewellyn, *supra* note 131, at 15.

137. *Id.*

138. *Id.* at 17.

nalism is utterly inadequate as a descriptive model.[139] Originalism fails to account persuasively, he argues, for the enormous twentieth-century expansion of civil liberties, the administrative state, and presidential power.[140] In Monaghan's view, only stare decisis can provide an acceptable foundation for constitutional decisionmaking, except possibly in areas not already dominated by precedent.[141] Although he does not go as far as Llewellyn in advocating a purely functional approach to constitutional interpretation, he does suggest that in certain cases the Court must be prepared to reject both precedent and original understanding when to do so "is necessary to maintain systemic equilibrium" or "will achieve the important values."[142]

Many other originalists have likewise frankly admitted the descriptive inadequacy of originalism. Richard Kay, for example, has written that "[m]ost observers agree that a substantial portion of constitutional law is only tenuously connected to the Constitution of 1787-89, as amended."[143] Bork has admitted that "much of our constitutional order today does not conform to the original design of the Constitution."[144] Gary Lawson has argued that "[t]he actual structure and operation of the national government today has virtually nothing to do with the Constitution" as originally understood.[145] Likewise, Perry has written (albeit before his conversion to originalism):

> Virtually all of modern constitutional decision making by the [Supreme] Court—at least, that part of it pertaining to questions of "human rights" . . . —must be understood as a species of policymaking, in which the Court decides, ultimately without any reference to any value judgement constitutionalized by

139. Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739 (1988).

140. *See id.* at 727-39. Monaghan admits that in many areas the original understanding is debatable and that if formulated at a high enough level of generality original understanding could account for many or all of these developments. *Id.* at 739-40. Monaghan suggests, however, that the weight of the evidence establishes the descriptive inadequacy of originalism and that insistence on a very high level of generality renders originalism vacuous as an interpretive method. *Id; see also* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 378-81 (1981) (discussing the inadequacy of original intent as a constraint on constitutional interpretation). These problems are discussed in Part V, *infra*, in the specific context of Fourteenth Amendment jurisprudence.

141. Monaghan, *supra* note 139, at 748-68.

142. *Id.* at 772.

143. Kay, *supra* note 31, at 227.

144. BORK, *supra* note 8, at 157.

145. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994).

> the framers, which values among competing values shall prevail and how those values shall be implemented.[146]

It is not surprising that the original understanding of a Constitution designed as a framework for oligarchic governance of a thinly populated homogeneous preindustrial society should retain less and less descriptive (or prescriptive) validity for a vastly more populous and heterogeneous democratic postindustrial world superpower. Originalism's continuing currency even as an ideological tool is a considerable tribute to the abilities of the framers. But originalism serves to do little more than *justify* decisions; it cannot *explain* the vast working edifice of constitutional law currently in place. Thus the burden is on the proponents of originalism to show that it can provide the basis of a just and workable constitutional system.

### *C. The Problem of Precedent*

A fundamental obstacle to originalism as a workable theory of constitutional decisionmaking is the fact that vast areas of the existing constitutional order cannot be reconciled with the original understanding. For example, Bork accepts as an "obvious truth" Monaghan's observation that much of current constitutional doctrine, and hence of modern governmental practice, is at variance with the original understanding.[147] Keeping this in mind, would Bork therefore overrule the nonoriginalist decisions legalizing paper money? Would he restore the original understanding concerning federalism and separation of powers that was judicially swept aside to make way for the New Deal and Great Society? Of course not: "To overturn these [precedents] would be to overturn most of modern government and plunge us into chaos. No judge would dream of doing it."[148] On the other hand, Bork suggests that, "it will probably never be too late to overrule the right of privacy cases, including *Roe* v. *Wade*."[149] Bork's principle for dealing with precedent is this: if a

146. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 2 (1982). More recently, of course, Perry has argued that the human rights decisions of the modern Court can be reconciled with the original understanding of the Fourteenth Amendment, which he interprets at a very high level of generality. As discussed in Part V, *infra*, while the historical record is sufficiently incomplete that such an approach is possible, the weight of the available evidence supports a much narrower reading. Similarly, it is no doubt possible that all of current doctrine could be reconciled with the original understanding, interpreted at a sufficiently high level of generality. But no originalist has attempted to undertake such a project, which would face immense historical difficulties and would largely undermine the claim of Scalia and others that the originalist approach to constitutional interpretation yields a fixed ascertainable meaning and prevents the judiciary from making difficult social value judgments. Scalia, *supra* note 60, at 854.

147. BORK, *supra* note 8, at 155.

148. *Id.* at 158.

149. *Id.* On the next page Bork introduces a further refinement: "[T]here may be no real point in overturning the decision in *Griswold* v. *Connecticut*

"wrong" decision is sufficiently "thoroughly embedded in our national life" then "it should not be overruled."[150] But "wrong" decisions which "remain unaccepted and unacceptable to large segments of the body politic" ought to be overturned.[151]

Bork's claim that his "originalist" approach provides neutral principles of decision is intellectually bankrupt. Most of our modern government, Bork concedes, is at variance with the Constitution; yet if an unconstitutional practice is embedded in our national life and widely accepted, it should be upheld. Expediency and popularity are thereby transformed into touchstones of constitutionality. It is not clear what purpose judicial review serves, in Bork's view. Certainly it does not function as a check on majority tyranny. Where a government practice is convenient and popular, no judge following Bork's approach would "dream" of overturning it. Judges should only act where to do so would "not produce any great disruption of institutional arrangements."[152] The more firmly entrenched and widely accepted a given practice, the greater its presumption of constitutionality.

Furthermore, Bork's prudential approach requires judges to make just the sort of subjective value judgments that he claims his method avoids. It is not immediately clear why certain Great Society programs (which are so firmly entrenched that to invalidate them would produce excessively "great disruptions") must be upheld while the right to abortion (which is "unaccepted and unacceptable to large segments of the body politic") should be overruled. It would seem fairer to say that both Great Society programs and the right to abortion are firmly entrenched, that to invalidate either would produce great disruptions, that both enjoy wide popularity, and yet both are not accepted by large segments of the population.[153] Evidently Bork has chosen infinitely malleable criteria which can be manipulated at will to support whatever outcome is most congenial to his personal moral views. His approach to the critical question of stare decisis belies his claim to believe that "judges must consider

[381 U.S. 479 (1965)]. . . since no jurisdiction wants to enforce a law against the use of contraceptives by married couples." *Id.* at 159. But *Griswold*, Bork writes, should "not be used to invalidate a statute again." *Id.*

150. *Id.* at 158.

151. *Id.*

152. *Id.*

153. *See, e.g.*, Robert J. Blendin & Karen Donelan, *Public Opinion and Efforts to Reform the U.S. Health Care System: Confronting Issues of Cost-Containment and Access to Care*, 3 STAN. L. & POL'Y REV. 146, 149 (1991) (discussing public opinion polls indicating limited support for Medicaid and other Great Society welfare programs); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 607 nn. 147-48 (1993) (citing public opinion polls indicating that majorities or at least pluralities have consistently favored the right to abortion).

themselves bound by law independent of their own views of the desirable."[154]

But any other originalist theory approaching the question of stare decisis is likely to founder on the same shoals as Bork's. If the theory rejects all prior nonoriginalist decisions it must reject the modern administrative state; but this is utterly unworkable and no one has ever seriously taken such a position.[155] If it accepts all prior nonoriginalist decisions it arbitrarily freezes constitutional law at its current state of development and embraces a mass of self-contradictory jurisprudence. But if it takes some middle course, as Bork does, it must provide some rule to distinguish those decisions that will be followed from those that will be overruled. If this rule is overly inflexible, it will eventually break down; if overly flexible, as Bork's is, it will allow judges to legislate their own morality from the bench, precisely the failing Bork claims his theory avoids. More importantly, to the extent that any middle course continues to embrace some deviations from the original understanding, originalism's claim to be a legitimating principle of constitutional interpretation is vitiated. Thus the descriptive inadequacy of originalism is one important reason for its inadequacy as a prescriptive theory as well.

### *D. Moral Inadequacy of Originalism*

As discussed above, there is no *a priori* reason why legislative acts of the majority should be subject to originalist judicial review in a democracy. Originalist (or for that matter nonoriginalist) judicial review cannot be adequately grounded in claims of legitimate authority of the adopters or in the alleged "consent" of subsequent generations. Rather, as Michael Perry has argued, originalist judicial review is only justified if the constitutional directives in question, as originally understood, are worth protecting.[156] This argument for originalist judicial review is ultimately result-oriented.

154. BORK, *supra* note 8, at 5.

155. *But see* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 29-33 (1994) (offering a self-styled "naive right-answerist" argument for rejecting any role for precedent in constitutional cases). Lawson offers a purely formal legalistic argument and makes no attempt to explore its moral underpinnings or consequences. He also concedes that his argument is practically irrelevant. For example, although he claims that paper currency is unconstitutional "beyond a reasonable doubt," he concedes that no one is likely to care. *Id.* at 33. Yet at the end of his article he hints that even he is willing to entertain the idea "that the irrevocable enshrinement of errors through precedent should compel the self-conscious creation of further errors in subsequent cases." *Id.* at 33 n.27. This, of course, is nonoriginalism.

156. PERRY, *supra* note 13, at 22. We might add that this is a necessary but not a sufficient condition. The original understanding must of course first be ascertainable; moreover, even if we find that originalist judicial review is pref-

The considerations that Perry advances for originalist judicial review are the same that others have advanced for nonoriginalist judicial review. For example, Owen Fiss has argued that the legitimacy of judicial review by courts is a function of their "competence" which he defines as "the special contribution they make to the quality of our social life."[157] Building on this idea, Paul Brest suggested the following criterion for evaluating a practice of judicial review: "How well, compared to possible alternatives, does the practice contribute to the well-being of our society—or, more narrowly, to the ends of constitutional government?"[158] As Brest said, "[i]t may still be contended that the ends of constitutionalism are best served by enforcing only values embodied in the text and original understanding of the Constitution. However, originalism can no longer be defended *a priori* but must justify itself in the face of alternative approaches to constitutional decisionmaking."[159] Thus, Perry is in broad agreement with leading nonoriginalists that a theory of constitutional judicial review should be judged by the results it yields. He differs with them only in his belief that originalism yields better results.

To evaluate originalism, then, we must examine more closely the "ends of constitutionalism." Among the most important of these are the protection of the integrity of the democratic process and the protection of individual and minority rights from majority tyranny. Since the purpose of constitutionalizing a right is to protect it from majoritarian political processes, constitutions function largely to protect minority rights. In the case of the Fourteenth Amendment, the minorities in question (paradigmatically racial minorities) are certain historically subordinate groups. Certain provisions in the Bill of Rights, such as the First Amendment, likewise protect the political process as a whole, as well as groups historically vulnerable to oppression (paradigmatically, religious and political minorities).

Other provisions in the Constitution, however, were enacted to protect historically dominant minorities.[160] The most notorious examples of this, the provisions protecting the right of slaveowners to import slaves, recover fugitive slaves, and receive disproportionate

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erable to no judicial review at all, it may not be preferable (and indeed this Article argues that it is not preferable) to non-originalist judicial review.

157. Owen M. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 38 (1979).

158. Brest, *supra* note 1, at 226.

159. *Id.* at 227.

160. As Gordon Wood has argued, the 1787 Constitution was "intrinsically an aristocratic document" that was intended "to restore and to prolong the traditional kind of elitist influence in politics that social developments, especially since the Revolution, were undermining." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 513 (1968). *See generally id.* at 483-99, 513-17; GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 254-55 (1992).

representation in Congress,[161] have since expired or been abolished. Others remain. The provisions establishing the Electoral College[162] are perhaps the most elaborate example of an enactment serving to protect elite minorities from majority control. The prohibitions on impairment of the obligation of contracts, certain direct taxes and takings of property without due process also served in part to protect wealthy elites from impoverished majorities.[163] The perpetual equal suffrage of the states in the Senate[164] gave smaller states a veto power over legislation sought by national majorities.

Perry has argued that even if a provision of the Constitution as originally understood is not worth protecting, the Court should "acquiesce" and continue to enforce it until it can be disestablished in some "less problematic way" (i.e., by the Article V amendment process) than for the Court simply "unilaterally to discontinue protecting it."[165] In the case of provisions protecting subordinate minorities this may indeed be plausible. However, in the case of provisions protecting elites or dominant minorities this view is questionable. To disestablish a privilege enjoyed by a dominant elite, its opponents must make use of the very machinery erected by that elite to entrench itself in power. The case of the equal suffrage

161. *See* U.S. CONST. art. I, § 9, cl. 1 (Importation Clause); *id.* art. IV, § 2, cl. 3 (Fugitive Slave Clause); *id.* art. I, § 2, cl. 3 (Three-Fifths Clause). Similarly, the Insurrections and Domestic Violence Clauses were widely understood to empower the federal government to suppress slave uprisings. *Id.* art. I, § 8, cl. 15; *id.* art. IV, § 4. The (unamendable) restrictions on capitations and the prohibition of export taxes were intended to prevent Congress from creating tax incentives for emancipation. *See* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 62-63 (1977). Wiecek notes that the slave-state representatives ensured that "the Philadelphia Convention inserted no less than ten clauses in the Constitution that directly or indirectly accommodated the peculiar institution." *Id.* at 62.

162. *See* U.S. CONST. art. II, § 1, cl. 2-3.

163. *See id.* art. I, § 10, cl. 1 (obligation of contracts); *id.* art. I, § 9, cl. 4 (direct taxes); *id.* amend. V (takings). Richard Epstein has attempted to construct an originalist defense of laissez-faire capitalism based on these clauses. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 704-17 (1984). In Epstein's view, apparently the Constitution did after all enact Mr. Herbert Spencer's Social Statics. *Cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). For critiques of Epstein, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 556-67 (1995), and William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 815-18 (1995). For Epstein's response to Flaherty, see Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591 (1995).

164. *See* U.S. CONST. art. V.

165. PERRY, *supra* note 13, at 23-24. Perry concedes the possibility that in some circumstances the least problematic way to disestablish a directive may in fact be for the Court simply to ignore it, but discounts that possibility as "marginal." *Id.* at 24.

of the states in the Senate presents the most striking case: the minority privilege enjoyed by the smaller states can only be disestablished with their unanimous consent. But even in the normal case where the Article V machinery is available, the amendment process presents a formidable and usually insurmountable obstacle to attacks on the power of a politically dominant elite. It may well have been morally less problematic for a judge simply to disregard where practicable the original understanding regarding slavery in the antebellum era or the rights of women in the nineteenth century than simply to "acquiesce" in the imposition of a constitutional regime on groups that had little or no voice in establishing it.[166] Similarly, it may be less problematic in our own time for a judge to disregard the original understanding regarding the rights of other disfranchised groups than to "acquiesce" in an original understanding that marginalizes their ability to effect change through the normal political process.

Furthermore, even where the Constitution as originally understood does protect the rights of subordinate minorities, it may do so inadequately. For example, no one would question that the adopters meant the Fourteenth Amendment to protect subordinate minorities, but it is highly doubtful whether they understood it to afford the broad protections that the modern Supreme Court has extended. Strong historical evidence suggests that the original understanding of the Fourteenth Amendment cannot accommodate much of modern equal protection doctrine, including the voting rights, reapportionment, and desegregation decisions, and the heightened scrutiny applied to gender discrimination and other non-racial forms of discrimination.[167] Yet few would dispute that these decisions have resulted in a more just and more democratic society, that in Perry's terms, they are "worth protecting," or that in Brest's terms, they serve the "ends of constitutionalism" in a democracy. Their validity should not depend on the outcome of an historical inquiry as to whether they can be justified by reference to some original understanding.

These considerations bear also on Scalia's arguments for originalism. Scalia argued that originalism supplies a fixed ascertainable meaning of the constitutional text and a consensus about constitutional decisionmaking lacking in any rival approach. In fact, nearly the opposite is true. Current Supreme Court doctrine is in many cases related to the original understanding only in a remote and perfunctory way. But current doctrine is far more ascertainable than the original understanding and provides detailed answers to important questions of constitutional interpretation that the Con-

166. For a discussion of the tension between morality and legal formalism in antebellum judicial decisions on slavery, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

167. *See infra* Part IV.

stitution as originally understood barely addresses. Modern doctrine also forms the basis of a general real-world consensus both among lawyers and judges as well as the broader public (the academy excepted). This is not to say that there are no inconsistencies or unresolved questions in current doctrine; but they pale by comparison to those raised by the originalist approach. In equal protection jurisprudence, for example, originalist analysis has run virtually the entire gamut of possible approaches, from the position of Berger, who rejects virtually all the major developments from the time of the Warren Court to the present, to that of Perry, who embraces almost all of these developments and would carry them further in several respects. In contrast, current doctrine provides much more determinate and ascertainable answers to equal protection issues. Given the indeterminacy of the historical record, originalism involves the courts in policy disputes and value judgments no less than the currently prevalent nonoriginalist approach. But at least the nonoriginalist approach allows them to do so openly, and thus (one hopes) to approach the choices involved more clearly and honestly.

In this regard, the various "soft" forms of neo-originalism advocated by liberal scholars such as Lessig, Kalman and Sunstein may present some of the same dangers as strong-form originalism. Lessig has suggested that even if a court's decision is ultimately rooted in policy considerations, the court should "budget the truth" and justify its decision as a nonpolitical act of "fidelity."[168] Similarly Kalman and Sunstein have suggested that not only litigators, but courts and commentators may properly resort to "stylized" or "mythical" versions of the past to reach desired outcomes.[169] These approaches run the risk not only of distorting history, but also of obscuring the real issues involved in modern cases by viewing them through a (suitably rose-colored) historical prism. Even if the original understanding is regarded only as a rhetorical tool rather than an authority in its own right, there is always the danger that historical rhetoric may overwhelm judges and distract them from a proper consideration of the substantive issues raised by the cases before them.[170]

### *E. Practical Inadequacies of Originalism*

Apart from its inadequacies as a descriptive and prescriptive model, originalism presents intractable internal problems. Which original understanding should be privileged? Even if we could de-

168. Lessig, *Constraint*, *supra* note 43, at 1384.

169. *See supra* notes 45-48 and accompanying text.

170. *See* Flaherty, *supra* note 163, at 567-79 (criticizing Sunstein); Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 491-510 (1997) (reviewing KALMAN, *supra* note 9).

cide in principle whose original understandings are relevant, it is often very difficult to determine what those understandings were. Often they were stated at various different levels of generality that will lead to radically different results, without any principled neutral means for courts to choose among them. Furthermore, the problem of summing the disparate understandings of each constitutional provision will often pose insoluble problems.

*1. Historical indeterminacy*

How is the originalist judge to determine which original understanding is to govern? Generally, as we have seen, modern originalists focus on objective public understanding rather than private subjective intentions, but regard as authoritative only the understandings of those groups with the authority to make law.[171] Thus to qualify as the "original understanding" of a given provision, an understanding must have been held by all members of sufficient majorities (or supermajorities, where required) of all bodies whose assent was required to make the provision a part of the Constitution.[172]

Bork has suggested that a variety of sources may be used to recover the original understanding of the 1787 Constitution:

> [R]ecords of the Philadelphia convention, records of ratifying conventions, the newspaper accounts of the day, the Federalist Papers, the Anti-Federalist Papers, the constructions put upon the Constitution by early Congresses . . . executive branch officials . . . and . . . courts, as well as treatises by men who, like Joseph Story, were thoroughly familiar with the thought of the time.[173]

But most of these sources are not authoritative in the strict sense. The Philadelphia convention did not have law-making authority and its records were not published until long after ratification.[174] Subsequent legislative, executive, and judicial interpretations, treatises, as well as even the Federalist Papers are irrelevant unless it can be convincingly demonstrated that they reflected the original understanding of the ratifiers. The Anti-Federalist Papers, which reflect views opposed to those of the ratifying majorities, are irrelevant. Only the records of the ratifying conventions are strictly authoritative as reflecting the views of those with constituent authority. In the case of the subsequent amendments, similarly, we

171. *See supra* Parts I.A-B.

172. *See* Kay, *supra* note 31, at 246-48.

173. BORK, *supra* note 8, at 165.

174. *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 1.1, at 16 (1992) (noting that the proceedings of the Philadelphia convention were not published until long after the Constitution was ratified).

must look to the records of Congress and the ratifying state legislatures in order to determine the original understanding of any given provision.

Unfortunately, the most authoritative sources, the contemporaneous public records of the originators' debates on the 1789 Constitution and the 1791 Bill of Rights, are highly inadequate.[175] The records of the state ratifying conventions are preserved only in Jonathan Elliot's *Debates*, a source that is egregiously incomplete, inaccurate, and partisan.[176] Similarly, the official reports of the debates over the Bill of Rights in the *Annals of Congress* are so badly garbled and inaccurate as to be utterly unreliable.[177] Best-preserved, although still quite unsatisfactory, are the records of the Philadelphia Convention of 1787,[178] which is not authoritative for public-understanding originalism.

These materials provide little guidance for elucidating the meaning of the most important rights guaranteed by the Constitution, such as the First Amendment right to freedom of speech, or the Fifth Amendment guarantee of due process. In the case of the freedom of speech, for example, historians cannot agree whether the ratifiers intended to adopt merely a narrow Blackstonian prohibition on prior restraints[179] or a broad libertarian principle which

175. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 1-2 (1986).

176. *See id.* at 13-24. Elliot was a partisan of John Calhoun and may have doctored his *Debates* to promote Calhoun's cause. *See id.* In any case, the reporters on whom Elliot relied were themselves notoriously inaccurate and partisan. *See id.* at 20-24. Hutson concludes that "[d]ocuments as corrupt as these cannot be relied upon to reveal the intentions of the Framers." *Id.* at 24.

177. *See id.* at 35-38. Thomas Lloyd, the preparer of these reports, was an unscrupulous partisan who, Elbridge Gerry complained, was so unreliable that at times he quoted speakers as saying the exact opposite of what they actually said. *See* Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 536 (1961). Madison complained of Lloyd's "illiteracy" and his "mutilation & perversion" of the record of the debates. *Id.* at 533. Lloyd's published records reflect his increasing problems with alcohol and bear only "slight resemblance" to his own stenographic notes, which are filled with doodles, poems, and sketches of people and horses. *Id.* at 530; *see also* Hutson, *supra* note 175, at 36.

178. Madison's notes of the Convention, first published in 1840, although incomplete, "stand alone as the key to the Framers' intentions" because the other sources are virtually worthless. Hutson, *supra* note 175, at 33. The official *Journal* of the Convention, kept by Secretary William Jackson and first published in 1819, is a bare skeleton listing motions in chronological order; Jackson's notes of the debates themselves have disappeared. *See id.* Robert Yates' notes of the debates, first published in 1821, were thoroughly falsified by their editor Edmond C. Genet ("citizen Genet") and, therefore, Hutson dismisses them as "the plaything of an unscrupulous partisan" that "cannot be considered a reliable record" of the proceedings at Philadelphia. *Id.* at 11.

179. *See, e.g.,* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 173, 263 (1969).

would abolish the common law of seditious libel as well.[180] The "authoritative" materials are silent: "Little can be drawn from the debates within the House on the meaning of the first amendment, nor are there any records of debates in the Senate or the states on its ratification."[181] And if we turn from the strictly authoritative materials to the wider universe of contemporary discussion of the subject, we are no better off. Some argued that sedition laws had no place in a republic where the people were sovereign;[182] but others argued that "freedom of speech" meant only freedom from prior restraints,[183] and many of the same men who framed the First Amendment in 1791 proceeded to enact the infamous Sedition Act in 1798.[184] If we seek answers to the critical questions of modern First Amendment theory, such as the question whether freedom of speech is ultimately rooted in the principle of self-government or of individual autonomy, the eighteenth-century materials offer no firm guidance.

Perry has argued that the possibility that "there may be no single original understanding" is "extremely unlikely" because "Constitutional provisions . . . are efforts to deal with real problems."[185] But precisely because they confront real problems and often irreconcilable conflicts, it is extremely tempting for the framers of a constitution to adopt grand, sweeping propositions capable of meaning all things to all people, propositions whose ringing, majestic generalities paper over the unresolved conflicts of the patchwork majorities cobbled together to enact them. Madison advised the framers not to inquire into the details behind "abstract propositions, of which judgment may not be convinced . . . . [I]f we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty."[186] It would be an error, then, to seek a single authoritative decoding or interpretation of provisions whose very vagueness and indeterminacy was essential to their meaning, and that would not have been ratified if they were not capable of being understood differently by each ratifier.

Thus, the argument that it may be difficult or impossible to recapture original understandings is not "an attack on the possibility and validity of historical investigation."[187] It is simply a recognition of the obvious truth that historical investigation has limits. Unfortunately, we cannot interview the framers to determine how they

180. *See, e.g.*, ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1941).

181. 4 ROTUNDA & NOWAK, *supra* note 174, § 20.5, at 10-11.

182. *See* CHAFEE, *supra* note 180, at 19-21.

183. *See generally* LEVY, *supra* note 179.

184. *See* 4 ROTUNDA & NOWAK, *supra* note 174, § 20.5 (discussing freedom of speech and the Alien and Sedition Act of 1798).

185. PERRY, *supra* note 13, at 39.

186. 1 ANNALS OF CONG. 738 (Joseph Gales ed., 1789).

187. Kay, *supra* note 31, at 252.

understood a given provision. The historical record is often radically inadequate for resolution of cases arising under the most important constitutional provisions. In some instances, the historical record itself is too sparse; in others, the very vagueness of the provision is the virtue that enabled it to be enacted.

*2. Level of generality*

One of the most difficult problems associated with originalism is the level of generality. If a constitutional directive is understood at a very high level of generality it exerts little constraint on judicial discretion; conversely, if it is understood at a low level of generality it confines judicial discretion within narrow limits. The originalist response to this problem has been to argue that "a judge should state the principle at the level of generality that the text and historical evidence warrant."[188] But if, as we have seen, the text and history often will not permit us even to decide among competing understandings, *a fortiori* it will often not permit us to choose among different levels of generality of any given understanding.

Indeed, the entire question of level of generality may be inappropriate, for it presumes that there exists a single level of generality at which a given constitutional provision may be interpreted. But the framers of a given provision may have intended it simultaneously at several different levels of generality. Thus, to take a concrete example, it may be that the ratifiers of the Fourteenth Amendment intended it to ban invidious classifications in general and racial discrimination in particular, or more accurately, that they did not distinguish between the two levels of generality. Since they did not generally consider sex discrimination or other forms of discrimination to be invidious classifications, if one were to ask them at what level of generality their provision should be interpreted they might have expressed considerable puzzlement. Moreover, there may be no principled way for the originalist judge to decide between the two levels. The obscure language of the text offers little guidance, and the historical evidence supports both the broad and the narrow view, since the ratifiers largely saw no conflict between the two.

