

Articles

Originalism and Sex Discrimination

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Introduction

It is a truism of modern constitutional law scholarship that originalism, the judicial philosophy propounded by Justice Antonin Scalia, Justice Clarence Thomas, former Judge Robert H. Bork, and former Attorney General Edwin Meese III, cannot justify the Supreme Court's sex discrimination cases of the last forty years. Justice Scalia confidently announced in a speech at Hastings College of Law recently that the Fourteenth Amendment does not ban sex discrimination because "[n]obody thought it was directed against sex discrimination."¹ And, Justice Ruth Bader Ginsburg once wrote that "[b]oldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities."² The received wisdom is that the only kind of discrimination that the Fourteenth Amendment was meant to outlaw originally was racial discrimination and perhaps discrimination based on ethnic origin. Both Justice Ginsburg's majority opinion in *United States v. Virginia*³ (*VMI*) and Justice Scalia's strongly worded dissent in that case assume that, as a matter of original meaning, the Fourteenth Amendment does not ban sex discrimination.⁴

This Article shows that both Justices Ginsburg and Scalia are wrong. They have failed to recognize two demonstrable things: first, that Section One of the Fourteenth Amendment was from its inception a ban on all systems of caste;⁵ and second, that the adoption of the Nineteenth Amendment in 1920 affected how we should read the Fourteenth Amendment's equality guarantee. The Nineteenth Amendment struck out the Constitution's only explicit privileging of the male sex (which was found in Section Two of the Fourteenth Amendment) and constitutionalized what had become widely recognized by 1920: that gender is not a rational basis for denying a person even the most exalted type of autonomy, an equal vote in a democracy. The fact that the Framers of the Fourteenth Amendment did not understand that the Amendment would eventually require the Virginia Military Institute (*VMI*) to admit female cadets does not undermine our

1. Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME (Sept. 22, 2010), <http://www.time.com/time/nation/article/0,8599,2020667,00.html>.

2. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161.

3. 518 U.S. 515 (1996).

4. See *id.* at 531 (noting that the current equal protection jurisprudence "responds to volumes of history" of sex discrimination); *id.* at 566–67 (Scalia, J., dissenting) ("Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable.").

5. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2410–13 (1994) (positing that the Fourteenth Amendment "forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage").

claim that the application of originalist interpretive methods justifies the *VMI* decision.

We should note at the outset that all the major scholars who have written in the field agree with Justices Scalia and Ginsburg that originalism is incompatible with the majority's holding in *VMI*, so we are taking issue with those scholars as well as with Justices Scalia and Ginsburg. Professors Michael Dorf of Cornell University, Ward Farnsworth of Boston University, and Reva Siegel of Yale University have all written major articles that discuss aspects of sex discrimination and the Fourteenth Amendment, and they each conclude that, as an original matter, the Fourteenth Amendment was not meant to forbid sex discrimination.⁶ Dorf, Farnsworth, and Siegel all assert that the Framers of the Fourteenth Amendment did not *expect* the provision to forbid sex discrimination.⁷ But many originalists reject the use of legislative history altogether and are likely to be unmoved by the isolated statements on which Dorf, Farnsworth, and Siegel rely.⁸ More importantly, even if one accepts that legislative history has some value—and we do—it does not follow that the original meaning of a clause or text is defined by the Framers' original expected applications.⁹ We contend that it is not, because original expected applications are not enacted by the text, and legislators are often unaware of the implications of laws they enact. In so arguing, we agree with Yale law professor Jack Balkin.¹⁰

6. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 975 (2002); Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1230 (2000); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 964 (2002).

7. See Dorf, *supra* note 6, at 974–75 (observing that the plain text of the Fourteenth Amendment allowed for the disenfranchisement of women, an issue not resolved until the passage of the Nineteenth Amendment); Farnsworth, *supra* note 6, at 1237–39 (quoting congressional leaders during the debates over the adoption of the Fourteenth Amendment saying that the Amendment's guarantees were not intended to extend to women); Siegel, *supra* note 6, at 983–84 (quoting the floor statement of Representative Broomall that “the fact that women do not vote is not in theory inconsistent with republicanism”).

8. See, e.g., *Zedner v. United States*, 547 U.S. 489, 509–11 (2006) (Scalia, J., concurring) (writing a concurrence for the sole purpose of criticizing the majority's use of legislative history); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386–87 (1999) (noting the decline in the Supreme Court's use of legislative history since Justice Scalia joined the bench); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 809, 819–20 (1998) (positing that the modern era's legislative process, with its mammoth bills and spools of legislative debate, demands congressionally mandated interpretative guidelines for the use of legislative history to be meaningful); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1896 (1998) (arguing for a rule that bars courts from considering legislative history because “there are reasons to doubt judicial competence to discern legislative intent from legislative history”).

9. See Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 669–70 (2009) (arguing that antimiscegenation laws were banned despite that ban not being an original expected application of the Fourteenth Amendment).

10. *Id.* at 668–69 (agreeing with Professor Jack Balkin that original expected applications are not binding).

Our thesis starts from the premise that originalists ought to begin and end all analysis with the original public meaning of constitutional texts.¹¹ We believe we are following Justice Scalia's methodology completely in this regard.¹² Original public meaning can be illuminated by legislative history and by contemporary speeches, articles, and dictionaries.¹³ Additionally, understanding the original public meaning depends on knowing what interpretive methods legislators and informed members of the public used to arrive at the meaning of the provision, as professors John McGinnis and Michael Rappaport have argued persuasively.¹⁴ Our analysis leads to the conclusion that the text of the Fourteenth Amendment was meant, as an original matter, to forbid class-based legislation and any law that creates a system of caste.¹⁵ The Black Codes, enacted by the Southern States in 1865

11. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (“The search is not for a subjective intention. . . . [W]hat counts is what the public understood.”).

12. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 37–38 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*] (arguing that the Constitution should be interpreted not according to the intent of the drafters, but by the original meaning of the text as understood by “intelligent and informed people of the time”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (explaining that constitutional interpretation should be grounded in the political and intellectual atmosphere at the time of the framing).

13. See William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 497–98 (2007) (highlighting Justice Scalia’s use of constitutional debating history and contemporary political writings in attempting to divine original constitutional meaning).

14. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 763 (2009) (“Although the public meaning cannot be divorced from word meanings or grammar rules, Barnett never explains why interpretive rules should be treated differently. It is true that the content of these interpretive rules is disputable, but so is the content of word meanings and grammatical rules.”).

15. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1413 (1992) (quoting Senator Jacob Howard in stating that the purpose of the Fourteenth Amendment was to “abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another” (alterations in original)); see also Philip A. Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 123 (2011) (“[The Civil Rights Act of 1866] had secured equality in various natural rights and the due process enjoyed under law. Echoing the statute, the Fourteenth Amendment guaranteed equal protection of the laws and due process, and in both ways it also established a foundation for enforcement legislation such as the Civil Rights Act.”); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 399–400 (2011) (opining that Section One of the Fourteenth Amendment granted express protection to the natural right of equal protection of the law for all persons). Professor Melissa L. Saunders has published a major article that argues that the Framers of the Fourteenth Amendment in some ways did more than merely ban a caste system. Saunders claims that the Amendment nationalized a body of constitutional limitations formulated by state courts that forbade legislatures from enacting “‘partial’ or ‘special’ laws, which forbade the state to single out any person or group of persons for special benefits or burdens without an adequate ‘public purpose’ justification.” Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48 (1997). Professor Saunders thinks the Fourteenth Amendment bans not merely systems of caste,

in an attempt to relegate the freed slaves to second-class citizenship, created the paradigmatic example of such a caste system or system of class legislation. Congress legislated to overturn the Black Codes when it adopted the Civil Rights Act of 1866. The Fourteenth Amendment wrote that Act into the Constitution, making it unalterable by future majorities of Congress. All scholars, including the original originalist Raoul Berger, concede that the Fourteenth Amendment made the Black Codes unconstitutional by constitutionalizing the Civil Rights Act of 1866.¹⁶

We contend, however, that the Fourteenth Amendment did more than that. The Civil Rights Act of 1866 guaranteed “citizens, of every race and color” the same common law civil rights “as [were] enjoyed by white citizens.”¹⁷ But Section One of the Fourteenth Amendment is not confined to race and provides that

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.¹⁸

The Black Codes violated this command because they gave some citizens or persons a shortened or abridged list of civil rights as compared to those

which are usually hereditary and involve social stigmatization, but all forms of class legislation or special-interest lawmaking, which are not usually hereditary and which may not involve stigmatization. *Id.* For purposes of our argument here, all we need say is that if sex discrimination is a forbidden form of caste then it is also *a fortiori* a form of forbidden class-based, special-interest lawmaking. Saunders’s article thus is entirely supportive of what we argue here.

16. RAOUL BERGER, *SELECTED WRITINGS ON THE CONSTITUTION* 185 (1987) (“[T]he uncontroverted evidence, confirmed in these pages, is that the framers [of the Fourteenth Amendment] repeatedly stated that the amendment and the Civil Rights Act of 1866 were ‘*identical*’”); see also ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 75 (1992) (“It was the demonstrable consensus of the Thirty-ninth Congress that section 1 of the Fourteenth Amendment ‘constitutionalized’ the Civil Rights Act of 1866.”); MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 72 (1999) (“Recall that, whatever else it did, the second sentence of section one constitutionalized the 1866 Civil Rights Act.”); 2 RALPH A. ROSSUM & G. ALAN TARR, *AMERICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS* 53 (8th ed. 2010) (“The Fourteenth Amendment was obviously designed to constitutionalize the Civil Rights Act of 1866.”).

17. The Civil Rights Act of 1866 provided:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

18. U.S. CONST. amend. XIV, § 1 (emphasis added).

enjoyed “by white citizens.” But the words of the Fourteenth Amendment are general and are not confined to discrimination or abridgements on the basis of race. In this respect the Fourteenth Amendment is sharply different from the Fifteenth Amendment, which forbids only race discrimination in determining eligibility to vote.¹⁹ The Fourteenth Amendment’s scope is much more similar to that of the Thirteenth Amendment, which forbids the enslavement of any person, not just people of African descent.²⁰

The Constitution’s text alone is evidence of the Fourteenth Amendment’s broad scope, but the original public meaning of a text can rarely be gleaned by reading it in a vacuum. As we have said, legislative history, newspaper accounts, speeches, and contemporary dictionaries can help to illuminate a text’s original public meaning.²¹ The Framers of the Fourteenth Amendment and those who contemplated its ratification said repeatedly and publicly that it forbids the imposition of caste systems and class-based lawmaking.²² Those who heard them concurred in that understanding.²³ If asked whether the imposition of a European feudal system or an Indian caste system was unconstitutional, the Framers of the Fourteenth Amendment would not have hesitated to condemn both as a blatant violation of the no-caste norm that animates the Fourteenth Amendment.²⁴ In fact, the Amendment’s Framers and contemporary commentators frequently compared race discrimination to other forms of arbitrary, caste-creating discrimination to illustrate the evil caused by the Black Codes and to explain what the Amendment would prohibit. Reasoning by analogy was the original interpretive method the Framers of the Fourteenth Amendment employed. The original meaning of the amendment is thus that it bars all systems of caste and of class-based laws, not just the Black Codes. This does not mean that no law can be discriminatory or make classifications—all laws classify²⁵—but it does mean that a law cannot discriminate on an improper basis. Any law that discriminates or abridges civil rights to set up a hereditary caste system violates the command of

19. See *id.* amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

20. See *id.* amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

21. See *supra* note 13 and accompanying text.

22. See *infra* sections I(C)(1)–(2).

23. See *infra* notes 162–64 and accompanying text.

24. See *infra* notes 153–64 and accompanying text.

25. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 154 (1980) (“[B]urglars are certainly a group toward which there is widespread societal hostility, and laws making burglary a crime certainly do comparatively disadvantage burglars.”); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 138 (1988) (“A theory that the state should treat all people equally cannot mean that the state may never treat two people differently, for such a theory would mean the end of all law.”).

Section One of the Fourteenth Amendment. According to Professor Melissa Saunders, the Amendment goes even further and bans not only systems of caste but all special or partial laws that single out certain persons or classes for special benefits or burdens.²⁶ Under this Jacksonian reading of the Fourteenth Amendment, the Black Codes would fall because they were examples of the slave power trying to perpetuate itself by giving its supporters monopoly power over the lives of the freed African-Americans. If there was one thing all Jacksonians hated, it was government-conferred monopolies or special privileges or class legislation.²⁷ This, in fact, is what President Jackson hated so much about the Bank of the United States, which was specially privileged above ordinary banks.²⁸

Did the Framers and ratifiers of the Fourteenth Amendment understand sex discrimination to be a form of caste or of special-interest class legislation? Certainly not. But then they also did not understand when they enacted the Civil Rights Act of 1866 banning race discrimination in making contracts that they were also banning antimiscegenation laws, which made it a crime for a white person to contract to marry a black person.²⁹ The point is that sometimes legislators misapply or misunderstand their own rules. For this reason, although the Framers' original expected applications of the constitutional text are worth knowing, they are not the last word on the Fourteenth Amendment's reach. This was recognized at the time, which is precisely why some legislators worried that the Amendment would have unanticipated effects.³⁰

It is important to note here at the start of our analysis that Congress often enacts texts into law without understanding what those texts mean. Members of Congress have little incentive to actually read and understand what they legislate, and they have great incentives to legislate ambiguously in order to please most of the people, most of the time.³¹ It is the job of the courts to figure out what the texts that Congresses have legislated actually meant to the public at large when they were enacted into law and to apply

26. Saunders, *supra* note 15, at 247–48.

27. See LAWRENCE FREDERICK KOHL, *THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA* 61–62 (1989) (exploring the Jacksonian fear of corporations, centralized banking, and monopolies).

28. *Id.* at 110.

29. See *Loving v. Virginia*, 388 U.S. 1, 9 (1966) (noting that the State presented legislative history tending to show that the Thirty-ninth Congress did not intend that the Civil Rights Act of 1866 ban state miscegenation laws).

30. See *infra* note 181 and accompanying text.

31. See ELY, *supra* note 25, at 132–33 (decrying the “undemocratic” congressional practice of passing tough decisions on to agencies via vaguely worded statutes); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 88 (1985) (noting situations in which legislators are incentivized to delegate broad policy-making authority to agencies).

those meanings to the facts of the cases before them.³² This does not mean judges are free to read their own values into open-ended legislative texts. It does mean, however, that judges must construct an objective social meaning of an enacted text rather than give that text the subjective meaning that certain members of Congress said they thought it had when they voted for it.³³

The idea that legal texts have an objective social meaning that differs from the subjective meaning given to the text by some who voted for it was well accepted in the post-*Marbury* world of the Thirty-ninth Congress, which ratified the Fourteenth Amendment.³⁴ And sometimes, as with interracial marriage, the result will be one that Congress did not “intend” but that it did “legislate.” The ability of a law to have effects other than those intended by its drafters was recognized in the Reconstruction era, and it is generally recognized today, including by Justice Scalia.³⁵ Justice Scalia himself is the leading proponent of text over legislative history or original intent or the original application of members of Congress,³⁶ which makes his reliance on the original intentions and expected applications of the Framers of the Fourteenth Amendment with respect to sex discrimination especially puzzling. We understand today that if a tenant signs a lease with his landlord without reading all of it, he is nonetheless bound by the clauses he did not

32. See U.S. CONST. art. III, § 2 (vesting power to hear all cases and controversies “arising under . . . the Laws of the United States”).

33. See BORK, *supra* note 11, at 144 (“The search is not for a subjective intention. . . . [W]hat counts is what the public understood.”). The need for courts to construct an objective original public meaning of enacted texts resembles the need for courts in tort cases to ask what a reasonable person might have done in a given situation. There is no need for originalist judges to sum up the intentions of all those who made the Fourteenth Amendment law, as Professor Robert W. Bennett claims. See Robert W. Bennett, *Originalism and the Living American Constitution*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 78, 87–88 (2011) (noting that even if the mental states of individual participants in the legislative process could be ascertained, the problem of determining the intent of the whole body from the intents of its members would remain). Such judges need instead to engage in a semantic interpretation of the text based on dictionaries and grammar books in use at the time the text was enacted, as Professor Lawrence B. Solum claims in his debate with Professor Bennett. See Lawrence B. Solum, *We Are All Originalists Now*, in BENNETT & SOLUM, *supra*, at 1, 10–11 (noting that the original-public-meaning originalist approach to word meaning involves examining writings of the period and that originalists’ arguments should focus directly on linguistic meaning, grammar, and syntax). They can do this by constructing an objective original social meaning of the text at hand.

34. For example, Senator Jacob M. Howard of Michigan famously said,

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarant[e]d and secured by the first eight amendments of the Constitution

CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

35. This is true when it comes to statutes. See *Brogan v. United States*, 522 U.S. 398, 403 (1998) (“[T]he reach of a statute often exceeds the precise evil to be eliminated.”).

36. Scalia, *Common-Law Courts*, *supra* note 12, at 29–30 (“My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning.”).

read. The same principle applies when members of Congress pass, and members of state legislatures ratify, constitutional amendments. The legal system and democracy itself cannot function unless the people writing in and commenting on proposed amendments or laws can have confidence that the content of the law is embodied in the objective social meaning of its text rather than in the unknowable intentions of those who voted for it.³⁷

Just as the Framers failed to recognize that antimiscegenation laws infringed on the freedom of contract guaranteed by the Civil Rights Act, they also were mistaken in their belief that laws discriminating on the basis of sex are not relevantly similar to laws that discriminate on the basis of race. They made clear that they believed that (most) racially discriminatory laws violate Section One's anticaste rule, but sexually discriminatory laws do not because sex classifications are different from race classifications in specific, relevant ways.³⁸ They conceded that if women had been fitted by nature for the privileges and responsibilities afforded to men, then the fears of some and the hopes of others that the Fourteenth Amendment would threaten the sexual social order would be well founded. We now know more about women's capabilities than the Fourteenth Amendment's Framers knew. Fortunately, as Robert Bork has explained, we are governed by the constitutional law that the Framers of the Fourteenth Amendment wrote and not by the unenacted opinions that its members held.³⁹ It follows that we also are not bound by their unenacted factual beliefs about the capabilities of women. Laws are to be applied to known facts.⁴⁰

The change in our understanding of women's abilities has been constitutionalized by a monumental Article V amendment—the Nineteenth Amendment, which in 1920 gave women the right to vote.⁴¹ By 1920, two-thirds of Congress and three-quarters of the states had concluded that each woman should have the same voting rights as each man. Sex discrimination, although not generally understood to be a form of caste in 1868, had come to be recognized as a form of caste by 1920, when the Nineteenth Amendment

37. *Cf. id.* at 25 (“Long live formalism. It is what makes a government a government of laws and not of men.”).

38. See discussion *infra* subpart II(A).

39. Robert Bork wrote,

I can think of no reason that rises to the level of constitutional argument why today's majority may not decide that it wants to depart from the tradition left by a majority now buried. Laws made by those people bind us, but it is preposterous to say that their unenacted opinions do.

BORK, *supra* note 11, at 235.

40. This should be uncontroversial. Surely most would agree that if, for instance, the legal definition of murder requires intent to kill, and if someone were to cause a deadly car accident while experiencing an entirely unexpected seizure, that person is not guilty of murder even if the framers of the law prohibiting murder happened to believe that seizures are a symptom of murderous intent.

41. See U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

was ratified.⁴² The definition of caste had not changed; rather, the capabilities of women and the truth of their status in society had come to be better understood and that new understanding was memorialized in the text of the Constitution.⁴³

The Nineteenth Amendment's supporters believed they were making women equal to men in all rights by securing women the right to vote.⁴⁴ This makes sense: those who hold political rights have attained the highest level of autonomy that organized society has to offer. The idea that women would be able to vote but would still in some respects be second-class citizens is an implausible synthesis of the constitutional text of the Fourteenth Amendment with the constitutional text of the Nineteenth Amendment. It is not plausible to read the Constitution as guaranteeing women their right to vote for President, Congress, Governor, and state legislative positions but also as allowing the state to forbid women from making a simple contract without their husbands' consent. The words of the Constitution have to be read holistically and not by snipping off a clause and analyzing it in isolation.⁴⁵ The Nineteenth Amendment ought to inform our reading of the general proscription on caste systems that was put in place by the Fourteenth Amendment, just as the Fourteenth Amendment itself informs our reading of the Eleventh Amendment.⁴⁶

42. Compare 2 IDA HUSTED HARPER, *THE LIFE AND WORK OF SUSAN B. ANTHONY* app. at 971 (1898) ("In the oft-repeated experiments of class and caste . . . [,] [t]he right way . . . is so clear . . . —proclaim Equal Rights to All."), with U.S. CONST. amend. XIX (enacting, in 1920, the Constitutional requirement that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex"); see also *infra* notes 308–21, 463 and accompanying text.

43. See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 212–18 (2000) (describing the rising political clout of women during the "endgame" preceding passage of the Nineteenth Amendment).

44. See *infra* subsection III(C)(1)(b); see also Siegel, *supra* note 6, at 968–76 (discussing deep historical ties between the Fourteenth and Nineteenth Amendments).

45. Professor Amar has written that, "Textual argument as typically practiced today is blinkered ('clause-bound' in [John Hart] Ely's terminology), focusing intently on the words of a given constitutional provision in splendid isolation. By contrast, intratextualism always focuses on at least two clauses and highlights the link between them." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999) (alteration in original) (footnote omitted). He continued, "[I]ntratextualism draws inferences from the patterns of words that appear in the Constitution even in the absence of other evidence that these patterns were consciously intended." *Id.* at 790. Professor Amar was talking about understanding similar words and phrases in light of each other, but the same problems of clause-bound interpretation exist when two clauses address the same topic. The Fourteenth and Nineteenth Amendments both address the same topic—individual rights—and they must be read together to reach the fullest understanding of their meaning.