It is especially hard to decide what weight to give to the framers' specific views about implementation of provisions they enacted. Perry views constitutional adjudication as a two-step process: first, "interpretation," whereby a textual constitutional provision is decoded to yield a "directive," and second, "specification," whereby the "directive" is applied to yield a decision in particular cases.[189] But Perry treats the question of the framers' understanding of how a provision should be applied in given concrete cases as one of "speci-

188. BORK, *supra* note 8, at 149.
189. PERRY, *supra* note 13, at 36-37.

fication" only and not of "interpretation."[190] Perry argues that a constitutional "directive" should be "specified" to ban practices that the framers specifically meant it to ban and to permit practices that they specifically intended it to permit, but that it need not be specified to permit practices that they merely did not understand it to ban (perhaps because they did not foresee it).[191]

There are several problems with this approach. First of all, there is strong evidence that the framers of the Fourteenth Amendment intended it to permit racial segregation. There was a widespread understanding that Section1simply constitutionalized the Civil Rights Act of 1866, and the legislative history of that Act suggests fairly clearly that Congress understood it to permit segregation.[192] Furthermore, there is a great deal of evidence that the Thirty-Ninth Congress understood "privileges and immunities" in a narrow sense which encompassed private-law rights but not political or social rights.[193] On this view, then, the Fourteenth Amendment should be construed to permit racial segregation.

On a more general level it is not clear why Perry seems to regard the specific views of the framers as relevant more to "specification" of indeterminate "directives" than to the "interpretation" of the constitutional text.[194] Even if the Thirty-Ninth Congress did not

190. *Id.* at 79-81. In so doing he places himself (with Bork) in the "moderate intentionalist" rather than the "strict intentionalist camp. *See id*. at 44-45. Here Perry deploys terminology used by Gregory Bassham and others. *Id.*

191. *Id.* at 79-81.

192. *See, e.g.,* BERGER, *supra* note 7, at 132-54.

193. *See id.* at 30-69.

194. Perry does admit that the specific views of the adopters will sometimes be relevant to the "interpretive inquiry." In the case where the framers specifically meant a directive to ban a practice, he argues that the directive should be "interpreted" to ban the practice, but that this is a more concrete and determinate aspect of a general directive. For example, the antidiscrimination directive represented by Section 1 of the Fourteenth Amendment was specifically meant to ban discrimination against blacks. Therefore, in addition to the general directive barring discrimination against members of a group based on a view that the group is inferior because of a trait irrelevant to their status as human beings (which may then be specified to bar invidious discrimination on the basis of sex, sexual orientation, etc.), the directive also contains "a more specific and concrete (determinate) aspect" specifically barring invidious discrimination based on race. PERRY, *supra* note 13, at 79-81. But Perry's general directive barring discrimination based on "irrelevant" traits is not specifically contained in the text, the public understanding, or the debates over the Amendment. Instead it is an abstraction derived from these things. The fact that originally the only classes ever clearly understood to be protected by the Amendment were blacks and loyalists might justify restating the general directive at a much lower level of generality, not just supplementing it with more determinate "aspects." Furthermore, in the case of practices that the framers specifically intended not to ban, Perry introduces an unwarranted assumption which underlies his tendency to formulate directives at an extremely high level of generality. Perry states:

specifically understand the Fourteenth Amendment to *permit* segregation, it is highly unlikely that it understood the Amendment to *forbid* segregation. This fact in itself is evidence that the "directive" represented by the constitutional text was something less sweeping than a general antidiscrimination principle. It was perhaps instead understood as a principle of nondiscrimination in private-law rights, or a principle of separate but equal. If this is so, then to exclude the evidence of the framers' toleration of segregation from the interpretive inquiry, thus obtaining a broad antidiscrimination directive, but admit it at the level of specification only to be trumped by the antidiscrimination directive, would amount to a *petitio principii*.

In his discussion of *Brown v. Board of Education* Bork takes a slightly different approach. He begins by supposing that "the original understanding of the fourteenth amendment" was the separate but equal doctrine embodied in *Plessy v. Ferguson*.[195] But the text and legislative history, he insists summarily, indicate that "equality under law was the primary goal." Segregation was not "the primary thrust of the equal protection clause . . . . Segregation is not mentioned in the clause, nor do the debates suggest that the clause was enacting segregation."[196] Moreover, by 1954, Bork continues, history had shown that "segregation rarely if ever produced equality."[197] Thus, the Court was forced to choose between the two: "There was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that."[198] Therefore, Bork argues, the secondary meaning had to yield to the primary and the Court rightly chose equality over segregation.

Bork's approach is too weak to account for modern doctrine even in the limited area of racial segregation.[199] It does not really require that *Plessy* be overturned; if the problem was only the inequality of separate facilities and not separation itself, courts could

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> It seems that it would be quite difficult, with respect to constitutional provisions regarding rights or liberties, to support a historical claim, not merely of a specific intention to disallow, but of a specific intention to allow alongside a specific intention to disallow. Indeed, it seems quite doubtful that such claims could often (ever?) be sustained. But maybe I am flat wrong about that.

*Id.* at 81. Perry's misgivings about his view are justified. The Fourteenth Amendment provides a clear counterexample: alongside a specific intention to disallow racial discrimination in property and contract rights, a manifest specific intention to allow racial discrimination in voting rights.

195. BORK, *supra* note 8, at 81 (discussing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

196. *Id.* at 82.

197. *Id.*

198. *Id.*

199. Bork also rejects *Bolling v. Sharpe*, 347 U.S. 497 (1954), believing the federal government is constitutionally free to engage in racial discrimination. BORK, *supra* note 8, at 83-84.

continue to require a factual showing that separate facilities in a given case were actually unequal. Moreover, the logic of Bork's approach rests on a dubious manipulation of history[200] and level of generality. Of course the debates did not suggest that the Thirty-Ninth Congress was enacting segregation through the Fourteenth Amendment; segregation had already been enacted by most states and the federal government. But much of the historical evidence suggests that the Fourteenth Amendment established only a limited principle of equality in the area of private-law rights, and that the right to public schooling fell outside this area.[201] Thus the problem is not, as Bork argues, that "equality and segregation were mutually inconsistent, though the ratifiers did not understand that."[202] Rather, the ratifiers did not enact equality as a general principle, but only with respect to a specified set of rights. For example, the text and legislative history of the Amendment make it clear that the ratifiers specifically intended to permit states to deny blacks the right to vote.[203]

Finally, if traditional originalism raises intractable level of generality problems, neo-originalist theories of "translation" only exacerbate those problems. The neo-originalist "translator" must not only formulate the original understanding at the proper level of generality, but must determine exactly what sort and what degree of change in external circumstances will warrant a departure from literal translation, and how extensive that departure should be. Each of these new variables introduces new level of generality problems. Moreover, as Michael Klarman has pointed out, not all changed circumstances can be treated as relevant in such a translation:

> If we treat all changed circumstances as relevant variables, then we simply will have converted the Framers into us, and asking how they would resolve a problem is no different from asking how we would resolve it. Yet a decision to treat some

200. *Cf.* Raoul Berger, *Robert Bork's Contribution to Original Intention*, 84 NW. U. L. REV. 1167, 1183 (1990) (arguing that Bork's attempt to justify *Brown* "runs counter to the historical record"); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. Rev. 1373, 1379 (1990) (book review) (arguing that "Bork's constructive defense of *Brown* is decidedly non-originalist"); Ronald Turner, *Was "Separate But Equal" Constitutional?: Borkian Originalism and Brown*, 4 TEMP. POL. & CIV. RTS. L. REV. 229, 262 (1995) (arguing that Bork's analysis of *Brown* "is actually informed by contemporary factors and his own notions of equality, and, therefore, is not originalist").

201. *See infra* Part IV.A for a discussion of the history of the Fourteenth Amendment.

202. BORK, *supra* note 8, at 82.

203. *See*, *e.g.*, MALTZ, *supra* note 8, at 118-23 (arguing that the Fourteenth Amendment was not understood to affect state control over suffrage).

> changed circumstances as variables and others as constants seems entirely arbitrary.[204]

Indeed, as Klarman notes, it is arbitrary to ask merely how the framers might have adapted their constitutional concepts to changed circumstances without considering whether changed circumstances might have caused them to rethink or abandon their original concepts altogether.[205]

*3. Summing different understandings*

Kay has argued that "[t]he possibility of multiple, varying intentions is not . . . fatal to the enterprise of original intentions adjudication. The difficulty is intractable only if there are multiple and totally contradictory intentions."[206] As long as the different intentions (or understandings) are "overlapping not contradictory" the sum of the multiple understandings will be the "common core of meaning shared by" a majority.[207] In set-theoretical terms, the sum is the intersection of the understandings of some enacting majority.

While any consistent originalist theory must adopt something like Kay's approach, it does pose a number of problems. First, Kay does not specify *which* enacting majority should be summed. In the case where more than a bare minimum has supported the provision there will be several possibilities. But the problem goes deeper than that. Kay's method results in the adoption of the least common denominator among multiple understandings, a minimal version of the given provision, which if stated in its minimal form might never have commanded a majority of the ratifying body. A couple of examples will make this clear. First, we may consider the case where the understandings of one segment of the ratifying majority is a proper subset of the understandings of another segment. We may take our First Amendment example as a paradigm. Suppose that in a given ratifying body, one third of the members understand "freedom of speech" to mean only a Blackstonian prohibition on prior restraints and support it because it is so limited, one third understand it the same way but oppose it because they believe it is too narrow (because it implicitly sanctions the power of the government to impose subsequent restraints), and one third understand it as a broad libertarian prohibition on both prior restraints and subsequent restraints such as seditious libel laws, and therefore support it. Kay's "core meaning" of freedom of speech in this case would be a prohibition on prior but not subsequent restraints, but only a minority favored enactment of that "core meaning." Indeed, if the "core meaning" had been made explicit, it is possible that the liber-

204. Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 402 (1997).
205. *Id.* at 395.
206. Kay, *supra* note 31, at 248.
207. *Id.*

tarian third that supported the provision would have rejected it. Thus it is not true that Kay's "core meaning" will not necessarily represent the intentions of an authoritative majority.

The problem is even more severe where the understanding of one segment of the ratifying majority is not a subset of the understanding of another segment. We may take the Privileges and Immunities Clause of the Fourteenth Amendment as a paradigm here. Suppose one-third of the ratifying body sees the clause as protecting absolutely a narrow set of "natural" rights from any infringement, one-third sees it as protecting a broader set of positive-law rights, but only against racially discriminatory infringement, and one-third opposes the clause. Kay's "core meaning" will be that the clause protects only the narrow set of liberties, and only against racially discriminatory infringement. This will be a meaning far narrower than that which any of the clause's proponents advocated. Even though their understandings were "overlapping not contradictory," the intersection of their understandings represents a provision far weaker than any of them intended to constitutionalize.

The real-world process of summing understandings is far more difficult than in the hypothetical examples above. For, in general, we do not know what percentage of support each understanding enjoyed. In some cases, like the First Amendment, we have little indication at all what the ratifiers' understandings may have been.[208] In other cases, like the Fourteenth Amendment, we have a number of confused and contradictory speeches by the leadership who introduced or supported a provision, but little indication as to which of these varying understandings was embraced by the requisite majorities or supermajorities in the bodies that ultimately approved it.[209]

Furthermore, it is clear from the foregoing that "core meaning" summation of different original understandings of a given right will always result in the narrowest interpretation of that right. This fact is especially alarming when we recall that the *powers* of government have gradually been expanded almost beyond recognition, a situation generally regarded as irreversible. Now that the vast expansion of government power is a *fait accompli*, originalism steps in to block further development of individual rights as a counterweight. Once the transformation from limited to virtually plenary government power is complete, the way is safe for the conservative votaries of originalism to arrest any further development of individual rights, by piously exhorting the Court to "Go and sin no more."[210]

208. *See* Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1985) (Bork, J., concurring).

209. *See generally* Part IV.A *infra*.

210. BORK, *supra* note 8, at 159 (quoting RAOUL BERGER, DEATH PENALTIES 82-83 n.29 (1982)).

### *F. Originalism and the Originators*

#### *1. The early Republic*

Defenders of originalism have been anxious to claim a pedigree for their approach extending back to the founding of the Republic.[211] However, H. Jefferson Powell argued in an iconoclastic article that the framers intended that judges interpreting the Constitution should look only at its text and disregard extrinsic evidence of intent.[212] Powell pointed out that the cultural climate of eighteenth century America viewed all legal "interpretation" with suspicion. Both Protestant biblicism with its slogan of *sola scriptura* and the Enlightenment rationalism of Montesquieu and Beccaria infused American legal thinking with hostility to any resort to extratextual sources of interpretation.[213] Similarly, the common-law approach to statutory interpretation (the so-called "English rule") excluded any resort to legislative history to resolve ambiguities in the text.[214] Where the text of a statute was unclear, courts were expected to rely on the statute's preamble or on prior statutes and judicial precedents to determine the statute's scope and purpose.[215]

Subsequent studies have challenged Powell on a number of particular points.[216] Most importantly, while the founding generation was on the whole demonstrably hostile to inquiry into the understanding of the Philadelphia framers as a method of constitutional interpretation, the founders did not rule out resort to the understanding of the ratifiers.[217] Nonetheless, Powell's central insight

211. Originalists have pointed, for example, to Madison's statement that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers." 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1900-10), *quoted in* BERGER, *supra* note 7, at 4. Similarly, in a letter of 1821, Madison wrote that the "true meaning" of a constitutional provision is "the sense in which it was understood by the nation at the time of its ratification." 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 245 (Philadelphia 1865) [hereinafter MADISON LETTERS].

212. *See generally* Powell, *supra* note 1.

213. *Id.* at 889-94.

214. *See id.* at 894-902.

215. *See id.* at 884-902. In this regard, Powell argues that the framers regarded the Constitution as a law enacted by the people and to be interpreted according to common-law principles of statutory interpretation, in contrast to the Articles of Confederation which were a compact between the states interpretable according to common-law rules of contractual interpretation. *Id.* at 902-13.

216. *See generally* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1988) (disputing some of Powell's conclusions); Berger, *supra* note 64, at 296 (same).

217. *See* Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENTARY 159, 160 (1996).

has not been effectively rebutted.[218] Recent studies have generally confirmed that in the late eighteenth century originalism was not a dominant approach to constitutional interpretation, and was never applied in a consistent manner.[219]

Madison, for example, seemed to vacillate between an originalist and a conventionalist approach. While Madison made a number of statements suggesting that the original meaning of the constitution ought to govern,[220] he also repeatedly indicated that convention or *usus*, as established by governmental practice and judicial interpretation, could "settle the meaning and the intention of its authors."[221] During the ratification debates Madison emphasized that the provisions of the Constitution would be "considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[222]

Jack Rakove has recently shed new light on the attitudes toward originalism reflected in the earliest disputes over the interpretation of the new Constitution.[223] The first such dispute, the 1789 debate in the House of Representatives over the power of the president to remove appointees, saw little recourse to original understanding. This debate "followed the prevailing rules of construction that emphasized the manifest language of the text, internal consis-

218. Kay discusses Powell's view at some length only to conclude that "I have not yet answered [it] to my own satisfaction." Kay, *supra* note 31, at 280.

219. *See* Rakove, *supra* note 217, at 164-65. Rakove states:

> Neither the framers nor the ratifiers had any notion that documentary evidence of their intentions and understandings would provide interpreters with a useful guide to the true meaning of the Constitution. The text and structure of the document would provide the locus of interpretation; historical evidence of the debates would not be relevant.

*Id.*; *see also* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1024 (1991) ("In the real-life world of the 'Founding Fathers' and their contemporaries, 'original understanding' plainly was not a very significant tool of constitutional hermeneutics, let alone the dominant one."); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1187 (1987) (concluding that originalism, while sometimes advanced in the late eighteenth century, "was considered neither the exclusive nor the predominant legitimate interpretive strategy").

220. *See supra* note 211.

221. Powell, *supra* note 1, at 939 (quoting letter (not posted) from James Madison to John Davis (c. 1832), *in* 4 MADISON LETTERS, *supra* note 211, at 232, 249).

222. THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961).

223. *See generally* Rakove, *supra* note 217. *See also* RAKOVE, *supra* note 80, at 339-65.

tency, and fidelity to general principles" rather than the understanding of the framers and ratifiers.[224]

The next major constitutional dispute, the 1791 debate over the bill to charter the First Bank of the United States,[225] likewise revolved mainly around textual and structural arguments. However, Madison and other opponents of the bill, who had the original understanding on their side, did make some use of originalist arguments, while Hamilton (the bill's drafter) and other Federalists insisted that such arguments were improper.[226] During the debates Madison noted that "he well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected."[227] Similarly, he noted, the ratifiers had repeatedly insisted that the Necessary and Proper Clause did not add to the enumerated powers of Congress.[228] Madison insisted that his recourse to original understanding was legitimate: "In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide. Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties."[229]

Hamilton, on the other hand, argued that the "grammatical," "popular," and "obvious" meaning found "in the instrument itself, according to the usual & established rules of construction" was controlling, not "arguments drawn from extrinsic circumstances."[230] If fair inferences drawn from the text of the Constitution permitted the creation of a national bank, then the express intentions of the framers to the contrary "must be rejected."[231] Likewise Elbridge Gerry rejected recourse to extrinsic evidence and adumbrated many of the concerns of modern critics about the difficulties of recovering a single coherent original meaning by aggregating the disparate in-

224. Rakove, *supra* note 217, at 170-71. The one attempt to invoke the original understanding was a dismal failure. During the debate William L. Smith quoted *The Federalist No. 77* to show that "[t]he consent of [the Senate] would be necessary to displace as well as appoint." But the next day a mortified Smith received a note informing him "that *Publius* [i.e., Alexander Hamilton, the author of *The Federalist No. 77*] . . . upon mature reflection had changed his opinion & was now convinced that the President alone should have the power of removal at pleasure." *Id.* and sources cited therein; *see also* RAKOVE, *supra* note 83, at 347-50.

225. Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

226. *See* Rakove, *supra* note 217, at 171-72, 174-75.

227. James Madison, Remarks Made Pertaining to the Power of Congress to Establish an Incorporated Bank (Feb. 2, 1791), *in* 13 THE PAPERS OF JAMES MADISON 372, 374 (Charles F. Hobson & Robert A. Rutland eds., 1984) [hereinafter MADISON PAPERS].

228. *See id.* at 380.

229. *Id.* at 374.

230. ALEXANDER HAMILTON, AN OPINION ON THE CONSTITUTIONALITY OF AN ACT TO ESTABLISH A BANK (1791), *reprinted in* 8 PAPERS OF ALEXANDER HAMILTON 97, 102-03, 111 (Harold C. Syrett ed., 1965).

231. *Id.* at 111; s*ee also* Powell, *supra* note 1, at 914-16.

dividual understandings reflected in the fragmentary and inadequate historical record.[232]

During the next major constitutional dispute, the debate in 1795-96 over the Jay Treaty, the roles were reversed. This time it was the Federalists who had the original understanding on their side, and they were prepared to discard their former scruples to make use of it. As usual, the debate focused on textual and structural, rather than originalist arguments, but Hamilton cited both the views of the framers and arguments made during the ratification debates (including Madison's arguments in *The Federalist*) to buttress his position.[233] President Washington went further and cited the official journal of the Convention to show that the framers had explicitly rejected a proposal to require legal ratification of treaties by both houses of Congress.[234]

Madison now retreated somewhat from his previous position, and insisted that the understandings of the framers at Philadelphia were irrelevant because they lacked law-making authority. Only the understandings of the sovereign people speaking through the ratifying conventions could properly be consulted:

> [W]hatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.[235]

However, the ratifiers offered little guidance. For the records of the ratification debates, as Madison himself conceded, were incomplete and inconclusive.[236]

Reviewing these events, Rakove has concluded that Madison's approach to originalism was "marred by unresolved problems."[237] The same may be said for the approach of Madison's Federalist op-

232. *See* Rakove, *supra* note 217, at 173-74 (citing Elbridge Gerry, Remarks During the Debate of 1791 Over the Bill to Charter a National Bank (Feb. 7, 1791), *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 75-81 (M. St. Clarke & D.A. Hall, eds.) (Augustus M. Kelly, reprint ed. 1967)).

233. *See id.* at 178.

234. *See id.* at 181-82.

235. James Madison, Response to those who Advocated an Appeal to the Authority and Intentions of the Framers (Apr. 6, 1796), *in* 16 MADISON PAPERS, *supra* note 227, at 295-96.

236. *See* Rakove, *supra* note 217, at 184-85.

237. *Id.* at 186.

ponents. Moreover, even in the earliest years of the Republic, "the temptation to resort to [originalism] was manifestly political. It was dictated not by the prior conviction that this was the most appropriate strategy to ascertain the meaning of the Constitution, but by considerations of partisan advantage."[238]

Madison reasserted his conventionalist views twenty years after these debates, when, despite his earlier arguments that a national bank was unconstitutional, he signed into law the act incorporating the Second Bank of the United States.[239] In doing so Madison explicitly reaffirmed his belief that *usus* or governmental precedent was authoritative even if it contravened the original understanding. Acquiescence in creation of a national bank by Congress, the President, the Supreme Court and the people, in Madison's view, was tantamount to "a construction put on the Constitution by the nation, which, having made it, had the supreme right to declare its meaning."[240]

Thus the originators' own views of the role of original understanding in constitutional interpretation cannot be very comforting to modern originalists. While the framers of the 1789 Constitution and the 1791 Bill of Rights did not rule out originalism altogether, they often rejected it in favor of pure textualism or conventionalism. Moreover, the founders did deploy powerful arguments against the sort of specific-intent originalism championed by Raoul Berger. As a practical matter, moreover, originalism rigorously pared of resort to evidence of the understandings of the Philadelphia framers tends to become an empty doctrine indistinguishable from any other form of textualism. Even such self-proclaimed paladins of "public meaning" as Bork and Scalia are rarely rigorous enough in practice to avoid extrinsic evidence of subjective intent.

*2. The nineteenth century*

The dominant approach to constitutional interpretation in the early Supreme Court was not originalism, but textualism informed by traditional common-law and natural-law principles.[241] Chief Justice John Marshall summarized the early Court's interpretive approach as follows:

> [A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in

238. *Id*.

239. Act of Apr. 10, 1816, ch. 44, 3 Stat. 266.

240. Letter from James Madison to Marquis de Lafayette (Nov. 1826), *in* 3 MADISON LETTERS, *supra* note 211, at 538, 542; *cf.* Letter from James Madison to Spenser Roane (Sept. 2, 1819), *in* 3 MADISON LETTERS, *supra* note 211, at 143, 145; Letter from James Madison to C.J. Ingersoll (June 25, 1831), *in* 4 MADISON LETTERS, *supra* note 211, at 183-87.

241. *See* Clinton, *supra* note 219, at 1214; Lofgren, *supra* note 216, at 111.

> the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.[242]

When the early Court cited *The Federalist*, it generally did so in reliance on its authority as a treatise rather than as evidence of the original understanding.[243] In *Chisholm v. Georgia*,[244] the Court deployed pure textualist arguments to support its jurisdiction in a suit against a state despite the well-known, nearly universal understanding of the ratifiers to the contrary.[245] Similarly, in *McCulloch v. Maryland*,[246] Marshall held the Second Bank constitutional despite the fact that the Philadelphia Convention as well as the ratifiers had rejected congressional power to incorporate banks. There can be little doubt that Marshall was aware of the original understanding, which was referred to extensively in oral argument; he simply chose to ignore it.[247]

Joseph Story, the leading nineteenth-century commentator on the Constitution, expressed grave reservations about the use of extrinsic evidence of original understanding in constitutional interpretation.[248] Story's concerns, like those of many modern critics of originalism, were both practical and principled. First, the practical difficulties of ascertaining the original intent seemed insurmountable, even in Story's time given the inadequacy of the historical record[249] and the difficulty of reconciling often divergent original

242. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

243. *See* Baade, *supra* note 219, at 1042 (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798)). However, in one opinion Chief Justice Marshall indicated that *The Federalist* was authoritative not just as a treatise but also as a contemporaneous exposition of the original understanding:

> [*The Federalist*] is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1819). The main thrust of the Court's opinion in *Cohens* is nevertheless textualist; originalist considerations are brought into play merely to confirm results already reached by other means. *See* Baade, *supra* note 219, at 1043.

244. 2 U.S. (2 Dall.) 419 (1793).

245. *See* Powell, *supra* note 1, at 921-23.

246. 17 U.S. (4 Wheat.) 316 (1819).

247. *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 10 (1988); Baade, *supra* note 219, at 1037-40.

248. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 406, at 287-88 (2d. ed. 1851).

249. As Story notes, in the case of the ratification debates, "of all the state conventions, the debates of five only are preserved, and these very imperfectly. What is to be done, as to the other eight states?" *Id.* § 407 n.1. Similarly, in the case of the framers and ratifiers alike:

> Are we to be governed by the opinions of a few, now dead, who have left them on the record? Or by those of a few now living, simply be-

meanings.[250] Second, in principle, the people ratified the text of the Constitution only, not any extrinsic evidence of their understanding of the text.[251] These considerations led Story to reject reliance on extrinsic historical evidence of the framers' or ratifiers' original understanding in favor of a purely textualist approach to constitutional interpretation.[252]

Nevertheless, as the nineteenth century wore on, originalism became ever more dominant as a rhetorical legitimating device in constitutional adjudicatory practice, even if it was never elaborated into a coherent interpretive theory and was never consistently or systematically applied. Chief Justice Taney's 1857 ruling in *Dred Scott* that the Constitution excluded blacks from citizenship is typical:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or this country, should induce the court to give the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted . . . . If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it re-

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> cause they were actors in those days, (constituting not one in ten thousand of those, who were in favour or against it, among the people)? . . . Is the sense of the constitution to be ascertained, not by its own text, but by the "*probable meaning*" to be gathered by conjectures from scattered documents, from private papers, from the table talk of some statesmen, or the jealous exaggerations of others?

*Id.*

250. As Story notes:

> [i]n different states and in different conventions, different and very opposite objections are known to have prevailed; and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favor. And there can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it. . . . It is not to be presumed, that, even in the convention, which framed the constitution . . . the clauses were always understood in the same sense, or had precisely the same extent of operation.

*Id.* § 406, at 287-88.

251. *See id.* § 406, at 288.

252. As Story explains:

> [i]t is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text; but the words are to be bent and broken by the probable meaning of persons [i.e., the framers and ratifiers], whom they never knew, and whose opinions, and means of information, may be no better than their own . . . .

*Id.* § 407, at 289 n.1.

> mains unaltered, it must be construed now as it was understood at the time of its adoption . . . . [I]t speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[253]

As a recent commentator has noted, Taney's *Dred Scott* opinion is a "riot of originalism."[254] Moreover, Taney's argument that the Constitution as originally understood was formulated on a racist basis, though inaccurate in many details, is on the whole difficult to refute.[255]

For this reason issues of constitutional interpretation assumed a special urgency in abolitionist circles. Some abolitionists, like William Lloyd Garrison, denounced the Constitution in biblical terms as an "agreement with hell" and a "covenant with death."[256] The publication in 1840 of Madison's notes of the Philadelphia convention seemed to confirm Garrison's views.[257] In 1844, Wendell Phillips, Garrison's colleague, compiled an extract from Madison's notes entitled *The Constitution a Pro-Slavery Compact*.[258] Phillips'

253. Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1856).

254. Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37, 46 (1993). Astonishingly, Bork and others have argued at length that *Dred Scott* is an example of the danger of *nonoriginalist* adjudication. *See* BORK, *supra* note 8, at 28-34. As Eisgruber has shown, nearly half of Taney's opinion is in fact devoted to an originalist argument that blacks are not citizens under the Constitution; this is followed by a second originalist argument, nearly as long, about the Territories Clause. Eisgruber, *supra*, at 50. Taney's discussion of the Due Process Clause, which Bork and other originalists have claimed as the fountainhead of the modern doctrine of substantive due process, is a total of two sentences long, does not articulate a theory of the Due Process Clause, and is neither necessary nor sufficient to support Taney's conclusions. *Id*. at 50-53; *cf*. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 382 (1978) ("Taney's contribution to the development of substantive due process was . . . meager and somewhat obscure.").

255. *See* Eisgruber, *supra* note 254, at 48; Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENTARY 271, 293-310 (1997).

256. PHILLIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 3 (1975). Garrison borrows his language from Isaiah 28:18.

257. *See* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & James Brown Scott eds., Prometheus Books 1987) (1840).

258. *See* AMERICAN ANTI-SLAVERY SOCIETY, THE CONSTITUTION A PRO-SLAVERY COMPACT: OR SELECTIONS FROM THE MADISON PAPERS, & C. (1844) [hereinafter THE CONSTITUTION A PRO-SLAVERY COMPACT]; *see also* WIECEK, *supra* note 161, at 239-40 (same); Baade, *supra* note 219, at 1044-45 (discussing the Anti-Slavery Society's publication).

approach was rigorously originalist: The Constitution "*means precisely what those who framed and adopted it meant*—NOTHING MORE, NOTHING LESS."[259] For the Garrisonians, the only moral response was "disunion": repudiation of the Constitution (Garrison burned the document in public rallies),[260] secession from the Union by the free states, and personal disallegiance and disengagement from the political process.[261]

The essential similarity in interpretive results (if not ultimate conclusions) between proslavery and antislavery originalism exemplified by Taney and Garrison respectively could not escape contemporary observers,[262] and Garrison's quietism seemed an inadequate response to the brutal realities of slavery. In opposition to the Garrisonians, radical constitutionalist abolitionists began to develop nonoriginalist arguments that slavery violated the Constitution.[263] Radicals such as Alvan Stewart,[264] William Goodell,[265] Lysander Spooner[266] and Joel Tiffany[267] rejected the originalist positivism of Phillips and the Garrisonians in favor of a natural-law and common-law approach to constitutional interpretation.[268]

Stewart built his entire argument on an "*a priori*, hypothetical, suppositional" exegesis of the Fifth Amendment Due Process Clause

259. THE CONSTITUTION A PRO-SLAVERY COMPACT, *supra* note 258, at 104.

260. *See* PALUDAN, *supra* note 256, at 3; *see also* WIECEK, *supra* note 161, at 237.

261. *See* WIECEK, *supra* note 161, at 238-39.

262. As Wiecek has pointed out, proslavery thought was rooted in the same positivist postulates as Garrisonian abolitionism: Only legislatures, not courts, could bring positive law into line with higher law. *Id.* at 240-41. Indeed, Phillips' pamphlet was so effective that one pro-slavery politician suggested that "we might circulate [it] to great advantage [by] excluding a few paragraphs." Letter from John A. Campbell to John C. Calhoun (Nov. 20, 1847), *in* CORRESPONDENCE OF JOHN C. CALHOUN 1139, 1143 (n.p. J. Franklin Jameson ed., 1899).

263. *See* WIECEK, *supra* note 161, at 249-75.

264. *See generally* Alvan Stewart, *A Constitutional Argument on the Subject of Slavery*, FRIEND OF MAN, Oct. 18, 1837, *reprinted in* JACOBUS TENBROEK, EQUAL UNDER LAW 281-95 (1965) (originally published as THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951)).

265. *See generally* WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY (photo. reprint 1971) (Utica, Jackson & Chaplin 1844).

266. *See generally* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (4th ed. Bela Marsh 1860) (photo. reprint 1965) (1845).

267. *See generally* JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (photo. reprint 1969) (Cleveland, J. Calyer 1849).

268. *See* WIECEK, *supra* note 161, at 259-63. The radicals' common-law arguments relied on Lord Mansfield's opinion in *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772), which held that slavery is contrary to natural law and could only be supported by positive law. *See* WIECEK, *supra* note 161, at 20-39, 261. Thus, the radicals' common-law argument ultimately rested on natural law.

in blithe disregard of well-known historical facts.[269] Goodell urged that strict construction precluded recourse to legislative history: "It rules the Historian . . . out of the witness-box."[270] As for the "spirit of the Constitution," that is "identical with the Spirit of the Common Law," which could never tolerate slavery.[271] Goodell emphatically rejected positivism and the idea of a binding social contract.[272] For him the "civil government must have" a "higher authority" than the constitutional text.[273] The true Constitution was a manifestation of natural law.[274] Spooner was even more adamant in his rejection of positivism and embrace of natural law. He insisted "that constitutional law, under any form of government, consists only of those principles of the written constitution, that are consistent with natural law, and man's natural rights."[275] The records of the Philadelphia convention were "inadmissible and worthless,"[276] while the records of the ratification debates were "if possible, a more miserable authority" and "stuff very suitable for constitutional dreams to be made of."[277] The meaning of the Constitution was to be derived from its words alone, interpreted in light of natural law.[278] The intentions of the framers were irrelevant,[279] and even the original understanding of the people was of "no legal importance."[280] Tiffany likewise relied on natural law and warned that the "basilisk" of historical interpretation was a mortal threat to the "blooming plant of liberty."[281]

269. TENBROEK, *supra* note 264, at 70. The basic assumption of Stewart's argument is that the Fifth Amendment was drafted in Philadelphia in 1787 as the most important element in the compromise over slavery. Of course, Stewart knew this was chronologically impossible. *See id.* at 69-70.

270. GOODELL, *supra* note 265, at 21.

271. *Id.* at 97.

272. *Id.* at 146-47.

273. *Id.* at 147.

274. *See id.* at 148-56.

275. SPOONER, *supra* note 266, at 14 (emphasis omitted).

276. *Id.* at 117.

277. *Id.* at 117 n.*. As Baade notes, Spooner's arguments on these points have a very "modern ring," and have "stood the test of time." Baade, *supra* note 219, at 1048-49.

278. *See generally* SPOONER, *supra* note 266, at 54-114, 157-65, 189-205 (discussing the process of interpreting the Constitution).

279. *See id.* at 114.

280. *Id.* at 124; *cf. id.* at 222-23 (arguing that the Constitution has an abstract "meaning of its own, independently of the actual intentions of the people").

281. TIFFANY, *supra* note 267, at 51. Although Tiffany argued that the framers and the public at the time the Constitution was ratified opposed slavery, he nonetheless insisted that appeal to extrinsic evidence of original understanding is impermissible and relied instead on plain-language and natural-law methods of interpretation. *Id.* at 8-23, 45-52. Tiffany quoted Blackstone's and Story's formulations of the no-recourse rule and warned against the dangers of originalism:

Thus, in radical abolitionist circles the propriety of recourse to original understanding was hotly disputed. Powell's claim that "[b]y the outbreak of the Civil War, intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation"[282] is a bit of an overstatement.[283] Although the opinions of the Taney Court and the writings of the Garrisonians reflect an emerging originalist orthodoxy (in rhetoric if not in substance), the radicals continued to reject originalism in favor of a natural-law approach to constitutional interpretation. The Radical Republican leaders who drafted the Fourteenth Amendment were in many ways the intellectual heirs of the radical constitutionalist abolitionists of the 1840s. Many of them embraced the constitutional doctrines developed by Spooner and Tiffany.[284] The abolitionist Timothy Farrar's influential *Manual of the Constitution of the United States*, published in 1867, reflected a similar interpretive approach.[285] In

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> If we are to go out of [the Constitution] to look for aid in the journals, newspapers, publications, debates and histories of any particular time, who is to limit the extent of that judicial wandering? Who is to determine what histories are to be consulted, on [sic: or?] what particular portions are to be taken as true? . . . You could no longer look at the plain, obvious meaning of the language employed; for under some apparently blooming plant of liberty, would lurk a basilisk concealed by dubious words and doubtful implications, to be developed into a fatal power by the aid of "Collateral history" and "National Circumstances."

*Id.* at 51.

282. Powell, *supra* note 1, at 947.

283. It is true that in his influential treatise *Constitutional Limitations*, published in 1868, the year the Fourteenth Amendment was ratified, Thomas Cooley endorsed the use of evidence of framer as well as ratifier understandings to interpret constitutional provisions whose literal meaning was ambiguous. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 66 (photo. reprint 1987) (n.p. 1868). As Hans Baade has shown, Cooley's work exerted an enormous influence over postbellum jurisprudence and eventually swept away the remaining American vestiges of the "English" no-recourse rule. *See* Baade, *supra* note 219, at 1058-61. Ultimately, in the final decades of the nineteenth century, the legitimacy of originalism as a mode of justifying and rationalizing constitutional decisions was widely accepted, even if the original understanding rarely controlled the actual results reached. *See id.* at 1060-62; Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Debates and Proceedings of Constitutional and Ratifying Conventions*, 26 CAL. L. REV. 437 (1938). But it would be anachronistic to read this late nineteenth-century orthodoxy back into the Reconstruction era.

284. *See* TENBROEK, *supra* note 264, at 170-71.

285. TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Boston, Little, Brown & Co. 1867). Farrar devotes well over one hundred pages, or approximately one-fifth of his entire treatise, to an explication of the Constitution's first sentence (usually called the Preamble). *Id.* at 31-148. In Farrar's view, "the distinction between *preamble* and *body* of the Constitution does not exist." *Id.* at 188 n.1. Rather, the so-called Preamble is "the essence and epitome of the whole instrument." *Id.* at 31. The Constitution did

the view of these radicals, the Thirteenth Amendment, which abolished slavery, was not really amendatory, but merely declaratory of rights already recognized by the antebellum Constitution.[286]

Thus, despite the increasing acceptance of originalism in the mid-nineteenth century, the problem of the interpretive theories of the originators of the Fourteenth Amendment cannot be lightly dismissed. Stewart, Goodell and other radicals argued that the Privileges and Immunities Clause of Article IV and the Due Process Clause of the Fifth Amendment already protected the citizenship rights of blacks and that the Bill of Rights applied against the states as well as the federal government.[287] Modern scholars such as John Harrison, Michael Kent Curtis, and Akhil Amar, in their attempts to justify the results of current Fourteenth Amendment equal protection and due process jurisprudence on originalist grounds, have relied heavily on the radical constitutionalist roots of Reconstruction Republican doctrine.[288] But these scholars have ignored the fact that radical constitutionalism was itself premised on a rejection of originalism.

## IV. THE FOURTEENTH AMENDMENT

The Fourteenth Amendment lies at the very core of both modern Supreme Court doctrine and current academic theories of constitutional civil rights. If the original understanding of the Amendment cannot account for the broad scope of modern equal protection jurisprudence that has emerged in the wake of *Brown v. Board of Education*,[289] or the established contours of modern due process requirements of rationality and respect for "fundamental" rights, then originalism's appeal as an interpretive method is seriously tarnished. As this Part will demonstrate, the problems of as-

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not create any new rights, but merely recognized various "natural and civil common-law rights," which "are placed beyond the reach of any subordinate government." *Id.* at 58. Extrinsic evidence of individual opinion is not admissible to establish the meaning of the Constitution. *See id.* at 46. As the right to liberty is expressly recognized in the Preamble, the Habeas Corpus Clause, and the Fifth Amendment Due Process Clause, slavery can never have been lawful even under the antebellum Constitution. *See id.* at 58-60. Both the Thirteenth and Fourteenth Amendments, in Farrar's view, merely restated rights already guaranteed by the antebellum Constitution. *Id.* at 400-02. Farrar was a well-known abolitionist and his work was influential among radical Republicans in Congress: it was cited on the floor of Congress by William Lawrence of Ohio and praised by Charles Sumner of Massachusetts. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 85 (1993); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, *in* 6 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1131-32 (Paul Freund ed., 1971).

286. *See* TENBROEK, *supra* note 264, at 170-71.

287. *See* WIECEK, *supra* note 161, at 265-71.

288. AMAR, *supra* note 12, at 161-62, 201, 262-63; CURTIS, *supra* note 12, at 42-44, 72, 81; Harrison, *supra* note 11, at 1404-13.

289. 347 U.S. 483 (1954).

certaining the original understanding of the Amendment are intractable, and originalist efforts to justify Warren Court results are unpersuasive. The history of the framing and adoption of the Fourteenth Amendment does not readily yield a clear original meaning. Furthermore, to the extent they can be recovered, the adopters' understandings are generally too narrow to account for modern equal protection and due process jurisprudence.

Although modern doctrine is cast largely in terms of "equal protection" and "due process," the focus of originalist historical inquiry must be the Privileges or Immunities Clause of the Fourteenth Amendment.[290] Modern scholars are virtually unanimous in concluding that the originators saw the Privileges or Immunities Clause as the Amendment's central restraint on legislative and executive action.[291] Ever since the Supreme Court, in the *Slaughterhouse Cases*,[292] virtually read the Privileges or Immunities Clause out of the Amendment, the Due Process and Equal Protection Clauses[293] have had to bear more weight than originally intended.

While the Privileges or Immunities Clause applies only to "citizens," the Due Process and Equal Protection Clauses apply to all "persons."[294] This suggests that the Privileges and Immunities Clause protects a broader set of rights than the other two clauses.[295] Although the framers and ratifiers often did not carefully distinguish among the three clauses, the evidence generally indicates that the Due Process and Equal Protection Clauses protected "[o]nly natural rights or those that had become otherwise vested."[296] Only the Privileges or Immunities Clause, which places a limitation on the states' power to "make . . . law," reads textually as a limitation on legislation.[297] The Due Process Clause reads as a limitation on adjudication,[298] but it is unclear whether it was understood as a general substantive limitation on legislation as well.[299] The Equal

290. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

291. *See, e.g.,* AMAR, *supra* note 12, at 163-74; BERGER, *supra* note 7, at 234-35; MALTZ, *supra* note 8, at 106; Harrison, *supra* note 11, at 1387-88.

292. 83 U.S. (16 Wall.) 36 (1873).

293. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

294. *See* MALTZ, *supra* note 8, at 96-97.

295. *See id.* at 97.

296. *Id.* at 99.

297. *See* PERRY, *supra* note 13, at 119.

298. *See id.* at 121.

299. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 57 (1988). Although the doctrine of substantive due process had roots in antebellum jurisprudence, it was limited to fundamental vested rights of life, liberty, and property. *See* MALTZ, *supra* note 8, at 99.

Protection Clause reads as a limitation on administration.[300] It requires equality in the "protection of the laws," and appears to have been directed at discriminatory law enforcement, such as the failure of the police in the South to protect blacks from private violence.[301] On this view, the Supreme Court's equation in *Yick Wo v. Hopkins* of "the equal protection of the laws" with "the protection of equal laws"[302] is little more than "textual sleight of hand."[303] Attempts to argue that the Equal Protection Clause was widely understood as a broad prohibition on discriminatory legislation have proven unconvincing.[304] Moreover, such a theory cannot account for the framers'

300. *See* PERRY, *supra* note 13, at 120.

301. *See* Harrison, *supra* note 11, at 1433-51; Earl A. Maltz, *The Concept of Equal Protection of the Laws: A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

302. 118 U.S. 356, 369 (1886).

303. Harrison, *supra* note 11, at 1390.

304. *See*, *e.g.,* Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 MICH. L. REV. 245 (1997). Although Saunders has shed interesting light on the influence of the antebellum doctrine against partial or special laws on Republican ideology, she fails to demonstrate convincingly that the Equal Protection Clause rather than the Privileges or Immunities Clause was understood as the primary expression of that doctrine. As Saunders notes, Representative Bingham made conflicting pronouncements on the purpose of the Equal Protection Clause. *Id.* at 282. But Saunders claims that "[o]ther participants" in the debate indicated that they understood the Clause to be directed at class legislation. *Id.* at 284. However, most of the statements Saunders cites refer to Section 1 generally, rather than the Equal Protection Clause in particular. In particular, Saunders tendentiously characterizes references to class legislation by Thaddeus Stevens and Giles Hotchkiss (who, incidentally, was an *opponent* of Bingham's equal protection proposal) as explanations of the Equal Protection Clause. *Id.* Saunders claims that Stevens' remarks were made "in response to criticisms directed solely to [the] equal protection clause." *Id.* at 284 n.168. In fact, the exact opposite is true: The remarks Saunders quotes were made in response to criticisms by Senator Hale that expressly mentioned privileges and immunities as well as due process but did not mention equal protection. *See* CONG. GLOBE, 39th Cong., 1st. Sess. 1063 (1866) (remarks of Sens. Hale and Stevens). Similarly, the remarks of Hotchkiss clearly refer to the proposed Amendment in general and do not specifically mention equal protection. *See id.* at 1095 (remarks of Rep. Hotchkiss). Similarly, Saunders characterizes Senator Jacob Howard as stating that the Equal Protection Clause would abolish class legislation. Saunders, *supra*, at 186-87. However (as Saunders admits in a footnote), Howard's language expressly referred to "the last two clauses of the first section," i.e., the Due Process Clause as well as the Equal Protection Clause: It is thus unclear whether he located the prohibition on "class legislation" in the former (which, as Saunders admits, would not be surprising), the latter, or both. *See id.* at 286 n.182; *cf.* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (remarks of Sen. Howard). Likewise, Senator Howe's reference to the "protection of equal laws" seems in context to refer to the Privileges or Immunities Clause, rather than the Equal Protection Clause as Saunders claims. *See* Saunders, *supra*, at 292 n.207; *cf.* CONG. GLOBE, 39th Cong., 1st Sess. app. 219 (1866). The other passages from the congressional and ratification debates that Saunders quotes in support of her theory likewise refer to the Section 1 of the Fourteenth Amendment in general rather than the Equal Protection Clause in particular. Saunders, *supra*, at 286-87 (quoting remarks

repeated assurances that the Fourteenth Amendment did not confer the right to vote on blacks.[305] Thus, originalist interpretations of the Amendment have properly focused on the Privileges or Immunities Clause.

Anyone seeking to interpret the Privileges or Immunities Clause faces several difficult questions. First, what are "privileges or immunities"? In other words, how is the class of protected rights defined? The proposed answers range from a narrow class of private-law rights of property and contract[306] to a very broad class embracing all legal rights.[307] Second, what does it mean to "abridge" these rights? What sort of legislative ("make . . . any law") or executive ("enforce any law") actions does the clause forbid? Some urge that "abridge" can refer only to discriminatory state action while others insist that it refers to certain nondiscriminatory action as well. But clearly not all discriminatory state action is prohibited since almost all legislation discriminates in one sense or another. Does the clause prohibit only racial discrimination, or discrimination against other classes as well, and if so, what classes? Does it prohibit only "invidious" or hostile discrimination (for example, a law forbidding blacks but not whites to own property) but not "benign" discrimination (for example, affirmative action)? Does it prohibit only asymmetrical discrimination (as in our property example above) or symmetrical discrimination as well (for example miscegenation laws prohibiting all people from marrying outside their own race, so that a white may not marry a black and a black may not marry a white)? And finally, what sort of nondiscriminatory state action (if any) does the clause prohibit as a forbidden "abridgement"? Again, the answers range from a narrow reading, which insists that the clause prohibits no nondiscriminatory state action, to an intermediate view, which holds that states are required to regulate for the public good in a reasonable manner, to an expansive reading, which claims that not only does the clause forbid the states to act unreasonably, but it also protects certain rights absolutely against abridgement by the states, such as the rights in the first ten amendments ("incorporation"), and perhaps other unenumerated rights as well (such as a right to privacy or personal autonomy).

These are the most important and difficult questions of Fourteenth Amendment jurisprudence. Unfortunately, the "original un-

of Sen. Trumbull and Reps. Eliot and Stevens). Surprisingly, although Saunders' article is devoted to an originalist reformulation of Fourteenth Amendment voting rights jurisprudence, she never adequately addresses the overwhelming evidence that the framers did not understand Section 1 to affect the right to vote. But this evidence is perhaps the most powerful indication that the Equal Protection Clause was not understood as a general prohibition on partial or class legislation.

305. *See* MALTZ, *supra* note 8, at 99-100; Harrison, *supra* note 11, at 1438-40.

306. *See* BERGER, *supra* note 7, at 30-56.

307. *See* AMAR, *supra* note 12, at 166-69.

derstanding" offers little hope of resolving them. In 1866-68 there was no clear common understanding about the bearing of the Amendment on these questions. William Nelson, in an extensive historical survey of the origins and adoption of the Amendment, has concluded that "[s]ection one simply fails to specify at all the particular rights to which it applies."[308] With respect to the issues regarding the scope of the rights protected, "some of [them] were discussed . . . and others were not, but the massive quantity of material in the *Congressional Globe*, in congressmen's papers, in the state ratification debates, and in the newspapers make it clear that the amendment's proponents reached no agreement even on the issues they did consider."[309] Nelson has found that "Congress and the state legislatures never specified whether section one was an equality provision or a provision protecting absolute rights as well."[310] Except for the fact that the Amendment prescribed some undefined ideal of "equality," there was little clear agreement on the scope of the rights involved. Likewise, there was no agreement as to which groups, other than the newly freed slaves, were protected: "Except for their statements about race, the framers and ratifiers of the Fourth Amendment had little reason to define further what equality meant or on whose behalf the concept should be invoked."[311] When asked whether the Amendment permitted a given classification, the framers "were always able to specify whether a particular classification was reasonable or arbitrary. But they were persistently unable to elaborate how their conclusions were derived from or compelled by their more general theory."[312] Indeed, there is little evidence that the framers even had a coherent general theory of equality.

Historical inquiry into the original understanding of a provision may sometimes reveal that it was in fact largely empty of meaning. Its very vagueness enabled it to mean all things to all persons: No single original meaning ever existed. Nelson suggests that this may have been true of the Fourteenth Amendment:

> Republicans agreed that all people, including blacks, were entitled to equal rights. However, an element of that agreement—an element necessary to creating the supermajorities needed to incorporate the equal protection concept into the Fourteenth Amendment—was its ultimate emptiness. Americans of 1866, like Americans of today, could all agree on the

308. NELSON, *supra* note 299, at 60.
309. *Id.* at 61.
310. *Id.* at 123.
311. *Id.* at 89.
312. *Id.* at 139.

> rightfulness of equality only because they did not agree on its meaning.[313]

On this view, the originalist claim to furnish constraints on judicial interpretive discretion is bound to fail in the Fourteenth Amendment context. The historical inquiry into the original meaning reveals only the "ultimate emptiness" of a completely indefinite equality principle. It provides no guidance as to the meaning of equality, the scope of rights protected against discrimination, the criterion for determining protected classes, or the nature of rights absolutely protected. In other words, it offers no guidance not already furnished by the bare text. Originalism, after surveying the historical record, leaves us no better off than nonoriginalist textualism. The originalist "interpretive inquiry," which seeks to "decode" the text into an intelligible directive, is a failure.

This Part explores these problems in greater detail. Subpart A briefly reviews the congressional debates in 1866 over the Fourteenth Amendment and its predecessors.[314] Many "originalist" treatments, by selectively quoting from suitable passages in the congressional debates, have conveyed a deceptive impression of coherence and unanimity. A short overview of these debates with a minimum of commentary may correct this impression and provide a framework for the ensuing discussion of particular originalist interpretations. This overview begins by considering two important antecedents to the Fourteenth Amendment, the Civil Rights Act of 1866 and the failed "Bingham Amendment," before turning to the debates over the Fourteenth Amendment itself. The focus is the

313. *Id.* at 80. Of course, there is a more sinister possibility, which Nelson correctly discounts: "Perhaps the draftsmen had such recourse to vague language in order to hide from the public the reach of the Fourteenth Amendment and its radical effect on the existing constitutional structure, so as not to jeopardize ratification." *Id.* at 60-61. But even if the draftsmen had thus hoodwinked the people into accepting a provision they would have rejected had they understood it, obviously we cannot speak of a common "original understanding" of the provision. In fact, it is unlikely that such conspiratorial unanimity existed even among the draftsmen.

314. For various treatments, see CHESTER J. ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT (1997); CHESTER J. ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT (1981); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 134-87 (1974); BERGER, *supra* note 7; FAIRMAN, *supra* note 285, at 1207-1300; HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); HYMAN & WIECEK, *supra* note 109, at 386-438; JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); MALTZ, *supra* note 8, at 29-120; NELSON, *supra* note 299, at 40-147; TENBROEK, *supra* note 264, at 201-33; Herman Belz, *The Civil War Amendments to the Constitution: The Relevance of Original Intent*, 5 CONST. COMMENTARY 115 (1988); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986). The congressional debates are conveniently collected in THE RECONSTRUCTION AMENDMENTS' DEBATES (Alfred Avins ed., 1967).

Privileges and Immunities Clause, although some discussion of due process and equal protection is included.[315]

Subpart B examines various attempts to recover the original understanding of the Privileges or Immunities Clause. Raoul Berger has argued that the clause protected only the limited set of property and contract rights enumerated in the Civil Rights Act of 1866 and only against racially discriminatory legislation.[316] Earl Maltz has similarly argued that the Privileges or Immunities Clause guaranteed "only a relatively small, fixed group of rights"[317] but insisted that these rights were protected not just against discriminatory legislation, but absolutely. The Fourteenth Amendment, in his view, embodies "a theory of 'limited absolute equality'—that all men, whatever their conditions or attributes, were entitled to a certain minimum level of rights."[318] John Harrison, on the other hand, has taken a different approach. Like Berger and Maltz, he states that "[t]he privileges and immunities of state citizenship are rights like, and probably consist mainly of, those listed in the Civil Rights Act of 1866."[319] However, he contends that "[t]hese rights are not minimum Lockean freedoms but rather a full specification of state law on basic subjects,"[320] apparently comprising the entirety of state positive law in specified areas. According to Harrison, these rights are not protected absolutely, but only against discrimination on the basis of "caste," a concept he shrinks from defining.[321] In Berger's view, *Brown* and most of the subsequent Warren Court equal protection cases cannot be squared with the original understanding,[322] while in Harrison's view they were

315. This brief narrative is confined to the debates in Congress, rather than during the subsequent ratification, for several reasons. The congressional debates, unlike the debates in the individual states, reflect a national understanding of the Amendment. As a practical matter, moreover, the ratification debates in the state legislatures and the press are voluminous and a summary of them is beyond the scope of this Article. For discussion of the ratification debates in the state legislatures, see JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984). For a discussion of ratification in the southern states, see JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997). Compared with the debates in Congress, the ratification debates are largely unilluminating. As Curtis writes, "[m]ost of the state legislatures that considered the Fourteenth Amendment either kept no record of their debates, or their discussion was so perfunctory that it shed little light on their understanding of its meaning. Messages by governors are available, but most are quite general." CURTIS, *supra* note 12, at 145. Discussions in the press were likewise often vague, cursory and unenlightening. *See id.* at 131; MALTZ, *supra* note 8, at 95.