46. The proposition that the Fourteenth Amendment altered the Eleventh Amendment was accepted even in an opinion written by Chief Justice Rehnquist, one of the most conservative members of the Supreme Court:

Thus our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the

We conclude that the original public meaning of the Fourteenth Amendment is that it bans all systems of caste and of class-based lawmaking, much the way the Fourth Amendment bans unreasonable searches and seizures⁴⁷ and the Eighth Amendment bans cruel and unusual punishments.⁴⁸ The meaning is not static, and the adoption of the Nineteenth Amendment changed permanently the way courts ought to read the no-caste-discrimination rule of the Fourteenth Amendment. Once women were given equal political rights by the Nineteenth Amendment, a reading of the general ban on caste systems in the Fourteenth Amendment that did not encompass sex discrimination became implausible. This is true for three reasons. First, the Nineteenth Amendment nullified the word “male” in Section Two of the Fourteenth Amendment, which had introduced that word into the Constitution and had countenanced sex discrimination in the bestowal of the franchise. Section Two is the only textual evidence that women’s legal status was to remain unchanged by the Fourteenth Amendment.⁴⁹ Second, there is abundant evidence that political rights have always been understood to hold a place at the apex of the hierarchy of rights.⁵⁰ The category of civil rights is broader and more inclusive than the category of political rights.⁵¹ For

Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (citations omitted).

47. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

48. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

49. Section Two of the Fourteenth Amendment provides,

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male inhabitants* of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added).

50. See *infra* subpart III(B).

51. See *Oregon v. Mitchell*, 400 U.S. 112, 163 (1970) (illustrating a historical distinction between civil rights that are required by “full membership in a civil society” and “participation in the political process,” which is not necessarily so).

example, children have civil rights, but they lack the political right to vote.⁵² Thus, giving women the political right to vote suggests that it is no longer plausible to deny them equal civil rights with men. Finally, giving women the right to vote is a constitutional repudiation of the mistaken facts that the Framers of the Fourteenth Amendment relied upon when they formed their original expectation that Section One would not alter the legal condition of women.

Put another way, constitutionally protecting a group's political rights is an acknowledgment that a certain characteristic, such as sex, does not affect a person's competence to exercise the most carefully bestowed of all rights—the right to vote. A constitutional guarantee that *political* rights will not be denied based on gender therefore should be seen as creating a presumption that denials of *civil* rights on that basis violate the Fourteenth Amendment's rule against caste systems. Even the pre-New Deal Supreme Court recognized as much in its 1923 decision in *Adkins v. Children's Hospital*,⁵³ where Justice Sutherland led five Justices to the conclusion that the Nineteenth Amendment made women as well as men the beneficiaries of Lochnerian substantive due process.⁵⁴ The case led Justice Holmes to quip in dissent, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."⁵⁵ Justice Holmes never explained, however, why the Nineteenth Amendment ought not affect our reading of the Fourteenth, and his dissent was motivated by his opposition to *Lochner*-style substantive due process for men as well as for women.⁵⁶ Holmes dissented in *Lochner v. New York*⁵⁷ as well as in *Adkins*, so he in fact would have applied the same constitutional rule to men as he applied to women notwithstanding his *Adkins* quip.

The Supreme Court in recent years has inexplicably ignored the Nineteenth Amendment. As we argue in this Article, and as Professor Reva Siegel has argued,⁵⁸ this is a mistake. The Court should recognize the

52. Compare, e.g., *In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."), with U.S. CONST. amend. XXVI, § 1 (protecting the right to vote only for citizens eighteen years of age and older).

53. 261 U.S. 525 (1923), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1936).

54. *Id.* at 553. Justices Taft, Sanford, and Holmes dissented. *Id.* at 562, 567.

55. *Id.* at 569–70 (Holmes, J., dissenting). In his separate dissent, Chief Justice Taft explained that "[t]he Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests. . . . I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment." *Id.* at 567. Justice Holmes did not address whether the Nineteenth Amendment would warrant construing the Fourteenth Amendment differently if a challenged law were based on supposed *intellectual* differences between men and women.

56. See *id.* at 570 (expressing disdain that the Court did not share his view that *Lochner* had been overruled by *Bunting v. Oregon*, 243 U.S. 426 (1917)).

57. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

58. Siegel, *supra* note 6, at 1022. Professor Mark Yudof has also opined that the *Adkins* reliance on the Nineteenth Amendment was "well placed." Mark G. Yudof, *Equal Protection*,

significance of the Nineteenth Amendment to Fourteenth Amendment interpretation. We and Professor Siegel agree on this, but on another important point we do not agree. She argues that the Court should ground its sex discrimination doctrine in the independent history of the women's movement, thereby obviating any need for the Court to analogize race and sex in order to find that sex discrimination is prohibited by the Fourteenth Amendment.⁵⁹ She gives a sociohistorical account, one that is less concerned with the legislative history, the nuances of text, and the original interpretive methods of the Framers.

We think our approach is more deeply grounded in law. The evidence leads us to conclude that the Court, by employing an analogy between race and sex, has acted consistently with the original interpretive methods of the Framers of the Fourteenth Amendment to find that sex discrimination is banned. The Fourteenth Amendment, as a matter of original public meaning, was drafted to prohibit systems of caste, which is why the text of the Amendment does not confine its reach only to race discrimination. The Framers, supporters, and early interpreters of the Amendment concluded that race discrimination created a system of caste and that the Amendment would reject race discrimination as a forbidden caste system.⁶⁰ They came to this conclusion by comparing institutionalized race discrimination to feudalism and the Indian caste system, finding that all were the same type of hereditary, class-based discrimination.⁶¹ Although the Fourteenth Amendment's text is open-ended and cannot be understood using only semantic methods, these "paradigm cases," as Professor Jed Rubenfeld has called them,⁶² let us know what sort of discrimination was to be made unconstitutional.

The Framers' use of analogy to understand the scope of the Amendment means that the modern Supreme Court, by comparing sex discrimination to race discrimination, has employed the appropriate interpretive method. The Court has only faltered by not following the analogy far enough. The ties between the Fifteenth and Nineteenth Amendments must be taken into account when analogizing race and sex. The Fifteenth Amendment completed the constitutional process of elevating nonwhite Americans to

Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics, 88 MICH. L. REV. 1366, 1403 (1990) (book review).

59. See Siegel, *supra* note 6, at 1018, 1022 (observing that "in the immediate aftermath of ratification, both the Supreme Court and Congress understood the Nineteenth Amendment to redefine citizenship for women in ways that broke with the marital status traditions of the common law," a fact ignored by the current "ahistorical" sex discrimination doctrine grounded in an analogy to race discrimination).

60. See *infra* Part I.

61. See *infra* subparts I(B)–(C).

62. We agree with Professor Rubenfeld that "on the basis of the Fourteenth Amendment's paradigm cases, . . . state action is unconstitutional if it purposefully imposes an inferior caste status on any group." Jed Rubenfeld, *The Purpose of Purpose Analysis*, 107 YALE L.J. 2685, 2685 (1998). He has argued persuasively for the importance of paradigm cases in constitutional law. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 455–57 (1997).

equal citizenship with white Americans. The Nineteenth Amendment was understood to do the same thing for women. The Court should not, however, require a perfect analogy between race and sex. The analogy between the Indian caste system and American slavery is also imperfect, suggesting that the Framers were looking for less than absolute interchangeability.

Our Article proceeds in four parts. Part I explains why the Fourteenth Amendment ought to be read as enacting a general prohibition on all class-based discrimination or systems of caste and not merely on laws that discriminate on the basis of race. The part begins with the text of Section One of the Fourteenth Amendment and shows how that text both constitutionalized the Civil Rights Act of 1866 and went even further. We collect here a large number of statements by members of the Thirty-ninth Congress and others who considered the Amendment's ratification, as well as early postenactment interpretations. We show that the Amendment reflected a widespread rejection of classifications based on birth status or religious designation, such as those found in feudalism and the Indian caste system. Racially discriminatory laws, like the laws that provided for African-Americans to be held in slavery, were simply an especially damaging and insidious species of class legislation. The Framers believed that other types of class legislation would also be barred by the Amendment. This was expressed by Congress in a number of ways, including by the rejection of an earlier draft of the Amendment that only prohibited race discrimination. The proper understanding of the Fourteenth Amendment is that it enacted a general rule prohibiting all systems of caste or of class-based laws.

Part II considers the way that Congress and the public understood the relationship between the Fourteenth Amendment's no-caste rule and sex discrimination. We argue that sex discrimination is precisely the kind of discrimination prohibited by the Fourteenth Amendment, despite the fact that the Framers of the Fourteenth Amendment did not understand this to be the case. An analysis of the discussions in Congress on women and the Fourteenth Amendment reveals a bipartisan congressional belief that *if* sex discrimination *were* like race discrimination in particular ways—i.e., if women were a caste—then sex discrimination would be prohibited by the Fourteenth Amendment. The question of whether sex discrimination was (or was not) a form of caste was purely a question of fact. We will try to explain how the term *caste* was understood by the Framers of the Fourteenth Amendment and why they did not generally recognize sex discrimination to be a form of caste before or during Reconstruction. We will also present the nineteenth-century minority view that gender discrimination did indeed create a forbidden form of caste, a view that anticipated the vast changes in public opinion that would culminate in the adoption of the Nineteenth Amendment. The adoption of the Nineteenth Amendment reflected a broad consensus that an individual's sex could not make him or her unfit to exercise an equal portion of the popular sovereignty that defines democracy.

Part III explains how the adoption of the Nineteenth Amendment permanently changed the way in which the Fourteenth Amendment ought to be read. We will present evidence that the Framers of the Fourteenth Amendment, as well as the Framers of the Nineteenth Amendment, would have found incomprehensible the idea that women or anyone else could have equal political rights but not equal civil rights. Political rights are at the apex of the pyramid of rights for which civil rights are the base. Anyone who has equal political rights must by definition also have equal civil rights. We describe what distinguished political and civil rights and how the relationship between them was understood. Our conclusion is that if a trait is an improper basis for denying political rights, it presumptively cannot be the basis for a shortened or abridged set of civil rights. Part III concludes with a discussion of the evidence that the Nineteenth Amendment was understood to make women the equals of men under the law by finishing the work that began with the Reconstruction Amendments.

In Part IV we briefly consider the other conclusions that can be drawn from our proposal that the Fourteenth Amendment proscribes caste systems, such as whether age discrimination against those between the ages of eighteen and twenty-one is barred as a result of the Twenty-sixth Amendment, which lowered the voting age to eighteen. We also discuss the clause in the original Constitution protecting the political right to hold public office without having to pass any “religious Test.”⁶³ We conclude that this clause, when read together with the Fourteenth Amendment, strongly implies that the no-caste rule of the Fourteenth Amendment bans laws and executive practices that discriminate as to civil rights on the basis of religion.

Our firmest conclusion remains that Justice Ginsburg and Justice Scalia are mistaken when they claim that part of the original meaning of the Fourteenth Amendment is that it does not apply to sex classifications. We think they have confused original meaning here with original intent. Both Justices have elevated the subjective opinions of enactors about the possible application of a legal text over the text itself and its objective original public meaning.

I. The Fourteenth Amendment as a Ban on Caste

*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.*⁶⁴

63. U.S. CONST. art. VI.

64. U.S. CONST. amend. XIV, § 1.

Any person reading these clauses for the first time would immediately conclude that they mandate, in some sense, “equality before the law.” *All* citizens’ privileges and immunities are protected from abridgment or lessening, and *no* person may be denied either due process or the equal protection of the laws. But “equality before the law” is an ambiguous concept—and no less ambiguous are the concepts behind such phrases as “privileges or immunities,” “due process,” and “equal protection of the laws”—making the conclusion that the Amendment is about equality only a first step in any analysis. The difficulties presented by the text are not a modern problem, and at least one member of the House complained during debates over Section One that the text is “open to ambiguity and admitting of conflicting constructions.”⁶⁵ Some texts are inherently open-ended and cannot be understood using only semantic methods.

Commentators like Raoul Berger have sought to tackle Section One’s undeniable ambiguity by interpreting it as a prohibition on race discrimination and discrimination based on ethnic origin only.⁶⁶ The argument is that the Framers of the Fourteenth Amendment were primarily concerned with the plight of the freed slaves and the longevity of the Civil Rights Act of 1866, and so their amendment did no more than address these problems. The majority in the *Slaughter-House Cases*⁶⁷ took this view of the Fourteenth Amendment, saying, “We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”⁶⁸

This conclusion is a simple one that could prevent overreaching by judges. But like many simple conclusions, it is mistaken. First, the text does not support a race-discrimination-only reading, and laws can reach further than the motive behind them necessitates—even further than the enactors’ various intents—if the text’s objective original public meaning countenances such extension. Moreover, the Framers’ use of broad language in Section One of the Fourteenth Amendment was no accident. They did not seek to prohibit institutionalized race discrimination alone, though that was their primary concern. As John Harrison has argued, the Reconstruction conception of “equality”⁶⁹ suggests that Republicans “phrased their opposition to

65. CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) (statement of Rep. Boyer).

66. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 191 (1977); see also *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (arguing that “[e]xcept in the area of the law in which the Framers obviously meant [Section One] to apply—classifications based on race or on national origin, the first cousin of race,” the Court’s decisions may be described as “an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle”).

67. 83 U.S. (16 Wall.) 36 (1873).

68. *Id.* at 81.

69. An exchange between Senator Cowan and Senator Wilson during debates over the Freedmen’s Bureau Bill illuminates the Republican conception of equality:

race discrimination in terms of the more general principle that all citizens were entitled to the same basic rights of citizenship.”⁷⁰ They enacted this principle into law with an amendment framed in sweeping terms.

Still, a number of difficult questions must be answered in order to get at the meaning and scope of Section One’s equality guarantee. What type of laws must be “equal”? Only those conferring civil rights? What about those conferring political rights? And what sort of equality before the law does the Amendment require? Facial neutrality? Something else? Finally, and most importantly for purposes of this Article, what are the prohibited grounds for discrimination?

These questions become somewhat easier to answer when Section One is understood in the way that it was understood originally: as enacting a rule against class legislation and systems of caste. *Caste*, as Senator Charles Sumner—one of the Amendment’s Framers—explained in 1869, was once confined to describing the famously stratified social system of India but had by “natural extension” come to mean “any separate and fixed order of society.”⁷¹ When one group “claim[s] hereditary rank and privilege” and another is “doomed to hereditary degradation and disability,” you have a caste system.⁷² From the time of the Jacksonians on, Americans had been

Mr. COWAN. . . . The honorable Senator from Massachusetts says that all men in this country must be equal. What does he mean by equal? Does he mean that all men in this country are to be six feet high, and that they shall all weigh two hundred pounds, and that they shall all have fair hair and red cheeks? Is that the meaning of equality? Is it that they shall all be equally rich and equally jovial, equally humorous and equally happy? What does it mean?

. . . .

Mr. WILSON. . . . Why are these questions put? Does he not know precisely and exactly what we do mean? Does he not know that we mean that the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and the proudest man in the land?

. . . .

The Senator knows what we believe. He knows that we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country.

CONG. GLOBE, 39th Cong., 1st Sess. 342–43 (1866).

70. Harrison, *supra* note 15, at 1388.

71. CHARLES SUMNER, THE QUESTION OF CASTE 7 (1869).

72. *Id.* at 10. *Class legislation* and *caste* were often used interchangeably by those who contemplated the Fourteenth Amendment, and this usage helps to define the terms. Contemporary dictionaries defined the terms as follows:

Caste, *n.* In *Hindustan*, a tribe or class of the same profession, as the caste of Bramins; a distinct rank or order of society.

Class, *n.* A rank; order of persons or things; scientific division or arrangement.

CHAUNCEY A. GOODRICH, A PRONOUNCING AND DEFINING DICTIONARY OF THE ENGLISH LANGUAGE 64, 75 (1856);

Caste, *n.* 1. In *Hindustan*, a name (from *casta*, race) first given by the Portuguese to the several classes into which society is divided, having fixed occupations, which have come down from the earliest ages. There are four great and many smaller castes.

2. A distinct order in society.

NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 152 (1857); and:

opposed to monopolies, systems of class, and special hereditary privileges, immunities, and emoluments.⁷³ Section One of the Fourteenth Amendment

Caste, n. A distinct, hereditary order or class of people among the Hindoos, the members of which are of the same rank, profession, or occupation; an order or class.

Class, n. A rank or order of persons or things; a division; a set of pupils or students of the same form, rank, or degree; a general or primary division.

JOSEPH E. WORCESTER, A UNIVERSAL AND CRITICAL DICTIONARY OF THE ENGLISH LANGUAGE 107–08, 128 (1849).

Caste, as used in nineteenth-century America, could refer exclusively to a class of people in the Indian caste system, or it could refer more generally to any order or class that was defined by entrenched legal or societal distinctions that created or maintained a hierarchy of classes. *Caste* in the social or economic rather than legal sense is expressed in this account from an official of the Freedmen’s Bureau who had been stationed in South Carolina:

During fifteen months of my life I had the honor of being known as the “Bureau-Major,” and of ruling by virtue of that title over a region in western South Carolina not much less extensive than the State of Connecticut. Although, as an officer of the “Bureau of Refugees, Freedmen, and Abandoned Lands,” I was chiefly concerned with the affairs of negroes and Unionists, I was occasionally obliged to deal with other classes of our Southern population, and especially with that wretched caste commonly spoken of as the “mean whites,” or the “poor white folks,” but in my district as the “low-down people.” I have strung together, on as brief a thread as the subject will admit, a few gems from the character of this variety of our much-boasted Anglo-Saxon race.

J.W. Deforest, *The Low-Down People*, 1 PUTNAM’S MAG. 704 (1868).

This poem in praise of Massachusetts denies that the state has a social or a legal caste system in place. The poem also ties the concept of caste not to slavery, but to racism:

She [Massachusetts] knows no caste, but honors all things good;
 The Esquimaux may doff his Norland furs
 And sit beside her hearth-stone, and the man
 Masked by the sun may throw his fetters by
 And unrebuked take place among his fellows,
 And thus assert that mind is colorless.
 And when he goes within the council hall,
 There is no need that he should rise and say
 The first blood shed upon our nation’s soil
 For Liberty was blood of Africa.
 The star is on thy forehead, noble State!
 There let it shine, the cynosure to all
 The mariners on Time’s tumultuous sea,
 Who set their sails for Freedom and the Truth.

Thomas Buchanan Read, *To Massachusetts*, BOS. DAILY ADVERTISER, Nov. 16, 1866, at 1.

Class legislation is a term of art that does not appear in dictionaries, but it was widely used and understood. While *class* could be a neutral term, *class legislation*, like *caste*, was normally pejorative, but some in Congress felt strongly that class legislation was appropriate:

[T]he negro race in this country constitute such a class which is easily and well defined; and the peace and welfare of a State, especially where they are found in great numbers, demand that the radical difference between them and the white race should be recognized by legislation.

CONG. GLOBE, 39th Cong., 1st Sess. 2081 (1866) (statement of Rep. Nicholson).

73. Professor Melissa Saunders argued in a painstakingly researched article that the term *class legislation* was understood to encompass laws that grant monopolies or otherwise benefit a favored few. Saunders, *supra* note 15, at 247–48. We do not think that our analysis of the Fourteenth Amendment is necessarily in conflict with that of Professor Saunders. Our argument that the Amendment bans caste does not preclude understanding the Amendment also to ban class legislation as described by Professor Saunders, although, her claim is in some respects a more

constitutionalized America's rejection of systems of class- or caste-based laws.

Our analysis of the Fourteenth Amendment begins with the language of the other two Reconstruction Amendments and with the other sections of the Fourteenth Amendment. These provisions suggest partial answers to some of the questions posed above. Reading these texts in conjunction renders the contention that Section One only prohibits race discrimination untenable. It also shows that Section One's equalizing power is not limitless, most strikingly because Section One cannot plausibly be read to guarantee equal political rights in light of Section Two, which discourages but does not prohibit race-based limitations on suffrage, and the Fifteenth Amendment, which finally does eliminate racial discrimination with respect to political rights like the right to vote.

The starting point for our analysis is the Civil Rights Act of 1866, a measure explicitly concerned with race discrimination. The widespread agreement among all interpreters of the Fourteenth Amendment, from Raoul Berger on, is that the Act was later constitutionalized by the Fourteenth Amendment,⁷⁴ but there is disagreement about whether it is significant that the Fourteenth Amendment used broader terms than the 1866 Act.⁷⁵ We argue that this difference in wording has considerable significance. There is a lot of support in the intellectual history of the times and even in the legislative history for the proposition that concerns over class legislation generally—both extant and potential—were well developed during Reconstruction. The American people clamored for a Constitution that would end class oppression, and Congress obliged.⁷⁶

The Fourteenth Amendment's legislative history in Congress and the ratifying state legislatures confirms that the inclusion of language at a high level of generality was purposeful and was understood to be addressed to a broad problem. This history reveals that Section One was understood to ban *class legislation* and systems of *caste*, terms that were understood to be nearly identical. Contemporary public statements demonstrate that the congressional understanding that the Amendment banned all systems of caste was shared by the public. Importantly, these sources make clear that the Amendment's core anticaste meaning is distinct from and superior to the

ambitious one. See also KOHL, *supra* note 27, at 58, 61–62 (noting the importance of equality and the fear of monopoly and privilege that crystallized within a subset of society during the Jacksonian era).

74. See *supra* note 16 and accompanying text.

75. Compare PERRY, *supra* note 16, at 215 n.49 (arguing that while Section One of the Fourteenth Amendment constitutionalizes the Act, the Privileges and Immunities Clause provides a broader mandate for equality), with ROSSUM & TARR, *supra* note 16, at 53 (suggesting that this broad sort of interpretation creates ambiguity as to what rights are protected by the Amendment).