316. *See* BERGER, *supra* note 7, at 30-56, 207-12.

317. MALTZ, *supra* note 8, at 107.

318. *Id.* at 4.

319. Harrison, *supra* note 11, at 1416.

320. *Id.* at 1418.

321. *Id.* at 1457-61.

322. *See* BERGER, *supra* note 7, at 132-89, 198-220.

correctly decided from an originalist perspective.[323] Michael McConnell similarly attempted an originalist justification of *Brown*;[324] however, his analysis focuses not on the debates in 1866-68 over adoption of the Fourteenth Amendment, but on statements made by the embattled congressional Republicans in 1875, as they attempted a final rear-guard defense of Reconstruction. None of these theories is completely defensible; but Harrison's and McConnell's approaches, which reach the most palatable results, are the least faithful to the historical record of 1866-68 and actually discard the originalist method while paying lip service to the idea of original understanding.

Subpart C discusses the debate over the incorporation of the Bill of Rights into the Fourteenth Amendment. Raoul Berger has argued that the Amendment was not originally understood to incorporate the Bill of Rights at all.[325] Charles Fairman, after marshaling a great deal of evidence against incorporation, ultimately concluded nonetheless that it was understood to incorporate only those rights in the Bill of Rights that may be deemed "fundamental." [326] Michael Curtis has argued that the Bill of Rights was incorporated in its entirety, with partial incorporation as the next most plausible option. [327] Finally, Akhil Amar has urged that the Amendment incorporated all citizen rights in the Bill of Rights.[328] However the historical record with respect to this question is even sparser than with respect to the general question of privileges and immunities. Moreover, Amar's approach, which is most confident on the incorporation issue, is methodologically and historically the most problematic.

### *A. Enactment of the Fourteenth Amendment*

#### *1. The Civil Rights Act of 1866*

Since proponents of the Fourteenth Amendment repeatedly asserted that it covered the same ground as or constitutionalized the Civil Rights Act of 1866,[329] any discussion of the Amendment must begin with a consideration of the Act. As originally introduced in the Senate by its drafter, Senator Lyman Trumbull (R. Ill.) on January 5, 1866, the Civil Rights Bill provided:

323. *See* Harrison, *supra* note 11, at 1462.
324. McConnell, *supra* note 10, at 984-1046.
325. RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 5 (1989).
326. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).
327. CURTIS, *supra* note 12, at 129-30.
328. AMAR, *supra* note 12, at xiv.
329. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866).

> That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other . . . .[330]

On January 29, 1866, Trumbull explained the purpose of the Bill. The civil rights that it secured were "[s]uch fundamental rights as belong to every free persons." These rights were those referred to in the Privileges and Immunities Clause of Article IV of the Constitution (now also known as the Comity Clause to distinguish it from the Privileges *or* Immunities Clause of the Fourteenth Amendment) which declares that "the citizens of each State shall be entitled to all privileges and immunities of the citizens in the several States."[331]

By way of explanation, Trumbull quoted at length from the leading antebellum discussion of the Comity Clause, Justice Bushrod Washington's opinion in the circuit court case of *Corfield v. Coryell*:

> The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental; which belong of right to the citizens of all free Governments; and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind; and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and

330. CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

331. *Id.* at 474 (quoting U.S. CONST. art. IV, § 2, cl. 1) (alterations of capitalization in original).

> immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise . . . .[332]

Trumbull indicated, however, that the Civil Rights Bill did not go as far as Justice Washington, and excluded the elective franchise from the list of civil rights.[333]

Under questioning, Trumbull clarified that the Bill defined the term "civil rights" by its specific enumeration of contract and property rights; the Bill had "nothing to do with the political rights or *status* of parties."[334] Nevertheless, the Bill's opponents charged that it would wreak monstrous changes; their most lurid fear was that it would override statutes against miscegenation.[335] Supporters of the Bill repeatedly replied that the Bill would not affect miscegenation statutes, because symmetrical laws prohibiting members of all races from marrying outside their race worked "no discrimination."[336]

A similar understanding was expressed by the Bill's principal sponsor in the House, Judiciary Committee Chairman James F. Wilson (R. Iowa). In a lengthy speech on March 1, Wilson explained that "civil rights and immunities" did not encompass suffrage, or the right to sit on juries or attend integrated schools:

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332. *Id.* (quoting Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230)). Like Trumbull, many other speakers during the ensuing debates over the Civil Rights Bill and the Fourteenth Amendment referred to the definition of "privileges and immunities" found in *Corfield*. *See* CONG. GLOBE, 39th Cong., 1st Sess. 505 (Sen. Johnson); *id.* at 1117-18 (Rep. Wilson); *id.* at 1122 (Rep. Rogers); *id.* at 1269 (Rep. Kerr); *id.* at 1835 (Rep. Lawrence); *id.* at 2765 (Sen. Howard); *id.* at app. 135 (Rep. Rogers); *id.* at app. 293 (Rep. Shellabarger). In a later sentence that Trumbull did not quote, Justice Washington indicated that the list he was presenting was not exhaustive, stating that there were "many others which might be mentioned." *Corfield*, 6 F. Cas. at 552. For omitting this sentence, Bruce Ackerman has quite harshly criticized Raoul Berger as a "really bad" and irresponsible historian lacking "basic ethics." ACKERMAN, *supra* note 113, at 334 n.21. According to Ackerman, "[i]ncluding this sentence would have damaged Berger's case, for it would suggest that every time the participants quoted *Corfield* they repeated Justice Washington's express warning that 'privileges and immunities' could not be reduced to a closed list of rights." *Id.* Ackerman's vitriolic criticism is quite unwarranted. If Ackerman had actually bothered to read the debates he accuses Berger of mischaracterizing, he would have seen that only one participant (Howard) ever quoted the sentence that he claims was repeated every time *Corfield* was quoted. Trumbull, Wilson, Kerr, and Lawrence all quoted at length from *Corfield* but omitted the sentence. *See* CONG. GLOBE, 39th Cong., 1st Sess. 475, 1117-18, 1269, 1835 (1866). Moreover, Trumbull and others also stressed that *Corfield*'s definition of privileges and immunities was too expansive. *See id.* at 475.

333. *See* CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

334. *Id.* at 476.

335. *See id.* at 505-06 (remarks of Sen. Johnson (D. Md.)); 598 (remarks of Sen. Davis (D. Ky.)).

336. *See id.* at 506 (remarks of Sen. Trumbull); *cf. id.* (remarks of Sen. Fessenden (R. Me.)).

> What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several states? No; for suffrage is a political right . . . . Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities. Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as—"The right of personal security, the right of personal liberty, and the right to acquire and enjoy property."[337]

Nevertheless, Democratic and moderate Republican opponents of the Bill continued to express reservations about its constitutionality and intended scope. On March 9, Representative John A. Bingham (R. Ohio), the future drafter of Section 1 of the Fourteenth Amendment, moved to strike out of the Bill its "oppressive" and "unjust" provision that "[t]here shall be no discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery."[338] Despite Trumbull's assurances, Bingham argued that "the term 'civil rights' as used in this bill does include and embrace every right that pertains to the citizen as such" and therefore included political rights.[339] Bingham insisted that Congress lacked constitutional authority to legislate in the area of civil rights and noted that racial discrimination in political rights was commonplace in the North as well as the South.[340] After some debate, Wilson agreed to Bingham's amendment, saying that it did not "materially change[ ] the bill," and that it might allay some members' fears that the Bill could otherwise receive "a latitudinarian construction not intended."[341] With the elimination of the reference to "discrimination in civil rights or immunities," the Bill passed both houses of Congress and was enacted into law over President Johnson's veto.[342]

### *2. The Bingham Amendment*

Bingham's efforts to secure a constitutional amendment guaranteeing equal protection predated even the introduction of the

337. *Id.* at 1117.

338. *Id.* at 1291.

339. *Id.*

340. *See id.* Bingham noted that "there is scarcely a State in this Union which does not, by its constitution or by its statute laws, make some discrimination on account of race or color." *Id.* For example, the constitution of Bingham's home state of Ohio limited the right to vote and hold office to whites. *See id.*

341. *Id.* at 1366.

342. The bill passed the house on March 13, although Bingham still voted against it. *See id.* at 1367. On March 15 the amended bill passed the Senate. President Johnson vetoed the bill on March 27; but on April 6 and April 9 the Senate and House respectively overrode the President's veto.

Civil Rights Act. On December 6, 1865, he proposed a constitutional amendment (the so-called "Bingham Amendment") which would have empowered Congress to pass "all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights of life, liberty, and property."[343] Although the Bingham Amendment was ultimately rejected, the debates surrounding it shed some light on congressional understanding of many of the issues that resurfaced in the context of the Fourteenth Amendment. In a lengthy speech on January 9, 1866, Bingham indicated that his proposal was necessary to protect "the foundation principle of our Constitution—the absolute equality of all men before the law."[344] In Bingham's view this equality principle, which he called "the divinest feature of your Constitution," was already enshrined in the document; thus, all that was needed was congressional legislative power to ensure that the principle was not disregarded.[345]

The Joint Committee on Reconstruction deliberated over Bingham's proposal in January and on February 3 reported it back out to the House in the following form:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th Amendment).[346]

In his speech on February 26 introducing this proposal, Bingham emphasized that it merely restated language already contained in the antebellum Constitution. The only innovation, he claimed, was the "express grant of power upon the Congress."[347]

But during the debates in the House, Bingham's proposal soon ran into serious trouble. Democrats such as Andrew J. Rogers (N.J.) naturally conjured up a parade of horribles. Rogers claimed that he did not object to the extension of private law rights to blacks (although in fact he had opposed the Thirteenth Amendment) and urged that "by the States they should be protected in life, liberty,

343. *Id.* at 14.
344. *Id.* at 157.
345. *Id.* at 158.
346. BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 61-62 (1914). The *Journal* is of limited usefulness as it records the votes of the Joint Committee, but not its debates. The parenthetical references to the Constitution were included in the version passed by the Committee but omitted from the version reported out to the House.
347. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). Bingham ignored the fact that the words "equal protection" were not found in the antebellum Constitution.

and property."[348] But the possibility that the proposed Amendment might authorize Congress to pass laws permitting miscegenation, granting blacks the franchise, or requiring integrated schools appalled him.[349]

William Higby (R. Cal.) and William D. Kelley (R. Pa.) rose to defend the Amendment, as Bingham had done, on the ground that it contained nothing that was not already in the original Constitution.[350] But, like many supporters of the Amendment, Higby demonstrated that he understood its scope to be quite limited. Under questioning, Higby indicated that the proposed Amendment could have no application to the Chinese in his state: "The Chinese are nothing but a pagan race. They are nothing but an enigma to me . . . . You cannot make good citizens of them."[351]

Robert Hale (R. N.Y.) was incredulous at the claim that the Bingham Amendment merely repeated language already in the Constitution:

> The ingenuity of the argument was admirable. I never heard it paralleled except in the case of the gentleman who undertook to justify suicide from the Scripture by quoting two texts: "Judas went and hanged himself;" "Go thou and do likewise."[352]

Hale argued that the Amendment would upset the entire balance of power between the federal government and the states, allowing Congress to assume "the powers of local jurisdiction and legislation" and impose "codes of civil and criminal jurisprudence and procedure" on the states.[353] Moreover, Hale remarked, "probably every

348. *Id.* at app. at 134.

349. *See id.* at app. at 134-35.

350. *See id.* at 1054-58.

351. *Id.* at 1056. Higby's extended diatribe portraying the Chinese as a nation of idolaters and prostitutes is omitted here.

352. *Id.* at 1063.

353. *Id.* Hale expounded further on his concerns over the expansion of federal power later in the same debate. He then returned to his main theme, the importance of state sovereignty:

> I believe that the tendency in this country has been from the first too much toward the accumulation and strengthening of central Federal power. During the last five years of war and rebellion, that tendency has necessarily and inevitably increased. . . . I believe that this is, of all times, the last when we should undertake a radical amendment of the Constitution, so immensely extending the power of the Federal Government, and derogating from the power of the States. . . . [T]here are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States. I believe that whatever most clearly distinguishes our Government from other Governments in the extent of individual freedom and the protection of personal rights we owe to our decentralized system . . . .

*Id.* at 1065.

State in this Union fails to give equal protection to all persons within its borders in the rights of life, liberty, and property."[354]

As an example, Hale cited the disabilities in property rights imposed on married women. Thaddeus Stevens (R. Penn.), the leader of the Radical Republicans in the House, replied that married women's disabilities would not be affected by the Amendment: "When a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way there is no pretense of inequality."[355] Hale responded as follows:

> The gentleman will pardon me; his argument seems to me to be more specious than sound. The language of the section under consideration gives to *all persons* equal protection. Now, if that means you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.[356]

Hale continued to press the Amendment's proponents to explain precisely which groups it protected. He asked whether the "whole intended practical effect of the amendment" was "the protection of 'American citizens of African descent' in the States lately in rebellion."[357] Bingham replied that the Amendment was intended to protect not just Southern blacks but also the "hundreds of thousands of loyal white citizens" in the South who were suffering confiscation and banishment and would also apply in Northern states like Oregon, whose constitution barred blacks from holding property, making contracts, or even entering the state.[358]

Hale also expressed concern that the Bingham Amendment would destroy the federal-state balance of power by conferring on Congress broad authority "to legislate upon all matters pertaining to the life, liberty, and property" of Americans.[359] Bingham's replies were confusing. He first suggested that the Amendment merely granted Congress the power to remedy unequal state legislation.[360] Under questioning from Hale, however, Bingham first conceded that it granted general power to legislate, and then seemed to backtrack, indicating that it granted remedial power.[361] In response to Hale's questions about married women's disabilities, Bingham offered a further qualification: the rights of life and liberty would be pro-

354. *Id.* at 1064.
355. *Id.*
356. *Id.*
357. *Id.* at 1065.
358. *Id.*
359. *Id.*
360. *See id.* at 1089-90.
361. *See id.* at 1094.

tected by the Amendment, "whatever States may enact."[362] But as for property, the Amendment protected its "enjoyment," but not its "acquisition and transmision [*sic*]" which would remain "dependent exclusively upon the local law of the States."[363]

Throughout the debate, Bingham insisted that his Amendment was merely a grant of power to Congress to enforce preexisting rights: "The proposition pending before the House is simply a proposition to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today. It 'hath that extent—no more.'"[364] Although Bingham seemed to believe that the "bill of rights" in the original Constitution was intended to bind the states, he noted that the Supreme Court had ruled otherwise in *Barron v. Baltimore*.[365] Thus he regarded his Amendment as necessary to protect those rights. At the same time, it is not entirely clear what Bingham meant by the "bill of rights." Bingham apparently swept together under the general rubric of "the immortal bill of rights" certain provisions of the 1789 Constitution (the Comity Clause) and the 1791 Bill of Rights (the Due Process Clause of the Fifth Amendment), along with certain extratextual natural law rights.[366]

362. *Id.* at 1089.
363. *Id.*
364. *Id.* at 1088.
365. *Id.* at 1089-90.
366. For example, Charles Fairman pointed to Bingham's speech in the House on February 26, 1866, in which Bingham apparently used the term "immortal bill of rights" to refer to the provisions of the Comity Clause and the Fifth Amendment. Fairman, *supra* note 326, at 24-26 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1033 (1866)). Recently, Richard Aynes has claimed that Fairman's argument "that Bingham used the term 'Bill of Rights' not to encompass the provisions of the first eight amendments, but rather to identify the provisions of the Fifth Amendment and Article IV's Privileges and Immunities Clause . . . inaccurately portrayed Bingham and distorted his constitutional theory." Aynes, *supra* note 285, at 67. Aynes argues that Fairman misrepresented Bingham's views by focusing only on the February 26 speech and "ignoring the bulk of Bingham's speeches and the context these provide." *Id.* Aynes even suggests that on February 26 "Bingham misspoke or the Congressional Globe erred in its transcription of the speech." *Id.* at 68 n.61. However, Aynes' claim that Bingham's language on February 26 was an aberration is incorrect. In his speech in the House on February 28, 1866, Bingham repeatedly referred to the "bill of rights" in exactly the same terms as he had on February 26. CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866). Bingham referred explicitly "the bill of rights, that citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several states, and that no person shall be deprived of life, liberty, and property without due process of law." *Id.* at 1089. He also referred to "the provision of the bill of rights that all shall be protected alike in life, liberty and property," thus including in the "bill of rights" an extratextual right of equal protection. *Id.* Later in the same speech he again referred repeatedly to "equal protection to life, liberty, or property" as a right guaranteed by the "bill of rights." *Id.* at 1190. Still later in the same speech Bingham referred to "the sacred rights of person" which are "the rights of human nature" as rights guar-

On February 28, 1866, the House voted to table the Bingham Amendment, and never took it up again.[367] Some, like Giles Hotchkiss (R. N.Y.), believed that by merely providing for congressional power to legislate, the Bingham proposal did not go far enough:

> I want to secure those rights against accidents, against the accidental majority of Congress . . . . Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out.[368]

Others, however, like Roscoe Conkling (Union R. N.Y.), voted to postpone "for very different . . . if not entirely opposite" reasons. In their view, the Bingham Amendment went too far, rather than "not . . . far enough."[369]

*3. The Fourteenth Amendment*

After the failure of the Bingham Amendment in the House, the Joint Committee on Reconstruction again took up the task of draft-

anteed by the bill of rights. *Id.* It is clear from this speech, that in the debates over the Fourteenth Amendment Bingham did not use the term "bill of rights" to mean the 1791 Bill of Rights. During Reconstruction, the term "bill of rights" did not have the fixed meaning that it has today. As Akhil Amar has recently pointed out, before the Fourteenth Amendment was adopted, the Supreme Court never once used the term "bill of rights" to refer to the first eight (or ten) amendments to the U.S. Constitution. AMAR, *supra* note 12, at 284-88. However, the Court did use the term repeatedly to refer to Article I, Section 10 of the unamended Constitution. *See id.* at 164. Charles Sumner referred to the Due Process Clause as "in itself a whole bill of rights." CONG. GLOBE, 38th Cong., 2d Sess. 1479 (1865). Timothy Farrar, whose *Manual of the Constitution* was exactly contemporaneous with the Fourteenth Amendment, used the term "bill of rights" in an expansive sense that included provisions in the 1798 Constitution such as the Contracts Clause, the Habeas Corpus Clause, and the Comity Clause, as well as provisions in the 1791 amendments. FARRAR, *supra* note 285, at 510-14. Bingham's "bill of rights" at times included the Comity Clause, "equal protection" (which he may have derived from the Comity Clause, the Fifth Amendment's Due Process Clause, natural law, or some combination of the three), and possibly other natural law rights as well. It is true that later, five years after Congress passed the Fourteenth Amendment, during the debates over the Ku Klux Klan Act, Bingham noted that "Jefferson well said of the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights" and argued that the "privileges and immunities of citizens" are "chiefly defined in the first eight amendments." CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871). But Bingham never clearly identified the "bill of rights" with the first eight amendments in 1866, when the Fourteenth Amendment was under consideration, and his 1871 reference to Jefferson suggests that the term "bill of rights" did not have a universally accepted meaning to his audience.

367. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

368. *Id.*

369. *Id.*

ing a constitutional amendment to implement the goals of Reconstruction. The progress of the Committee's deliberations is very difficult to follow, since the Committee's *Journal* records only the texts of the various proposals and the votes on them; it does not describe the debates themselves.

On April 21, 1866, Thaddeus Stevens introduced in the Committee a proposal authored by Robert Dale Owen, son of the English reformer and an advocate of black suffrage. The Owen proposal contained five parts. The first part, the ancestor of Section1of the Fourteenth Amendment, provided that "[n]o discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[370] Bingham proposed the following addition as an amendment: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property without just compensation."[371] Bingham's amendment was defeated five to seven and the language as first proposed by Stevens was adopted.

Later in the day Bingham proposed as an addition the language that eventually became the second sentence of Section1of the Fourteenth Amendment:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[372]

On April 21, this amendment was approved by a vote of 10 to 2; on April 25, it was removed by a vote of 7 to 5; later that day, a proposal offering it as a separate amendment was defeated by a vote of 8 to 4; but on April 28, the Committee voted to strike the original provisions for black suffrage and replace the original language proposed by Stevens with the Bingham language now found in Section One.[373] Although this pattern of votes is quite puzzling, Earl Maltz has analyzed it in detail, and concluded that the Bingham language was understood as more conservative than the original Owen proposal.[374]

On May 8, Thaddeus Stevens introduced the proposed Fourteenth Amendment to the House.[375] Stevens indicated that the proposal, though not all he had hoped for, was the most "stringent" that the Committee believed the states "could be induced to ratify."[376]

370. KENDRICK, *supra* note 346, at 83.
371. *Id.* at 85.
372. *Id.* at 87.
373. *See id.* at 87, 98, 101, 106.
374. MALTZ, *supra* note 8, at 79-92.
375. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2459-60 (1866).
376. *Id.* at 2459.

He argued that the Amendment went no further than the Constitution or the Declaration of Independence, but that it

> allow[ed] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all . . . . Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed.[377]

Stevens then turned to Section Two, which he described as the "most important" in the proposed Amendment.[378] Although he disliked the fact that the Amendment "allows the States to discriminate" in conferring the franchise, the proportional reduction in the representation of such states was at least a "short step forward."[379]

This time, Section1of the Fourteenth Amendment was not debated nearly as extensively as the Bingham Amendment, with its similar language about "privileges and immunities," had been three months before. Rather, following Stevens' lead, Congress largely focused on Section 2, which dealt with congressional apportionment, and Section 3, which would have disfranchised former adherents of the rebellion.[380] Those representatives who did address Section1generally indicated that it embodied principles already enshrined in the Constitution and specified in the Civil Rights Act.[381] However, Bingham rather confusingly stated that the elective franchise and the franchise of office were "privileges of a citizen of the United States," but added that "[t]he amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States."[382] On May 10, the Amendment passed the House by the requisite two-thirds margin.

On May 23, the Amendment was introduced in the Senate. Since the Senate Chairman of the Joint Committee, William Fessenden (R. Me.), was ill, the task of explaining the measure fell to the radical Jacob Howard (R. Mich.). Howard discussed the meaning of privileges and immunities in detail, and was the only member of Congress to claim unequivocally that the Privileges or

377. *Id.*
378. *Id.*
379. *Id.* at 2460.
380. The reason for this, as Nelson has suggested, is undoubtedly that at the time it was enacted, "[t]he Fourteenth Amendment was understood less as a legal instrument to be elaborated in the courts, than as a peace treaty to be administered by Congress in order to secure the fruits of the North's victory in the Civil War." NELSON, *supra* note 299, at 110-11.
381. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (Rep. Garfield); *id.* at 2465 (Rep. Thayer); *id.* at 2467 (Rep. Boyer); *id.* at 2468 (Rep. Kelley); *id.* at 2511 (Rep. Eliot); *id.* at 2539 (Rep. Farnsworth).
382. *Id.* at 2542.

Immunities Clause incorporated the first eight amendments to the Constitution:

> It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. I do not propose to go at any length into that question at this time. It would be a somewhat barren discussion. But it is certain the [Comity C]lause was inserted in the Constitution for some good purpose. It has in view some results beneficial to the citizens of the several States, or it would not be found there; yet I am not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guarantied [sic]. Indeed, if my recollection serves me, that court, on a certain occasion not many years since . . . very modestly declined to go into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise. But we may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington . . . [here a long quotation from *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No, 3230) (1823), is inserted]. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their precise nature—to these should be added the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution; such as . . . [here the first eight amendments are paraphrased at length] . . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and to compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section . . . .[383]

Howard next proceeded briefly to discuss the remainder of the second sentence of Section 1, which contains the Due Process and Equal Protection Clauses:

> This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.[384]

383. *Id.* at 2765-66.
384. *Id.* at 2766.

Most of the rest of Howard's speech was devoted to the question of suffrage.[385] As Howard was "sorry to be obliged to acknowledge," the proposed Amendment did not "recognize, much less secure, the right of suffrage to the colored race."[386]

A significant exchange took place between Howard and Reverdy Johnson (D. Md.) on the question of the rights of women. Howard read several passages from Madison's writings suggesting that "those who are to be bound by the laws ought to have a voice in making the laws"; he argued (without pointing to any specific language from Madison) that this principle ought to apply without distinction of color.[387] Thereupon the following exchange ensued:

> MR. JOHNSON: Females as well as males?
> MR. HOWARD: Mr. Madison does not say anything about females.
> MR. JOHNSON: "Persons."
> MR. HOWARD: I believe Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children are not regarded as the equals of men. Mr. Madison would not have quibbled about the question of women's voting or of an infant's voting. He lays down a broad democratic principle, that those who are to be bound by the laws ought to have a voice in making them; and everywhere mature manhood is the representative type of the human race.[388]

Anxious to see the constitutional Amendment finally passed after so many delays, Republicans agreed to curtail their lengthy speeches.[389] As in the House, most of the ensuing debate in the Senate focused on the question of suffrage and the definition of citizenship.[390] The Privileges or Immunities Clause received far less attention than these other matters but what little discussion there was indicates that no uniform understanding of the clause existed. Ignoring Howard's remarks about the incorporation of the Bill of Rights, Senator Luke Poland (R. Vt.) indicated that the clause "secures nothing beyond" the original Comity Clause.[391] Senator Timothy Howe (Union R. Wis.) gave a catalogue of privileges and immunities which did not exceed the scope of those enumerated in the

385. *See id.* at 2766-67.
386. *Id.* at 2766.
387. *Id.* at 2767.
388. *Id.*
389. *See* FAIRMAN, *supra* note 285, at 1295-96; *see also* JAMES, *supra* note 323, at 132-52 (discussing the debates regarding the Fourteenth Amendment).
390. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2869, 2890-97, 2938-39, 3010, 3027-29, 3031-42 (1866). During the Senate debate the first sentence of the present Section 1 defining citizenship was added and the House versions of Sections 2 and 3 were weakened.
391. *Id.* at 2961.