76. Cf. RICHARD SCHNEIROV, *LABOR AND URBAN POLITICS: CLASS CONFLICT AND THE ORIGINS OF MODERN LIBERALISM IN CHICAGO, 1864–97*, at 32–33 (1998) (observing the maturation of class outlook in Chicago and the push to get the working class involved in American politics).

applications of that principle that the enactors predicted. Our findings support Professor John Harrison's conclusion that ad hoc castes were banned⁷⁷ and have important implications for applying the Fourteenth Amendment to sex discrimination, which we turn to in Part II.

A. *The Text*

1. *Which Clause Guarantees Equality and Prohibits Caste?*—At the outset, a question presents itself: which clause in Section One of the Fourteenth Amendment guarantees equality? The Framers themselves were, for the most part, vexingly silent on the independent operation of Section One's clauses. They tended to explain that Section One would guarantee equality and ban caste without getting more specific.⁷⁸ Though the Supreme Court has long relied on the Equal Protection Clause as the source of the Fourteenth Amendment's equality guarantee, Professor John Harrison made a strong argument in a law review article nineteen years ago that the Privileges or Immunities Clause is a much better candidate.⁷⁹ Professor Harrison's argument is that the noun in the Equal Protection Clause is *protection* while the word *equal* is only an adjective.⁸⁰ The Equal Protection Clause, he contends, is about giving everyone, including free African-Americans and Northerners in the South, the same right to be protected by laws against violence already on the books as was enjoyed by white Southern citizens.⁸¹ The Clause is thus addressed primarily to state executive officials who enforce laws that have already been made. It says nothing about what laws the legislature can make⁸² but rather was aimed at the very real problem that general laws against violence in the South were not being enforced equally to protect against lynchings and violence by the Ku Klux Klan.⁸³

In contrast to the Equal Protection Clause, Professor Harrison argues, the Privileges or Immunities Clause is specifically addressed to the question of what laws the legislature and Executive can make or enforce.⁸⁴ The Privileges or Immunities Clause explicitly says, "No State shall *make or enforce* any law which shall abridge the privileges or immunities of citizens

77. Harrison, *supra* note 15, at 1459 ("[T]he Reconstruction notion of abridgment probably also included what we might call ad hoc castes . . . that are not commonly employed but that nevertheless represent a division of the citizenry into classes for reasons unrelated to the content of fundamental rights.")

78. See *infra* subpart I(B).

79. Harrison, *supra* note 15, at 1414–33.

80. *Id.* at 1434.

81. *Id.* at 1437 & n.213.

82. See *id.* at 1411 (describing the congressional vision of the Equal Protection Clause as one that would "preserve state control over the content of law while demanding that the laws apply to all citizens equally").

83. See *id.* at 1437 (discussing the Equal Protection Clause as the source of authority for the Ku Klux Act of 1871).

84. *Id.* at 1420–24, 1447–51.

of the United States”⁸⁵ Here is a clause addressed to the state legislatures about what laws they may “make,” and according to Professor Harrison, the privileges or immunities of citizens of the United States include all privileges or immunities (e.g., civil rights) that a citizen enjoys under state law as well as the privileges or immunities of national citizenship.⁸⁶ This makes sense. The Civil Rights Act of 1866—which all agree was constitutionalized in the Fourteenth Amendment⁸⁷—guaranteed equality in a number of common law rights that were conferred by state common law.⁸⁸ These rights included rights of contract, recovery in torts, rights to own property, and family law rights.⁸⁹ The Privileges or Immunities Clause forbids a state from “abridging” (i.e., shortening or lessening) these rights on the basis of race or some other system of caste. The privileges or immunities of state citizenship were common law rights, and perhaps rights under state constitutional law, and the Privileges or Immunities Clause forbade the making of any law that abridged those rights of state citizenship.⁹⁰

The drafters of the Fourteenth Amendment explained the scope of state privileges or immunities by making reference to the common law rights listed in Justice Bushrod Washington’s opinion in *Corfield v. Coryell*.⁹¹ The list in *Corfield* was a description of the privileges and immunities protected by the Comity Clause of Article IV of the Constitution, which in turn had roots in a clause in the Articles of Confederation.⁹² Justice Washington implied in *Corfield* that Article IV privileges or immunities included all state common law and state constitutional rights, but he also said that such rights could be overcome by “restraints as the government may justly prescribe for the general good of the whole.”⁹³ Therefore, Justice Washington believed that even federal constitutional rights could be overcome where there is a

85. U.S. CONST. amend. XIV, § 1 (emphasis added).

86. *Id.* at 1422.

87. *See supra* note 16 and accompanying text.

88. Harrison, *supra* note 15, at 1416.

89. *See supra* note 17.

90. *See* Harrison, *supra* note 15, at 1419–20 (illuminating the congressional debate surrounding the meaning of the Privileges or Immunities Clause, proclaiming, “We are therefore justified in reading the Fourteenth Amendment as including positive law rights of state citizenship within the scope of the privileges and immunities of citizens.”); *see also* David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEXAS L. REV. 1483, 1529–30 (2005) (noting that freed slaves were often formally deprived, by positive state law, of the same common law rights as other citizens, which led to the passage of the Privileges or Immunities Clause). *But see* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873) (holding that the Privileges or Immunities Clause of the Fourteenth Amendment only protects the privileges or immunities of U.S. citizens and that the privileges or immunities of state citizens, “whatever they may be, are not intended to have any additional protection by this paragraph of the amendment”); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030–31 (2010) (acknowledging the controversy surrounding the limited scope of the Privileges or Immunities Clause under the holding in the *Slaughter-House Cases* but declining to disturb that holding).

91. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230); Harrison, *supra* note 15, at 1409–10.

92. *Corfield*, 6 F. Cas. at 551–52.

93. *Id.*

governmental interest is “just” and that promotes “the general good of the whole” people. Government may trump constitutional rights but only if it does so “justly” and in a “nondiscriminatory” way. This statement anticipates the view of the judicial role that the Supreme Court has followed in the modern era. Professor Harrison argues that “the privileges or immunities of citizens of the United States” listed in Section One of the Fourteenth Amendment are the same body of rights as the “Privileges and Immunities of Citizens in the several States” which are protected by the Comity Clause in Article IV.⁹⁴ Critically, Professor Harrison explains that systems of caste or of class-based laws violate the Privileges or Immunities Clause because they offer a lesser or shortened or abridged set of rights to one class of citizens as compared to another⁹⁵ and they are not laws that have been “justly prescribe[d] for the general good of the whole” people.⁹⁶ The Privileges or Immunities Clause forbids making or enforcing “any” law that “abridges” a citizen’s privileges or immunities.⁹⁷ This use of the word *abridge* in an antidiscrimination sense occurs again in the Fifteenth Amendment, which says that “[t]he right of citizens of the United States to vote shall not be denied or *abridged* by the United States or by any State on account of race, color, or previous condition of servitude.”⁹⁸ The word *abridged* is again used in the same way in the Nineteenth Amendment when it extends the franchise to women.⁹⁹

Professor Harrison argues that the word *abridge* can only mean discriminate and that as a result there is an antidiscrimination command in Section One of the Fourteenth Amendment but no command protecting individual rights.¹⁰⁰ He thus constitutionalizes the approach taken by John Hart Ely in *Democracy and Distrust*.¹⁰¹ This seems to us to go way too far. Rights can be “abridged” or “shortened” one person at a time as well as one class at a time. The First Amendment ban on “abridgements” of freedom of speech or of the press obviously protects individual rights and also protects

94. Harrison, *supra* note 15, at 1452.

95. *See id.* at 1422 (noting that a state “abridges such rights when it withdraws them from certain citizens, but not when it alters their content equally for all”).

96. *Corfield*, 6 F. Cas. at 552.

97. U.S. CONST. amend. XIV, § 1.

98. *Id.* amend. XV, § 1 (emphasis added).

99. *Id.* amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

100. Harrison, *supra* note 15, at 1420–24.

101. Compare Harrison, *supra* note 15, at 1474 (“If we pay more attention to language, we realize that it is possible for a state to abridge a state law right and conclude that the clause secures equality with respect to such rights. If we pay enough attention to the Equal Protection Clause to get beyond the word equal, we discover that protection is narrower than privileges and immunities. We then can conclude that the Privileges or Immunities Clause does the main work of Section 1 by constitutionalizing the Civil Rights Act of 1866.”), with ELY, *supra* note 25, at 24 (“[T]he slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements.”).

against class or caste discrimination.¹⁰² But Professor Harrison's core point that the word *abridge* in the Privileges or Immunities Clause is a synonym for *discriminate* is correct. A modern formulation of that Clause would read: "No State shall make or enforce any law that shortens or lessens the civil and common law rights of citizens of the United States in a way that is unjust and that is not for the general good of the whole people."

Professor Harrison's argument that the main equality guarantee of the Fourteenth Amendment must be the Privileges or Immunities Clause¹⁰³ is compelling, but not entirely convincing. For one thing, "citizens of the several States"—the language used for the rights-bearers in Article IV of the Constitution—may have a meaning different from the phrase "citizens of the United States," which is the language used for rights-bearers in the Fourteenth Amendment's Privileges or Immunities Clause. Additionally, the word *protection*, as understood during Reconstruction, was better able to bear the broad meaning it is given today than Harrison concedes. *Webster's Dictionary*, for instance, offered a number of synonyms for *protection* in 1856: *defense, guard, shelter, safety, and exemption*.¹⁰⁴ And a number of the Framers seemed to understand "equal protection of the laws" as a requirement of equal legislation rather than equal police protection.¹⁰⁵ As we see it, the clauses may have some overlap, or perhaps taken together they ban caste. One objectionable law or official practice could violate one clause, while another violates a different clause. Moreover, among the existing laws on the books as to which the Equal Protection Clause guarantees equality of protection are the rights citizens hold under the federal and state constitutions. Thus, a state legislative enactment discriminating as to federal or state constitutional free speech rights on the basis of race might be said to deprive someone of the equal protection of the federal or state constitution.

Fortunately, settling which clause or combination of clauses the Framers and contemporary readers of Section One understood to prohibit unequal legislation is not necessary to our argument. What matters is (1) that the Framers of the Fourteenth Amendment drafted an amendment to forbid legislation that prohibits all systems of caste and of class-based laws that were not "justly prescribe[d] for the general good of the whole"¹⁰⁶ people;

102. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 224 (3d ed. 2010) ("Thus, the First Amendment would lose much of its value if it protected only isolated individuals but left the government a free hand to prevent organized activity.").

103. *Id.* at 1420–24.

104. GOODRICH, *supra* note 72, at 356. The full text of the definitions are as follows:

Protect, *v.t.* To secure from injury; to throw a shelter over; to keep in safety.—
SYN. To shield; save; cover; vindicate; *defend*, which see.

Protection, *n.* The act of preserving from evil, loss, injury, [etc.]; that which protects or preserves from injury; a writing that protects.—SYN. Defense; guard; shelter; safety; exemption.

Id.

105. See *infra* notes 154, 254 and accompanying text; see also *infra* note 290.

106. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230).

(2) that they used language broad enough to carry out their intention; and (3) that contemporary readers generally understood the amendment to mandate equality under the law by forbidding caste. We turn now to proving each of these propositions.

2. *The Text in Context.*—The Thirteenth and Fifteenth Amendments, like the Fourteenth Amendment, were primarily motivated by the plight of people of African descent. Thus, the Thirteenth Amendment banned slavery,¹⁰⁷ and the Fifteenth Amendment prohibited race-based denials of suffrage.¹⁰⁸ The Thirteenth Amendment's silence on the issue of race and the Fifteenth Amendment's explicit mention of it are telling. The former gives *everyone* the right not to be enslaved, while the latter endows only *some* citizens with the right to vote, demonstrating that the Framers made narrow pronouncements when such was their intention and used broad language when they sought broad application. Based on the content of the other two amendments, the Fourteenth Amendment, which by its terms protects the rights of "any person," or any citizen in the case of the Privileges or Immunities Clause, can hardly have been read to protect only the victims of race discrimination.¹⁰⁹

Justice Scalia agrees that the Thirteenth Amendment informs the meaning of the Fourteenth, but he draws a far more limited inference. In his dissenting opinion in *Rutan v. Republican Party of Illinois*,¹¹⁰ he gave a glimpse into his view of the Equal Protection Clause: "[T]he Thirteenth Amendment's abolition of the institution of black slavery[] leaves no room for doubt that laws treating people differently because of their race are invalid."¹¹¹ Of course, as discussed above, the Thirteenth Amendment

107. The Thirteenth Amendment reads as follows:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

108. The Fifteenth Amendment reads as follows:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Id. amend. XV.

109. See ELY, *supra* note 25, at 33 ("[Congress] knew how to bind their successors when they wanted to: the Fifteenth Amendment provides that the right to vote shall not be denied or abridged 'by the United States or by any State' on account of race.").

110. 497 U.S. 62 (1990).

111. *Id.* at 95 n.1 (Scalia, J., dissenting).

banned more than “black slavery.”¹¹² This supports our argument that the Equal Protection Clause was meant to apply broadly.

Other sections of the Fourteenth Amendment limit the reach of Section One’s equality guarantee.¹¹³ Under Sections Three and Four, certain former Confederates were explicitly given lesser rights than other Americans.¹¹⁴ Most striking today, however, is the inclusion of the word *male* in Section Two, which provides that if a state denies any male twenty-one or older the right to vote, the state’s basis of representation will be reduced proportionally, except in the case of criminals and traitors.¹¹⁵ There is no penalty in the Fourteenth Amendment for disenfranchising women, but there is an explicit penalty for disenfranchising men.

Section Two bestowed political rights on men but not women, and it is of course absolutely true that Section Two’s sanctioning of sex discrimina-

112. See *supra* notes 107–09 and accompanying text.

113. The unamended text of the Fourteenth Amendment reads as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Id. amend. XIV.

114. *Id.* §§ 3–4.

115. *Id.* § 2.

tion in voting rights makes it more doubtful that the Amendment's original readers could have understood Section One to prohibit all laws that discriminate on the basis of sex. This is especially so considering that in the United States, today and in the past, groups that are denied the vote tend to have reduced civil rights.¹¹⁶ Thus aliens who lack the right to vote can be deported,¹¹⁷ felons who lack the right to vote can be monitored,¹¹⁸ and children who lack the right to vote can be forced to comply with a curfew to which adults are not subject.¹¹⁹ Why would women who lack the right to vote have been any different? This is perhaps the strongest argument against an originalist reading of Section One as banning sex discrimination. The Nineteenth Amendment, however, struck the word *male* out of Section Two of the Fourteenth Amendment and at the same time altered the reach of Section One. The Framers of the Fourteenth Amendment would have thought that if political rights were guaranteed to a group, civil rights could not rationally be denied on the basis of group membership. This argument is made in more depth in Part III.

Section Two also limits Section One's scope in an additional way by permitting denials of suffrage so long as the disenfranchised are not counted in the basis of representation.¹²⁰ By most accounts, this made the Fifteenth Amendment necessary if African-Americans were to have a right to vote. Thus, Section One of the Fourteenth Amendment is concerned only with the protection of equal civil rights and not with the protection of equal political rights. The nineteenth-century distinction between political and civil rights is explored in section III(B)(1). At this point, it is only necessary to understand

116. See, e.g., Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1334 (2011) (arguing that denial of suffrage results in an inferior form of citizenship).

117. Compare ARIZ. REV. STAT. ANN. § 16-101(A)(1) (2006) (establishing United States citizenship as a prerequisite to voting in Arizona), with ARIZ. REV. STAT. ANN. § 11-1051(B), (D) (2006 & Supp. 2010) (mandating immediate notification of federal immigration authorities when an alien is illegally present in Arizona and giving authority to transfer aliens unlawfully present into "federal custody that is outside the jurisdiction").

118. Compare TEX. ELEC. CODE ANN. § 13.001(a)(4) (West 2010) (prohibiting certain felons from voting in Texas), with *Griffin v. Wisconsin*, 483 U.S. 868, 875-77 (1987) (affirming a probation officer's warrantless search of a felon's home on the basis of a tip that the felon possessed a firearm).

119. Compare CAL. CONST. art. II, § 2 (establishing a voting age of eighteen in California), with L.A., CAL., MUN. CODE § 45.03(a) (2011) (making it unlawful for individuals in Los Angeles who are under the age of eighteen to be seen in public between 10:00 p.m. and sunrise on the following day).

120. Members of Congress made clear statements that Section Two permitted disenfranchisement. Senator Stewart asked, "[W]ould [Section Two] not be a recognition of the power of the State to [exclude persons from the right of suffrage]?" CONG. GLOBE, 39th Cong., 1st Sess. 1280 (1866) (statement of Sen. Stewart). Senator Fessenden replied,

I confess that owing to my very great stupidity I do not understand what the Senator is driving at. If he means to ask me whether this proposition is not an admission that the States have the power under the Constitution, I say certainly it is, and I have been arguing that this last half hour or more.

Id. (statement of Sen. Fessenden).

that political rights were more narrowly conferred and were more highly valued than civil rights. As we have said, lots of people with civil rights, such as children, lacked political rights. But no one with political rights lacked civil rights.

It seems clear from the historical record that Section One of the Fourteenth Amendment bans abridgements of civil but not political rights. But the text is ambiguous as to what abridgements are banned. It seems clear that more than just abridgements on the basis of race are banned, because the Fourteenth Amendment is phrased at a higher level of generality than is the Fifteenth Amendment. In order to recapture the objective original public meaning of Section One, it is helpful to consult extratextual sources that document the events that led to the writing of the Amendment, the intellectual history of the times, contemporaneous dictionaries, the discussion of the Amendment, and newspaper accounts at the time of the Fourteenth Amendment's adoption. When these sources are consulted, they point strongly toward the view that Section One bans abridgments of civil rights by enacting a ban on all systems of caste or of class-based legislation.

B. Background: The Need for a Constitutional Amendment

Before the Fourteenth Amendment was introduced, the Civil Rights Act of 1866 was passed by Congress, vetoed by President Johnson on the grounds that it exceeded congressional authority to enforce the Thirteenth Amendment,¹²¹ and then passed again over his veto.¹²² President Johnson claimed the Civil Rights Act of 1866 was unconstitutional because it exceeded Congress's power to enforce the Thirteenth Amendment's ban on slavery, and proponents of the Civil Rights Act of 1866 were concerned that the courts might hold the Act unconstitutional.¹²³ The uncertain future of the Act was the most pressing reason for a constitutional amendment.¹²⁴ The idea was to give the Civil Rights Act of 1866 a more secure constitutional footing and to immunize it from the attacks of future majorities in Congress should the Democrats ever regain control of the national lawmaking apparatus. No scholar of the history of the Fourteenth Amendment has argued

121. When he vetoed the Civil Rights Bill on March 27, 1866, President Johnson purported to be worried about discrimination: "The bill, in effect, proposes a discrimination against large numbers of intelligent, worthy, and patriotic foreigners, and in favor of the negro, to whom, after long years of bondage, the avenues to freedom and intelligence have just now been suddenly opened." EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 75 (3d ed. 1880). While this statement is offensive, it does raise questions about permissible discrimination and impermissible discrimination.

122. Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.

123. See MCPHERSON, *supra* note 121, at 77 ("It cannot, however, be justly claimed that, with a view to the enforcement of this article of the Constitution, there is at present any necessity for the exercise of all the powers which this bill confers. Slavery has been abolished, and at present nowhere exists within the jurisdiction of the United States . . .").

124. BERGER, *supra* note 66, at 23.

that the Amendment does not constitutionalize the Civil Rights Act of 1866.¹²⁵

So what exactly did the Civil Rights Act of 1866 do? Tellingly, the Act was titled “An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.”¹²⁶ The operative language provided as follows:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.¹²⁷

Democrats and a few Republicans joined President Johnson in doubting this Act could be constitutionally justified by Congress’s power to enforce the Thirteenth Amendment’s prohibition on slavery. The power to legislate against slavery, it was said, does not include the much more sweeping power to legislate to require equal civil rights.¹²⁸ As a result, supporters of the Civil Rights Act of 1866 feared that even if the Act initially survived judicial review, as a mere statute, it might be repealed by a future Democratic Congress or struck down by some future Democratic Supreme Court.¹²⁹ The relationship between the Civil Rights Act and the Fourteenth Amendment is recognized by nearly all modern commentators on the original meaning of the Fourteenth Amendment¹³⁰—including those, such as Raoul Berger, who

125. BERGER, *supra* note 16, at 185.

126. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

127. *Id.* § 1.

128. MCPHERSON, *supra* note 121, at 75.

129. As an example of some of these concerns, one Congressman stated:

The gentleman who has just taken his seat [Mr. Finck] undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional. He was anticipated in that objection by the gentleman from Pennsylvania, [Mr. Stevens.] The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman’s party comes into power.

CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield) (alterations in original); *see also id.* at 2081 (statement of Rep. Nicholson) (“The very fact that this amendment would authorize such legislation as the ‘civil rights bill’ is an additional reason why it should not be adopted.”).

130. *See supra* note 16 and accompanying text.

have given the Amendment an exceptionally narrow construction.¹³¹ They agree that at a bare minimum the Fourteenth Amendment must be understood as constitutionalizing the Civil Rights Act of 1866.¹³²

The problem of class legislation was a prominent consideration of the supporters of the Civil Rights Act of 1866, and at times the scope of the Act was exaggerated. A congressional commentator went so far as to claim that the Act “declares that in civil rights there shall be an equality among all classes of citizens,”¹³³ despite the fact that the Act on its face only protected citizens from being denied particular civil rights on the basis of race.¹³⁴ Nonetheless, this claim was echoed and exaggerated further in the press, with one editorial contending that the Civil Rights Act of 1866 was a “guarantee of the rights of *freedmen*, and of *all others* who are citizens of the republic, to hold property, transact business, and to be in all things equal before the law with all other classes.”¹³⁵

Although equality before the law for all “classes” could not be satisfied by any fair reading of the words of the Civil Rights Act of 1866—it was only concerned with race discrimination¹³⁶ as to certain common law rights—the Fourteenth Amendment could be read as guaranteeing equality before the law for all classes of citizens. Significantly, as the amendment that would become the Fourteenth was being considered in Congress, some members of the public were asking for a constitutional amendment that would do more than just constitutionalize the Civil Rights Act of 1866. They wanted an end to all forms of class legislation whatsoever for good. These commentators associated slavery and the Black Codes with feudalism and aristocratic class discrimination, and they knew that any distinguishing characteristic could potentially be used as the basis for arbitrary or predatory discrimination if a simple majority so chose.¹³⁷ One especially forceful appeal for a constitutional amendment was made by a *Chicago Tribune* editorial in January 1866,¹³⁸ just as Congress was gearing up to address the problem of race discrimination with a constitutional amendment that was to become the

131. BERGER, *supra* note 66, at 191.

132. *See supra* note 16 and accompanying text. Berger contended that while segregation was not prohibited by the Fourteenth Amendment, the “purpose of the [F]ourteenth [A]mendment” was to “incorporate” the Civil Rights Act. BERGER, *supra* note 16, at 268.

133. CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (statement of Sen. Trumbull).

134. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (guaranteeing certain rights to “citizens, of every race and color”).

135. *Adjournment of Congress*, PHILA. N. AM. & U.S. GAZETTE, July 30, 1866, at 1 (emphasis added).

136. *Class* and *race* were often spoken of in tandem, but were never synonyms. *See* Saunders, *supra* note 15, at 289–90 n.198 (noting the historic distinction between “class” and “caste” legislation).

137. The Fourteenth Amendment may also ban class legislation based on nonhereditary characteristics, but discussion of that point would take us far afield from the topic of sex discrimination since sex is a hereditary characteristic.

138. Editorial, *Class Legislation*, CHI. TRIB., Jan. 12, 1866, at 2.

Fourteenth Amendment. The editorial conceptually ties the Black Codes to the English aristocracy, in this way revealing that American laws based on racial classifications were recognized as just one species of impermissible oppression by hereditary ruling classes:

We have seen, through bitter experience, the evils of class legislation as practi[c]ed by the States, in the form of slave and black codes. We cannot but perceive the evils of the system in England, and all monarchical governments, where the laws are allowed to recognize distinctions between persons and classes. We cannot shut our eyes to the patent fact that such legislation, even when exercised for good purposes, is based upon a principle of pernicious tendencies, that ought not, if it can be avoided, to obtain a recognition in the Republic. The design and spirit of our Government is opposed to this system, and its evident intent is to render unnecessary any special enactments for the benefit or repression of any class, but to legislate for all alike. But, unhappily, there is, at present, no special clause whereby this intent can be accomplished, in cases like that under consideration. And, if the several States can practi[c]e class legislation, as between whites and blacks, except when forbidden by counter-legislation by Congress, they can also create class distinctions in the future between native and adopted citizens, between rich and poor, or between any other divisions of society.

The most effectual way to reach the root of this matter, is to amend the Constitution so as to forbid class legislation entirely by prohibiting the enactment of laws creating or recognizing any political distinctions because of class, race or color between the inhabitants of any State or Territory, and providing that all classes shall possess the same civil rights and immunities, and be liable to the same penalties, and giving Congress the power to carry the clause into effect. . . . [W]e believe that we might as well level the evil of caste at one blow, as to fight it by driblets and sections, through another long course of years.¹³⁹

The *Tribune's* call for a constitutional amendment that would “level the evil of caste at one blow” was obviously not echoed by all. But the reality that such an amendment would be a congressional goal was acknowledged even by those who opposed it, such as one commentator, also writing in January 1866, who expressed fear that Congress would soon go beyond the abolition of slavery and “repeal God’s law of caste.”¹⁴⁰ More supportive of

139. *Id.*

140. DAILY NAT’L INTELLIGENCER, Jan. 5, 1866 at col. 1. This is in harmony with Professor Harrison’s insight that “ad hoc castes”—groups discriminated against based upon unjustified animus—are prohibited by the Fourteenth Amendment. Harrison, *supra* note 15, at 1457–58. Harrison gives the example of laws denying “individuals who drive foreign cars” the right to purchase gasoline because of widespread resentment against them and contends that the Fourteenth Amendment prohibits such legislation. *Id.* Notably, the *Tribune* editorial contemplates an amendment that would prohibit the creation of “class distinctions” in the future. Editorial, *supra* note 138.

equality, the *Philadelphia North American Gazette* informed its readers in February 1866 that a constitutional amendment was being discussed in Congress that would “secure for the citizens of any one State the same rights as are enjoyed by the citizens of other States, thus terminating the discriminations made against sections and classes and races.”¹⁴¹ The hope of some and the fear of others—that Congress would produce a constitutional amendment mandating equality, meaning there would be no subjugated classes—was in fact realized.

C. *The Drafting of the Fourteenth Amendment*

1. *Congress Crafts the Text.*—Fifteen members of Congress began crafting what would become the text of the Fourteenth Amendment in 1866.¹⁴² The mission of the Committee of Fifteen on Reconstruction was to draft an amendment that would alter the relationship between the states and the federal government by allowing the federal government to nullify discriminatory state legislation.¹⁴³ This amendment would secure Congress’s constitutional power to enact the Civil Rights Act of 1866.¹⁴⁴

The Committee of Fifteen held hearings to determine the scale of inequity and persecution in the Confederate states.¹⁴⁵ The hearings show that the congressional motive to amend the Constitution was from the beginning broader than the desire to protect freed slaves. Members of the Committee expressed concern for white Unionists in the South who were being persecuted,¹⁴⁶ a concern that was also raised during the subsequent debates.¹⁴⁷

141. *Constitutional Amendments*, PHILA. N. AM. & U.S. GAZETTE, Feb. 15, 1866, at 1.

142. The subject of the framing and ratification of the Fourteenth Amendment has been well treated by a number of commentators. *E.g.*, BERGER, *supra* note 66; KULL, *supra* note 16; NELSON, *supra* note 25; Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 29–65 (1955); Charles Fairman, *Reconstruction and Reunion 1864–88*, in 6 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund ed., 1971); Harrison, *supra* note 15; Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984).

143. *See* BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 213 (1914) (“At this time laws discriminating against the negroes and denying to them civil rights . . . were being passed by the legislatures in the southern states. . . . [O]n the very day that the 39th Congress met, Charles Sumner introduced some resolutions, providing among several other things for equal civil rights.” (footnote omitted)).

144. And most scholars today agree that it did. *See supra* note 16 and accompanying text.

145. KENDRICK, *supra* note 143, at 264.

146. Several witnesses testified before the Committee that hostility toward Union men in the South was prevalent. *Id.* at 286. One member warned that if former Confederates were re-enfranchised, it would be a “death-blow to the Union men and the men of color in the South. They will have no protection, their rights will not be recognized.” *Id.* at 410.

147. John Martin Broomall of Pennsylvania was one member of Congress who discussed the plight of white Unionists in the South:

The Committee submitted an initial, inadequate version of what would become the Fourteenth Amendment in April 1866:

Section 1. No 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.

Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.

Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.¹⁴⁸

This version obviously differed from the Fourteenth Amendment as we know it today in important ways. Most obviously, it was confined to prohibiting only race discrimination.

The narrow scope of this proposed race discrimination version of the Fourteenth Amendment caused the draft to be rejected both by members of Congress on the left who wanted to prohibit all forms of caste and by members on the right who wanted to protect the rights of white Unionists in the South and to refer to race obliquely. Senator Charles Sumner, who was in the first camp, argued that the voting-rights provision in the original Section Three (which, modified, would become Section Two) was in fact “the recog-

But are the evils complained of limited to the black man? While I would blush if I could admit that that fact, if acknowledged, would in any degree lessen the necessity for the passage of this law, I nevertheless maintain and hold myself ready to prove that white men, citizens of the United States, have been, and are now being punished under color of State laws for refusing to commit treason against the United States at the bidding of Democratic candidates for the Presidency

CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866). Sidney Perham of Maine was similarly concerned about the plight of white Unionists:

Their policy is to render it so uncomfortable and hazardous for loyal men to live among them as to compel them to leave. Many hundreds of northern men who have made investments and attempted to make themselves homes in these States have been driven away. Others have been murdered in cold blood as a warning to all northern men who should attempt to settle in the South.

Id. at 2082. Representative Broomall said that he could not support a system of reconstruction that did not

effectually guaranty the rights of the Union men of the South [T]he Government of the United States above all other duties owes it to itself and to humanity to guard the rights of those who, in the midst of rebellion, periled their lives and fortunes for its honor, of whatever caste or lineage they be.

Id. at 469–70. Similarly, Representative Bingham felt that an amendment was needed because “equal and exact justice” had been denied to “white men as well as black men.” *Id.* at 157.

148. KENDRICK, *supra* note 143, at 83–84.

inition of a caste and the disenfranchisement of a race”¹⁴⁹ because it allowed for African-Americans to be denied the right to vote by a state so long as its representation in Congress was proportionally diminished. His concern was addressed by the revised version, our race-neutral version of the Fourteenth Amendment, which Senator Jacob Howard explained, “applies not to color or to race at all, but simply to the fact of the individual exclusion.”¹⁵⁰ Senator Henderson also explained the more expansive meaning of the revised Section Two: “For all practical purposes, under the former proposition loss of representation followed the disenfranchisement of the negro only; under this it follows the disenfranchisement of white and black, unless excluded on account of ‘rebellion or other crime.’”¹⁵¹

The importance of this change, and the reason Senator Sumner viewed the original version as creating a system of caste, is illuminated by a discussion between Senators Howard and Clark. Senator Howard explained that the application of Section Two to individual exclusion will combat feudal aristocracy, which, like caste, was opposed by the drafters.¹⁵²

149. CONG. GLOBE, 39th Cong., 1st Sess. 1281 (1866).

150. *Id.* at 2767.

151. *Id.* at 3033.

152. During the congressional debate, Senator Howard explained his position on Section Two of the Fourteenth Amendment:

Mr. CLARK. . . . I wish to inquire whether the committee’s attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State.

Mr. HOWARD. Certainly it does, no matter what may be the occasion of the restriction. It follows out of the logical theory upon which the Government was founded, that numbers shall be the basis of representation in Congress, the only true, practical, and safe republican principle. If, then, Massachusetts should so far forget herself as to exclude from the right of suffrage all persons who do not believe with my honorable friend who sits near me [Mr. Sumner] on the subject of negro suffrage, she would lose her representation in proportion to that exclusion. If she should exclude all persons of what is known as the orthodox faith she loses representation in proportion to that exclusion. . . . And, sir, the true basis of representation is the whole population. It is not property, it is not education, for great abuses would arise from the adoption of the one or the other of these two tests. Experience has shown that numbers and numbers only is the only true and safe basis; while nothing is clearer than that property qualifications and educational qualifications have an inevitable aristocratic tendency—a thing to be avoided.

. . . .

Mr. HOWARD. It is not an abridgement to a caste or class of persons, but the abridgement or the denial applies to the persons individually. If the honorable Senator will read the section carefully I think he will not doubt as to its true interpretation. It applies individually to each and every person who is denied or abridged, and not to the class to which he may belong. It makes no distinction between black and white, or between red and white, except that if an Indian is counted in he must be subject to taxation.

Id. at 2767.

The new version of Section One was introduced by Thaddeus Stevens on April 30, 1866, and it also dropped the words *race* and *color*.¹⁵³ Its meaning was explained in most detail by Senator Howard:

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. 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.¹⁵⁴

Senator Eliot explained the meaning of Section One in similar terms:

I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit[]State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.¹⁵⁵

This understanding of Section One as banning all class legislation was discussed at length,¹⁵⁶ but it was not contested.¹⁵⁷ Suggestions that Section One only protected black people were explicitly rejected.¹⁵⁸ Those who

153. *Id.* at 2286.

154. *Id.* at 2766.

155. *Id.* at 2511.

156. Melissa Saunders quotes Representative Hotchkiss of New York as saying that the Fourteenth Amendment was “designed to forbid a state to ‘discriminate between its citizens and give one class of citizens greater rights than it confers upon another.’” Saunders, *supra* note 15, at 284. She quotes Senator Jacob Howard as saying that the Amendment would “abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.” *Id.* at 286 (alterations in original). She quotes Senator Timothy Howe as saying the Amendment would give the federal government “the power to protect classes against class legislation.” *Id.* at 287.

157. Senator Dixon, debating the content of Section One, stated,

One word in reply to the Senator from Massachusetts, with the consent of the Senate. The Senator says that I have forgotten many things, and among others the guarantees required by the four million slaves who have been emancipated. I desire to ask the Senator what guarantee those persons have in the proposition reported by the committee. The Senator exhausted all the terms of opprobrium in the English language in denouncing a resolution which was before the Senate some time since, and which contained the only guarantee for the colored race that is contained in this report.

CONG. GLOBE, 39th Cong., 1st Sess. 2335.

158. Senator Bingham, during the congressional debate, clarified that Section One applied to whites as well as blacks:

Mr. HALE. It is claimed that this constitutional amendment is aimed simply and purely toward the protection of “American citizens of African descent” in the States lately in rebellion. I understand that to be the whole intended practical effect of the amendment.

Mr. BINGHAM. It is due to the committee that I should say that it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal

opposed the Amendment did not dispute the idea that it prohibited class legislation; they simply were unabashedly in favor of class legislation.¹⁵⁹

On June 16, 1866, the text of what was to become the Fourteenth Amendment was formally presented to the states.¹⁶⁰ In August of that year—two years before three-quarters of the states had ratified the Amendment—the National Republican Party published a laudatory account of the caste-abolishing accomplishments of the 39th Congress:

The Republicans in Congress sought by legislation and by constitutional amendment to guarantee to every citizen of the republic the equality of civil rights before the law. How much did the Democrats do toward that object?

The Republicans in Congress sought to break up the foundations of secession and rebellion by making citizenship national and not sectional. How much did the Democrats do toward that object?

The Republicans in Congress tried to the extent of their powers *to abolish throughout the bounds of the republic the evils of caste*, as second only to those of slavery. How much did the Democrats do toward that object?¹⁶¹

Undeniably, the Framers of the Fourteenth Amendment gave state legislators ample notice that they understood the Amendment to prohibit caste or systems of special-interest and class-based lawmaking.

Newspapers regularly recounted Congress's debates on the proposed amendment, and many publications articulated the amendment's anticaste meaning. The *San Francisco Daily Evening Bulletin* described the amendment as an "opportunity . . . for the masses to break down the domination of caste and aristocracy."¹⁶² The *Boston Daily Advertiser* reported that "[t]he great object of the first section, fortified by the fifth, was to compel the States to observe these guarantees, and to throw the same shield over the black man as over the white, over the humble as over the powerful."¹⁶³ The Republican

white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment.

Id. at 1065.

159. A statement made by Representative Nicholson during congressional debates exemplifies sentiment favorable to class legislation:

Now, the negro race in this country constitute such a class which is easily and well defined; and the peace and welfare of a State, especially where they are found in great numbers, demand that the radical difference between them and the white race should be recognized by legislation; and every State should be allowed to remain free and independent in providing punishments for crime, and otherwise regulating their internal affairs, so that they might properly discriminate between them, as their peace and safety might require.

Id. at 2081.

160. HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 140 (1908).

161. *Who Did It?*, PHILA. N. AM. & U.S. GAZETTE, Aug. 18, 1866, at 1 (emphasis added).

162. *Southern Experiment*, S.F. DAILY EVENING BULL., Nov. 9, 1866, at 1.

163. Editorial, *Reconstruction*, BOS. DAILY ADVERTISER, May 24, 1866, at 1.

understanding that Section Two was a challenge to aristocracy and feudalism was also disseminated:

“But,” say some, “this section is designed to *coerce* the South into according Suffrage to her Blacks.” Not so, we reply; but only to notify her ruling caste that we will no longer bribe them to keep their blacks in serfdom. An aristocracy rarely surrenders its privileges, no matter how oppressive, from abstract devotion to justice and right. It must have cogent, palpable reasons for so doing.¹⁶⁴

By connecting the old-world problems of aristocracy and feudalism with race discrimination and caste in America, these commentators provide more evidence that the American public conceived of the word *caste* at a higher level of generality than the word *race*. The Framers and ratifiers of the Fourteenth Amendment would have understood it to ban European feudalism or the Indian caste system, as well as the special-interest monopolies that so outraged Jacksonian Americans.

2. *State Legislatures Consider Ratification.*—As John Hart Ely has noted, the legislative history of a constitutional amendment merely begins with Congress; it is the state legislators who ratify an amendment who actually make it binding law.¹⁶⁵ Accordingly, it is the public understanding of the ratifiers of the Fourteenth Amendment that establishes its original public meaning. State legislators in 1866–1868 presumably would have been familiar with newspaper accounts such as those described above. They must also have been aware that some of their constituents had been lobbying Congress to prohibit systems of caste or of class-based lawmaking for some time.¹⁶⁶ But, Indiana Governor Oliver Morton was mistaken when he declared that

164. Nat’l Republican Union Comm., *Address to the American People*, BANGOR DAILY WHIG & COURIER, Sept. 22, 1866, at 1.

165. ELY, *supra* note 25, at 17.

166. See CITIZENS OF W. TEX., MEMORIAL ON BEHALF OF THE CITIZENS OF WESTERN TEXAS, H.R. MISC. DOC. NO. 40-35, at 2 (2d Sess. 1867) (complaining that the new state legislature “forever excluded a large portion of citizens from a participation in the common school fund, and only granted them partial privileges in courts of justice, for no other reason than because of their caste or color”). The Republican Party of Louisiana made a similar argument:

[I]n the name of those who love their country and hate its enemies, in the name of those who love liberty and hate tyranny, we appeal to you, as the faithful representatives of the American people, as our brothers, to protect the lives, the liberty, and the property of the loyal people of Louisiana; to establish here a government loyal to the nation, a government founded on justice to all, under which all good citizens, regardless of caste or color, shall enjoy equal civil and political rights.

....

... Willing as we are to forgive the past offen[s]es of those who, having sinned against the government, are now sincerely repentant, we are at the same time opposed to any compromise with its known enemies. We do not believe in submitting constitutional amendments to rebel legislators who glory in having served the defunct confederacy. We protest against the continuance of the present so called State government of Louisiana. We ask you to abolish it, and substitute one composed of

[n]o public measure was ever more fully discussed before the people, better understood by them, or received a more distinct and intelligent approval. I will enter into no argument in its behalf before this General Assembly. Every member of it understands it, and is prepared, I doubt not, to give his vote for or against, on the question of ratification.¹⁶⁷

In reality, America's unusual post-Civil War political situation complicated state legislatures' discussions of the Fourteenth Amendment's propriety, meaning, and scope, and undoubtedly confused the public. The struggle between North and South, Republicans and Democrats, and federal and state authorities frequently dominated discussion of the Amendment, and in Southern legislatures, insidious prejudice and wounded pride sometimes led them to refuse to discuss the merits of the Amendment at all.¹⁶⁸

Many of the states that did consider the Amendment at length did not record the debates in detail.¹⁶⁹ For the most part, we are left with governors' addresses and committee reports, which sometimes and to some degree illustrate how the proposed amendment was understood. The bulk of objections to ratification rested on states-rights arguments, at least nominally. The indisputable fact that the Fourteenth Amendment increased the power of Congress at the expense of the states gave pause even to some in the North.¹⁷⁰ But the wildest pronouncements came from Southern anti-Amendment forces seeking to discourage ratification. They ranged from claims that the Amendment would give Congress plenary power over the

those who require no Executive pardons before they enter upon the duties of their offices. Do these things and the loyal people of Louisiana will ever hold in grateful remembrance the members of the thirty-ninth Congress.

THE CENT. EXEC. COMM. OF THE REPUBLICAN PARTY OF LA., MEMORIALS AND RESOLUTIONS, H.R. MISC. DOC. NO. 39-8, at 1-2 (2d Sess. 1866).

167. S. JOURNAL, 45th Gen. Assemb., Reg. Sess. 42 (Ind. 1867).

168. The views expressed in the Georgia state legislature provide one example:

Your committee ha[s] serious doubts as to the propriety of discussing the proposed amendments to the Constitution of the United States. They are presented without the authority of the Constitution, and it occurred to us, that as the dignity and rights of Georgia might be compromised by a consideration of the merits of the proposed amendments, that the proper course would be to lay them on the table, or indefinitely postpone their consideration, without one word of debate. We shall depart from this course, only so far as to give the reasons which, to our minds, forbid discussion upon the merits of the proposed amendments.

J. COMM. ON THE STATE OF THE REPUBLIC, REPORT, JOURNAL OF THE H., Ann. Sess., at 61 (Ga. 1866).

169. *But cf.* NELSON, *supra* note 25, at 60 (explaining that "voluminous material" covers the "extensive debates" about the Fourteenth Amendment that took place in state legislatures).