Civil Rights Act: "The right to hold land . . . the right to collect their wages . . . the right to appear in the courts . . . the right to give testimony."[392] As a particular example of "unequal laws" Howe cited a Florida statute establishing a system of unequal schools.[393] But Howe's objection to this system apparently focused not on segregation itself, but rather on the fact that while whites in Florida were taxed only to support white schools, blacks paid taxes to support both white schools as well as separate (and inadequate) black schools.[394]

Even as late as June 8, 1866, the day the final vote in the Senate was taken, the meaning of the Privileges and Immunities Clause was unclear to some. Senator Thomas Hendricks (D. Ind.) complained that throughout the debate the proponents had failed to define adequately the terms "abridge" and "privileges and immunities."[395] Senator Reverdy Johnson (D. Md.), a moderate Democrat, indicated that although he supported the equal protection and due process provisions, he opposed the Privileges or Immunities Clause "simply because I do not understand what will be the effect of that."[396] Despite any remaining confusion, the Amendment passed the Senate. On June 13, the House concurred in the Senate version and sent the Amendment to the states for ratification.[397]

### *B. The Original Meaning of the Privileges or Immunities Clause*

#### *1. Berger*

Raoul Berger's 1977 study may be taken as the starting-point for the modern debate over the original meaning of the Privileges or Immunities Clause. Emphasizing the pervasive racism and negrophobia that gripped much of the Northern electorate and the Republican party at the time the Amendment was adopted, Berger has argued that the original understanding of the clause was quite narrow.[398] He claims that the key to the meaning of the clause is to be found in the 1866 Civil Rights Act, which was limited to the protection of a narrow set of rights to life, liberty and property.[399] For many of the adopters, these rights were synonymous with Lockean

392. *Id.* at app. at 219.
393. *See id.*
394. *See id.* White schools were financed by property taxes applicable to blacks and whites alike; black schools were financed by a fund created by an annual capitation tax of one dollar imposed only on black men. After the salary of administrators was deducted from this fund (including $2000 for the state superintendent), only $2200 remained to pay all the teachers of black children in the state. *See id.*
395. *See id.* at 3039.
396. *Id.* at 3041.
397. *See id.* at 3148-49.
398. BERGER, *supra* note 7, at 11-18.
399. *Id.* at 30.

natural rights, Blackstonian absolute rights, or the privileges and immunities identified in the Comity Clause (Article IV, Section 2) of the 1789 Constitution.[400] Berger calls attention to various statements by members of Congress indicating that the rights protected by Section1of the Fourteenth Amendment were identical with those enumerated in the Civil Rights Act.[401] He notes that Wilson, Trumbull and other Republican leaders repeatedly insisted that the rights protected in the Civil Rights Act did not include political or social rights,[402] and that the leadership ultimately agreed to delete the ban on "discrimination in civil rights and immunities" from the Act in order to avoid a "latitudinarian construction not intended."[403]

Berger has concluded from such statements that the language eventually adopted in the Fourteenth Amendment, barring *abridgment* of *privileges and immunities*, was necessarily narrower than the language discarded in the Civil Rights Act, which barred *discrimination* in *civil rights and immunities*.[404] He draws similar conclusions from Congress's repeated rejection of proposals by Stevens, Sumner, and others to ban all legislation that discriminated on the basis of race.[405] Finally, Berger points to contemporaneous practices (such as segregation of public schools throughout much of the North as well as the District of Columbia, the widespread denial of the right to indictment by grand jury, and trial by petit jury), as well as to the narrow construction placed on the Amendment by courts in the period immediately following its adoption, as evidence that the broad interpretation that it has received in modern times would have astonished its original adopters.[406]

Berger's work provided a valuable corrective for the pervasive anachronistic tendency to read twentieth-century ideals of equality back into the Reconstruction Amendments. However, his approach suffers from a number of serious limitations. In his polemical zeal, Berger often ignores evidence that does not fully support his conclusions. He stresses the pervasive negrophobia of Northern Republicans but gives short shrift to the abolitionist ideology that animated much of the party.[407] As Berger points out, the statements of many Republican leaders (especially Bingham) often appear careless and

400. *See id.* at 30-32.

401. For example, Representative George Latham (R. W.Va.) stated that the Act and the Amendment "cover[ed] exactly the same ground." *Id.* at 32-33 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866)).

402. *See id.* at 36-39.

403. *Id.* at 133-36 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1366 (1866) (remarks of Rep. Wilson)).

404. *Id.* at 58.

405. *See id.* at 195-96, 204.

406. *Id.* at 132-89.

407. *See id.* at 11 ("The key to understanding the Fourteenth Amendment is that . . . the Republicans, except for a minority of extremists, were swayed by . . . racism . . . rather than by abolitionist ideology.").

incoherent.[408] But Bingham and many others entertained the unorthodox theory that slavery was incompatible with the antebellum Constitution.[409] Once this is realized, their statements that the Fourteenth Amendment contained nothing not already in the Constitution seem less bizarre.

Many of Berger's claims rest on *argumenta ex silentio*. For example, he concludes from the fact that no one bothered to discuss some of Bingham's and Howard's more sweeping claims about the scope of the Amendment that no one shared their views;[410] but of course it is possible to draw the opposite conclusion. He relies heavily on the specific intentions of the adopters in reconstructing the original meaning of the Amendment, and thus runs the risk of giving binding force to their personal prejudices rather than their constitutional principles.[411] Significantly, Berger fails to formulate clearly what, in his view, the adopters meant by "abridge." As we have noted, the adopters seemed to believe that the Amendment protected privileges and immunities not simply against racial discrimination, but against other forms of discrimination as well;[412] and some seemed to believe that it protected rights absolutely, rather than simply against discriminatory abridgment.[413] On such questions, which lie at the very heart of modern controversies over the Fourteenth Amendment, Berger is silent.

*2. Maltz*

Like Berger, Earl Maltz has concluded that the Republicans "almost certainly viewed the privileges and immunities clause as guaranteeing only a relatively small, fixed group of rights."[414] However, Maltz is more sensitive to the widespread differences of opinion among Republicans and the ambiguities of the historical record. Maltz argues, as Berger did, that the privileges and immunities protected by the Fourteenth Amendment were identified with the privileges and immunities protected by the Comity Clause, and that in describing these, "the antebellum authorities generally tracked the language of the Civil Rights Act closely," though with "aberrations."[415] In particular, Maltz does not regard the right to state-supported education[416] or the right to vote[417] as included among the

408. *Id.* at 164, 254.
409. *See id.* at 165.
410. *See id.* at 167.
411. *See supra* Parts I.C., III.E.2. Of course, the opposite approach of allowing the reconstructed "meaning" to trump the adopters' intentions runs the opposite risk of oversimplifying the original meaning.
412. *See supra* text accompanying notes 354-58.
413. *See supra* text accompanying note 383.
414. MALTZ, *supra* note 8, at 107.
415. *Id.*
416. *Id.* at 109-13. In particular, Timothy Howe's remarks about the school system in Florida, in Maltz's view, reflected concerns not about racial segrega-

privileges or immunities. He argues that at least some and probably all of the rights guaranteed by the first eight amendments are included, but admits that there are plausible arguments to the contrary.[418] But Maltz is quick to add that from an originalist perspective, acceptance of the incorporation doctrine does not justify most recent Supreme Court decisions in this area. Because the Bill of Rights was understood much more narrowly than it is today, "the Fourteenth Amendment would not have sanctioned modern decisions requiring state adoption of the exclusionary rule or *Miranda* warnings, nor would it have supported the expansive First Amendment decisions of the Warren era."[419]

A central point of Maltz's theory is that Section 1 protected privileges and immunities not just against discriminatory state action, but rather absolutely.[420] In other words, rights are "abridged" not just when they are denied to one group but not to another, but also when they are to denied to everyone without distinction. This view certainly comports more closely with the normal meaning of the term "abridge," which is not ordinarily limited merely to discriminatory restrictions. It also is consistent, as Maltz points out, with an ideology of natural rights that was important from the founding of the Republic right through the Reconstruction era (albeit with declining influence in the nineteenth century).[421] Maltz marshals several types of evidence to support his view that limited absolute rights were the focus of the Fourteenth Amendment, including Bingham's repeated claims that it protected only preexisting rights;[422] the Joint Committee's rejection of the Owen language ("No discrimination shall be made . . . as to the civil rights of any person because of race . . . .") in favor of Bingham's version ("No state shall . . . abridge the privileges or immunities of citizens

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tion, but rather that the "taxing of blacks for the education of whites" was a "taking of property without just compensation." *Id.* at 112. Earlier, however, Maltz had tentatively argued that *Brown v. Board of Education*, 347 U.S. 483 (1954), may be justified on originalist grounds. Earl Maltz, *Some New Thoughts on an Old Problem—The Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 846-50 (1983). However, Maltz's earlier argument depended on establishing a "virtually irrebuttable presumption," based on historical experience, that segregated facilities are in fact unequal. *Id.* at 849-50. Thus, if it could be shown (as stipulated in *Brown*) that the segregated facilities in question were in fact equal, or if blacks and whites were taxed separately for separate facilities, school segregation would apparently be constitutional under this interpretation. Moreover, Maltz merely argued that the result in *Brown* is possible, not inevitable, under an originalist approach. *Id.* at 850.

417. MALTZ, *supra* note 8, at 118-20.

418. *See id.* at 113-18.

419. *Id.* at 118.

420. *Id.* at 4 (discussing the prominence of the concept of "limited absolute equality").

421. *Id.* at 4-5.

422. *Id.* at 57-59.

. . . .");[423] and references in the Committee Report to "the civil rights of all citizens" or of "all men."[424]

Maltz is undoubtedly correct that natural-rights ideology was widespread among Republicans. The proponents of the Fourteenth Amendment made many statements indicating that they understood the Amendment to embody a notion of limited absolute equality.[425] But, as John Harrison has pointed out, other Republicans made statements suggesting that the Amendment prohibited only discriminatory "abridgments" of rights.[426] For example, Howard explained that the Amendment "abolishe[d] all class legislation in the states and [did] away with the injustice of subjecting one caste of persons to a code not applicable to another";[427] and both Trumbull and Representative William Lawrence (R. Ohio) argued that states were free under the Civil Rights Act to grant or withhold any civil rights so long as they did so impartially.[428] In 1871 Representative Shellabarger seemed to indicate that "abridge" referred specifically to discriminatory legislation rather than nondiscriminatory restrictions. The Privileges or Immunities Clause, he said, "provides that those rights shall not be 'abridged;' in other words, that one man shall not have more rights on the face of the laws than another man."[429] Although such conflicting evidence does not disprove Maltz's theory, it does raise serious (and perhaps unanswerable) questions as to whether the central purpose of the Fourteenth Amendment was to secure a "minimum level of rights" to all or to attack racial discrimination per se.[430]

423. *Id.* at 82-92.
424. *Id.* at 95-96.
425. *See id.* at 4.
426. Harrison, *supra* note 11, at 1412.
427. *Id.* at 1413 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)).
428. *Id.* at 1413 n.102 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1760, 1832 (1866)).
429. *Id.* at 1423 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 71 (1871)).
430. *Cf.* MALTZ, *supra* note 8, at 4. Maltz has argued that the seemingly sweeping statements made by Howard and others that the Amendment prohibited "all class legislation" must be understood to refer only to denials of fundamental vested rights of life, liberty, and property. *Id.* at 98-99; *see also* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEG. HIST. 305, 324-26 (1988). Thus, in Maltz's view, the tension between the absolute rights and antidiscrimination readings of the Amendment is more apparent than real. However, Maltz admits that the Civil Rights Act of 1866 did prohibit only racial discrimination in civil rights, not violations of absolute rights per se. MALTZ, *supra* note 8, at 66-67. Maltz ascribes this limitation to concerns about federalism. *Id.* at 67. Maltz's view is the result of careful and judicious study and is certainly not unreasonable. However, it leaves several puzzles unsolved: How could some in Congress claim that the Act and the Amendment covered exactly the same ground? And why did the federalism concerns that proved so decisive in March of 1866 (when Congress passed the Act) evaporate by June (when it passed the Amendment)?

*3. Harrison*

Like Maltz and Berger, John Harrison begins with the proposition that the Privileges and Immunities clause essentially constitutionalizes, but does not go far beyond, the Civil Rights Act of 1866: "The privileges and immunities of state citizenship are rights like, and probably consist mainly of, those listed in the Civil Rights Act of 1866."[431] However, in Harrison's view, "[t]hese rights are not minimum Lockean freedoms but a full specification of state law on basic subjects."[432]

Moreover, unlike Maltz, Harrison argues that the Amendment does not protect these rights absolutely, but only against discriminatory "caste legislation."[433] Harrison argues that the term "abridge" refers not to any "change in the content of a right" but only to restrictions that discriminate among classes of individuals.[434] But Harrison's evidence shows only that Republicans regarded discrimination in rights as a *form* of abridgment. Harrison draws the logically untenable conclusion that because Republicans regarded caste discrimination as a form of abridgment of rights, they therefore regarded it as the only form.[435] Moreover, the clearest evidence Harrison cites that "abridge" refers only to caste discrimination is Shellabarger's 1871 speech, delivered five years after Congress passed the Fourteenth Amendment.[436]

It is unclear what interpretive method underlies Harrison's "equality-based" theory. In any case, he fails to ground it adequately in original intent. Harrison's project is far more modest. He claims only that his interpretation "is one that someone in 1866 could have meant by the language of the [Fourteenth Amendment]"[437] and that "some Republicans adopted the equality-based view."[438] Harrison does not attempt to show that the required constituent majorities actually or even probably understood it as he does, or even that some hypothetical average person would have understood it so. Indeed, Harrison "hesitate[s] to attribute to most participants in the framing and ratification of the Fourteenth Amendment any precise notion of the meaning of Section 1" and,

431. Harrison, *supra* note 11, at 1416.

432. *Id.* at 1418.

433. *Id.* at 1422 ("A state abridges such rights [i.e., state positive law rights of property or contract] when it withdraws them from certain citizens, but not when it alters their content equally for all.").

434. *Id.* at 1421.

435. *Id.* at 1420-22.

436. *Id.* at 1423 (quoting Shellabarger's remark that the Fourteenth Amendment's ban on abridgment of rights means "that one man shall not have more rights upon the face of the laws than another man." CONG. GLOBE, 42d Cong., 1st Sess. app. at 71 (1871)); *see also id.* (quoting 3 CONG. REC. 1793 (1875) (remarks of Sen. Boutwell)).

437. *Id.* at 1397.

438. *Id.*

unlike Maltz, "asserts nothing (or almost nothing) about the relative strength of conservative, moderate, and radical Republicans during the framing and ratification of the Fourteenth Amendment."[439] But in order to establish his reading as the "original understanding," Harrison would have had to undertake precisely the inquiry he eschews. Although Harrison does not actually insist that his reading represents the original understanding, he does claim to have recovered the "real meaning"[440] of the Privileges or Immunities Clause.

If Harrison's interpretation of the Fourteenth Amendment is questionable from an originalist point of view, his application of his interpretation to concrete cases is extremely perfunctory.[441] Although Harrison is able to reach many Warren Court results (such as *Brown* and *Loving v. Virginia*[442]), he does so only by sweeping the most important difficulties of his approach under the rug. It may be true, as he claims, that "some Republicans" understood the Amendment as he does. But, as Nelson has suggested, it is unlikely that any clear common understanding ever existed. Moreover, because summing disparate original understandings of widely divergent factions generally yields a narrow reading of a given right, a careful originalist reading is likely to yield a crabbed and conservative reading of the Fourteenth Amendment that would plunge constitutional doctrine back into the era before the civil rights revolution. It is, in short, more likely to look like Berger's or at least Maltz's version than Harrison's.

The main obstacle to Harrison's originalist justifications of *Brown* and *Loving* is the restricted understanding of the term "privileges and immunities" prevalent in 1866-68. As Harrison is aware, many in Congress suggested that the Fourteenth Amendment had the effect of constitutionalizing the Civil Rights Act of 1866, which was widely understood as limited to "civil" rights rather than "social" and "political" rights like public school attendance, intermarriage, and jury service.[443] Moreover, the adopters of the Civil Rights Act and the Fourteenth Amendment repeatedly rejected opportunities to frame them as clear and sweeping antidiscrimination directives.[444] Also problematic for Harrison is Justice Washington's decision in *Corfield*, cited repeatedly in the Thirty-Ninth Congress, holding that use and enjoyment of a state's common property is not a privilege or immunity of citizenship.[445] As Harrison notes, this decision

439. *Id.*
440. *Id.* at 1389.
441. *Id.* at 1459-66.
442. 388 U.S. 1 (1967) (holding miscegenation laws unconstitutional).
443. *See supra* text accompanying notes 334-37.
444. *See* Harrison, *supra* note 11, at 1409.
445. According to Justice Washington:

> we cannot accede to the proposition . . . that, under the provisions of the constitution, the citizens of the several states are permitted to

> raises the question whether anything that we might now characterize as a government benefit can qualify as a privilege or immunity. The question is difficult, in part because public services are a more common and more important function of government now than when the Comity Clause or the Privileges or Immunities Clause was adopted.[446]

From an originalist point of view, if the original understanding of "privileges or immunities" did not encompass government benefits, it is not clear why it should matter that public services are more important now than they were in 1787 or 1866. From a practical point of view, however, it would force Harrison to reject *Brown v. Board of Education*.

Harrison's suggested solution to this problem is to draw a distinction between property obtained by taxation and property "not obtained from anyone":

> When the government undertakes to provide something that individuals have a natural right to acquire, and either monopolizes its provision or forces citizens who obtain the benefit privately to pay for it a second time by taxing its public provision, then the benefit so provided is a privilege of citizens . . . . With this approach . . . the disposition of property that the state had not obtained from anyone, such as oyster beds, would not necessarily represent a privilege of citizens. But if the state used tax revenues to buy an oyster bed, it could not exclude citizens from fishing there on the basis of race, color, or previous condition of servitude.[447]

Justice Washington drew no distinction in 1823 between property obtained by taxation and property "not obtained from anyone," whatever that may mean.[448] Rather, the distinction derives from a

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> participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by these citizens; much less, that in regulating the use of the common property of the citizens of [a] state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.

Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230). Thus, the plaintiff in *Corfield*, a Delaware citizen, was not entitled under the Comity Clause to fish for oysters in New Jersey, which were the common property of the State of New Jersey. *See id.*

446. Harrison, *supra* note 11, at 1455.

447. *Id.* at 1456-57.

448. Presumably under Harrison's scheme Alaska could exclude its native peoples from the public schools, as long as it financed its school system from its oil revenue derived from lands "not obtained from anyone" (i.e., stolen from the native peoples). Other jurisdictions could avoid having to integrate their schools by the simple expedient of establishing separate systems of taxation for each race.

suggestion made in 1983 by Judge Stephen Williams.[449] Nor can Harrison produce any evidence that the originators of the Privileges or Immunities Clause made any such distinction, beyond a general claim that the distinction is consonant with Lockean natural rights ideas that were "[a] favorite theme of Abolitionists and Republicans."[450]

The only specific reference to the debates of the originators that Harrison proffers in support of his theory is Howe's speech condemning the Florida system of taxing both whites and blacks to support white schools, but taxing only blacks to support black schools.[451] But Howe focused on the unfairness of taxing blacks at a higher rate than whites and on the ludicrously inadequate provisions made for the black schools.[452] At the time Howe spoke, eight Northern states, as well as the District of Columbia, had segregated public schools; another five excluded blacks from the public schools entirely.[453] Howe did not point to any of these as examples of unequal legislation. Evidently what was particularly objectionable about the Florida law was not segregation per se but unequal taxation without just compensation. Unequal taxation, after all, strikes at a right that *does* lie at the core of the original understanding of privileges and immunities: property. If states could tax blacks unequally it could effectively destroy their right to property. It makes sense, therefore, that Justice Washington included "exemption from higher taxes or impositions than are paid by the other citizens of the state" among the immunities protected by the Comity Clause.[454] But there is no evidence that all public benefits supported by general taxation were regarded as privileges or immunities: on the contrary, it was widely understood that public education was not a privilege or immunity.[455] Moreover, even if the Fourteenth Amendment was understood to require equal schools where blacks were taxed at the same rate as whites, it does not follow that the Amendment required *integrated* schools.[456]

449. *See* Harrison, *supra* note 11, at 1456 n.273 (citing Stephen Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983)).

450. *Id.* at 1456.

451. *Id.* at 1456 n.274 (citing CONG. GLOBE, 39th Cong., 1st. Sess. app. at 219 (1866)).

452. *See* CONG. GLOBE, 39th Cong., 1st Sess. app. at 219 (1866).

453. *See* BERGER, *supra* note 7, at 137.

454. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

455. *See* BERGER, *supra* note 7, at 117-33.

456. *Cf.* MALTZ, *supra* note 8, at 113. Perhaps unsure of his own argument, Harrison cautions: "I do not think that my theory of the 14th Amendment stands or falls with this question. . . . An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*." Harrison, *supra* note 11, at 1463 n.295.

Harrison's "originalist" defense of *Loving* rests on a facile dismissal of the problem of "symmetrical" discrimination. Harrison argues:

> Under a ban on interracial marriage, the rights of individuals are not the same under all descriptions, because blacks can marry blacks and whites cannot, even though all are prevented from marrying members of the other race. But if the rights are different under any description, they are not the same.[457]

But the only authority from the Thirty-Ninth Congress Harrison can cite is Senator Reverdy Johnson (D. Md.) a bitter *opponent* of the Civil Rights Act and the Fourteenth Amendment.[458] In response to Johnson, the Amendment's Republican proponents replied that it did not prohibit "symmetrical" discrimination. Senator Fessenden, Republican of Maine, argued that miscegenation laws were equal because they punished both races equally for mixed marriages.[459] Likewise, in the House, Illinois Republican Samuel W. Moulton, denied "that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman."[460] Harrison, who evidently feels Johnson had the better of the argument, concludes: "On this issue, the Republicans either deceived themselves or decided that the only thing for it was a round untruth."[461] But whether the Republicans deceived themselves or merely deceived the ratifying public with a "round untruth," the fact remains that the public understanding of the Amendment expressed by its originators (in contrast to its opponents, such as Reverdy Johnson) was that it forbade asymmetrical, but not symmetrical discrimination.

Harrison's methodology, despite its constant appeals to the historical record, has little in common with originalism. To establish that the Amendment prohibits only discriminatory rather than absolute "abridgments" of rights, Harrison is content to show merely that "some Republicans" (but not a majority) in fact understood it thus. In determining the scope of the equality provision he espouses, Harrison does not even inquire whether "some Republicans" took the positions he favors. To support his view that public benefits supported by general taxation are "privileges", consistency with Locke's theory of natural rights, as glossed in 1983 by Judge Stephen Williams, suffices; express statements of the ratifiers to the contrary may be disregarded. To support his view that symmetrical discrimination is an "abridgment," Harrison even relies on state-

457. Harrison, *supra* note 11, at 1459.

458. *Id.* at 1460 n.280 (citing CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866)).

459. *See* CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866).

460. *Id.* at 632.

461. Harrison, *supra* note 11, at 1460 n.280.

ments of the Amendment's opponents; the clear consensus of its supporters may be ignored. Although he claims to have put the Amendment in its "historical context,"[462] in fact Harrison selectively manipulates that context or disregards it entirely as it suits his purpose.

Moreover, Harrison never adequately explains what types of discrimination the Amendment prohibits. His suggestion that the Amendment prohibits discrimination based on "caste"[463] is unenlightening. Harrison never defines his concept of "caste" or explains how he derives it from the original understanding. The framers gave very little attention to the question of exactly what classes the Amendment protected. It is begging this question simply to assert, for example, as Harrison does, that religion "fit[s] comfortably into both our own, and the Republicans', notion of caste" and is therefore protected.[464] The Republicans did not have a clearly defined notion of caste. The debates on the Fourteenth Amendment provide little illumination on the question of religion. As Nelson has noted, "Republicans were . . . divided on whether the Fourteenth Amendment permitted religious classifications, like the one in New Hampshire that permitted only Protestant Christians to hold office."[465] Moreover, although during the drafting of the Fifteenth Amendment the House rejected language that would authorize religious tests for the elective franchise, it refused by an even greater margin "to accept the clear language that Bingham proposed to outlaw such tests."[466]

At a minimum, it is clear that the originators intended to protect the newly freed slaves from certain types of discriminatory state action. But they cannot have intended to protect every group from discriminatory action, since almost all legislation discriminates against one group in favor of another. Between these two extremes lies a vast range of possibilities, and the historical record offers scarcely any guidance.[467] Republicans could not even agree on

462. *Id.* at 1474.
463. *Id.* at 1457-62.
464. *Id.* at 1461.
465. NELSON, *supra* note 299, at 141.
466. *Id.* Similarly, in the Fifteenth Amendment context there was widespread disagreement about state English-language literacy requirements barring substantial German-speaking minorities from access to the ballot-box. *See id.* at 140-41.
467. On its face the text of the Amendment makes no reference to race, and thus offers no clear warrant to limit its scope to racial classifications. Moreover, as noted above, the Joint Committee replaced Stevens' original version prohibiting "discrimination . . . as to the civil rights of persons because of race, color, or previous condition of servitude" with Bingham's more opaque language forbidding abridgment of privileges or immunities of citizens. *See supra* text accompanying note 373. But the change from Stevens' version to Bingham's seems to have been motivated primarily by a desire to restrict the scope of rights protected rather than to broaden the number of protected classes. *See supra* text accompanying notes 370-74. Similarly, the parallel change of lan-

which classifications (other than racial classifications) violated the Amendment, much less on a general criterion for distinguishing permissible from impermissible classifications. Harrison's pseudo-originalist theory fails to provide any satisfactory answer to this central question of modern "equal protection" jurisprudence.

*4. McConnell*

Michael McConnell attempts not a general elucidation of the original meaning of the Fourteenth Amendment, but rather a narrow originalist justification of the result in *Brown*. As McConnell notes, "[s]uch is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."[468] Moreover, McConnell is evidently dissatisfied with approaches that would address this question at "an extremely high and indeterminate level of abstraction";[469] rather, he seeks to show that the originators (or at least the congressional framers) of the Fourteenth Amendment specifically understood it to forbid school segregation.[470]

Unfortunately, as McConnell concedes, the evidence that does exist from 1866-68 tends to suggest that the framers and ratifiers of the Fourteenth Amendment did not understand the Amendment to ban school segregation. The only clear statement in the legislative history indicates that the right to attend common schools was not a "civil right," and the terms "civil rights" and "privileges and immunities" were widely equated.[471] Segregation was widespread and quite popular throughout the Union, North, and South, both before and after adoption of the Amendment.[472] All state and federal courts to consider the question in the nineteenth century (with one small exception) concluded that school segregation did not violate the Amendment.[473] Finally, Congress declined to enact legislation

guage in the Civil Rights Act of 1866 (striking out the "no discrimination" clause) was apparently understood as restricting the scope of protected rights. *See supra* notes 337-41 and accompanying text. Likewise, the exchanges between Hale and Stevens in the House and between Johnson and Howard in the Senate concerning the question of sex discrimination reveals only that the Amendment's proponents had no clear idea what they meant by "unequal legislation" or which classes were protected from unequal treatment. *See supra* text accompanying notes 355-56, 388.

468. McConnell, *supra* note 10, at 952.

469. *Id.*

470. *Id.* at 953.

471. *See id.* at 960.

472. *See id.* at 962-71.