170. *See* S. JOURNAL, 19th Leg., Ann. Sess. 96 (Wis. 1867) (claiming that the "framers of the federal constitution were very careful to guard the rights of the several states, and held in abhor[r]ence everything that looked like consolidation"); NELSON, *supra* note 25, at 104 (detailing Southerners' concerns about centralized power and its erosive effect on state autonomy and noting that "[s]imilar views were held by Northerners").

states¹⁷¹ to warnings that Southern Democrats would be made permanently powerless. Governor Thomas Swann of Maryland explained that Section Five “may leave the Southern and Border States at the mercy of the majority in Congress, in all future time,” which he found “subversive . . . of every principle of justice and equality among the States, and in times of high party excitement and sectional alienation, dangerous to the liberties of the people.”¹⁷² Others in the South took a more practical view, recognizing that ratification of the Amendment was the only path back to representation in Congress: they argued for it solely on that ground.¹⁷³

Despite these different modes of evaluating the Amendment, available commentary shows widespread agreement that the Amendment was about more than just the rights of people of African descent (though a desire to secure those rights was known to be its catalyst). Governor Frederick Low of California recognized that white Unionists were being persecuted along with former slaves,¹⁷⁴ and Arkansas Governor J.H. Barton expressed the same concern, recounting that “[i]n Woodruff County a premium is offered for the murder of Union men. The Ku Klux riding about the county. D.P. Upham and F.A. McClure shot down while riding along the road. Several freedmen killed. Officers cannot execute the law.”¹⁷⁵ Governor Swann of Maryland, in what may have been an attempt at cleverness, provided more evidence that the Amendment was not understood simply to protect African-Americans by claiming that a law on the books in his state discriminated against white people and should be repealed promptly in the name of racial equality:

171. See S. JOURNAL, 16th Leg., Ann. Sess. 259–60 (Ark. 1866) (“The great and enormous power sought to be conferred on Congress, under the Amendment, which gives that body authority to enforce by appropriate legislation the provision of the first article of such amendment, in effect, takes from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the States.”).

172. MESSAGE OF GOVERNOR SWANN TO THE GENERAL ASSEMBLY OF MARYLAND 21–22 (1867), available at <http://www.archive.org/details/messageofgoverno1867swan> [hereinafter MESSAGE OF GOVERNOR SWANN].

173. H. JOURNAL, 17th Leg., Ann. Sess. 19 (Ark. 1868) (“As the reconstruction laws require the ratification of this 14th Article before the State will be received and recognized as a State in the Union, it will be unnecessary for me to say more to the present Legislature, composed of loyal citizens of the State, than merely call their attention to the importance of early attention to the ratification of the same.”).

174. Governor Low explained that the proposed Amendment was needed because in some states,

laws were passed by their Legislatures providing for the apprenticing of negroes, which, if carried into effect, would have rendered the condition of the freedmen worse than that from which they had been emancipated by the operations of the war; and all men, whether white or black, who had stood by the Government in the hour of its peril, were proscribed and persecuted. In a word, the spirit of rebellion seemed triumphant, and all loyalty appeared crushed under its iron heel.

S. JOURNAL, 17th Leg., Reg. Sess. 50 (Cal. 1868).

175. POWELL CLAYTON, THE AFTERMATH OF THE CIVIL WAR, IN ARKANSAS 70 (1915).

In relation to that feature of your Code, relating to the colored population, adopted years ago, giving to the courts the power to commute criminal sentences, by selling the offender into slavery for the period of his sentence, in lieu of imprisonment at hard labor in the penitentiary, I would commend it to your notice, not in the interest of the colored race, to whom it is a benefit, but as making an unfair discrimination under the new order of things, against the white man, from whom the same privilege is withheld. I trust that its repeal will be promptly ordered.¹⁷⁶

The Amendment's detractors understood it to do more than abolish the Black Codes.¹⁷⁷ So did its supporters, but in public they stuck to vague talk of equality. This was the tactic that was also employed (unsuccessfully¹⁷⁸) by the outgoing Governor, Frederick F. Low. He explained that Section One "declares 'equality before the law' for all *citizens*, in the solemn and binding form of a constitutional enactment, to which no reasonable objection can be urged."¹⁷⁹ Governor William Ganaway Brownlow of Tennessee also dealt with the arguably ambiguous meaning of the Amendment by simplifying it. He paraphrased the entirety of Section One as "[e]qual protection of all citizens in the enjoyment of life, liberty, and property."¹⁸⁰ Such pronouncements, while they confirm the Amendment's broad scope, fail to tell us much else. Uncertainty about the Amendment's meaning caused concern in some quarters specifically because it was recognized that courts can interpret ambiguous language in unanticipated ways. The minority

176. MESSAGE OF GOVERNOR SWANN, *supra* note 172, at 19.

177. *See, e.g.*, John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 856 (1966) (noting that the Fourteenth Amendment was intended to outlaw the Black Codes of 1865–1866, but that "its intended scope and impact are less clearly illuminated by the legislative debate preceding adoption").

178. California did not ratify the Fourteenth Amendment until 1959! 1959 Cal. Stat. 5695–96.

179. S. JOURNAL, 17th Leg., Reg. Sess. (Cal. 1868) (emphasis added). Interestingly—and supportive of John Harrison's Privileges or Immunities theory—the Governor paraphrased the Privileges or Immunities Clause and the Due Process Clause but did not mention the Equal Protection Clause at all. *See id.* ("By the first section it is provided that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside, and States are prohibited from abridging the privileges and immunities of citizens, or depriving them of life, liberty, or property, without due process of law."). On the other hand, he considered the Amendments, "so necessary for the protection of individual rights," a purpose Harrison might dispute. *Id.*; *see* Harrison, *supra* note 15, at 1458 n.277 ("The teaching of the Civil Rights Act of 1866 on this subject is equivocal because § 2 of the Act, which provided criminal enforcement, penalized state actors who deprived inhabitants of rights protected under § 1, or who imposed greater punishments on an inhabitant than were prescribed for white persons. This suggests a focus on the rights of individuals, not the abstract rule of equality. On the other hand, the 1866 Act elsewhere spoke in terms of simple race-blindness." (internal citations omitted)).

180. JAMES E. BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 20–21 n.51 (1997) (explaining that the Governor's message was distributed throughout the state, including through papers like the *Nashville Daily Press-Times* on June 22, 1866).

report from the Joint Committee of the Indiana General Assembly is an example:

We have seen so many instances of stretching the powers of government in the last few years, by resorting to new and startling constructions of what seemed to be plain provisions, plainly written, that we feel the time has come when proposed amendments should be freed from all ambiguity; and therefore we are unwilling to sanction any new proposal to confer power upon the Federal Government, by amending the Constitution, until we know its precise scope and meaning.¹⁸¹

Discussions of the Amendment in state legislative journals sometimes raise more questions than they answer. For example, Missouri's Governor, Thomas C. Fletcher, who was a ratification proponent, claimed in a message to the General Assembly that the Amendment gives Congress the ability to create new rights for citizens that the states must honor: "[Section One] prevent[s] a State 'from depriving any citizen of the United States of any rights conferred on him by the laws of Congress, and secures to all persons equality of protection in life, liberty and property under the laws of the State.'" ¹⁸²

This is not the meaning ascribed to the Amendment today, though it is certainly not an unreasonable construction. Governor Fletcher's explanation also contains an interesting merger of the language of the Due Process and Equal Protection clauses, further highlighting the confusion the Amendment engendered.

While it is impossible to know how often the Amendment's anticaste rule was discussed in state legislatures or how many legislators were consciously aware of its existence, there is little doubt that most understood the Amendment to guarantee equal rights.¹⁸³ Other commentary reveals that state legislators understood that one goal of Reconstruction was the elimination of caste. For example, on the issue of Section Two and enfranchisement, Governor Morton decried "political vassalage" and described "our Republican theory, which asserts that 'governments exist only by the consent of the governed,' and that 'taxation and representation' should go together."¹⁸⁴ He explained that this theory "does not admit that suffrage

181. H.R. JOURNAL, 45th Gen. Assemb., Reg. Sess. 104 (Ind. 1867).

182. JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 166 (1984). Large majorities in both houses ratified the Amendment after listening to Governor Fletcher. *Id.* at 165.

183. *See supra* notes 69–106 and accompanying text. We also include in this category those, such as the Governor of Vermont, who were concerned about a small, helpless minority of whites in the South who, along with black people, were being persecuted. *See* H.R. JOURNAL, Ann. Sess. 33 (Vt. 1867) (worrying that the Executive's restoration policy might "leav[e] to [Southerners'] unappeased and unrelenting hate a minority of whites so small as to be helpless").

184. S. JOURNAL, 45th Gen. Assemb., Reg. Sess. 44–45 (Ind. 1867).

shall be limited by race, caste, or color.”¹⁸⁵ Similarly, the Governor of Arkansas, Isaac Murphy, explained that under the new state constitution, the adoption of which was a prerequisite for re-admittance to the Union,

the interest of a few will no more crush out the energies and liberty of the people, but every human being in the State will feel confidence that his life, liberty, character, and property, are fully and equally protected. Class rule, class monopoly, and class oppression, will no more be known. All the citizens of the State are free, and entitled to seek their own happiness in their own way, so long as they obey the laws and respect the rights of others.¹⁸⁶

State elected officials seem to have understood the proposed Amendment to be more than simply a ban on racially discriminatory legislation.

D. Post-enactment Practice and Early Jurisprudence

Almost as soon as the Fourteenth Amendment became law, controversy over its meaning erupted. Some claimed that it only protected the rights of black people,¹⁸⁷ but more commonly, it was acknowledged that the Constitution had been amended to prohibit caste and class legislation.¹⁸⁸

185. *Id.*

186. H.R. JOURNAL, 17th Sess. (Ark. 1868). Steven Calabresi and Sarah Agudo argue that state constitutions current in 1868 provide much insight into what rights were considered “fundamental” at the time. See Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEXAS L. REV. 7, 95 (2008) (“Nineteen states out of thirty-seven in 1868—a bare majority—specifically guaranteed ‘equality’ of some kind or equal protection . . .”). A study of how those nineteen state constitutional provisions were discussed and applied could shed more light on how the federal Equal Protection Clause was understood by its readers.

187. One Congressman argued,

The only purpose of this provision was to abolish discriminations, and to give, “without regard to race, color, or previous condition,” citizenship; and to invest those who previously had been withheld from any rights, privileges, or immunities all that had been common to persons then citizens of the United States, and thus to put the colored citizens upon the same level with white citizens. This provision applies to all citizens, without regard to color, age, or sex; and yet it gives to no woman or minor the right to vote, and its only effect is to abolish all discriminations against the black or colored race. To the extent that the laws of any State may make such discriminations Congress may intervene to abolish them, but no further.

CONG. GLOBE, 42d Cong., 1st Sess. 648 (1871) (statement of Sen. Davis).

188. Senator Thayer of Nebraska explained that “[f]or the first time in our history [the Fourteenth Amendment] struck down that prop of despotism, the doctrine of caste.” CONG. GLOBE APP., 41st Cong., 2d Sess. 322 (1870). Similarly, Senator George Edmunds of Vermont opined,

The Constitution of the United States . . . is a bill of rights for the people of all the States, and no State has a right to say you invade her rights when under this Constitution and according to it you have protected a right of her citizens against class prejudice, against caste prejudice, against sectarian prejudice, against the ten thousand things which in special communities may from time to time arise to disturb the peace and good order of the community.

Importantly, it was recognized early on that the Framers' original expected applications were not determinative of the Amendment's meaning, demonstrating that the interpretive methods of the time were not unlike our own. Thus, Justice Bradley, riding circuit, explained,

It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment. It is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed.¹⁸⁹

Additionally, arbitrary classifications such as those based on height or hair color were presumptively invalid, as one petitioner assumed when asking Congress,

Could a State disenfranchise and deprive of the right to a vote all citizens who have red hair; or all citizens under six feet in height? All will consent that the States could not make such arbitrary distinctions the ground for denial of political privileges; that it would be a violation of the first article of the fourteenth amendment; that it would be abridging the privileges of citizens.¹⁹⁰

And a similar understanding was adopted in *Strauder v. West Virginia*¹⁹¹:

Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.¹⁹²

One especially powerful exposition of the Amendment's prohibition of class legislation was made by Charles Sumner, one of the Framers of the

3 CONG. REC. 1870 (1875). Speaking of his opponents, Congressman Lewis of Virginia critiqued the Democratic Party for being "the party of privilege, of monopoly, of caste, of proscription, and of hate." *Id.* at 998.

189. *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8,408).

190. H.R. REP. NO. 41-22, pt. 2, at 9-10 (1871). Although this report was concerned with political rights, this fact does not undermine its relevance.

191. 100 U.S. 303 (1880).

192. *Id.* at 308.

Fourteenth Amendment, as he decried the system of segregation that had sprung up all over the South:

[It is] vain to argue that there is no denial of Equal Rights when this separation is enforced. The substitute is invariably an inferior article. . . . Separation implies one thing for a white person and another thing for a colored person; but equality is where all have the same alike.

. . . .

. . . Religion and reason condemn Caste as impious and unchristian, making republican institutions and equal laws impossible; but here is Caste not unlike that which separates the Sudra from the Brahmin. Pray, sir, who constitutes the white man a Brahmin? Whence his lordly title? Down to a recent period in Europe the Jews were driven to herd by themselves separate from Christians; but this discarded barbarism is revived among us in the ban of color. There are millions of fellow citizens guilty of no offense except the dusky livery of the sun appointed by the heavenly Father, whom you treat as others have treated the Jews, as the Brahmin treats the Sudra. But pray, sir, do not pretend that this is the great Equality promised by our fathers.¹⁹³

Sumner's 1872 remarks demonstrate once again that those who objected to race discrimination did so because such discrimination violates a broader equality principle. The idea was not new—Sumner himself had made a similar case against the exclusion of witnesses on the basis of race in an 1864 Senate report.¹⁹⁴ It is striking that Sumner equates the racial caste system of the South to the traditional Indian caste system and to the oppression of the Jews in Europe. This supports our thesis that the animating principle behind Section One of the Fourteenth Amendment is a general rule of no caste and not merely a ban on race discrimination.

The same year, Senator Allen G. Thurman of Ohio employed the race–sex analogy in *support* of segregation and provided more evidence that from the beginning of the Fourteenth Amendment's existence, analogy has been the primary interpretive method employed:

[L]et the Senator hear me and he will see. Let me turn the argument of [Senator Edmunds]. Is not a female child a citizen? Is she not

193. CONG. GLOBE, 42d Cong., 2d Sess. 382–83 (1872).

194. CHARLES SUMNER, *Exclusion of Witnesses on Account of Color: Report, in the Senate, of the Committee on Slavery and Freedmen, February 29, 1864*, in 8 THE WORKS OF CHARLES SUMNER 176, 203 (1873). Sumner argued that

it is in the irreligious system of Caste, as established in India, that we find the most perfect parallel. Indeed, the late Alexander von Humboldt, in speaking of colored persons, has designated them as a Caste; and a political and juridical writer of France has used the same term to denote not only the distinctions in India, but those in our own country, which he characterizes as “humiliating and brutal.”

Id. (footnote omitted).

entitled to equal rights? Why, then, do you allow your school directors to provide a school for her separate from a school for the male? Why do you not force them into the same school? . . . Will the Senator say that all the laws of the States providing for a division of the schools by sexes are unconstitutional and infringe the fourteenth amendment? He cannot say that; and if he cannot say that, his argument falls to the ground.¹⁹⁵

Senator Thurman does not pose the precise question at issue in *VMI*—the Court in *VMI* would seemingly have allowed separate-but-equal facilities for women (if truly equal, and the Virginia Military Institute, the Court concluded, is one of a kind)¹⁹⁶—but he came close. Analogy as an original interpretive method is explored more fully in Part II.

In 1873, the Supreme Court weighed in on the scope of the Fourteenth Amendment. In the *Slaughter-House Cases*, famous for cutting the Privileges or Immunities Clause off at the knees, Justice Miller wrote, “We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”¹⁹⁷ But he went on, “It is so clearly a provision for that race and that emergency, that a *strong case would be necessary for its application to any other*[.]”¹⁹⁸ conceding earlier that “if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.”¹⁹⁹ He did not say what sort of situation would present a “strong case,” but his concession that one could exist is notable. Justice Bradley was more in touch with the original meaning when he wrote in dissent that the Constitution prohibits states from passing a “law of caste.”²⁰⁰

Several years after the *Slaughter-House Cases*, the Supreme Court issued another landmark opinion. In the *Civil Rights Cases*,²⁰¹ a majority of the Justices paid lip service to “[w]hat is called class legislation,” which it said was banned.²⁰² But it was Justice Harlan’s dissent that first gave a thorough explanation of the Fourteenth Amendment’s equality guarantee:

195. CONG. GLOBE APP., 42d Cong., 2d Sess. 26 (1872).

196. See *United States v. Virginia*, 518 U.S. 515, 553–54 (1996) (holding that Virginia had failed to create a comparable women’s institute due to its inability to replicate VMI’s “funding, prestige, alumni support and influence”).

197. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

198. *Id.* (emphasis added).

199. *Id.* at 72.

200. *Id.* at 113 (Bradley, J., dissenting).

201. 109 U.S. 3 (1883).

202. *Id.* at 24. The Court found the Civil Rights Act of 1875 unconstitutional because it regulated private parties rather than lawmakers. *Id.* at 11 (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

At every step, in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, “for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.” To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.²⁰³

Twelve years after the *Civil Rights Cases*, in *Plessy v. Ferguson*,²⁰⁴ Justice Harlan once more dissented and invoked the anticaste command of the Fourteenth Amendment:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here.* Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.²⁰⁵

Between the *Slaughter-House Cases* and *Plessy*, Justice Miller also commented on the Fourteenth Amendment once more, this time during oral argument following an adjuration from legislator-turned-advocate Roscoe Conkling—one of the members of the Joint Committee of Fifteen on Reconstruction. Conkling, arguing for the defendant in *San Mateo v. Southern Pacific Railroad*,²⁰⁶ gave two reasons why the Amendment should not be understood merely to protect the interests of people of African descent: first, because “complaints of oppression, in various forms, of white men in the South,—of ‘Union men,’ were heard on every side,” as Conkling knew first hand;²⁰⁷ and second, because “the Congress which proposed, and the people who through their legislatures ratified the Fourteenth Amendment, must have known the meaning and force of the term ‘persons.’”²⁰⁸ He continued with feeling:

203. *Id.* at 62 (Harlan, J., dissenting).

204. 163 U.S. 537 (1896).

205. *Id.* at 559 (Harlan, J., dissenting) (emphasis added).

206. 116 U.S. 138 (1885). Conkling—a member of the committee responsible for the Fourteenth Amendment—entered the case hoping to convince the Court that “the opinion of Justice Miller in the Slaughter-House cases was based upon a misconception of the intent of the framers of section 1 of the fourteenth amendment.” KENDRICK, *supra* note 143, at 28–29.

207. KENDRICK, *supra* note 143, at 32–33.

208. *Id.* at 34.

Those who devised the fourteenth amendment wrought in grave sincerity. They may have builded better than they knew.

They vitalized and energized a principle as old and as everlasting as human rights. To some of them, the sunset of life may have given mystical lore.

They builded, not for a day, but for all time; not for a few, or for a race, but for man. They planted in the Constitution a monumental truth, to stand foursquare whatever wind might blow. That truth is but the golden rule, so entrenched as to curb the many who would do to the few as they would not have the few do to them.²⁰⁹

In response to these arguments and those of Conkling's co-counsel, Justice Miller declared that he had "never heard it said in this Court or by any judge of it that these articles [i.e., the Fourteenth Amendment] were supposed to be limited to the negro race."²¹⁰ Though the decision in *San Mateo* did not reach these questions, it has been claimed that this case marked the beginning of the Court's willingness to apply the Amendment more broadly than just on behalf of African-Americans.²¹¹

II. Sex Discrimination as Caste

Aside from black Southerners, female citizens were the group whose status under the proposed Fourteenth Amendment was discussed most frequently by Congress. The general view is that the discussions in Congress of women and the Fourteenth Amendment's no-caste rule are the greatest barrier between originalists and the conclusion that sex discrimination is unconstitutional. We disagree with this view and think that the debates actually support our thesis that fidelity to the original public meaning of the Fourteenth Amendment has, since 1920, led inexorably to the conclusion that the Fourteenth Amendment prohibits sex discrimination. These debates show that using the interpretive methods current in the 1860s to interpret Section One—i.e., analogizing oppressed groups and applying Section One's anticaste rule to known facts—will lead any committed originalist to reach outcomes much like the modern Supreme Court has reached in cases beginning with *Reed v. Reed*.²¹² And as we have said, we agree with Professors John McGinnis and Michael Rappaport (among others) that understanding the interpretive methods of the drafters and enactors is

209. *Id.*

210. *Id.* at 34–35 (alteration in original). He went on to explain that "[t]he purport of the general discussion in the Slaughter-House cases on this subject was nothing more than the common declaration that when you come to construe any act of Congress, you must consider the evil which was to be remedied in order to understand fairly what the purpose of the remedial act was." *Id.* at 35.

211. *Id.* at 34.

212. 404 U.S. 71 (1971). The Court struck down an Idaho statute giving mandatory preference to males in the appointment of administrators for estates as a violation of the Equal Protection Clause. *Id.* at 76–77.

essential to any accurate assessment of the original public meaning of a constitutional provision.²¹³

One problem with the general view of the congressional debates is that it is derived exclusively from statements of supporters of the Amendment who assured their listeners that adoption would not change women's legal status. (Women, they explained, needed to have their freedom limited much the way children's freedom needed to be limited.)²¹⁴ This narrow focus ignores that the Framers and enactors intended the Amendment to be applied to actual facts²¹⁵ and that they knew that courts would be tasked, at least in part, with this job. These legislators naturally assumed that judges would find the same "facts" they had found themselves during the debates—that sex discrimination is natural and necessary rather than unjust and arbitrary²¹⁶—but they did not think that these factual assumptions were part of the rule they had enacted.²¹⁷ Their expected applications illuminate their interpretive methods but do not define the text they drafted and sent out into the world.

On this point we diverge from Professors McGinnis and Rappaport, who argue that expected applications are fairly conclusive of original public meaning.²¹⁸ Professors McGinnis and Rappaport make this claim notwithstanding *Loving v. Virginia*,²¹⁹ a case many originalists, including John Harrison and both of us, believe correctly held that antiscegenation laws violate the Fourteenth Amendment.²²⁰ We think that liberty of contract was protected by the Civil Rights Act of 1866 and was also a privilege or immunity of state citizenship.²²¹ Marriage contracts are contracts just as much as any other kind of contract.²²² Under an antiscegenation law, a

213. McGinnis & Rappaport, *supra* note 14, at 761.

214. *See infra* notes 245–48 and accompanying text.