473. *See id.* at 971-77. As McConnell notes, the only decision striking down school segregation on constitutional grounds was a lower-court opinion mooted by subsequent legislation and thus never appealed. *Id.* at 975 n.128 (citing Commonwealth *ex rel.* Allen v. Davis, 10 Weekly Notes of Cases 156 (C.P. Crawford County, Pa. 1881)). All other courts to pass on the issue, including courts composed entirely of Republicans, concluded that public school segregation did not violate the Fourteenth Amendment. *See id.* at 971-74.

desegregating schools either in the states or under its direct jurisdiction in the District of Columbia.[474]

Nevertheless, McConnell insists that there is "no significant body of evidence" from 1866-68 regarding the Fourteenth Amendment's intended impact on school segregation.[475] McConnell therefore resorts to the legislative history of the Civil Rights Act of 1875 as the "best available evidence of the original understanding" of the Amendment on this issue.[476] Because there was more discussion of segregation in the 1870s than in 1866-68, McConnell argues that the evidence from the enactment period is "overwhelmed by the abundance of evidence from the enforcement period."[477]

Thus, in ascertaining the original understanding, McConnell allows evidence from the period of enforcement to trump evidence from the period of enactment. McConnell assumes, but does not adequately demonstrate, that there existed a "continuity in opinion" regarding the Amendment's meaning "during the nine-year period from the proposal of the Fourteenth Amendment through the passage of the Civil Rights Act of 1875."[478] In fact, attitudes toward civil rights changed dramatically during the Civil War and Reconstruction. In 1861, most Republicans opposed emancipation; by 1865, they passed the Thirteenth Amendment, abolishing slavery.[479] In 1866, the Republican Congress decisively rejected black suffrage; in 1869, it passed the Fifteenth Amendment, granting blacks the right to vote.[480] In particular, as Michael Klarman has shown, attitudes toward racial segregation in public schools evolved very rapidly during this period.[481] While the opposition to school desegregation was overwhelming at the time the Amendment was passed,

474. *See id.* at 977-80.
475. *Id.* at 984.
476. *Id.*
477. *Id.*
478. *Id.* at 1105.
479. *See* PETER KOLCHIN, AMERICAN SLAVERY 1619-1877, at 206 (1993) ("[W]hat it meant to be a radical Republican was continually in flux.").
480. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 271-81 (1988) (documenting the "astonishingly rapid evolution of Congressional attitudes" toward black suffrage); *see also* Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENTARY 223, 227 (1996). Similarly, as Maltz notes, the Fourteenth Amendment was not originally understood to guarantee blacks the right to serve on juries, which was seen as a political right, but in the 1870s Republicans in Congress overwhelmingly supported proposals to prohibit racial discrimination in jury selection under the enforcement provision of the Amendment. *Id.* at 227-28. For McConnell's reply to Maltz, see Michael W. McConnell, *Segregation and the Original Understanding: A Reply to Professor Maltz*, 13 CONST. COMMENTARY 233 (1996).
481. Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885-93, 1903-11 (1995). For McConnell's response, see Michael W. McConnell, *The Originalist Justification for* Brown*: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

Northern support for integration grew dramatically in the 1870s and 1880s.[482] McConnell does not (and cannot) demonstrate that the Republicans' understanding of privileges and immunities in 1875 was the same as in 1866.[483]

Furthermore, McConnell ignores entirely the views of the ratifiers in his search for the Fourteenth Amendment's meaning. In fact, McConnell argues that the views of the ratifiers are irrelevant:

> The states and the people exercised little control . . . . [T]he margin of victory for the Amendment was attained by coercion of the Southern states rather than by winning the support of the electorate in three-fourths of the States. When an Amendment obtains its supermajority through congressional exercise of its power to condition readmission of states to the Union, it is a fiction to treat the opinions of the people of the various states as controlling; it is Congress that effectively exercised the amendatory power.[484]

It is not entirely clear why McConnell does not simply conclude that the Fourteenth Amendment is invalid because the Article V amendment procedures were not properly followed. But if the Amendment is valid, there is no principled justification for ignoring the record of ratification in the Northern states, where ratification was not coerced. The real reason why McConnell focuses on congressional rather than ratifier understanding, one suspects, is that many Republican leaders favored black civil rights more strongly than their constituents. As Klarman has argued, by eliminating "the Republicans' felt need to accommodate the racism of their constituents" as a cognizable factor in the originalist calculus, McConnell is able to justify the result in *Brown* at the price of distorting the historical meaning of the Amendment.[485]

During the 1871-75 debates over the bill that eventually became the 1875 Civil Rights Act, only a handful of the Fourteenth

482. *See* Klarman, *supra* note 481, at 1902-07.

483. Indeed, McConnell candidly recognizes that opinions on civil rights changed during this period. In fact, he even suggests that "[a]n analogy might be drawn to the shift of opinion that occurred among supporters of civil rights between passage of the Civil Rights Act of 1964 (when affirmative action was explicitly disavowed) and a decade later (when affirmative action was firmly entrenched)." McConnell, *supra* note 10, at 1106. Nevertheless, McConnell devotes very little attention (about two pages in an article of nearly two hundred pages) to this central difficulty of his approach. Essentially his argument is that "[w]hile Reconstructionist fervor apparently increased between 1866 and 1870, there is reason to believe that it cooled considerably in the years after 1870," so that any shifts in the understanding of the Amendment after ratification cancelled each other out. *Id.* at 1106-07.

484. *Id.* at 1109.

485. Klarman, *supra* note 481, at 1920-21. *See also* Raoul Berger, *The "Original Intent"—As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242, 266-68 (1996).

Amendment's original supporters remained in Congress.[486] Thus, McConnell's samples are small.[487] Moreover, as McConnell admits, legislative history of the 1875 Act is ambiguous, even if it is regarded as probative of the original meaning of the Fourteenth Amendment.[488] Of the eighteen votes that McConnell analyzes, five resulted in defeats for the proponents of desegregation.[489] Ultimately, the provision requiring desegregation of the public schools was deleted from the final version of the Bill.[490]

McConnell's study has shed new light on Republican attitudes toward school segregation in the 1870s. But his claim that post-enactment evidence is a reliable guide to the original meaning of the Fourteenth Amendment is unconvincing. Not only were Republican views on civil rights in rapid flux during Reconstruction, but Republican leaders who favored broader protection for civil rights than the public was willing to accept in 1866-68 had every incentive to overstate the Amendment's original scope after it had been enacted.[491] McConnell is able to justify the result in *Brown* only by discarding originalist methodology. Moreover, even if accepted at face value, McConnell's narrow defense of *Brown* cannot account for most of the Supreme Court's modern civil rights jurisprudence in areas outside of school desegregation.[492]

### *C. Incorporation of the Bill of Rights*

#### *1. Frankfurter and Black*

The Supreme Court's decision in *Adamson v. California*[493] may be taken as the starting-point for the modern debate over the incorporation of the Bill of Rights into the Fourteenth Amendment. Although the Court's focus in *Adamson* and subsequent incorporation decisions was on the Due Process rather than the Privileges or Immunities Clause, Justice Frankfurter's concurrence and Justice

486. In the series of votes that McConnell analyzes, of the 33 original Senators who voted for the Amendment, 12 remained in the Senate in 1871; by 1874, 4 remained. Of the 120 original supporters of the Amendment in the House, between 13 and 8 remained to vote on the various versions of Sumner's bill. *See* McConnell, *supra* note 10, at 1096.

487. McConnell attempts to circumvent this problem by arguing that the votes of the Republican delegation in Congress in 1871-75 can serve as a proxy for the views of the framers of the Fourteenth Amendment in 1866. *Id.* at 1096-99.

488. *Id.* at 1099.

489. *Id.* at 1094.

490. *See id.* at 1080-86.

491. *See* Klarman, *supra* note 481, at 1914.

492. *See id.* at 1919-20. As Klarman notes, McConnell's interpretation cannot account for the modern decisions striking down miscegenation laws, requiring integration of swimming pools and golf courses, and so forth. *Id.* at 1920.

493. 332 U.S. 46 (1947).

Black's dissent prefigured much of the current historical debate on incorporation. In *Adamson*, the Court held that the Fifth Amendment privilege against self-incrimination did not apply to the states under the Fourteenth Amendment.[494] In so doing, the Court reaffirmed the standard of *Palko v. Connecticut*,[495] which held that the Due Process Clause of the Fourteenth Amendment protects only such provisions in the Bill of Rights as are "implicit in the concept of ordered liberty."[496]

In his concurrence, Justice Frankfurter focused exclusively on the Due Process Clause, in accordance with established precedent that had virtually eviscerated the Privileges or Immunities Clause.[497] Frankfurter argued that incorporation was not consistent with the "sense most obvious to the common understanding at the time of [the Fourteenth Amendment's] adoption":[498]

> It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way . . . . Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments.[499]

Frankfurter further urged that the ratifiers clearly did not contemplate the application of Bill of Rights criminal procedure requirements to the states:

> [A]t the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established method for prose-

494. *Id.* at 53.

495. 302 U.S. 319 (1937).

496. *Adamson*, 332 U.S. at 54 (quoting *Palko*, 302 U.S. at 325).

497. Frankfurter applauded the fact that the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), had sharply confined the scope of the Privileges and Immunities Clause. *See Adamson*, 332 U.S. at 61-62. Frankfurter was evidently concerned at the potential for abuse of that clause by a Lochnerite Court bent on using substantive rights to thwart economic legislation. *See id.* (Frankfurter, J., concurring) (citing Colgate v. Harvey, 296 U.S. 404 (1935) (interpreting the clause as a limitation on state taxing power), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940)).

498. *Adamson*, 332 U.S. at 63 (Frankfurter, J., concurring) (quoting Eisner v. McComber, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting)).

499. *Id.* (Frankfurter, J., concurring).

> cuting crime and fastened upon themselves a new prosecutorial system.[500]

Bingham's suggestion that the Amendment would make the "bill of rights" enforceable against the states, Frankfurter argued, was unknown to the ratifiers and thus not part of the original meaning.[501] Frankfurter's aversion to a broad reading of the Due Process Clause was evidently rooted in fresh memories of the abuses of that clause to frustrate legislative reforms in the *Lochner* era.[502]

Justice Black's jurisprudential outlook and personal background, on the other hand, led him to favor the Due Process Clause over the Equal Protection Clause, and to read the scope of due process broadly.[503] In a vigorous dissent and lengthy appendix, Justice Black concluded that the Privileges or Immunities and Due Process

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500. *Id.* at 64 (Frankfurter, J., concurring).

501. With regard to Bingham's suggestion that the Fourteenth Amendment was meant to make the Bill of Rights enforceable against the states, Frankfurter argued:

> Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the Amendment. Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech.

*Id.* (Frankfurter, J., concurring).

502. *See id.* at 62 (Frankfurter, J., concurring) (urging that judges interpreting the Fourteenth Amendment should be "mindful of the relation of our federal system to a progressively democratic society"). Richard Aynes has noted that in 1924 Frankfurter wrote in an unsigned article that the Fifth and Fourteenth Amendment Due Process Clauses "ought to go." Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1217 (1995) (quoting *The Red Terror of Judicial Reform*, THE NEW REPUBLIC, Oct. 1, 1924, at 110, 113). Thirty years after the 1924 article, Frankfurter wrote to Learned Hand: "I once shocked Cardozo by saying I would favor the repeal of the Fourteenth Amendment—and had wished only that the XIII and XV had issued from the Civil War." Aynes, *supra*, at 1218 (quoting letter from Felix Frankfurter to Learned Hand (June 25, 1954) (on file with Harvard Law School Library)).

503. Because the Equal Protection Clause invites judicial evaluations of the reasonableness of government classifications and resists the sort of positivistic and literalistic analysis he favored, Black tended to construe the Clause quite narrowly. *See* TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS 198-99, 226-45 (1988). Indeed, Black once suggested in an interview that perhaps the Equal Protection Clause should have been left out of the Constitution. *See id.* at 37. Black was not always personally sensitive to the plight of minorities. *See*, *e.g.*, MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING 101-07 (1984) (describing Black's background in the Ku Klux Klan and racist remarks on the floor of the Senate); YARBROUGH, *supra*, at 1 (quoting Black's remark that wartime internment of Japanese-Americans was justified because "[t]hey all look alike to a person not a Jap"). As a whole, Black's record on racial issues was much better than these examples would suggest. But Black, no less than Frankfurter, no doubt perceived the original understanding of the Fourteenth Amendment through the filter of his own jurisprudential prejudices and personal experience.

Clauses of the Fourteenth Amendment made the Bill of Rights as a whole applicable against the states.[504] Black's analysis relied most heavily on statements made by Bingham, whom he called "the Madison of the first section of the Fourteenth Amendment."[505] Black quoted at length from Bingham's speech of February 28, 1866, where Bingham urged that his Amendment was necessary to make the "bill of rights" enforceable against the states.[506] Black also surveyed the debates over the Civil Rights Act of 1866[507] and quoted Howard's speech introducing the Amendment to the Senate.[508] Finally, Black quoted extensively from postenactment discussions of the Amendment during the congressional debates in 1871 over the Ku Klux Klan Act[509] and from various dissenting opinions of the Court in the 1870s on incorporation.[510]

Although Black's "total incorporation" view did not prevail in *Adamson*, in practice the Court has since incorporated most of the Bill of Rights into the Fourteenth Amendment via the "selective incorporation" approach advanced most prominently by Justice Brennan.[511] This approach, while paying "lip service to Frankfurter's insistence on fundamental fairness as the touchstone of the Fourteenth Amendment,"[512] has in fact paved the way for the application of virtually every clause of the Bill of Rights against the states.

*2. Fairman and Crosskey*

In 1949 Stanford Professor Charles Fairman undertook an originalist rebuttal of Justice Black's dissenting opinion in *Adamson*.[513] Fairman surveyed in detail the debates over the Amendment and the Civil Rights Bill in Congress, the accounts of those debates in the press, the ratification debates, the debates surrounding the admission of new Western states and the readmission of Southern states of the former Confederacy, early judicial con-

504. *See* Adamson, 332 U.S. at 71-72 (Black, J., dissenting).

505. *Id.* at 74 (Black, J., dissenting).

506. *See id.* at 95-97 (Black, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1089-91 (1866)).

507. *See id.* at 100-03 (Black, J., dissenting).

508. *See id.* at 104-07 (Black, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866)).

509. *See id.* at 110-20 (Black, J., dissenting).

510. *See id.* at 120-23 (Black, J., dissenting).

511. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (holding the Fifth Amendment's protection against compulsory self-incrimination applicable to the states via the Fourteenth Amendment).

512. AMAR, *supra* note 12, at 139.

513. *See generally* Fairman, *supra* note 326. As Richard Aynes has documented, "Frankfurter . . . was Fairman's teacher and mentor," and the two corresponded often and shared a common legal philosophy. Aynes, *supra* note 502, at 1207.

struction of the Amendment, and later statements made in retrospect by principal players.[514]

Fairman notes that antebellum judicial elucidation of the "privileges and immunities" of the Comity Clause seemed mostly to treat them as state positive law rights protecting person and property.[515] He then turns to the abortive Bingham Amendment, which provided for congressional enforcement of the Comity Clause ("privileges and immunities") and the Fifth Amendment Due Process Clause ("equal protection in the rights of life, liberty and property").[516] Bingham evidently believed these clauses already applied directly to the states' treatment of their own citizens but that Congress lacked the power to enforce them.[517] When Bingham, at the end of February 1866, argued in his opening and closing speeches defending the proposal that it gave Congress the power to enforce the "immortal bill of rights," both times he indicated clearly that he was referring to the Comity Clause and the Fifth Amendment, not the first eight (or ten) amendments.[518]

Fairman notes how fuzzy Bingham's conception of the effect of his proposed Amendment was. Bingham's bizarre distinction between the right to enjoy property (which was protected, in his view) and the right to acquire it (which was not) seems at odds with general Republican opinion, which clearly favored at least the right of blacks to acquire property.[519] When pressed to explain whether his Amendment gave Congress the power to pass general laws for the protection of life, liberty, and property (rather than merely to prohibit unequal legislation), Bingham replied at first that it didn't, then that it did, and then that it didn't.[520] Bingham's colleagues displayed a similar confusion.

During the debates over the Fourteenth Amendment itself, Fairman found little mention of incorporation in the House of Representatives, with the possible single exception of a reference by Bingham to cruel and unusual punishments.[521] Rather, speaker after speaker expressed the opinion that Section1 of the Amendment

514. *See generally* Fairman, *supra* note 326.
515. *Id.* at 9-15.
516. First and most importantly, the equal protection component would have empowered Congress to remedy unequal treatment by a state of its own residents, and was aimed most pointedly at the notorious Black Codes. Second, the privileges and immunities component would have enabled Congress to compel states to live up to their Comity Clause obligations by refraining from unconstitutional discrimination against out-of-staters. It thus aimed at protecting outsiders like Massachusetts abolitionist Samuel Hoar, who had been driven out of South Carolina before the war. *See id.* at 21-22.
517. *See id.* at 24-26.
518. *See id.* at 24-37.
519. *See id.* at 30.
520. *See id.* at 36-37.
521. *Id.* at 53.

served merely to constitutionalize the Civil Rights Act.[522] The only clear reference to incorporation was Howard's speech introducing the Amendment to the Senate.[523] However, if the Privileges or Immunities Clause already incorporated the Bill of Rights (including the Due Process Clause) Howard did not adequately explain why a second due process clause was necessary.[524] Moreover, Fairman argued, although little of the ensuing debate in the Senate focused on Section1, those Senators who did address it continued to equate it with the Civil Rights Act and thus to express an understanding inconsistent with Howard's.[525]

Apart from verbatim quotations of Senator Howard's May 23 speech in the *New York Herald* and *New York Times*, no newspaper accounts discussed the issue of incorporation of the first eight amendments into the Fourteenth. Rather, Howard's remarks seemed "to have sunk without leaving a trace in public discussion."[526] Similarly, incorporation was not an issue in the election campaign of 1866[527] or the ratification debates in the states: for example, no suggestion was made that state criminal procedure needed to be brought in line with the federal Bill of Rights.[528] Likewise, in the years following ratification, subsequent litigation generally did not raise the incorporation theory, and courts continued to hold the Bill of Rights inapplicable to the states.[529] Finally, although in 1871, five years after the framing of the Amendment, Bingham argued that the privileges and immunities of Section1 "are chiefly defined in the first eight amendments to the Constitution," he never expressed this view during the actual adoption of the Amendment.[530] As Representative Garfield replied to Bingham, "[m]y colleague can make but he cannot unmake history."[531]

Curiously, after marshaling this impressive array of evidence that the Section1 was not understood to impose the Bill of Rights on the states, Fairman declared himself in favor of partial incorporation.[532] But Fairman's argument for partial incorporation is not well developed and seems to be appended to his article almost as an

522. *See id.* at 43-51.
523. *See id.* at 54-68.
524. *See id.* at 58-59.
525. *Id.* at 60-64.
526. *Id.* at 69.
527. *See id.* at 70-78.
528. *See id.* at 81-126 (discussing the ratification debates).
529. Rather, in *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1868), the Supreme Court continued unanimously to adhere to the doctrine of *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights applied only to the federal government. *See* Fairman, *supra* note 326, at 132-34; *see also* Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).
530. Fairman, *supra* note 326, at 136.
531. *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. at 151 (1871)).
532. *Id.* at 139.

afterthought.[533] Although Fairman's negative conclusions were widely accepted,[534] many scholars rejected his ultimate conclusion about selective incorporation, even as the consensus on the Supreme Court shifted increasingly in favor of the idea.[535]

Five years later, University of Chicago Professor William Crosskey undertook a rebuttal of Fairman and a detailed rehabilitation of Justice Black.[536] Crosskey argued that resort to the legislative history of the Fourteenth Amendment was unnecessary because the equation of "privileges and immunities" with the Bill of Rights was "clear" from the Amendment's plain language.[537] In fact, Crosskey claimed, the Privileges and Immunities Clause "seems about as clear as a clause could be."[538] Crosskey insisted that the meaning of the Amendment had to be understood against the background of *Dred Scott* and *Barron v. Baltimore*, and that the statements of Bingham and Howard needed to be evaluated in the context of the "old, forgotten Republican constitutional ideas" that the Comity Clause guaranteed rights of national citizenship, that the Due Process Clause of the Fifth Amendment guaranteed equal protection of the laws, and that the Bill of Rights was already directly applicable to the states even before the Fourteenth Amendment was enacted.[539] Despite his argument that the legislative history was irrelevant, Crosskey did review it to refute Fairman's analysis, and argued that other Republicans shared Bingham's views on incorpo-

533. Fairman's entire argument for partial incorporation amounts to two sentences:

> Brooding over the matter in the writing of this article has, however, slowly brought the conclusion that Justice Cardozo's gloss on the due process clause—what is "implicit in the concept of ordered liberty"—comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause. This accommodates the fact that freedom of speech was mentioned in the discussion of 1866, and the conclusion that, according to contemporary understanding, surely the federal requirements as to juries were not included.

*Id.* at 139 (footnote omitted).

534. *Cf.* CURTIS, *supra* note 12, at 6 ("Fairman's article has been accepted as gospel by many legal scholars.").

535. For example, Raoul Berger, who relied heavily on Fairman's article in his discussion of incorporation in his 1977 book, nonetheless rejected the idea of any incorporation. BERGER, *supra* note 7, at 155-89. Although Curtis agreed with Fairman's conclusion that the evidence points at least toward selective incorporation, he found that considering all the evidence Fairman had marshaled against incorporation, "Fairman's conclusion is puzzling" and "seems at war with the burden of his argument." CURTIS, *supra* note 12, at 6, 99.

536. William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). For Fairman's brief response, see Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

537. Crosskey, *supra* note 536, at 6.

538. *Id.*

539. *Id.* at 11-21.

ration.[540] Finally, Crosskey culled the 1871 debates over the Ku Klux Klan Act for further support for his view.[541]

Crosskey did make some important points in his critique of Fairman's article. Most importantly, he demonstrated that the remarks of Bingham and other Republicans, when placed in the context of heterodox Republican constitutional theories, were not necessarily as incoherent as they appeared to Fairman. For example, he provided an explanation for the apparent paradox raised by the presence of the Due Process Clause in the Fourteenth Amendment.[542] While in Crosskey's view the Privileges or Immunities Clause incorporated the entire Bill of Rights as rights of *citizens* against the state, a clause applying to all *persons* was needed to guarantee the due process rights of aliens.[543]

Crosskey's arguments were not widely accepted, perhaps in part because of his reputation as an eccentric.[544] Even Justice Black never cited Crosskey to support his incorporationist theory. However, a few scholars continued to defend the incorporation thesis.[545]

540. *Id.* at 21-84.

541. *Id.* at 89-100.

542. *See id.* at 77.

543. *Id.* This argument has been convincingly developed by Curtis. CURTIS, *supra* note 12, at 107. Berger has argued that the framers of the Fourteenth Amendment did not distinguish carefully between the rights of "citizens" and the rights of "persons." BERGER, *supra* note 7, at 240-44. However, a number of them did clearly have such a distinction in mind. *See* MALTZ, *supra* note 8, at 97.

544. For example, Crosskey denounced Madison as a "forger" who deliberately fabricated passages in his notes of the Constitutional Convention. 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 7-13 (1953) (discussing Madison); *see also* William Winslow Crosskey, *The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. CHI. L. REV. 248 (1968); Abe Krash, *William Winslow Crosskey*, 35 U. CHI. L. REV. 232, 232 (1968). This view is not supported by any evidence. *See* Hutson, *supra* note 175, at 27-32. Crosskey also argued that the Commerce Clause was originally understood as giving Congress plenary power to regulate almost all economic activity, that judicial review of federal statutes is unconstitutional, and that the Bill of Rights was originally understood as a limitation on the power of the states. 1 CROSSKEY, *supra*, at 17-292, 1091; 2 *id.* at 976-1046. *See generally* Abe Krash, *The Legacy of William Crosskey*, 93 YALE L.J. 959, 959 (1984) (reviewing WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, VOLUME III: THE POLITICAL BACKGROUND OF THE FEDERAL CONSTITUTION (1980)) (describing Crosskey as "unquestionably the most controversial" legal historian of recent times). Crosskey's views were roundly attacked by many of his contemporaries. *See*, *e.g.*, Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456, 1457 (1954) (stating that Crosskey "[c]onstructed a never-never world of his own").

545. *See, e.g.,* Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968) (arguing that the Privileges or Immunities Clause was intended to incorporate the Bill of Rights).

*3. Curtis and Berger*

The work of Michael Kent Curtis is the most formidable historical attempt to rehabilitate incorporation.[546] Curtis is not himself a strict originalist but treats historical meaning as merely one of several factors properly considered in constitutional adjudication:

> If court decisions are compared to vectors, then history has been one of the forces that are finally reflected in the result. It has never been more, and perhaps never will. Still, the study of history leading to a constitutional provision can improve the quality of a judicial decision. It can do so by increasing the number of cases and consequences judges consider and by allowing the judges to consider and follow the purposes and policies that produce the provision.[547]

Curtis is also sensitive to the inadequacy of the historical record. He notes that the overwhelming bulk of the debates over the Fourteenth Amendment concerned problems of the return of political power to the states of the former Confederacy: "Distressingly, the issue that seems primary to us today, the meaning of section 1 of the Amendment, received relatively little discussion."[548] But without minimizing these concerns, Curtis argues that "conceding the historical record to those favoring a 'strict construction' of individual rights is often premature."[549]

Curtis's most important contribution is his effort to place the debates over the Fourteenth Amendment into the context of the unorthodox constitutional ideology embraced by many Republicans. The earlier radical constitutionalists, it will be recalled, held both that slavery was unconstitutional[550] and that the Bill of Rights was already directly applicable to the states in the antebellum era.[551] The Garrisonians, on the other hand, rejected the Constitution as a proslavery document.[552] Curtis argues that most Republicans took a middle position between these two views, denying that the Constitution forbade slavery in the states and that slaves were citizens but insisting that the Bill of Rights, despite *Barron v. Baltimore*, was applicable against the states and incorporated among the privileges and immunities of the Comity Clause.[553] With the passage of the Thirteenth Amendment, outlawing slavery, and as Republicans thought, making freed blacks citizens, "many differences

546. *See generally* CURTIS, *supra* note 12.
547. *Id.* at 11.
548. *Id.* at 15.
549. *Id.* at 9-10.
550. *See id.* at 42.
551. *See id.* at 43-44.
552. *See id.* at 44.
553. *Id.* at 46-49.

between Republican and radical abolitionist thought tended to disappear."[554]

Thus, Curtis argues that the orthodox reading of the Comity Clause's "privileges and immunities" found in antebellum cases such as *Corfield* is not a reliable guide to the meaning of "privileges or immunities" in Section1 of the Fourteenth Amendment. Citing evidence ranging from the Magna Carta, the Petition of Right, the English Bill of Rights, through the works of William Penn, Blackstone, and Madison, to the writings of the abolitionists and other antebellum authors, Curtis urges that "privileges" and "immunities" were used as synonyms for fundamental rights in general.[555] Curtis also emphasizes the difference in wording between the Comity Clause ("Privileges and Immunities of the Citizens *in the several States*") and the Fourteenth Amendment ("privileges or immunities of citizens *of the United States*").[556] This change in wording, Curtis argues, indicates that the framers understood the Fourteenth Amendment's "privileges or immunities" to refer to a body of national rights, rather than the narrow set of state-law rights to which (in the orthodox view) the Comity Clause referred.[557] These national rights included all fundamental constitutional rights, including (but not limited to) those enumerated in the first eight amendments.