215. *See supra* notes 71–77 and accompanying text.

216. There may, of course, have been quiet Republicans who hoped that the Amendment would equalize women's legal status.

217. *See infra* notes 247–48, 251, 254 and accompanying text.

218. *See* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 379 (2007) ("Using expected applications is particularly important for modern interpreters, because usage may have changed in dramatic or subtle ways since the Framers' day. Expected applications are especially useful because they caution modern interpreters against substituting their own preferred glosses on meaning for those that would have been widely held at the Framing.").

219. 388 U.S. 1 (1967).

220. *See* Calabresi & Fine, *supra* note 9, at 669–70 ("Does this clear expected application mean that under originalism *Loving v. Virginia* is wrong? No. It does not. All originalists, from Raoul Berger to the present, have always conceded that the Fourteenth Amendment was meant at a minimum to codify the antidiscrimination command of the Civil Rights Act of 1866." (footnote omitted)); Harrison, *supra* note 15, at 1460 ("If marriage is a contract then the Civil Rights Act banned antiscegenation laws.").

221. *See* Calabresi & Fine, *supra* note 9, at 669–70, 693 (arguing that the Civil Rights Act of 1866 and the Privileges and Immunities Clause protect a common law right to make contracts).

222. *Id.* at 670 (arguing that the common law of contracts included a right of marriage); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *433 ("Our law considers marriage in no other

white woman may enter into a contract to marry only a white man and not an African-American man.²²³ Such a law “abridges” the liberty of contract of both parties; it makes race relevant to whether the contract a person enters into is valid; and it thus violates both the Civil Rights Act of 1866 and the Fourteenth Amendment. Antimiscegenation laws are as unconstitutional as would be a law prohibiting a black person from hiring a white plumber and a white person from hiring a black plumber. Under the Fourteenth Amendment, the race of a person who enters into a contract simply does not affect whether the contract is valid. Age and mental capacity matter, but race does not. The fact that most people did not understand this in the 1860s or in 1896 is quite simply irrelevant. People often misunderstand the formal requirements of legal texts, but their misunderstandings do not therefore alter the objective social meaning of those texts. The originalist case against antimiscegenation laws is absolutely airtight.

Professors McGinnis and Rappaport disagree with us on this, and they reason that the enactors of the Fourteenth Amendment expected others to use the same facts and reach the same conclusions that they had reached themselves, making the enactors’ expectations part of their interpretive method.²²⁴ At least in the Fourteenth Amendment context (and likely in many others), this conclusion is inconsistent with the interpretive methods of the enactors of that particular constitutional amendment. For one thing, by the 1860s the U.S. Supreme Court’s decision in *Marbury v. Madison*²²⁵ was firmly entrenched.²²⁶ The Fourteenth Amendment’s creators knew well that their Amendment, once adopted, could be applied in ways contrary to their expectations just as in *McCulloch v. Maryland*,²²⁷ where the Supreme Court had found a federal power to charter corporations even though the Philadelphia Convention had voted *against* giving such a power to the national government.²²⁸ Moreover, the Framers of the Fourteenth

light than as a civil contract. . . . And, taking it in this civil light, the law treats it as it does all other contracts . . .”).

223. E.g., N.C. GEN. STAT. ANN. § 14-181 (Michie 1953) (repealed 1973); MD. CODE ANN., art. 27, § 398 (Michie 1967) (repealed 1967); VA. CODE ANN. §§ 20-54, 20-59 (Michie 1960) (repealed 1968).

224. McGinnis & Rappaport, *supra* note 218, at 372 (“[P]eople at the time of the enactment of the Constitution would have been unlikely to eschew expected applications because such applications can be extremely helpful in discerning the meaning of words.”).

225. 5 U.S. (1 Cranch) 137 (1803).

226. See James H. Landman, *Marbury v. Madison: Bicentennial of a Landmark Decision*, 66 SOC. EDUC. 400, 405 (2002) (emphasizing the significance of the 1857 *Dred Scott* case, in which the Supreme Court had clearly exercised its power of judicial review).

227. 17 U.S. (4 Wheat.) 316 (1819).

228. Compare *id.* at 424 (“After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.”), with JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 725–26 (E.H. Scott ed., 1893) (1840) (stating that the members of the Constitutional Convention rejected a provision that would have granted the federal government the power to grant charters of incorporation).

Amendment had little reason, if any, to expect that judges would look to the legislative history to glean their expected applications. Original expected applications had not been looked to by the Supreme Court in the eras of John Marshall or Roger B. Taney.²²⁹ There is, in addition, the problem that original expected applications, like intentions, could not have been uniform throughout Congress and throughout state legislatures. Some members of Congress may have expected the Amendment to allow antimiscegenation laws, segregation, and discrimination against women while others might have disagreed.²³⁰ The Framers of the Fourteenth Amendment were free to use language that was either broad or narrow. They could have explicitly excluded women from Section One's protections, but they did not do so. As Professor Siegel has pointed out, women's rights groups made no objections to Section One because they believed it to protect women's civil rights.²³¹ (The use of the word *male* in Section Two of the Fourteenth Amendment is what they struggled against.)²³² In our opinion, this was a reasonable conclusion for women's rights groups to draw from reading the language of Section One.

The discussions of sex discrimination that peppered congressional debates over the Amendment bolster these claims. There was substantial disagreement over whether sex discrimination was enough like race discrimination (or the Indian caste system or European feudalism) for the Amendment to prohibit it.²³³ Alongside these disagreements, a consensus emerged that ought to inform our understanding of the original meaning of the Amendment and how it should affect laws that discriminate on the basis of sex. Lawmakers, in effect, agreed to a conditional statement. If sex discrimination *were* similar to race discrimination, then sex discrimination would be prohibited by the Amendment.²³⁴ The question was whether sex discrimination in 1868 was considered to be relevantly similar to race discrimination, feudalism, and the Indian caste system.

To answer this question, we must look at the now-debunked popular justifications for sex discrimination and the powerful rejoinders that were

229. See Vermeule, *supra* note 8, at 1887 ("For nineteenth-century statutory interpreters, ascertaining the intention of the legislature was the fundamental goal of interpretation. . . . However, nineteenth-century interpreters also adhered to a strict rule, traceable to English law, that forbade recourse to internal legislative history."); see also *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1844) (Taney, C.J.) ("In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.")

230. This is the summing-of-intentions problem that concerns Professor Bennett. See Bennett, *supra* note 33, at 87–91 (discussing the "summing problem" of inferring the state of mind of a body from the states of mind of its individual members).

231. Siegel, *supra* note 6, at 970–72.

232. *Id.* at 975–76.

233. See *infra* notes 247, 254 and accompanying text.

234. See *infra* subpart II(A).

made even during Reconstruction and ask whether the legal status of women in the 1860s and later made them a subordinate caste. The available evidence of original meaning makes it abundantly clear, we think, that legislation that discriminates on the basis of sex violates the anticaste rule of the Fourteenth Amendment as that rule was originally understood.

This evidence also shows that the belief of many scholars and judges today that women were shut out of Fourteenth Amendment protection from the Amendment's inception is mistaken. In fact, the Supreme Court did not hold that women lacked equal civil rights under the Fourteenth Amendment until 1908—a full forty years after the Amendment was finally ratified and following several previous opportunities in which the Court could have so ruled but declined to do so.²³⁵ The offensive decision came in *Muller v. Oregon*²³⁶ at the urging of Louis Brandeis and the anti-*Lochner* Progressives, of all people.²³⁷ Notably, the Supreme Court's opinion in *Muller* relied heavily on sociological evidence to withhold *Lochnerian* liberty of contract from women.²³⁸ The Brandeis Brief in *Muller* provided studies and statistics on the “Dangers of Long Hours,”²³⁹ including the “specific evil effects on childbirth and female functions”²⁴⁰ and the “bad effect of long hours on morals.”²⁴¹ This means that the Supreme Court was swayed by contemporary sociological evidence to apply the Fourteenth Amendment differently to women from the way in which it was applied to men. It was not original public meaning that animated *Muller v. Oregon* but judicial reliance on Louis Brandeis's contemporary sociology from 1908. The use of this type of sociological evidence in place of arguments from original meaning has long been one of the main criticisms made by originalists of Chief Justice Warren's much-discussed sociological opinion in *Brown v. Board of Education*.²⁴²

235. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) were decided on other grounds. See *infra* notes 278, 290 and accompanying text.

236. 208 U.S. 412 (1908).

237. *Id.* at 420–21.

238. As Josephine Goldmark stated,

Today the Brandeis Brief is so widely copied—the presentation of economic, scientific, and social facts is so generally made part of the legal defense of a labor law—that the boldness of the initial experiment is hard to realize. . . . To present such a brief evidenced a supreme confidence in the power of truth. . . .

. . . .

Gone was the deadening weight of legal precedent.

JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER* 157–59 (1953).

239. Brief for Defendant in Error at 18–55, *Muller v. Oregon*, 208 U.S. 412 (1908).

240. *Id.* at 36.

241. *Id.* at 44.

242. 347 U.S. 483 (1954). The Court stated that it could not “turn the clock back” when addressing segregation and used academic research to conclude that “[s]eparate educational facilities are inherently unequal.” *Id.* at 492–96; see also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949 (1995) (asserting that *Brown v. Board of Education* was “arguably the first explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution's text, history, and interpretive tradition—not on consideration of modern social policy”).

Originalists who object to the shaky sociology in the Supreme Court's opinion in *Brown v. Board of Education* should stop and consider carefully whether the sociology of the Court's opinion in *Muller v. Oregon* can be squared with their interpretive theories.

A. *Congressional Debates*

Most supporters of the Fourteenth Amendment in the Thirty-ninth Congress claimed that legislation discriminating on the basis of sex would not violate Section One. Democratic opponents of the Fourteenth Amendment, on the other hand, argued that Section One was just as applicable to women as to black men. Yet the vocal members of both sides generally agreed on some critically important points. They agreed that women were a class,²⁴³ and, as we develop below, they agreed that *were* sex discrimination relevantly similar to race discrimination, Section One would prohibit both. They simply did not agree on whether women were a class that was suffering from arbitrary, caste-like discrimination. Indeed, they may well have thought that sex discrimination was a restraint that the government could “justly prescribe for the general good of the whole” people.²⁴⁴

The widespread congressional belief that legislation discriminating on the basis of sex was appropriate had two main justifications: (1) nature had not suited women for making certain kinds of decisions, and (2) family unity, and ultimately national unity, required that women remain in a subservient role to men.²⁴⁵ A look at how members of Congress supported these factual

243. For example, one Congressman argued,

Formerly under the Constitution, while the free States were represented only according to their respective numbers of men, women, and children, all of course endowed with civil rights, the slave States had the advantage of being represented according to their number of the same free classes, increased by three fifths of the slaves whom they treated not as men but property.

CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

244. See *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (listing Article IV privileges and immunities). Note that race discrimination could not have been so justified as to common law rights because the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866 and that Act explicitly required that African-Americans should have common law rights “as [were] enjoyed by white citizens.” Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. There can thus be no difference at all in the common law rights accorded to African-Americans and white Americans. Obviously, laws that create a forbidden caste system are by definition unjust laws that are not enacted “for the general good of the whole” people. *Id.* at 552.

245. The same ideas were the basis for denying women suffrage as well as civil rights. They were reflected outside Congress, one notable example coming from Orestes Brownson in 1885:

The conclusive objection to the political enfranchisement of women is, that it would weaken and finally break up and destroy the Christian family. The social unit is the family, not the individual We are daily losing the faith, the virtues, the habits, and the manners without which the family cannot be sustained; and when the family goes, the nation goes too

Extend now to women the suffrage and eligibility; give them the political right to vote and to be voted for; render it feasible for them to enter the arena of political strife, to become canvassers in elections and candidates for office, and what remains of family union will soon be dissolved. The wife may espouse one political party, and the

claims exposes the absurdity of a legislature or court concluding today, especially in light of the Nineteenth Amendment, that the Fourteenth Amendment does not prohibit sex discrimination. Such a conclusion would fly in the face of the original understanding of the Fourteenth Amendment's meaning because the Amendment was designed to be applied to the facts as we can best determine them today, not as people understood the facts 113 years ago. Surely the original public meaning of the Amendment does not call on subsequent generations to apply it based on misinformation prevalent in 1868, particularly after the Nineteenth Amendment knocked down all the factual foundations that caused the Supreme Court to allow sex discrimination in *Muller v. Oregon*.²⁴⁶

Many members of Congress put forward arguments that the Fourteenth Amendment would not interfere with the legal disabilities of women because women were inherently unequal to men. These are arguments that few, if any, would accept today. Senator Howard, the most thorough explicator of the Fourteenth Amendment, relied on "natural law" to exclude women from the Amendment's operation. In answer to the question of whether James Madison meant to include women in his statements on the importance of equality, Senator Howard explained,

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 were not regarded as the equals of men. . . . [E]verywhere mature manhood is the representative type of the human race.²⁴⁷

husband another, and it may well happen that the husband and wife may be rival candidates for the same office, and one or the other doomed to the mortification of defeat. . . .

Woman was created to be a wife and a mother; that is her destiny. To that destiny all her instincts point, and for it nature has specially qualified her. . . .

We do not believe women, unless we acknowledge individual exceptions, are fit to have their own head. The most degraded of the savage tribes are those in which women rule, and descent is reckoned from the mother instead of the father. Revelation asserts, and universal experience proves that the man is the head of the woman, and that the woman is for the man, not the man for the woman; and his greatest error, as well as the primal curse of society is that he abdicates his headship, and allows himself to be governed, we might almost say, deprived of his reason, by woman. It was through the seductions of the woman . . . that man fell She has all the qualities that fit her to be a help-meet of man, to be the mother of his children . . . ; but as an independent existence, free to follow . . . her own ambition and natural love of power, without masculine direction or control, she is out of her element, and a social anomaly, sometimes a hideous monster, which men seldom are, excepting through a woman's influence. This is no excuse for men, but it proves that women need a head, and the restraint of father, husband, or the priest of God.

Orestes A. Brownson, *The Woman Question* (1885), reprinted in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* 632–33 (6th ed. 2006).

246. See *infra* text accompanying notes 294–306.

247. CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866).

Other congressional claims that sex and race discrimination were not the same reveal their proponents' utter ignorance of women's plight:

Women have not been enslaved. Intelligence has not been denied to them; they have not been degraded; there is no prejudice against them on account of their sex; but, on the contrary, if they deserve to be, they are respected, honored, and loved. Wide as the poles apart are the conditions of these two classes of persons.²⁴⁸

It should be immediately apparent that the claim that women who deserve to be are always respected, honored, and loved is absurd in hindsight, if not as it was being made. Equally absurd are the claims that there was no prejudice against women on account of their sex and that women were not denied "intelligence," presumably meaning education.²⁴⁹ It would be an exaggeration to suggest that the position of white women and slaves were nearly identical, but "wide as the poles apart" is also a gross exaggeration of the disparity. It is true that some women were treated kindly in 1868, but in theory slaves could also have been treated kindly in the 1860s and a very small number were.²⁵⁰ The point is that both groups had their options in life curtailed by law, making their abilities, merits, and desires irrelevant, and leaving them to some degree at the mercy of the men who benefited from their unpaid labor.

Some members of Congress supported their mistaken claim that sex and race were relevantly different by relying on questionable interpretations of legal authorities. Thus, for example, Representative William Lawrence explained

[James] Kent says that if citizens

"[r]emove from one State to another they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made."

That is, distinctions created by nature of sex, age, insanity, [etc.], are recognized as modifying conditions and privileges, but mere race or color, as among citizens, never can.²⁵¹

It is odd and rather shocking that Lawrence would class sex with age and insanity, rather than with race.²⁵² An editorial in the *Macon Daily*

248. CONG. GLOBE, 39th Cong., 2d Sess. 56 (1866) (statement of Sen. Williams).

249. See Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 660 (1996) (observing that the "limited opportunities for higher education" were a chief concern of the early women's rights movement).

250. See ROBERT B. EDGERTON, *HIDDEN HEROISM: BLACK SOLDIERS IN AMERICA'S WARS* 14 (2001) (explaining that some house slaves were treated as if they were "part of the family" and many "developed great affection for their masters").

251. CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866). Lawrence made his comments during debate on the Civil Rights Act. *Id.* at 1832.

252. The need for special care was Lawrence's likely rationale. Similarly, a North Carolina Supreme Court judge would write in 1899, "I certainly did not intend the slightest reflection upon married women, by continuing to give them the same protection afforded to 'infants, idiots, lunatics

Telegraph from September 21, 1866, challenged such baseless distinctions, from bad motives unfortunately, when it asked, “[O]n what principle shall we exclude the women of the country and children above the age of fifteen” if black men should be given the vote?²⁵³ Others also failed to see the significance of the distinctions between sex and race, concluding that laws limiting people’s rights based on their sex were no different than laws that discriminated on the basis of race. A back-and-forth between Senators Hale and Stevens demonstrates that these members of Congress had the better argument:

Mr. HALE. . . . Take the case of the rights of married women; did any one ever assume that Congress was to be invested with the power to legislate on that subject, and to say that married women, in regard to their rights of property, should stand on the same footing with men and unmarried women? There is not a State in the Union where disability of married women in relation to the rights of property does not to a greater or less extent still exist. Many of the States have taken steps for the partial abolition of that distinction in years past, some to a greater extent and others to a less. But I apprehend there is not to-day a State in the Union where there is not a distinction between the rights of married women, as to property, and the rights of *femmes sole* and men.

Mr. STEVENS. If I do not interrupt the gentleman I will say a word. 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 then there is no pretense of inequality.

Mr. HALE. 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. I think, if the gentleman from Pennsylvania claims that the resolution only intends that all of a certain class shall have equal protection, such class legislation may certainly as easily satisfy the requirements of this resolution in the case of the negro as in the case of the married woman. The line of

and convicts’; nor have I heard any complaint from those married women whose opinions would naturally influence my conduct.” *Weathers v. Borders*, 32 S.E. 881, 882 (N.C. 1899) (Douglas, J., concurring).

253. Editorial, *Democracy Run Mad—What Are We Coming To*, MACON DAILY TELEGRAPH, Sept. 21, 1866, at 2.

distinction is, I take it, quite as broadly marked between negroes and white men as between married and unmarried women.²⁵⁴

Ward Farnsworth presents the above passage as strong evidence for his position that sex discrimination is permissible under the Fourteenth Amendment's objective original public meaning.²⁵⁵ Though Professor Farnsworth acknowledges Judith Baer's claim that Hale's point was simply unanswerable,²⁵⁶ he does not give her observation proper weight, instead answering weakly, "[B]ut it seems likely that Stevens would have had more to say."²⁵⁷ Baer was quite right: Stevens did not have logic on his side, even given the misinformation about women's abilities that was widely accepted in his time. Rather than interpreting this passage as evidence that women fell outside of the "equal protection" guarantee, we contend that it should be viewed as evidence that supporters of the Amendment were not always willing to apply their own anticaste rule in an honest and consistent manner—a failure that did not go undetected at the time—which is one more reason why it would be inappropriate to give their expected applications significant weight.

Encouragingly for women's rights activists, there were glimmers of progressive thought on sex discrimination in the Thirty-ninth Congress. The radical Senator Benjamin Wade of Ohio did not see the justification for denying women the vote, although he thought the issue was less pressing than suffrage for black men. Commenting on the possibility of women's suffrage in Washington, D.C., he made a statement that straddles the line between progress and ignorance:

I do not know that I would have agitated it now, although it is as clear to me as the sun at noonday that the time is approaching when females will be admitted to this franchise as much as males, because I can see no reason for the distinction. I agree, however, that there is not the

254. CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866). Although Hale is talking about distinctions between married and unmarried women rather than between men and women, it is impossible to ignore the subtext: married men did not have the same legal disabilities as married women.

255. Farnsworth, *supra* note 6, at 1240–41.

256. *Id.* at 1241 & n.26 (citing JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 90 (1983)).

257. *Id.* at 1241. Hale's argument brings to mind John Adams, though Adams was making a somewhat different point:

The Same Reasoning, which will induce you to admit all Men, who have no Property, to vote, with those who have, for those Laws, which affect the Person will prove that you ought to admit Women and Children: for generally Speaking, Women and Children, have as good Judgment, and as independent Minds as those Men who are wholly destitute of Property: these last being to all Intents and Purposes as much dependent upon others, who will please to feed, cloath, and employ them, as Women are upon their Husbands, or Children on their Parents.

Letter from John Adams to James Sullivan (May 26, 1776), in 1 THE FOUNDERS' CONSTITUTION 394, 395 (Philip B. Kurland & Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s10.html>.

same pressing necessity for allowing females as there is for allowing the colored people to vote; because the ladies of the land are not under the ban of a hostile race grinding them to powder. They are in high fellowship with those that do govern, who, to a great extent, act as their agents, their friends, promoting their interests in every vote they give, and therefore communities get along very well without conferring this right upon the female.²⁵⁸

Although *communities* may have gotten along very well, women who longed for expanded opportunities probably did not feel that they were getting along well.²⁵⁹ And surely some women were being ground to powder.²⁶⁰ But despite his failure to see the plight of women with complete clarity, Senator Wade was an unequivocal supporter of women's equality. The *New York Times* reported on a speech that Senator Wade delivered in Lawrence, Kansas, in 1867:

Mr. Wade then said that as he had kept in advance of the people in the great strife between Freedom and Slavery, he *meant to do the same thing in the contest which had just commenced for extending the right of suffrage to women*. He was unqualifiedly in favor of equal rights for all, not only without regard to nationality and color, but without regard to sex. . . . If he had not believed that his own wife had sense enough to vote, he never would have married her, [laughter and applause,] and if any of his hearers had wives who were unequal to the discharge of the right of suffrage, he would advise them to go home and get divorced at once. [Renewed laughter.]²⁶¹

Is it possible that Senator Wade held these views but did not agree with Democratic opponents of the Fourteenth Amendment who argued that its guarantee of equal civil rights applied to women? It would seem to be very unlikely.

Another Framer, former Representative John M. Broomall, assumed (soon after ratification if not earlier) that equality in civil rights was guaranteed to women by the Amendment. At the Pennsylvania Constitutional Convention of 1872–1873, he declared,

Four hundred years ago women, according to the popular notion of that day, had no souls Still later than that, the women were beasts of burden Still the world moves, and in our time they have

258. CONG. GLOBE, 39th Cong., 2d Sess. 63 (1866).

259. See O'Connor, *supra* note 249, at 659–61 (describing women's rights in the nineteenth century and identifying the right to vote as an important tool to remedy legal discrimination against women).

260. Cf. *id.* at 659 (discussing Elizabeth Cady Stanton's childhood experience of observing her father give legal advice to "[m]any . . . women who complained that their husbands and fathers had disposed of their property, spent their earnings on liquor, or had the sole right to guardianship of their children in the event of a separation").

261. *Senator Wade's Speech at Lawrence, Kansas*, N.Y. TIMES, June 20, 1867, at 8 (alterations in original).

been granted equal civil rights with men. The next step is coming, and there are those living who will see it That step is equality of all human beings both before the law and in the making of the law.

Thus it is that the world moves, and the man who is not prepared to keep pace with its motion had better get out of the way.²⁶²

These Reconstruction Senators, it appears, believed that equal political rights would make women the complete equals of men under the law. Equal political rights would necessarily mean equal civil rights.

While political rights continued to elude women, Justice Bradley's concurring opinion in *Bradwell v. Illinois*,²⁶³ the case that held that the practice of law was not a privilege or immunity of citizenship, did not hesitate to proclaim that

[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.²⁶⁴

This was not the majority's basis of decision (the majority sidestepped the sex discrimination question as we discuss below), but if it had been, could the decision be good constitutional law after women were guaranteed the vote by the Nineteenth Amendment?²⁶⁵ If women can vote for President and Congress and Governor, surely they can make contracts without their husbands' consent.

B. *Why Sex Discrimination Creates Castes*

In light of the conclusion that Section One prohibited all systems of caste, and not only racial-caste systems, a fundamental question must be answered: was discrimination on account of sex a form of caste- or class-based lawmaking? Put another way, under the definition of *caste* in the 1860s, was it conceptually legitimate to call sex discrimination a caste system? It turns out that people did use *caste* to describe the position of women, although the Fourteenth Amendment's use of the word *male* in Section Two might have made it difficult for them to make their case in court.

Looking first to the original caste system, that of India, we find that in its earliest sense, the term *caste* was an apt description of the status of women. The *shastras*, which are the third-century-BC treatises that form the

262. 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 553 (1873), available at http://www.duq.edu/law/pa-constitution/_pdf/conventions/1873/debates/debates-a-vol1.pdf.

263. 83 U.S. (16 Wall.) 130 (1873).

264. *Id.* at 141 (Bradley, J., concurring).

265. We answer this question in the negative in Part III, *infra*.

basis of the Indian caste system, expose the deep connection between women and the lower castes in India:

In these treatises women have been equated to the lower castes and definite restrictions have been placed on both. Both have been defined as impure, of sinful birth and as having a polluting presence. Both the lower castes and women had to observe practices of verbal difference, temporal distance and dress codes as a[n] index of their subordinate status.²⁶⁶

Sex and caste were not identical, however, and Mary Cameron warns that “[i]n attempting to understand how gender and caste hierarchy are intertwined, we need to be aware that these are not always direct correspondences. Far less gender hierarchy exists at the lower levels of caste hierarchy than at the top, and not strictly for reasons of impurity.”²⁶⁷ But it is still quite significant that the “same pollution–purity ideology that divides the castes divides the sexes as well,” and although different, “[g]ender and caste are seen as different manifestations of the same principles.”²⁶⁸

Similarly, the connection between sex and the American version of caste, black slavery, was drawn many years before the Fourteenth Amendment was adopted. As early as 1837, Sarah Grimké opined that the slave laws of Louisiana were “not very unlike” those governing married women.²⁶⁹ She made it clear that she was not claiming white women suffered to the same degree as slaves, but, she said,

The various laws which I have transcribed, leave women very little more liberty, or power, in some respects, than the slave. “A slave,” says the civil code of Louisiana, “is one who is in the power of a master, to whom he belongs. He can possess nothing, nor acquire anything, but what must belong to his master.”²⁷⁰

In the latter half of the nineteenth century, the legal status of women was repeatedly decried as a species of caste. In 1869, Elizabeth Cady Stanton made a powerful speech that drew connections between race discrimination, sex discrimination, caste, feudalism, and aristocracy:

A government, based on the principle of caste and class, can not stand. The aristocratic idea, in any form, is opposed to the genius of our free institutions, to our own declaration of rights, and to the civilization of the age. All artificial distinctions, whether of family, blood, wealth,

266. Sharmila Rege, *Caste and Gender: The Violence Against Women in India*, in DALIT WOMEN IN INDIA: ISSUES AND PERSPECTIVES 18, 33 (P.G. Jogdand ed., 1995).

267. MARY M. CAMERON, ON THE EDGE OF THE AUSPICIOUS: GENDER AND CASTE IN NEPAL 43 (1998).

268. Sherry B. Ortner & Harriet Whitehead, *Introduction: Accounting for Sexual Meanings*, in SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY 1, 18 (Sherry B. Ortner & Harriet Whitehead eds., 1981).

269. Sarah Grimké, *Legal Disabilities of Women* (1837), reprinted in PRESSER & ZAINALDIN, *supra* note 245, at 580.

270. *Id.* at 581.

color, or sex, are equally oppressive to the subject classes, and equally destructive to national life and prosperity. Governments based on every form of aristocracy, on every degree and variety of inequality, have been tried in despotisms, monarchies, and republics, and all alike have perished. . . . Thus far, all nations have been built on caste and failed. Why, in this hour of reconstruction, with the experience of generations before us, make another experiment in the same direction? If serfdom, peasantry, and slavery have shattered kingdoms, deluged continents with blood, scattered republics like dust before the wind, and rent our own Union asunder, what kind of a government, think you, American statesmen, you can build, with the mothers of the race crouching at your feet Of all kinds of aristocracy, that of sex is the most odious and unnatural; invading, as it does, our homes, desecrating our family altars, dividing those whom God has joined together, exalting the son above the mother who bore him, and subjugating, everywhere, moral power to brute force.²⁷¹

Similarly, at the Woman's Rights Convention of 1866, Susan B. Anthony and Elizabeth Cady Stanton, after proclaiming that they proposed "no new theories," but simply desired the government to "secure the practical application of the immutable principles of our government to all, without distinction of race, color, or sex," asked

In the oft-repeated experiments of class and caste, who can number the nations that have risen but to fall? Do not imagine you come one line nearer the demand of justice by enfranchising but another shade of manhood; for, in denying representation to woman, you still cling to the same false principle on which all the governments of the past have been wrecked. The right way, the safe way, is so clear, the path of duty is so straight and simple, that we who are equally interested with yourselves in the result, conjure you to act not for the passing hour, not with reference to transient benefits, but to do now the one grand deed which shall mark the zenith of the century—proclaim Equal Rights to All.²⁷²

Matilda Joslyn Gage's comparison of sex discrimination to caste harkened back to the earliest days of the Indian caste system:

[T]he caste of sex everywhere exists, creating diverse codes of morals for men and women, diverse penalties for crime, diverse industries, diverse religions and educational rights, and diverse relations to the

271. Elizabeth Cady Stanton, Address to the National Woman Suffrage Convention (Jan. 19, 1869), in *THE CONCISE HISTORY OF WOMAN SUFFRAGE* 249, 251–52 (Mari Jo Buhle & Paul Buhle eds., 2005).

272. Elizabeth Cady Stanton & Susan B. Anthony, Address to Congress (May 10, 1866), in *HARPER*, *supra* note 42, app. at 968, 969, 971.

Government. Men are the Brahmins, women the Pariahs, under our existing civilization.²⁷³

These statements, although they do not reflect how most people at the time conceived of women's legal status, are evidence that the word *caste* as understood during Reconstruction was applicable to women. Indeed, intelligent and discerning people sometimes said as much.

C. *The Supreme Court Weighs In*

Women would not see their rights expanded by the Fourteenth Amendment for a century. The first failed test came in *Bradwell v. Illinois*, when Myra Bradwell challenged an Illinois law that prohibited women from practicing law.²⁷⁴ Bradwell presented the question, "Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the fourteenth amendment, the privilege of earning a livelihood by practicing at the bar of a judicial court?"²⁷⁵ Counsel for Bradwell had argued

The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification, to which a whole class of citizens never can attain, is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. For instance, a State legislature could not, in enumerating the qualifications, require the candidate to be a white citizen. This would be the exclusion of all colored citizens, without regard to age, character, or learning. Yet no sound mind can draw a distinction between such an act and a custom, usage, or law of a State, which denies this privilege to all female citizens, without regard to age, character, or learning. If the legislature may, under preten[s]e of fixing qualifications, declare that no female citizen shall be permitted to practice law, it may as well declare that no colored citizen shall practice law; for the only provision in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen."²⁷⁶

Bradwell, a good textualist, insisted that "the argument *ab inconvenienti*, which might have been urged with whatever force belongs to it, against *adopting* the fourteenth amendment in the full scope of its language, is futile to resist its full and proper operation, now that it has been adopted."²⁷⁷ The Court nonetheless managed to resist the Amendment's full scope, not by

273. Matilda Joslyn Gage, *Preceding Causes* (1881), reprinted in *THE CONCISE HISTORY OF WOMAN SUFFRAGE*, *supra* note 271, at 51, 52.

274. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 130 (1873).

275. *Id.* at 133.

276. *Id.* at 135–36.

277. *Id.* at 136.

reasoning that women were not protected by the Fourteenth Amendment, but by concluding that the practice of law was not one of the privileges or immunities of citizens of the United States.²⁷⁸ With only the Chief Justice dissenting, the Court decided against Bradwell.²⁷⁹

The majority in *Bradwell* could easily have said that sex classifications were not forbidden by the Fourteenth Amendment, but the majority did not take what could be called the Ward Farnsworth route.²⁸⁰ Even Justice Bradley's concurrence, although it would have upheld the legislation in question on the basis that women are different from men in their capacity to practice law, did not go so far as to say that women fall entirely outside the Fourteenth Amendment's scope and protection.²⁸¹ Because the entire Court—minus Chief Justice Chase—was in favor of upholding the Illinois law barring women from practicing law, the failure of the eight Justices in the majority to say the Fourteenth Amendment left women out entirely is interesting.²⁸²

Five years after *Bradwell*, another court, the Supreme Court of West Virginia, explicitly said that women were protected by the Fourteenth Amendment's equality guarantee to the same degree as black men. In *State v. Strauder*,²⁸³ the Supreme Court of West Virginia concluded that black men could be excluded from juries because women could be excluded, and the

278. *Id.* at 139. The Court stated,

We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them.

Id. The concurring opinion talks about the “respective spheres” of men and women. *Id.* at 141 (Bradley, J., concurring). But the majority opinion avoids deciding the case on that basis. *Id.* at 139.

279. Chief Justice Chase, who had a very liberated and capable daughter, dissented, but he did not write a dissenting opinion. Richard L. Aynes, *Bradwell v. Illinois: Chief Justice Chase's Dissent and the "Sphere of Women's Work,"* 59 LA. L. REV. 521, 526, 530–35 (1999). He died soon thereafter without ever explaining his position. *Id.* at 526–27. For a discussion of what Chase's views may have been, see *id.* at 526–29.

280. Farnsworth, *supra* note 6, at 1230 (“But the view that emerges from the record nevertheless is clear enough. The [Fourteenth] Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.”).

281. See *Bradwell*, 83 U.S. (16 Wall.) at 139–42 (Bradley, J., concurring) (standing by the traditional view that “a woman had no legal existence separate from her husband” but acknowledging the “humane movements of modern society”).

282. The Supreme Court in *Bradwell* could have thought that the right to practice law was a political right like the right to vote or serve on a jury and that it therefore was not a “privilege or immunity” of state citizenship. Lawyers are officers of the courts, and practicing law has some of the same elements as does jury duty. Finding the right to practice law as being a political rather than a civil right would explain why the Court would have ruled against Bradwell.

283. *Strauder I*, 11 W. Va. 745 (1877), *rev'd sub nom.* *Strauder v. West Virginia*, 100 U.S. 303 (1880).

Fourteenth Amendment protected both groups in the same way.²⁸⁴ The opinion explains,

It is true that the occasion for this provision and all the other provisions of the thirteenth and fourteenth amendments was the supposed necessity of protecting the negro; but special care was taken to extend these provisions to all persons whatsoever. The language is as broad as it possibly can be: "No person shall be denied the equal protection of the laws."

. . . .

The negro has no more right to insist upon the equal protection of the laws, than a Chinaman or a woman. And surely it will not be pretended that a State, which by its laws, prohibits a Chinaman or a woman from sitting on a jury, does thereby deny to a Chinaman or woman, who is being tried for a felony the equal protection of the laws. Has not a woman as much right to insist that a State, by its laws, must permit her to be defended by a woman as her counsel, as she has to insist that women should be allowed to sit on a jury which tries her.²⁸⁵

The U.S. Supreme Court overturned the West Virginia Supreme Court's decision by concluding that the Fourteenth Amendment prohibits laws that exclude African-American men from juries, but the opinion entirely avoided mentioning women.²⁸⁶ This may have been because the argument that women have as much right to have women on their juries as black men have to have black men on their juries was unassailable,²⁸⁷ but the U.S. Supreme Court was unwilling to make this acknowledgement until 1975.²⁸⁸

Two years after the U.S. Supreme Court's decision in *Bradwell*, the Court considered the question of whether women have the right to vote under the Fourteenth Amendment. The case was *Minor v. Happersett*.²⁸⁹ Strikingly, the Court in *Minor v. Happersett* did not deny that women's civil rights were equally protected by the Fourteenth Amendment, but it instead

284. *Id.* at 814, 817.

285. *Id.*

286. See *Strauder v. West Virginia (Strauder II)*, 100 U.S. 303, 308–12 (1880) (overturning the West Virginia Supreme Court's decision to exclude African-American men from juries but not mentioning women anywhere in the decision).

287. *Strauder I*, 11 W. Va. at 814, 817 (insisting that the Fourteenth Amendment affords women the same degree of equal protection as African-Americans). If it is not immediately apparent that female defendants benefit from having women on their juries, consider cases where women raise the affirmative defense that they defended themselves against an abusive husband. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 182 n.111, 183 n.113 (1989) (noting that prosecutors and defense attorneys often exercise peremptory challenges on the basis of gender in battered-wife-syndrome cases).

288. See *Taylor v. Louisiana*, 419 U.S. 522, 531–33 (1975) (guaranteeing men as well as women a jury that is a "fair-cross-section" of the community, which must include women).

289. 88 U.S. (21 Wall.) 162 (1875).

concluded that the Fourteenth Amendment guaranteed *no one* the right to vote because the Amendment protected only civil and not political rights.²⁹⁰ As we discuss, Section Two of the Fourteenth Amendment makes it implausible to read Section One as guaranteeing citizens the right to vote.²⁹¹ Moreover, the passage of the Fifteenth Amendment to give African-American men the right to vote made it clear that the Reconstruction Framers did not think the Fourteenth Amendment guaranteed equal political rights and thought instead it guaranteed only equal civil rights.

The Court's continued silence on the question of whether the Fourteenth Amendment protected against sex discrimination allowed other courts to say that the Fourteenth Amendment did prohibit sex discrimination as to civil rights. In 1895, the Illinois Supreme Court said that a woman's contract rights could not be restricted any more than a man's could be, first noting that the Supreme Court had held in *Minor v. Happersett* that "a woman is both a 'citizen' and a 'person' within the meaning of [Section One]."²⁹² The opinion continued,

As a "citizen," [a] woman has the right to acquire and possess property of every kind. As a "person," she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty, or property without due process of law. Involved in these rights thus guarant[e]d to her is the right to make and enforce contracts. The law accords to her, as to every other citizen, the right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations. Before the law, her right to a choice of vocations cannot be said to be denied or abridged on account of sex.²⁹³

The U.S. Supreme Court did eventually come to the opposite conclusion—that women were not entitled to the same protections as men under the Fourteenth Amendment—but not until 1907 and even then only at the urging of future Justice Louis D. Brandeis.

In *Muller v. Oregon*, the Supreme Court held that laws setting maximum work hours for women were valid even though such laws were invalid for men under the rule of *Lochner v. New York*, a case where the Supreme Court had struck down a law that forbade bakers from working more than sixty hours a week.²⁹⁴ Future Supreme Court Justice Louis Brandeis's infamous

290. *See id.* at 171 ("The [Fourteenth] [A]mendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.").

291. *See supra* notes 120, 164 and accompanying text; *infra* notes 354–59 and accompanying text.

292. *Ritchie v. People*, 40 N.E. 454, 458 (Ill. 1895) (citing *Minor*, 88 U.S. (21 Wall.) at 162).

293. *Id.*

294. *Muller v. Oregon*, 208 U.S. 412, 416–19, 423 (1907). *Lochner* involved the common law right of liberty of contract, which was a privilege or immunity of state citizenship; but there was a disagreement among the Justices over whether the sixty-hour-a-week work limit was a just law

brief—the original Brandeis brief—on the important differences between men and women convinced the Court that women could be given restricted contract rights compared to men without falling afoul of the Fourteenth Amendment’s no-caste-rule guarantee.²⁹⁵ Perhaps surprisingly, the brief was conceived of and largely written by a very progressive woman, Florence Kelley.²⁹⁶ Kelley, daughter of Congressman William Darrah Kelley, was the first female factory inspector in Chicago, a resident of Hull House, and an early member of the NAACP.²⁹⁷ She was also a fierce fighter for women’s rights, whom Jane Addams’s nephew described as “the toughest customer in the reform riot, the finest rough-and-tumble fighter for the good life for others, that Hull House ever knew.”²⁹⁸ It may seem strange that such a woman would work so hard to push women out of the Fourteenth Amendment’s scope. But the Court had foreclosed the possibility of universally protective labor laws in *Lochner*,²⁹⁹ and so Kelley, despite believing women *and* men were being woefully mistreated by their employers, was willing to push for labor laws that applied to women only. If she could not protect all workers thanks to *Lochner*, she would protect some in *Muller*. Kelley also reasoned that protective labor laws were more necessary for women because they could not vote to improve their conditions and did not have the power of trade unions behind them.³⁰⁰

When Kelley first heard that *Muller* would be heard by the Supreme Court, she reportedly exclaimed, “There is just one man whom I wanted for the defense of the next labor case Such a chance may not come soon

enacted for the good of the whole people. The majority appears to have thought that the sixty-hour-a-week limit was special-interest, rent-seeking legislation that insulated established bakers from competition. See *Lochner*, 198 U.S. at 64 (stating that the Court would look beyond the letter of the statute to determine its true meaning). Justice Harlan’s dissent, however, argued that the law was a valid exercise of the police power. *Id.* at 73–74 (Harlan, J., dissenting). Justice Holmes thought the Supreme Court ought only to strike down violations of the Fourteenth Amendment when there was nothing in history or tradition to support the laws being challenged. *Id.* at 76 (Holmes, J., dissenting). Since the New Deal, there has been a consensus on the Court that state laws should only be found to be unjust and not for the good of the whole people when they: (1) discriminate; (2) violate the rights protected in the federal Bill of Rights; or (3) violate personal liberties in contraception, abortion, or gay rights cases. See generally *Lawrence v. Texas*, 539 U.S. 558, 564–79 (2003); *Roe v. Wade*, 410 U.S. 113, 147–66 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). For a critique of the current doctrine, see generally Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517 (2008).

295. See *Muller*, 208 U.S. at 419 (citing approvingly to Brandeis’s brief); Brief for Defendant in Error at 18–27, *Muller v. Oregon*, 208 U.S. 412 (1907) (citing to numerous professional reports discussing the dangers of long workdays for women).

296. *The Life and Times of Florence Kelley in Chicago 1891–1899*, NW. UNIV. SCH. OF LAW, <http://florencekelley.northwestern.edu/florence>.

297. *Id.*; Louis L. Athey, *Florence Kelley and the Quest for Negro Equality*, 56 J. NEGRO HIST., 249, 250 (1971).

298. JAMES WEBER LINN, *JANE ADDAMS: A BIOGRAPHY* 138–39 (1935).

299. See *Lochner*, 198 U.S. at 57 (striking down a maximum-hour law for bakers as a violation of the right to freedom of contract).

300. GOLDMARK, *supra* note 238, at 148.

again. The man I wanted is Louis Brandeis.”³⁰¹ On November 14, 1907, she approached Brandeis—accompanied by his sister-in-law, Josephine Goldmark, who would later be Kelley’s biographer—to enlist his support for the “Oregon ten-hour law for women.”³⁰² He agreed. According to Goldmark, “[h]e then outlined what he would need for a brief: namely, *facts*, published by anyone with expert knowledge of industry in its relation to women’s hours of labor, such as factory inspectors, physicians, trades unions, economists, [or] social workers.”³⁰³ Kelley collected the facts, and Brandeis successfully defended the law. Thrilled with the Court’s decision, Kelley described it as “epoch-making.”³⁰⁴ To her great satisfaction, the Court had relied heavily on the “facts” she had supplied.³⁰⁵

Interestingly, the opinion in *Muller*—despite undermining women’s claim to equal protection of the laws under the Fourteenth Amendment—provides much support for our argument that the equality principle of the Fourteenth Amendment is to be applied to the facts as currently understood (especially in light of the adoption of the Nineteenth Amendment) rather than by trying to reconstruct discarded beliefs of yesteryear. The Court explained:

Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.³⁰⁶

So, the very Supreme Court case that first held that men and women could receive differential Fourteenth Amendment protection also established that the degree of difference must be justified by well-established facts.