Similarly, Curtis argues that there is no inconsistency between incorporation and Republican statements that the Fourteenth Amendment did nothing more than constitutionalize the Civil Rights Act of 1866.[558] The Act guaranteed "full and equal benefit of all laws for the security of person and property"; and, Curtis argues, "the provisions of the Bill of Rights are, by ordinary use of language, laws 'for security of person and property.'"[559]

During the ratification debates, Curtis contends, the central concern of the drafters of the Fourteenth Amendment to guarantee individual rights necessarily overrode any issues of federalism:

> The campaign of 1866 dealt with gut issues: the rights of blacks, the political power of the rebellious southern states, racism, and the protection for loyalists in the South. These were the issues that could and did defeat politicians. No politician, then or since, is likely to be defeated for advocating grand juries, criminal juries of twelve, or the right to jury trial in civil cases where the damages exceed twenty dollars. The argu-

554. *Id.* at 46.

555. *Id.* at 64-66; *see also* Michael Kent Curtis, *Two Textual Adventures: A Comment on Jeff Rosen's Paper* (draft of Apr. 2, 1998 on file with the author) at 9-19 [forthcoming in GEO. WASH. L. REV.].

556. CURTIS, *supra* note 12, at 113-17.

557. *Id.*

558. *Id.* at 71-72.

559. *Id.* at 72.

> ment [against incorporation] assumes that Republicans in state legislatures would allow the South a dramatic increase of political power by counting disfranchised blacks for purposes of representation rather than provide for jury trials in civil cases where the damages exceed twenty dollars.[560]

Curtis also suggests that the ratifiers' failure to discuss the application of the Bill of Rights to the states points in favor of rather than against incorporation, because many Republicans believed the Bill of Rights already applied to the states.[561]

Shortly after Curtis's book appeared, Raoul Berger published a polemical and pointed refutation. Where Curtis stressed abolitionist ideology as the key to the adopters' understanding, Berger stressed their attachment to state sovereignty and their pervasive racism. Berger points out that the adopters drew a sharp distinction between federal intervention in the South, then under military occupation, and interference in the internal affairs of the sovereign states of the North.[562] Similarly, abolitionism, which was widely seen as directed only at Southern institutions, often went hand in hand with racism. As one scholar has pointed out, "[w]e forget that many nineteenth-century Americans, perhaps the clear majority, opposed slavery and racial equality with equal intensity."[563] Moreover, Berger stresses that public opinion had turned sharply against abolitionism once the war had been won.[564]

Berger rejects as irrelevant much of Curtis's evidence about the historical meaning of "privileges" and "immunities." The Magna Carta, for example, required trial by a jury of one's peers; but Wilson insisted that the right of blacks to sit on juries was not a civil right or immunity.[565] Blackstone, whom Wilson had quoted in the

560. *Id.* at 105.

561. *Id.* at 217-18.

562. BERGER, *supra* note 325, at 49-55. For earlier volleys in the debate between Berger and Curtis, see Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Michael Kent Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982); Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1 (1983) and Michael Kent Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights to the States*, 62 N.C. L. REV. 517 (1984). For Curtis's latest discussion of incorporation, see Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner: *Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996).

563. BERGER, *supra* note 7, at 56 (quoting Henry Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 126 (1978)).

564. *Id.* at 61-62.

565. *See id.* at 112-13.

House, explained the "great fundamental civil rights" as the rights of personal security, freedom of movement, and property, which corresponded closely with the private-law rights enumerated in the Civil Rights Bill.[566] The references to "fundamental" and "absolute" rights that recur throughout the debates, Berger argues, were repeatedly explained by the framers to refer to this narrow set of rights.[567] Berger contends that the Fourteenth Amendment's reference to "privileges or immunities of citizens of the United States" was generally understood simply to emphasize that blacks were now citizens rather than to expand the scope of rights protected.[568]

The difficulty in relying on "plain meaning" or even historical tradition to explicate the Fourteenth Amendment's "privileges and immunities" is perhaps clearest in the case of the right to vote. This right was often referred to as a "privilege" or fundamental right of citizens. Many of the same sources that Curtis cites to support the incorporation argument treated it as such, including William Penn, American revolutionary writers, antebellum authorities such as Justice Washington in *Corfield*, and leaders of Reconstruction such as John Bingham.[569] Nevertheless, as even Bingham admitted, suffrage was not one of the "privileges or immunities" protected by Section 1 of the Fourteenth Amendment.[570] Evidently those "privileges and immunities" were not understood to embrace every right that could be described as a "privilege." As Representative Lawrence noted, in discussing the Comity Clause, "the courts [had] by construction limited the words 'all privileges' to mean only 'some privileges.'"[571] The Thirty-Ninth Congress, in excluding suffrage from the list, was not even willing to go as far as the courts.

566. *See id.* at 110-11.

567. *Id.* at 105-19.

568. *Id.* at 97. Others have argued that the change from "privileges and immunities of citizens in the several states" in the Comity Clause to "privileges or immunities of citizens of the United States" in the Fourteenth Amendment indicated a shift from a prohibition on discrimination in state-law rights to absolute protection for a national set of rights. *See*, *e.g.*, Lambert Gingras, *Congressional Misunderstandings and the Ratifiers' Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEGAL HIST. 41, 47 (1996).

569. Penn repeatedly insisted that the right to vote and be represented in Parliament was one of the most important of the "rights and privileges" of Englishmen. *See* RAKOVE, *supra* note 80, at 294-95. The right to vote was widely regarded by the Revolutionary generation as fundamental. *See*, *e.g.*, *id.* at 304. For Justice Washington's inclusion of the "elective franchise" in the list of "privileges and immunities" in *Corfield*, see *supra* note 332 and accompanying text. Bingham stated in the debates on the Fourteenth Amendment that "[t]he franchise of a Federal elective office is as clearly one of the privileges of a citizen of the United States as is the elective franchise for choosing Representatives in Congress or presidential electors." CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

570. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

571. *Id.* at 1835.

Berger places great stress on the many Republican statements equating Section1 of the Fourteenth Amendment with the Civil Rights Act. He rejects Curtis's argument that the Bill of Rights, as applied to the states, could be regarded as "laws for the security of person and property" within the meaning of the Civil Rights Act: "Existing 'law' held the Bill of Rights inapplicable to the States . . . . 'Law' does not mean dissenting abolitionist opinion."[572] Moreover, the deletion of the words "civil rights" from the Act, made to prevent any future "latitudinarian construction," would seem pointless if "laws for the security of person and property," which was left in the Act, had such broad scope.[573]

In regard to the ratification debates, Berger criticizes Curtis for shifting the burden of proof. Since incorporation would have radically altered the states' internal affairs and particularly their criminal procedure, he argues that more evidence is needed than the framers' mere silence or their vague utterances about "liberty" or the "pursuit of happiness."[574] Berger argues that Curtis's scenario of a Republican "choice" between reconstructing the South and retaining state control over criminal procedure was unrealistic:

> [Curtis] sets up a false issue and a false antithesis. Local control over criminal administration was and remains a "gut" issue, witness continuing adherence to the States' death penalties notwithstanding the Court's crusade to abolish and hobble them . . . . Nor was the North faced by a choice between a federal takeover of local criminal administration and a contraction of Southern representation geared to black disfranchisement . . . . Politicians were not faced by a distressing choice between the two; they were in tandem.[575]

Curtis has highlighted the unorthodox constitutional ideology of many Republicans and has succeeded better than anyone else in constructing a plausible if not completely unproblematic argument that the Fourteenth Amendment was understood to incorporate the Bill of Rights. But as the continuing controversy over incorporation shows, ultimately neither side in the debate can declare victory. Howard clearly stated that the Privileges or Immunities Clause incorporated the Bill of Rights,[576] and Bingham evidently intended the same, although he often was not as clear as he could have been.[577] But most other proponents focused on rights of property, contract, and access to the courts, and many equated the Fourteenth Amendment with the Civil Rights Act or the Comity and Due

572. BERGER, *supra* note 7, at 79.
573. *Id.*
574. *Id.* at 82-87.
575. *Id.* at 78.
576. *See supra* text accompanying note 383.
577. *See supra* notes 364-66 and accompanying text.

Process Clauses of the antebellum Constitution.[578] Such statements are not necessarily conclusive, however, because the speakers may have adhered to the unorthodox view that the antebellum constitution or the Civil Rights Act already guaranteed the rights in the first eight amendments against abridgment by the states.

In any case, the virtual silence of Congress, the ratifying states and the courts on so important an issue is very hard to explain.[579] Earl Maltz, himself an incorporationist, has noted that "[t]he most puzzling anomaly for incorporationists is the failure of proponents of the amendment to make explicit reference to the Bill of Rights as a whole during the ratification campaign."[580] Similarly, Curtis expresses puzzlement that suddenly, almost before the ink on the newly ratified Amendment was dry, "[f]or reasons not entirely clear, Republican judges were abandoning a commitment to enforcement of Bill of Rights liberties."[581] Of course, if the Amendment was not generally understood to incorporate the Bill of Rights, all these puzzles disappear.

*4. Amar*

Recently, Akhil Amar has deployed currently fashionable techniques of literary criticism to the problems of uncovering the original meaning of the Fourteenth Amendment. For Amar, the task of parsing the Amendment's language, which others have found so difficult, is "remarkably straightforward" and "easy."[582] In a move reminiscent of Crosskey, Amar insists that one need hardly look beyond the text to discover the obvious "plain meaning"[583] that has eluded other commentators and courts for more than a century.

According to Amar, the very first words of the Privileges and Immunities Clause ("No State shall") with their "rhetorical resonance" are a "dramatic" announcement of the adopters' intent to

578. *See supra* notes 381, 401-02 and accompanying text.

579. Curtis suggests that this silence indicates that the incorporationist view was accepted, because "[no] one explicitly denied that [the Amendment] would have that effect." CURTIS, *supra* note 12, at 15. But since most congressmen and ratifiers indicated that they understood Section 1 as simply conferring equality of property and contact rights, or requiring a minimum level of protection for such rights, their silence on the incorporation issue suggests that they did not understand the Amendment to incorporate the Bill of Rights. *See* Gingras, *supra* note 568, at 66-68.

580. MALTZ, *supra* note 8, at 117.

581. CURTIS, *supra* note 12, at 179.

582. AMAR, *supra* note 12, at 163, 181. Most of the material on the Fourteenth Amendment in Amar's book appeared previously in Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992). For critiques, see Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993), and Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down the Wrong Road Again,"* 74 N.C. L. REV. 1559, 1574-92 (1996).

583. AMAR, *supra* note 12, at 181.

overrule *Barron* and incorporate the rights in the first eight amendments against the States.[584] Amar's argument then proceeds as follows:

> As the key sentence rolls on, the incorporation reading gains steam. Various critical words of the next phrase—*make*, *any*, *law*, and *abridge*—call to mind the precisely parallel language in parallel sequence of the First Amendment—*make*, *no*, *law*, and *abridging* . . . . And what better way to make clear that even rights and freedoms in the original Bill of Rights that explicitly limited Congress should hereafter apply against states than by cloning the language of the First Amendment? . . . However . . . there is no suggestion thus far that only the First Amendment is to be incorporated . . . . Of course, my last sentence was a bit of a cheat . . . . The words we have considered so far are wonderfully suggestive . . . but hardly definitive . . . . Happily, the final words of the first clause are very different . . . . Consider first the words *privileges* and *immunities*. Now, these exact words do not appear in the Bill of Rights, but the words *right[s]* and *freedom[s]* speckle the Bill. The plain meaning of these four words are virtually synonymous; indeed, the *Oxford English Dictionary* definition of *privilege* includes the word *right*; and of *immunity*, *freedom*.[585]

This, in essence, is Amar's argument about "the plain meaning of the words of Section One circa 1866."[586] But Amar never reaches the crux of the matter. The problem is to show that the Amendment transforms rights held by citizens against the federal government into rights held as well against the states, and to define those rights. Amar's elaborate *explication de texte* leaves us little wiser than before. Obviously the Amendment prohibits states from abridging certain rights. But there is nothing in the "plain language" of the Amendment to show that it transforms constitutional rights enjoyed against the federal government into rights enjoyed against the states. One might just as well argue, by Amar's "plain meaning" method, that the Amendment transforms statutory rights enjoyed against the federal government into rights enjoyed against the states.

Amar rhetorically asks, referring to the language of the Amendment, "what better way to make clear that even rights and freedoms in the original Bill of Rights that explicitly limited Congress should hereafter apply against [the] states . . . ?"[587] Amar's

584. *Id.* at 164. The "resonance" is with Article 1, Section 10 of the Constitution ("No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .") which *Flectcher v. Peck* referred to as "a bill of rights for the people of each state." *Id.* (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810)).

585. *Id.* at 165-66 (citations omitted).

586. *Id.* at 181.

587. *Id.* at 165.

question supplies its own retort. The way to make it clear would be to enact an amendment saying "all rights and freedoms in the first eight amendments limiting Congress shall hereafter apply against the states as well." The Fourteenth Amendment as enacted does not make it clear at all.

For all his talk about verbal "resonance" with the 1787 Constitution, the 1791 Bill of Rights, and antebellum caselaw, Amar relies principally on the general dictionary meanings of the words "privilege" and "immunity" (which can of course be quite broad), while ignoring the specific historical and legal context of the phrase "privileges and immunities" in the 1866-68 debates to discover the "plain meaning . . . circa 1866" of the phrase.[588] But of course the phrase "privileges and immunities" is taken from the Comity Clause and by 1866 a substantial body of antebellum caselaw interpreting it "consistently listed the same rights" (chiefly private-law rights of property and contract) with minor variations.[589] For some radical Republicans, the phrase may have had a very different meaning. But in any case, it was a specialized legal term of art in 1866. Its original meaning is not to be found by looking at the general usage of its component parts.

Next, Amar provides a perfunctory historical survey. Amar claims that the legislative history provides nothing but "glosses that mesh perfectly with each other, and most importantly, with the plain meaning of the words of section I."[590] Amar's "glosses" are as follows: first, in 1859, before the Fourteenth Amendment was even on the horizon, Bingham said that all constitutional guarantees of rights to citizens were "limitation[s] upon the states."[591] But for Bingham, these guarantees (Bingham also used the words privileges and immunities) included not only textual rights but also such "rights" as the "right to know."[592] Similarly, in 1864, Wilson suggested that First Amendment rights were among the privileges and immunities binding on the states.[593] Amar writes that during the 1866 debates over the Fourteenth Amendment itself, "Bingham spoke to the issue at much greater length and made himself abundantly clear. Over and over he described the privileges and immunities clause as encompassing 'the bill of rights' . . . ."[594] Moreover, Howard explicitly identified the privileges and immunities with the first eight amendments.[595] Finally, Amar notes that in 1871 Bingham stated that "the privileges and immunities of citizens of the United States . . . are chiefly defined in the first eight amendments

588. *Id.* at 166-67.
589. MALTZ, *supra* note 42, at 56.
590. AMAR, *supra* note 12, at 187.
591. *Id.* at 181 (quoting CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859)).
592. *Id.*
593. *See id.* at 184.
594. *Id.* at 182.
595. *See id.* at 185-86.

to the Constitution."[596] Amar claims that he could have cited "much more" evidence, but that "[a]s a lover of mercy" he has restrained himself.[597]

Thus, Amar's legislative history merely goes over the same ground as prior discussions. It shows that only once in the voluminous debates over the Civil Rights Act, the Bingham Amendment, and the Fourteenth Amendment did any speaker (Howard) clearly state that the Fourteenth Amendment or its predecessors incorporated the first eight amendments against the states. Bingham spoke at length in 1866 about "the immortal bill of rights," but as far as one can tell this consisted of the Comity Clause plus the Fifth Amendment rather than the first eight amendments.[598] Perhaps it included the "right to know" as well. It may be true, as Amar once claimed, that Bingham "made himself about as clear as anyone could ever hope for"—from Bingham, at least.[599]

Amar claims to find it "astonishing that some scholars, most notably Charles Fairman and Raoul Berger" could have rejected the incorporationist thesis.[600] He attacks Fairman ("a rather un-Fairman")[601] and Berger (his "misstatements, distortions, and nonsequiturs are legion")[602] for engaging in a rather monstrous project to distort the historical record.[603] Moreover, Amar himself is not above distorting the historical record by quoting material out of context.[604]

The application of the citizen rights in the Bill of Rights to the states, in Amar's view, is the easy part of incorporation.[605] The "hard part" is that although "*all* of the privileges and immunities of citizens recognized in the Bill of Rights became 'incorporated' against states by dint of the Fourteenth Amendment, . . . not all of the provisions of the original Bill of Rights were indeed rights of citizens."[606] "Thus far, the Supreme Court has avoided these puzzles . . . ."[607] This is hardly surprising, for the solution involves "far

596. *Id.* at 183.
597. *Id.* at 186.
598. *See supra* note 366.
599. Amar, *supra* note 582, at 1234. As several of his colleagues' remarks suggested, Bingham was esteemed more for his rhetorical exuberance than for his analytical perspicacity. *See* FAIRMAN, *supra* note 285, at 1270.
600. AMAR, *supra* note 12, at 183.
601. Amar, *supra* note 582, at 1239 n.204.
602. AMAR, *supra* note 12, at 197 n.*.
603. *See generally id.* at 188-97 (discussing Fairman and Berger's understandings of the Fourteenth Amendment, as well as opposition to incorporation).
604. *See* Gingras, *supra* note 568, at 51 (discussing how Amar "distorted the meaning of several remarks by omitting important sentences").
605. AMAR, *supra* note 12, at 181, 215.
606. *Id.* at xiv.
607. *Id.* at 218 (discussing the Court's refusal to review Second Amendment cases).

more judicial artisanship—far more judgment"[608] than the Court has been willing—or perhaps able—to deploy.

Fortunately, Amar possesses the requisite degree of skill and artisanship. The solution is Amar's own especially elegant brand of incorporation, which he calls "refined incorporation."[609] The crux of Amar's thesis is that the central concern of the Bill of Rights as originally understood in 1787-89 was the protection of the rights of popular majorities against self-interested government, not the protection of individuals or minorities.[610] Only by incorporation through the Fourteenth Amendment, Amar argues, did the Bill take on the countermajoritarian, individual-rights coloring it has today.[611]

Even if one accepts Amar's somewhat overdrawn and simplistic distinction between the majoritarian Bill of 1787-89 and the countermajoritarian Bill of 1866-68, his argument self-destructs. If the meaning of a constitutional provision is to be sought in original understanding, then the Bill of Rights cannot have meant something different in 1866-68 from what it meant in 1787-89. If, on the other hand (as Amar evidently concedes), the meaning of constitutional provisions evolves over time, so that the Bill of Rights did mean something different in 1866-68 from what it meant in 1787-89, then the meaning of the Fourteenth Amendment itself must similarly evolve over time. But if this is so, Amar is wrong to seek the Amendment's meaning today solely by examining what it meant in 1866-68.

Amar seems to argue that the originators of the Fourteenth Amendment engrafted onto the Constitution not just their understanding of that Amendment, but also their understanding of the Constitution as a whole, and perhaps even their *Weltanschauung* or understanding of the world at large. For example, he argues that while the eighteenth-century "vision" of "arms bearing" focused on the collective militia, the Reconstruction "vision" focused on the individual right of self-defense.[612] Therefore, he urges, the properly "refined" meaning of the Second Amendment is closer to the views of "today's National Rifle Association" than it is to those of modern gun-control advocates.[613] Likewise, in his eagerness to preserve the

608. *Id.* at 215.
609. *Id.* at xiv.
610. *Id.* at xii-xiii.
611. *Id.* at xiii-xv.
612. *Id.* at 259. Earlier in his book, Amar makes the rather bizarre suggestion that the term "arms" in the un-Reconstructed Second Amendment is broad enough to include modems and fax machines. *Id.* at 49. Amar does not discuss how this interpretation might be affected by the process of "refinement."
613. *Id.* at 266. In support of this view he does not shrink from expectation originalism or creative reconstruction of the framers' state of mind. For example, he suggests that the Republican leadership in 1866 was "hardly in the

modern doctrine of "reverse incorporation," Amar is undeterred by the lack of textual or historical supporting evidence. It is enough that "[t]he entire spirit of the Fourteenth Amendment was to affirm rights against all governments and to insist that state and federal governments be held to the same standard."[614] Thus, although the text of Section1 the Fourteenth Amendment does not limit the federal government at all, Amar argues that by virtue of a "doctrinal 'feedback effect'" it transforms and refines the Bill of Rights even in cases involving only the federal government.[615]

This last conclusion seems at war with the entire burden of Amar's argument. His whole point is that rights enjoyed against the federal government are *not* the same as rights enjoyed against the states: The rights in the Bill of Rights "do not incorporate jot for jot."[616] Precisely because they are not the same, rights enjoyed against the federal government must be "refined" before they can be applied against the states. But once they have been "refined," they may then (by a kind of doctrinal bootstrapping) be applied in their "refined" form even against the federal government, because although they are *not* the same, the "entire spirit" of the Amendment is that they *are* the same.

Amar does not reveal all the arcana of "refined incorporation" but merely offers the reader a few tantalizing glimpses, which "are suggestive but not exhaustive."[617] For example, the historical evidence as to whether the First Amendment should permit state establishments of religion, he hints darkly, "is somewhat sparse and rather mixed."[618] But Amar seems remarkably unconcerned about the practical doctrinal consequences of his approach, which "might yield different results if worked by another hand."[619] The important thing is his theory and not its consequences: At least "lawyers, scholars and judges would be asking the same (and right) questions even if they reached different answers."[620] In fact, once Amar's theory is adopted, doctrinal disarray is almost inevitable, since as Amar notes, "[v]irtually no one in Congress or the states carefully considered clause by clause and right by right how the Bill could be sensibly incorporated."[621] Unlike Amar, in 1866-68 "many informed men simply were not thinking carefully about the words of section I at all."[622]

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mood" to shore up local militias as a possible check on federal standing armies of occupation in the South. *Id.* at 216.

614. *Id.* at 281-82.

615. *Id.* at 243-44; *see also id.* at 281-83.

616. *Id.* at 193; *see also id.* at 174, 222-23, 243 (rejecting mechanical incorporation).

617. *Id.* at 231.

618. *Id.* at 253.

619. *Id.*

620. *Id.*

621. *Id.* at 193.

622. *Id.* at 202.

### *D. An Original Understanding of the Fourteenth Amendment?*

> HAMLET: Do you see yonder cloud that's almost in shape of a camel?
> POLONIUS: By th' mass and 't is, like a camel, indeed.
> HAMLET: Methinks it is like a weasel.
> POLONIUS: It is back'd like a weasel.
> HAMLET: Or like a whale?
> POLONIUS: Very like a whale.[623]

Any attempt to ground modern Fourteenth Amendment doctrine in original understanding inevitably confronts two intractable obstacles. First, the historical record is too sparse to permit confident conclusions about any of the most difficult and contentious questions of Fourteenth Amendment jurisprudence. Originalism's promise to provide constraints on judicial discretion is unfulfilled. Modern doctrine has resolved these questions with far more certainty than originalism ever could. Second, if, despite the inadequacy of the record, one were to hazard an educated guess as to the Amendment's "core meaning," the weight of the evidence favors a far narrower reading than current doctrine allows. The original understanding can hardly account for the school desegregation decisions of the 1950s, let alone the voting rights, gender discrimination, and privacy decisions that were to follow in subsequent decades. A "return" to original understanding would completely unsettle constitutional law and eviscerate many of the civil liberties now protected by our common-law Constitution.

The "originalist" interpretations that reach the most palatable results, and those most in line with current Supreme Court doctrine, are those of Harrison and Amar. But they reach these results only by studiously ignoring or laboriously reworking parts of the historical record. Harrison's reading ignores the plain meaning of "abridge" which was not clearly restricted to discrimination on the basis of "caste" in 1866 any more than it is today. He is able to argue that "abridge" means "discriminate on the basis of caste" only by drawing unwarranted inferences from post-enactment statements taken out of context. In fact, as the legislative history clearly shows, if Congress had wished merely to ban "discrimination" it could have done so: Language expressly banning "discrimination in civil rights or immunities" was considered and rejected in the Civil Rights Bill of 1866.[624] In applying his antidiscrimination principle to questions such as miscegenation laws, Harrison is even less precise: he relies on statements by the Amendment's opponents to show

623. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2.

624. Harrison, *supra* note 11, at 1402 n.53, 1405 n.64 (noting the removal of "discrimination in civil rights or immunities" from the final version of the Civil Rights Act of 1866).

that it meant the opposite of what its proponents said.[625] With regard to the meaning of "privileges or immunities," on the other hand, Harrison takes the original public meaning as his starting point; but since both case law and the debates in Congress indicate that "privileges and immunities" did not include public benefits, Harrison allows neo-Lockean theory to trump original meaning. Thus, Harrison's interpretation of the Fourteenth Amendment rests on an eclectic methodology by which he resolves each question as it arises by selecting from among original public understanding, post-enactment statements, mischaracterizations by opponents, or general philosophical theories, whichever yields the most palatable meaning in light of current conceptions of civil rights.

Amar's methodology is similarly eclectic. In the case of the word "abridge" he relies on the ordinary sense and original public meaning, which was not restricted to discriminatory action.[626] But in the case of "privileges and immunities" he ignores very substantial evidence of a specialized legal meaning developed in antebellum cases interpreting the Comity Clause and referred to repeatedly during the original debates, and relies instead on word-association, a modern dictionary, and statements during the original debates by two or three proponents favoring incorporation (ignoring the many other statements suggesting a very different understanding).[627] Though he purports to base his argument on the text itself, he fails to explain exactly where the text transforms rights enjoyed against the federal government into rights enjoyed against the states as well.

Like the Ptolemaic astronomers who piled epicycle upon epicycle in an effort to reconcile increasingly detailed empirical observation with theory, originalists have resorted to increasingly elaborate convolutions to reconcile the confused and inchoate original understanding of the Fourteenth Amendment with a modern Supreme Court jurisprudence that is far broader and more determinate. By engaging in some very difficult contortions, Harrison purports to provide an originalist foundation for the modern equal protection doctrine. By engaging in equally gymnastic (but very different) contortions, Amar purports to account for the incorporation doctrine. Each has high praise for the other's work. Harrison lauds Amar's article as "by far the best argument in favor of incorporation under the Privileges or Immunities Clause" and states that he has "profited enormously from conversations with Amar."[628] Similarly, Amar argues that in the case of state-created rights, Harrison's reading of the word "abridge" is "perhaps the most plausible" one.[629]

625. *Id.* at 1459-60 & 1460 n.280.
626. AMAR, *supra* note 12, at 165-66.
627. *See id.* at 166-67, 182-87.
628. Harrison, *supra* note 11, at 1466 n.309.
629. AMAR, *supra* note 12, at 178 n.*.

But how can the two theories possibly be reconciled? Harrison's theory gives "abridge" the meaning "discriminate on the basis of caste with respect to," and his theory gives "privileges and immunities" essentially the common legal meaning it had in 1866 (basically "state private law rights") but stretched as necessary to account for *Brown v. Board of Education*.[630] Amar's theory gives "abridge" its ordinary meaning but "privileges and immunities" their modern general usage meaning, namely, "rights" in general.[631] It would seem that only an inveterate circle-squarer could reconcile the two interpretations. But Amar purports to have solved the problem: "The language of the privileges-or-immunities clause can be understood as . . . two-tiered."[632]

The rhetorical device known as syllepsis, common in the classical poets but rare today, consists of "[t]he use of any part of speech comparably related to two other words or phrases . . . in different ways, so as to produce a witty effect."[633] Although Alexander Pope was one of our last writers who really indulged in this sort of thing, if we believe Amar's "two-tier" theory of meaning then syllepsis enjoyed a brief resurgence in 1866 among the framers of the Fourteenth Amendment. If modern efforts to square current Supreme Court Fourteenth Amendment doctrine with the original understanding have been, as Cass Sunstein has suggested, heroi-comic,[634] perhaps it is only fitting that a rhetorical device familiar from heroi-comic poetry should play such a prominent role in reconciling Amar with Harrison. Indeed, the framers apparently employed a double syllepsis, a device unknown to both Pope and the ancients. For, according to the "two-tier" theory, they employed "abridge" both in its ordinary (Amar) sense of "curtail" and in the specialized (Harrison) meaning of "discriminate on the basis of caste with respect to." Similarly they employed "privileges and immunities" both in the (Amar) sense of "federal constitutional rights enjoyed by individuals, which are hereby transformed into rights against the state gov-

630. Harrison, *supra* note 11, at 1397, 1416-20; *see also* Brown v. Board of Educ., 347 U.S. 483 (1954).

631. *See supra* text accompanying notes 626-27.

632. AMAR, *supra* note 12, at 178 n.*.

633. PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 832 (Alex Preminger ed., 1974). The following verses furnish two examples of syllepsis:

> Whether the Nymph shall break *Diana*'s Law,
> Or some frail *China* Jar receive a Flaw,
> Or stain her Honour, or her new Brocade,
> Forget her Pray'rs, or miss a Masquerade,
> Or lose her Heart, or Necklace, at a Ball; . . . .

THE POEMS OF ALEXANDER POPE 225 (John Butt ed., 1963) (*The Rape of the Lock* 2.105-09). In the passage quoted, "stain" is used figuratively with "Honour" and literally with "Brocade"; similarly, "lose" is used figuratively with "Heart" and literally with "Necklace."

634. *Cf.* Cass Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 312 (1996).

ernments" and in the (Harrison) sense of "state-created private law rights, plus benefits supported by general taxation." By the use of double syllepsis, or as Amar calls it, "two-tiered" meaning, the drafters of the Amendment were able to produce a "witty effect" far surpassing all its predecessors in the annals of literary history. What is most remarkable about this is that the adopters in Congress and the state legislatures all implicitly understood, without ever having to discuss the matter, that the Amendment forbade states from abridging (in the Amar sense) privileges or immunities (in the Amar sense) and from abridging (in the Harrison sense) privileges or immunities (in the Harrison sense). The Amendment, however, did not prevent states from abridging (in the Amar sense) privileges or immunities (in the Harrison sense) or merely from abridging (in the Harrison sense) privileges or immunities (in the Amar sense).

There is something a little tragic in these heroi-comic efforts. Talented scholars like Harrison and Amar have seen fit to waste their time on such a silly enterprise as undertaking an originalist justification of modern Fourteenth Amendment doctrine that distorts the historical record and stretches logic and common sense to the breaking point. History, which should teach us about our past and our present, is degraded to a mere ideological instrument of justification to be manipulated for preconceived ends. Academics and judges rush to embrace the latest originalist theories not because of their historical accuracy or logical and methodological consistency, qualities that they possess in short supply. Rather, they support these theories because the theories fit preconceived ideas about the result required to be reached (modern doctrine, more or less) and the means required to reach it (appeal to the "original understanding"). Originalism is prepared to find in the Fourteenth Amendment a camel, a weasel, a whale, and whatever else current doctrine requires.

Moreover, even if one takes this heroical-comical-tragical-historical[635] originalist endeavor seriously, it still provides a far less determinate and satisfactory basis for equal protection jurisprudence than current doctrine. Under current doctrine, there is no need for an elaborate inquiry into whether a given right or benefit, such as the right to attend public schools, is a "privilege or immunity" under the original understanding. Notwithstanding the clear original understanding of the framers to the contrary, under modern doctrine the Fourteenth Amendment applies to all government-conferred rights and benefits, including the elective franchise and

635. *Cf.* SHAKESPEARE, *supra* note 623, act 2, sc. 2 ("[T]ragedy, comedy, history, pastoral, pastoral-comical, historical-pastoral, tragical-historical, tragical-comical-historical-pastoral . . . .").

other political rights.[636] The Fifteenth and Nineteenth Amendments, which forbid race and sex discrimination in voting rights, only partially remedied the defect in the original understanding of the Fourteenth Amendment in this regard. There is nothing in the original understanding of the Constitution to prevent race and sex discrimination in qualification to hold office, or national origin discrimination in voting rights, or violations of the one-person one-vote principle generally. But in the voting rights cases the Court properly proceeded not from a consideration of what the original understanding of the Fourteenth Amendment required, but from the principle that "the right of suffrage is a fundamental matter in a free and democratic society [and] . . . is preservative of other basic civil and political rights."[637]

Similarly, modern doctrine provides a far more determinate answer than originalism provides to the question of what classifications are prohibited under the Fourteenth Amendment. Harrison insists that the original understanding prohibits "caste" discrimination, but is hard pressed to explain what that means. He is unsure, for example, whether sex discrimination, "the single most difficult of these questions," constitutes caste discrimination.[638] Indeed, he candidly admits that his "discussion of candidates for caste status has probably not advanced our understanding of that concept very much."[639] From the historical evidence, it is not at all clear that the Fourteenth Amendment was originally understood to embody a general prohibition of racial discrimination (as the adopters' discussions of Chinese rights show),[640] let alone a prohibition general enough to encompass discrimination based on sex or alienage.[641] By contrast, modern doctrine has firmly settled that not only race discrimination[642] but alienage,[643] illegitimacy,[644] national origin[645] and sex discrimination[646] require serious Fourteenth Amendment scru-

636. *See e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964) (invalidating apportionment scheme for the Alabama legislature); Baker v. Carr, 369 U.S. 186 (1962) (holding that a challenge to an apportionment scheme for the Tennessee legislature stated a justiciable cause of action under the Fourteenth Amendment).

637. *Reynolds*, 377 U.S. at 561-62.

638. Harrison, *supra* note 11, at 1460.

639. *Id.* at 1462.

640. *See* Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223, 224 (1994).

641. *See* Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers' Ideal of Equality*, 7 CONST. COMMENTARY 251, 252 (1990).

642. *See* Loving v. Virginia, 388 U.S. 1, 9 (1967).

643. *See* Plyler v. Doe, 457 U.S. 202 (1982); Graham v. Richardson, 403 U.S. 365 (1971).

644. *See* Levy v. Louisiana, 391 U.S. 68 (1968).

645. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

646. *See* Craig v. Boren, 429 U.S. 190, 204-05 (1976).

tiny. Moreover, the Court has at least struggled to evolve a rationale to explain what sort of classifications are prohibited. This process began, of course, with Justice Stone's famous suggestion that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[647] More recently, the Court has subjected to special scrutiny government classifications that target historically victimized and vulnerable groups based on traits that are beyond their control and bear no relation to their ability to contribute to society.[648] Although this formulation is not completely satisfactory and not always consistently applied, it offers far more guidance than the vague "caste" theory of modern originalists, let alone the inarticulate and scattered pronouncements of the originators themselves. Moreover, it has evolved as the Court has attempted to come to grips with the reasons for the need to protect minorities in a constitutional democracy, rather than as an axiomatic deduction from the *ipsi dixerunt* of the framers.

Thus the Court has developed its modern rights jurisprudence by facing squarely its duty to protect the integrity of the political process and to safeguard minorities from oppression by the majority: in other words, to prevent democracy from evolving into tyranny. This jurisprudence did not spring into existence by any sudden rediscovery of the forgotten original meaning of the Fourteenth Amendment, but by gradual refinement of principles that were present in the original understanding only in a very confused and embryonic state. *Brown v. Board of Education* did not spring to life fully developed like Athena from the head of Zeus; rather, it emerged by the gradual evolutionary articulation of doctrine in which all common-law courts engage. In a series of decisions stretching back fifteen years before *Brown*, the Court gradually undermined the separate but equal doctrine.[649] The expansion of vot-

647. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (dictum).

648. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602-03 (1986); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (plurality opinion).

649. The Court first held, in line with the separate but equal doctrine, that a state that maintained a segregated law school for whites had to maintain equal facilities for blacks, no matter how limited the demand. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350-51 (1938). It also began to use the Commerce Clause to invalidate segregation in interstate transportation. *See* Morgan v. Virginia, 328 U.S. 373, 386 (1946). Next, the Court held that a separate state law school established for blacks was not in fact equal to its all-white counterpart because of both objective factors and qualities that were not capable of objective measurement. *See* Sweatt v. Painter, 339 U.S. 629, 633-34 (1950). Finally, it decided that physical separation of blacks, even in an educational institution where they were allowed to attend the same classes and use the same facilities as whites, was unconstitutional because it impaired their

ing rights and the extension of protection to other classes that have suffered invidious discrimination have proceeded in a similar common-law fashion. The baseline at each stage in this process has always been the legal status quo established by current doctrine, not the original understanding of 1866-67. The engine of legal evolution in this area has been general principles of equality which may have originated with the framers, but have since taken on a far broader and more determinate scope which can no longer honestly be fully accounted for by reference to the original understanding.

## CONCLUSION

Exclusive reliance on the original understanding does not provide a basis for a just or workable system of constitutional adjudication. The historical record is far too incomplete to furnish answers to the most critical questions of modern constitutional law. Moreover, to the extent that it can be reconstructed, the original understanding of the scope of federal power is far too narrow for the needs of a modern administrative state and a modern economy. The original understanding of the Fourteenth Amendment does not furnish an adequate basis for the equal protection and due process jurisprudence that undergird our pluralistic democracy. Efforts to prove the contrary have been exercises in ideological justification through the manipulation of the historical record.

Recent decisions suggest that the Supreme Court's originalists are in disarray. When "public understanding" originalism fails to yield sufficiently determinate answers, the Court's originalist Justices have not hesitated to resort to specific intentions evidence (or even to imaginative reconstruction of intent) of the sort expressly discountenanced by the framers. The Court's recent decision in *McIntyre v. Ohio Elections Commission*[650] is a good example of this tendency. In *McIntyre*, the Court applied modern doctrine to hold that a state law prohibiting distribution of anonymous campaign literature violated the First Amendment.[651] Justice Thomas, concurring in the judgment only, excoriated the majority for "superimpos[ing] its modern theories concerning expression" upon the Constitution and ignoring the original understanding.[652] Nonetheless,

ability to interact with other students. *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-42 (1950).

650. 514 U.S. 334 (1995).

651. Justice Stevens, writing for the majority, noted that the law was both a direct regulation of the content of speech and a limitation on political expression; as such, under well-settled doctrine, it was subject to strict scrutiny. *See id.* at 345-46. The state's interest in providing the electorate with relevant information was insufficient to survive such scrutiny and the state's interest in preventing fraud and libel was already adequately served by much more narrowly tailored prohibitions on false statements during election campaigns. *See id.* at 348-53.

652. *Id.* at 370 (Thomas, J., concurring).

Thomas made little discernible attempt to distinguish between the original public understanding approach championed by the more sophisticated recent defenders of originalism and the cruder forms of specific intentionalism.[653] In any case, since the legislative history of the First Amendment is silent on the question of anonymous pamphleteering (and virtually everything else), Thomas argued that the "analysis must focus on the practices and beliefs held by the Founders concerning anonymous political articles and pamphlets."[654] Since many of the framers engaged in anonymous pamphleteering, Thomas concludes that they could not have intended to ban it.[655]

Thomas' version of originalism elevates the "practices and beliefs of the Framers" to a status of supreme law almost above the text of the Constitution itself. For Thomas refuses to consider (at least explicitly) whether "freedom of speech," as originally understood, does or does not protect anonymous pamphleteering. Rather, he deems the absence of specific reference in the legislative history to anonymous political expression to be sufficient to conclude this inquiry. The question then becomes not whether the text of the Constitution protects the practice, but whether the framers would subjectively have wanted it to be protected. This is intentionalism of the most extreme sort. It entails precisely the sort of resort to extrinsic evidence expressly rejected by the eighteenth-century framers, and hopelessly entangles the intentionalist in self-contradiction.

Justice Scalia, joined in dissent by Justice Rehnquist, also applied an originalist analysis in *McIntyre*, but reached the opposite result. But Scalia did not reject the specific-intent approach in principle.[656] Scalia argued that there can be no constitutional violation "when government conduct that is claimed to violate the Bill of Rights or the Fourteenth Amendment is shown, upon investigation,

653. Thus, for example, he urged that the meaning of the 1787 Constitution depends on the "meaning and intention of the convention which framed and proposed it for adoption for ratification to the conventions . . . in the several states" without referring at all to the "meaning and intention" of the latter conventions which alone had constituent authority. *Id.* at 359 (Thomas, J., concurring) (quoting Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838)).

654. *Id.* at 360 (Thomas, J., concurring).

655. *See id.* at 360-69 (Thomas, J., concurring).

656. *See id.* at 372 (Scalia, J., dissenting). For other examples of specific intentionalism in Scalia's jurisprudence, see *Harmelin v. Michigan*, 501 U.S. 957, 975-84 (1990) (opinion of Scalia, J., joined as to the originalist portions of the opinion only by Rehnquist, C.J.) (concluding largely from specific early practices that the Cruel and Unusual Punishments Clause does not prohibit punishment that is grossly disproportionate to the crime), and *Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) (relying on Madison's secret notes of the Constitutional Convention to support the claim that the Article III "judicial Power" is limited to cases or controversies).

to have been engaged in without objection at the very time the Bill of Rights or the Fourteenth Amendment was adopted."[657] Thus libel and obscenity laws, he argued, cannot violate the First Amendment, since the framers did not think they could. Presumably, by the same token (although Scalia refrains from saying so), segregated schools cannot violate the Fourteenth Amendment, since the Thirty-Ninth Congress and most of the ratifying states had established and approved of segregation.

However, a different presumption, in Scalia's view, applies when it is not a common government practice that is attacked as unconstitutional but a common practice of individuals that is claimed to be protected by the constitution. In *McIntyre*, for example, "to prove that anonymous electioneering was used frequently [in the framers' era] is not to establish that it was a constitutional right."[658] Since the search for the original meaning yields no determinate result, Scalia retreats to a conventionalist position. "Where the meaning of a constitutional text (such as 'the freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine."[659] Since states had begun enacting statutes prohibiting anonymous leafletting as early as 1890 and almost every state now had one on the books, Scalia argued, "[s]uch a universal and long established American legislative practice must be given precedence . . . over historical and academic speculation" concerning original intent.[660]

Scalia's admission that there is no clear original understanding of the First Amendment's freedom of speech is problematic for originalism. If so important a constitutional provision is completely indeterminate with respect to a practice, such as anonymous pamphleteering, that the framers were intimately familiar with and must have had clearly in mind, it is hard to see how originalism could ever be expected to yield any but the most trivial results. Furthermore, Scalia's presumption of constitutional protection for government practices (but not private practices) engaged in and claimed as protected by the framers, like his presumption that fundamental rights must be construed at the lowest possible level of generality,[661] seems to be a canon designed to expand government power and restrict individual rights. It is little more than prejudice masquerading as principle.

657. *McIntyre*, 514 U.S. at 372 (Scalia, J., dissenting).
658. *Id.* at 373 (Scalia, J., dissenting).
659. *Id.* at 378 (Scalia, J., dissenting).
660. *Id.* at 377 (Scalia, J., dissenting).
661. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia J., joined by Rehnquist, C.J.) (stating that a constitutional right should be interpreted at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

But Scalia's conventionalism is no less problematic than his originalism. Empirically, it is unclear why a government practice (regulation of anonymous pamphleteering) unknown until 1890 should be the "best indication of what fundamental beliefs [the First Amendment] was intended to enshrine" in 1791. And it is unclear why, once Scalia has decided to adopt a conventionalist approach, he does not take the well-settled First Amendment doctrine of the Supreme Court as his starting point rather than the well-established practice of the states.

Before he joined the Court, Scalia wrote that originalism's "greatest defect" is "the difficulty of applying it correctly."[662] The tasks it requires are "better suited to the historian than the lawyer."[663] The performance of Scalia and his originalist colleagues on the court are an ample illustration of this defect. In contrast, the dominant common-law approach expects judges to perform tasks that they are better-trained and better-suited to perform. As David Strauss has explained:

> [o]ne great advantage of the common law approach is that it explains why trained lawyers—not historians, literary critics, philosophers, or political scientists—should play such a large role in constitutional interpretation. It is not clear what, exactly, the distinctive lawyers' skills are, but the abilities required by the common law method—proficiency in a form of moral casuistry (distinguishing cases, recognizing significant particular facts, and so on), a rough understanding of social science, and skill at certain types of textual interpretation—are good candidates. It is less clear why lawyers should be thought to have the abilities required by the other approaches, such as the historian's skills required by originalism . . . . [664]

*United States v. Lopez*,[665] decided a week after *McIntyre*, highlights the problem of precedent. For the first time since the New Deal, the *Lopez* Court, in a sharp departure from established precedent, struck down a law on the grounds that it exceeded Congress' power under the Commerce Clause.[666] At issue was the Gun-Free School Zones Act of 1990, which criminalized possession of a firearm in a school zone.[667] The Court held that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[668] Although Justice Thomas concurred in the majority opinion, he also wrote a separate concurrence that is to-

662. Scalia, *supra* note 60, at 856.
663. *Id.* at 857.
664. Strauss, *supra* note 125, at 932.
665. 514 U.S. 549 (1995).
666. *Id.* at 551.
667. *See id.*
668. *Id.* at 567.

tally at odds with the majority's approach and rationale.[669] Taking an impeccably consistent public understanding originalist line, Thomas eloquently demonstrated that the "substantial effects" test approved by the majority cannot be reconciled with the original meaning of the Commerce Clause.[670] A consistent originalist would have to strike down not just the Gun-Free School Zones Act, but the vast bulk of economic legislation enacted since the New Deal. But Thomas devoted a mere two sentences, buried in a footnote, to the contemplation of this prospect:

> Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the last 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.[671]

Remarkably, Thomas seems to admit that a consistent application of originalism would be utterly impracticable. But this never leads him to reconsider the viability of originalism as an interpretive method or even to attempt to develop a principled theory of stare decisis that does not swallow originalism itself. *McIntyre* and *Lopez* highlight the failure of originalism to develop a workable alternative to current doctrine in the respective areas of individual rights and federal power. In the area of individual rights, particularly free speech and equal protection, the original understanding is simply far too indeterminate to form a workable and stable basis for constitutional adjudication. Moreover, the inadequate historical evidence we do have suggests that originalist jurisprudence would lead to a

669. *See id.* at 584-602 (Thomas, J., concurring).

670. Eighteenth-century dictionaries and discussions universally define commerce in terms of buying and selling, as well as transporting for those purposes. *See id.* at 585-86 (Thomas, J., concurring). To substitute "agriculture" or "manufacturing," which commonly involve a single party, for "commerce," which implies an exchange between two parties, makes nonsense of the text, which speaks of "Commerce with foreign Nations, and among the several States, and with the Indian tribes." *See id.* at 587-89; *see also* U.S. CONST. art 1, § 8, cl. 3. The text says "regulate Commerce," not "regulate matters that substantially affect Commerce." If the framers had desired to establish an "effects" test, they could have done so in the Commerce Clause, as in fact they did in Article V. *See Lopez*, 514 U.S. at 588 (Thomas, J., concurring). Moreover, if the Commerce Clause did establish congressional power over all matters that "substantially affect" commerce, than most of the other enumerated powers in Article I, Section 8 are superfluous, including the power to regulate bankruptcy, coin money, fix the standard of weights and measures, punish counterfeiters, establish post offices and roads, grant patents and copyrights, and punish piracy. *See id.* at 592 (Thomas, J., concurring). The discussions during ratification also confirm the limited scope of the Commerce Power. *See id.* at 590-92 (Thomas, J., concurring). Thus, the substantial effects test "lack[ed] any grounding in the original understanding of the Constitution . . . [and] appear[ed] to grant Congress a police power over the Nation." *Id.* at 599-600 (Thomas, J., concurring).

671. *Id.* at 601 n.8 (Thomas, J., concurring).

much lower level of protection of the individual than does current doctrine. In the area of federal power, the historical record is more determinate. But the original understanding here is fundamentally at odds with the requirements of a modern national state. Originalism has conspicuously failed to address the problem of precedent. This is a fatal flaw.

The dominant common-law method of constitutional interpretation as practiced by the Supreme Court, in contrast, takes precedent as its baseline. In exercising its power of judicial review, the Court is perpetually engaged in balancing the principle of democratic majority rule against important rights and values that a particular exercise of majority rule may violate. The body of doctrine that has emerged from the Court's case law has been forged out of this tension and is thus uniquely suited to serve as the foundation for judicial review. This is not to say that current doctrine is completely consistent or settled. But it is far more consistent and determinate than the original understanding. Moreover, the inconsistencies in our common-law Constitution comprise the engine that drives its further development and refinement.

Accordingly, the view that precedent, not original understanding, should form the baseline for constitutional adjudication does not imply that constitutional interpretation should remain static. As David Strauss has argued, our common-law constitutional tradition is not rooted in worship of established rules merely because of their age or pedigree. Rather, the rational traditionalism of the common law is rooted in humility and respect for judgments that embody the cumulative wisdom of many generations, not just the generation of the framers.[672] Past practices may deserve the benefit of the doubt. But where existing practice is morally unacceptable, the precedents that embody it can and should be "eroded or even discarded."[673]

As Strauss has noted, it is of course impossible to "specify an algorithm" for deciding when departure from prior precedents is warranted.[674] But the basic methods of the common law are clear. The common law proceeds, as Cardozo said, by articulating unifying and rationalizing principles that explain prior precedents and extend them along logical lines;[675] by attention to the origins and course of development of such principles;[676] and by continual reexamination of such principles in light of their relation to "the welfare of society" which is the "final cause of law."[677] This method does not

672. *See* Strauss, *supra* note 125, at 891-94.
673. *Id.* at 895.
674. *Id.*
675. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 31 (1921). Cardozo called this the "method of philosophy." *Id.* at 30.
676. *Id.* at 51-54 (Cardozo's "method of history").
677. *Id.* at 66 (Cardozo's "method of sociology").

exclude consideration of the original understanding as a component of constitutional meaning. The original understanding is entitled to respect because, and to the extent that, it represents the views of a generation that struggled with, and thought deeply about many of the same problems that are still with us today.[678] But the common-law approach, unlike originalism, requires us to consult not just the understandings of a founding generations, but also the accumulated wisdom of the generations before and after that have struggled with the same problems.[679]

Although the Legal Realists[680] of the early twentieth century were the first accurately to comprehend the essential common-law nature of our system of constitutional adjudication,[681] the great values that have informed and ought to inform that system are neither those of conventional morality, as Cardozo believed,[682] nor the subjective values of judges themselves, as extreme realists like Jerome Frank argued.[683] Conventional morality is an inadequate basis for judicial review. Majoritarian mores cannot provide a meaningful check on the excesses of majorities. But pure subjectivity substitutes autocratic rule by individuals for the rule of law. The most important external sources of our constitutional values are to be sought in our evolving common-law precedents and in the requirements of the democratic system itself.

Even if the only value sought to be achieved in a democracy were the principle of majority rule, some degree of judicial review would be appropriate.[684] When the majority acts to disfranchise a minority, courts are justified in stepping in to frustrate the will of the majority in order to preserve the principle of majority rule. Likewise, if majorities malapportion the electoral structure in such a way that gives certain groups a disproportionate influence and makes it possible for a minority to control the government, judicial review is justified on strictly democratic grounds. Without effective judicial review, democracy can degenerate into oligarchy and even into tyranny. The "redemption" of the post-Reconstruction American South furnishes an example of the former, the disintegration of the Weimar Republic an example of the latter. The Voting Rights

678. *Cf.* CURTIS, *supra* note 12, at 11.

679. *See* Strauss, *supra* note 125, at 904-05.

680. The term Legal Realism is used here in a broad sense that at least includes such schools of thought as Sociological Jurisprudence. For a discussion of legal realism, see AMERICAN LEGAL REALISM (William M. Fisher et al. eds., 1993).

681. *See* Llewellyn, *supra* note 131; *cf.* CARDOZO *supra* note 675, at 82-83 ("[T]he content of constitutional immunities is not constant, but varies from age to age.").

682. CARDOZO, *supra* note 675, at 104-11.

683. JEROME FRANK, LAW AND THE MODERN MIND 154 (1930).

684. For a discussion of the costs and benefits of majoritarian judicial review, see Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

cases, although inconsistent with the original understanding of the Constitution, are nonetheless among the most legitimate exercises of the power of judicial review that the Court has ever engaged in.

Of course, majority rule is not the only value worth protecting in a democracy. The protection of individual rights is also a fundamental value. Even when a government action does not directly undermine democratic majority rule, it may do so indirectly, by undermining the principles of equality and individual freedom that underlie it. Our common-law Constitution serves not just to reinforce representative democracy,[685] but extends as well to nonpolitical rights of expression, privacy, and autonomy.

Common-law evolution has given broad and definite content to the Fourteenth Amendment. Understood by many of its framers largely as a narrow provision protecting only the basic natural rights that distinguish free persons from slaves, the Amendment has grown to embody the general principles that government must not discriminate irrationally and must regulate reasonably for the public good. These principles have derived their meaning, as Justice Harlan said, from a "rational process" of elaboration which has continually balanced "liberty and the demands of organized society."[686] Liberty under the Fourteenth Amendment is continually evolving from an "isolated series of points pricked out" by specific rights and guarantees into a "rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[687] The common-law evolution of Fourteenth Amendment rights has proceeded by a "process of interpolation and extrapolation" of prior formulations of those rights.[688]

In deciding the constitutional issues that come before them, courts will inevitably be confronted by difficult questions. While our common-law Constitution provides more guidance than originalism, it will not always offer easy answers. But it supplies a starting point and a method. Above all, it compels decision-makers to confront openly the questions they face, rather than taking refuge behind the actual or imagined commands of the framers. Perhaps no theory of constitutional interpretation will ever perfectly balance the competing demands of tradition and justice, or individual liberty and majority rule. But at least our existing common-law Constitution, as it evolves case by case, continually forces judges to weigh and evaluate these demands, and thereby to decide the questions before them honestly.

685. *Cf.* ELY, *supra* note 1.
686. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
687. *Id.* at 543 (Harlan, J. dissenting).
688. Tribe & Dorf, *supra* note 63, at 1068.