It is worth considering how *Muller v. Oregon* might have come out if the Nineteenth Amendment had already been adopted when *Muller* was decided in 1907. The Supreme Court might very well have concluded, two years after *Lochner v. New York*, that women would protect their own contract rights through the political process if they needed protection. This would have been a mistaken conclusion for reasons we will discuss at length

301. *Id.* at 152.

302. *Id.* at 143.

303. *Id.* at 155.

304. *Id.* at 159.

305. See *Muller v. Oregon*, 208 U.S. 412, 419–21 (1908) (citing approvingly to Brandeis’s brief and generally incorporating facts from the brief into the Court’s reasoning); Brief for Defendant in Error at 18–27, *Muller v. Oregon*, 208 U.S. 412 (1907) (citing to numerous professional reports discussing the dangers of long work days for women).

306. *Muller*, 208 U.S. at 420–21.

below.³⁰⁷ On the other hand, the Court might have concluded that a constitutional amendment declaring sex an impermissible basis for disenfranchisement—in effect, a constitutional assertion that sex is irrelevant to decision making—outweighed Brandeis and Kelley’s collection of sociological evidence. In that event, the law would be struck down either for failure to protect women’s contract rights or for failure to protect men’s labor rights.

III. The Difference the Nineteenth Amendment Made

“If that word ‘male’ be inserted as now proposed, it will take us a century at least to get it out.”

—Elizabeth Cady Stanton³⁰⁸

It is tempting to conclude that if Section One of the Fourteenth Amendment prohibits systems of caste, and if legislation that discriminated on the basis of sex made women a caste, then the argument that sex discrimination is prohibited is complete. This is not certain in part due to the Amendment’s second section, which privileged men. We argued above that the Framers were free to write their factual assumptions into law and exclude women from the protection of the Fourteenth Amendment if they so chose, but that they failed to do so.³⁰⁹ Yet in some sense they did inject their assumptions about women’s competence and proper sphere into the text of the Fourteenth Amendment. In Section Two, the Reconstruction Framers inserted the word *male* into the Constitution for the first time, explicitly privileging males over females with respect to voting rights. The section mandated a reduction in a state’s basis of representation if the vote were “denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States.”³¹⁰ This makes it very difficult to read the original 1868 version of the Fourteenth Amendment as a bar to sex discrimination. The Nineteenth Amendment changed all this, however, when it reinstated the Constitution’s sexual neutrality by nullifying the use of the word *male* in Section Two.

The Nineteenth Amendment also implicitly changed how the Fourteenth Amendment treats sex classifications. By guaranteeing that political rights would not be denied on the basis of sex, the Nineteenth Amendment made it

307. In short, political power is an important, but not always sufficient, means of carrying out the equality guarantee of the Fourteenth Amendment. This is true even in the case of groups, such as women, who exist in very large numbers. Individuals should not be dependent on all class members being motivated to secure the rights of the class.

308. ELLEN CAROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN’S RIGHTS* 94 (1998) (quoting ALMA LUTZ, *CREATED EQUAL: A BIOGRAPHY OF ELIZABETH CADY STANTON* 134 (1940)).

309. See *supra* notes 207–11 and accompanying text.

310. U.S. CONST. amend. XIV, § 2 (amended 1920).

implausible to read the Fourteenth Amendment's equality guarantee as inapplicable to women, because a guarantee of political rights implicitly guarantees full civil rights. Political rights are at the apex of the rights hierarchy with civil rights at the base.³¹¹ Lots of people, such as children and resident aliens, have equal civil rights, but only the most privileged citizens have the political right to vote.³¹² We think that once the Constitution was amended to give women the right to vote it became implausible to read the no-caste rule of the Fourteenth Amendment as allowing discrimination on the basis of sex with respect to civil rights. Our conclusion rests on the way the relationship between the two types of rights—political rights and civil rights—have been understood in America historically, as well as on the stark fact that if two-thirds of Congress and majorities in at least three-quarters of the state legislatures believe that a class of people is fit to exercise the vote—the most carefully bestowed of all rights—then there is good reason to believe that limiting that class's civil rights would be arbitrary and improperly discriminatory under the Fourteenth Amendment.

Additionally, the Nineteenth Amendment's legislative history shows that those who debated it understood it to make women equal to men under the law. Outdated assumptions about gender were rejected by the Nineteenth Amendment's supporters, and its detractors objected to the Amendment precisely because it emancipated women.³¹³ Debaters on both sides of the issue made explicit statements that full equality—not merely equal voting rights but full equality—was the purport of the Amendment.³¹⁴

Reva Siegel has also argued that the connection between the Fourteenth and the Nineteenth Amendments calls for a synthetic reading of the two Amendments. She has amassed significant evidence that women's struggle for the vote, which began in earnest in 1866 and was finally realized in 1920, was a struggle against subordination within the family.³¹⁵ In this way, Siegel has provided a sociohistorical grounding for the sex discrimination doctrine that she hopes will influence courts to look at the ways in which women are oppressed within the family—something that she feels cannot happen so long as sex discrimination is prohibited not for its own sake but as a form of

311. See *infra* subpart III(B).

312. See *infra* subpart III(B).

313. See *infra* notes 449–60 and accompanying text.

314. See *infra* notes 437–43 and accompanying text. Of course the push for the Equal Rights Amendment, which came hot on the heels of the Nineteenth Amendment's adoption, cannot be ignored. See CHRISTINE LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910–1928 (1986). It suggests that the very people responsible for guaranteeing women the vote did not think that the Constitution prohibited sex discrimination as to civil rights. But consider that in the 1920s, Section One of the Fourteenth Amendment was not given full force even in the race discrimination context: segregation and antimiscegenation laws were decades away from being held unconstitutional. It would have required real imagination for anyone to have anticipated *Loving v. Virginia*, let alone *Reed v. Reed*. Proponents of the ERA could reasonably have viewed Section One as a dead letter.

315. Siegel, *supra* note 6, at 1030–31.

discrimination similar to race discrimination.³¹⁶ But while Siegel argues that history provides sex discrimination doctrine with an independent grounding, freeing it from the race analogy, we argue that history (legislative and otherwise) shows something else: that the two forms of discrimination have a common rationale, a shared struggle, and a common remedy, making the analogy quite appropriate. We reach this conclusion by taking what may be a more legalistic approach than the sociohistorical treatment offered by Siegel, who gives little consideration to the legislative history of either the Nineteenth Amendment or the Fourteenth.

The legislative history of the Nineteenth Amendment shows that sex discrimination was intertwined with race discrimination in surprising ways. Some members of Congress feared that the Nineteenth Amendment, by enfranchising black women, who, according to some, would be more politically active than their male counterparts, would spark a “second Reconstruction.”³¹⁷ Suffragists, deriving hope rather than fear from this possibility, argued that white men would be more hesitant to use violence against black *women* to deny them access to the polls.³¹⁸ Other supporters in Congress proclaimed that the Nineteenth Amendment was fifty years late, the implication being that women should have been full beneficiaries of the Fourteenth and Fifteenth Amendments.³¹⁹

The Fourteenth Amendment’s explicators had in effect said that if sex discrimination was like race discrimination in relevant ways, then it would be prohibited by Section One of the Fourteenth Amendment. The Nineteenth Amendment’s explicators finally concluded that sex discrimination and race discrimination were like cases that ought to be treated alike.³²⁰ From 1920 on,³²¹ the U.S. Constitution ought to have been read as conferring equal civil

316. *Id.* at 952.

317. *See infra* notes 452–54 and accompanying text.

318. *See, e.g.*, W.E.B. DuBois, *Votes for Women*, THE CRISIS, Nov. 1917, at 8 (highlighting the deterrent effect of publicity on the use of violence to disenfranchise black women).

319. *See infra* note 444 and accompanying text.

320. *See infra* note 445 and accompanying text.

321. Professor Calabresi’s view is that it was only in 1920, when the Nineteenth Amendment struck out the word *male* in Section Two of the Fourteenth Amendment, that sex discrimination became unconstitutional as to all civil rights. Ms. Rickert thinks that Section One always could have been legitimately read to prohibit laws discriminating on the basis of sex, but she admits that it would have been challenging to argue that all sex-discriminatory laws were arbitrary and unconstitutional while the Constitution still explicitly privileged males. But the authors completely agree that the Nineteenth Amendment, as an analogue to the Fifteenth Amendment, made sex-discriminatory laws as unconstitutional as race-discriminatory laws. Professor Calabresi, however, believes that an Article V consensus is the only sure way to identify a caste, while Ms. Rickert thinks other types of evidence (including sociological) can establish that a group is being discriminated against in violation of the no-caste and no-class-legislation rules of the Fourteenth Amendment. The authors agree, of course, that sex discrimination as to civil rights prior to 1920 was immoral. *See also* Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988) (arguing that sexual-orientation discrimination is in fact just a form of forbidden sex discrimination).

rights as well as equal political rights on women as well as men. This did not happen in part thanks to *Muller v. Oregon*.

A. *The Problem of Section Two*

When word spread that the word *male* would be included in Section Two of the Fourteenth Amendment, feminists were rightfully indignant.³²² They pushed back hard,³²³ but they did not have the clout to stop the Constitution from becoming gendered nor to stop the very Amendment that was designed to stamp out class legislation from setting women apart in its second section. The “Call for the Eleventh National Women’s Rights Convention” of 1866 made this critique:

Those who tell us the republican idea is a failure, do not see the deep gulf between our broad theory and partial legislation; do not see that our government for the last century has been but a repetition of the old experiments of class and caste. Hence the failure is not in the principle, but in the lack of virtue on our part to apply it. The question now is, have we the wisdom and conscience, from the present upheavings of our political system to reconstruct a government on the one enduring basis which never yet has been tried—Equal Rights to All?

From the proposed class legislation in Congress, it is evident we have not yet learned wisdom from the experience of the past; for, while our representatives at Washington are discussing the right to suffrage for the black man as the only protection to life, liberty and happiness, they deny that “necessity of citizenship” to woman, by proposing to introduce the word “male” into the Federal Constitution. . . . Can a ballot in the hand of woman and dignity on her brow, more unsex her than do a scepter and a crown? Shall an American Congress pay less honor to the daughter of a President than a British Parliament to the daughter of a King?³²⁴

Women’s rights advocates’ fears were realized. The inclusion of the word *male* would directly or indirectly justify many denials of women’s rights. The Court in *Minor v. Happersett* relied on Section Two to find that voting is not a privilege or immunity of citizenship, asking,

Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, “persons.”³²⁵

322. Siegel, *supra* note 6, at 968–69.

323. *Id.*

324. Elizabeth Cady Stanton & Susan B. Anthony, Nat’l Woman’s Rights Convention, *in* HARPER, *supra* note 42, at 256–57.

325. *Minor v. Happersett*, 88 U.S. 162, 174 (1875).

The Nineteenth Amendment remedied the sex inequality found in the Fourteenth Amendment's text. In doing so, it excised Section Two's implication that women could justifiably—and constitutionally—be denied equal rights. The text of the Constitution was made sex-neutral once more.

B. A Grant of Political Rights Implies Equal Civil Rights

Before, during, and after the adoption of the Fourteenth Amendment and the Nineteenth Amendment, Americans conceived of political rights (i.e., rights concerned with governance) as encompassing full civil rights (i.e., personal rights such as contract and property). Historically, groups lacking political rights could permissibly have a shortened or abridged set of civil rights—e.g., felons, aliens, children, and women³²⁶—but if a class had political rights, it would be guaranteed full civil rights (at least in theory). This makes a good deal of sense. If membership in a particular group is an impermissible basis for disenfranchisement, it is very difficult under the Fourteenth Amendment to justify denial of less momentous decision-making power—like the power at issue in *Reed v. Reed*³²⁷—on that basis. Along these lines, Akhil Amar has argued that after the Nineteenth Amendment was adopted, legislatures were estopped from basing legislation on the idea that women were not the political equals of men.³²⁸ The historical evidence provided below supports Professor Amar's argument.

1. Background: The Distinction Between Political Rights and Civil Rights.—If you were to look for the distinction between political and civil rights in *Black's Law Dictionary* today, you would discover that there is none:

civil right. (usu. pl.) 1. The individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include esp. the right to vote, the right of due process, and the right of equal protection under the law.

2. *civil liberty.* “At common law a person convicted of a felony became an outlaw. He lost all of his civil rights and all of his property became forfeited. This harsh rule no longer prevails. Under modern jurisprudence the civil rights of a person convicted of a crime, be it a

326. See *supra* notes 117–19 and accompanying text.

327. 404 U.S. 71 (1971). The Court held that a law favoring men over women in the administration of deceased relatives' estates was unconstitutional. *Id.* at 73, 77.

328. Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 471–72 (1995).

felony or misdemeanor, are in nowise affected or diminished except insofar as express statutory provisions so prescribe.”³²⁹

Professor Tushnet has argued that, in fact, there never was any principled distinction between these types of rights and that the categories have always been in flux.³³⁰ Nonetheless, in the nineteenth century, it was widely accepted that there was a difference between political and civil rights, including by members of Congress.³³¹ Senator Stephen Douglas drew the classic distinction back in 1850, explaining that free blacks in Illinois were “protected in the enjoyment of all their civil rights,” yet they were “not permitted to serve on juries, or in the militia, or to vote at elections; or to exercise any other political rights.”³³²

Traditionally, political rights were thought to be those concerned with governance: voting, jury service, and holding office.³³³ On occasion, the practice of law was added to this list,³³⁴ which may explain the *Bradwell* case’s holding that the right to practice law was not a privilege or immunity.³³⁵ Political rights were bestowed on select citizens with especially good judgment; civil rights, on the other hand, were the natural rights to which every person, or at least every citizen including even children, was entitled.³³⁶ The Civil Rights Act of 1866 included among these civil rights the right

to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to

329. BLACK’S LAW DICTIONARY 281 (9th ed. 2009) (quoting Alexander Holtzoff, *Civil Rights of Criminals*, in ENCYCLOPEDIA OF CRIMINOLOGY 55 (Vernon C. Branham & Samuel B. Kutash eds., 1949)).

330. See Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1209 (1992) (“Even during Reconstruction, difficulties arose in sustaining the idea that these types of rights were categorically different.”).

331. Even those who did not think the distinction should exist recognized that it existed nonetheless: “A distinction is taken, I know very well, in modern times, between civil and political rights.” CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham).

332. CONG. GLOBE APP., 31st Cong., 1st Sess. 1664 (1850).

333. Harrison, *supra* note 15, at 1417; see also Amar, *supra* note 328, at 467 (listing “the rights to vote, hold office, serve on a jury, and serve in a militia” as the “quintessential[.]” political rights).

334. See *A Woman Cannot Practice Law or Hold Any Office in Illinois*, CHI. LEGAL NEWS, Feb. 5, 1870, at 147 (discussing *In re Bradwell* and analogizing that “the Dred Scott case was to the rights of negroes as citizens of the United States, [as] this decision [denying Bradwell’s admission to the Illinois bar] is to the political rights of women in Illinois—annihilation”).

335. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873) (“We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them.”).

336. See Tushnet, *supra* note 330, at 1208 (contrasting civil rights, as rights “attached to people simply because they were people,” with “[p]olitical rights, [which] in contrast, arose from a person’s location in an organized political system”).

none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.³³⁷

Professor Harrison explains that these common law rights were foreshadowed in the explanation of privileges and immunities found in *Corfield v. Coryell*, which concerned a New Jersey act that forbade residents of other states from gathering oysters in New Jersey.³³⁸ The case was explicitly relied upon by the drafters of the Civil Rights Act of 1866.³³⁹ *Corfield* expounded on the meaning of the Comity Clause—Article IV’s “Privileges and Immunities” Clause.³⁴⁰ *Corfield* is important because its discussion of the words “privileges and immunities” in Article IV was said by the Framers of the Fourteenth Amendment to shed light on the meaning of that Amendment’s Privileges or Immunities Clause.³⁴¹ But interestingly, *Corfield*’s list of fundamental rights ends by saying that the political right to vote was a privilege and immunity³⁴²—a conclusion that most scholars reject today.³⁴³ Justice Washington described a list of fundamental rights: “[T]o which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised,”³⁴⁴ a fact

337. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

338. Harrison, *supra* note 15, at 1416 (“[*Corfield*’s] privileges and immunities closely foreshadow[ed] the common law rights protected by the 1866 Act.”); *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

339. See Harrison, *supra* note 15, at 1416–18 (relating portions of the debates over the Civil Rights Act and noting that “Senator Trumbull relied on [*Corfield*] and the positive law notion of privileges and immunities that accompany[ed] it in explaining the Civil Rights Bill”) (citing CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)).

340. *Corfield*, 6 F. Cas. at 551–52.

341. Ahkil Amar’s “intratextualism” supports reading the Privileges or Immunities Clause in light of the meaning of the older Comity (Privileges and Immunities) Clause. Amar, *supra* note 45, at 792 (“The words ‘privileges,’ [and] ‘immunities,’ . . . in the Fourteenth Amendment provide another example [of intratextualism]. . . . [W]hen we . . . turn to the clustered use of these . . . words in Article IV, . . . we see the linguistic light (and link).”).

342. *Corfield*, 6 F. Cas. at 551–52 (listing the political right to vote among the fundamental rights that comprise a citizen’s privileges and immunities).

343. See, e.g., Raoul Berger, *The “Original Intent”—As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242, 256 (1996) (criticizing *Corfield* as a “rambling opinion . . . in which [Justice Washington] read the *right to vote* as a privilege and immunity of Article IV, an assertion for which the history of Article IV leaves no room”); Brainerd Curie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1335–38 (1960) (criticizing *Corfield*’s exposition of the clause as dicta and arguing that “[j]udicial interpretation of the clause got off to a bad start when Mr. Justice Bushrod Washington, riding circuit in 1825, felt called upon to expound his reasons for believing that it did not prevent New Jersey from denying to nonresidents the privilege of taking oysters from the waters of the state”); see also Upham, *supra* note 90, at 1485–86 (collecting sources criticizing *Corfield*).

344. *Corfield*, 6 F. Cas. at 551–52. The full list of fundamental rights from *Corfield* is as follows:

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,

dubiously ignored by the opinion in the *Slaughter-House Cases*, which quoted *Corfield*.³⁴⁵ This tends to support Professor Tushnet's claim that categories of rights have never been well-defined,³⁴⁶ but it does not change that most people living in 1868 thought there was a difference between political rights and civil rights,³⁴⁷ nor does it change that the drafters of the Civil Rights Act of 1866 conspicuously did not include in it the rights that were traditionally viewed as political rights.³⁴⁸ And *Corfield* must have been wrong that under Article IV the elective franchise was one of the privileges and immunities of citizens under the Comity Clause, because out-of-state citizens cannot vote in state elections, nor do they have other political rights such as the right to serve on a jury.³⁴⁹ Furthermore, the statements in *Corfield* were merely dicta: no civil right to harvest oysters was found.³⁵⁰ The right to harvest oysters was neither a civil nor a political right but was instead a right of in-state citizens to make use of state property. Harvesting

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 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, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

Id.

345. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75–76 (1873) (citing *Corfield*, 6 F. Cas. 546).

346. See Tushnet, *supra* note 330, at 1209–10 (“[D]uring Reconstruction, difficulties arose in sustaining the idea that . . . rights were categorically different. . . . Thus even at the outset, the distinctions among civil, political and social rights were unstable.”).

347. See *id.* at 1208 (“Reconstruction legal thinkers [saw] civil, political and social rights . . . as three distinct categories.”).

348. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (securing the right to contract, to sue, to own property, etc., but not the right to vote).

349. See Harrison, *supra* note 15, at 1417 (“[N]ineteenth-century usage concerning political participation confirms the close connection between privileges and immunities and civil rights: neither was thought to extend to political rights, such as voting or serving on juries.”). But see *id.* (noting that, “in opposition to the Fourteenth Amendment, Democratic Representative Andrew Jackson Rogers of New Jersey complained that ‘all the rights we have under the laws of the country are embraced under the definition of privileges and immunities,’” but rejecting Rogers’s statements as “hyperbole”).

350. *Corfield*, 6 F. Cas. at 552.

oysters was thus like Alaskans getting money from the state as a result of its oil resources. Itinerant out-of-staters in Alaska have no right to share in the proceeds of state natural resources.³⁵¹ This is why Justice Washington concluded in *Corfield v. Coryell* that the right to harvest oysters was not fundamental.³⁵² The correct understanding of the words *privileges* and *immunities* in Article IV, Section Two, and the Fourteenth Amendment is that only civil rights are privileges or immunities. This is confirmed, as we said earlier, by Section Two of the Fourteenth Amendment, which plainly contemplates the constitutionality of state deprivations of the political right to vote.³⁵³

It should be mentioned that some individuals, mostly opponents of the Fourteenth Amendment, claimed in 1868 that they understood the Amendment to guarantee African-Americans the right to vote.³⁵⁴ There was enough disagreement, however, to convince the Reconstruction Framers that another constitutional amendment beyond the Fourteenth was needed to secure the right of African-American men to vote.³⁵⁵ As a result, the Fifteenth Amendment, which prohibited disenfranchisement on the basis of race, was approved by Congress and ratified by three-quarters of the states in 1870.³⁵⁶ The prevailing understanding in 1868 was that Section One of the

351. See *State Dep't of Revenue v. Cosio*, 858 P.2d 621, 627 (Alaska 1993) (reasoning that dividends from the Alaska Permanent Fund are a governmental "grace" and not a fundamental right, such as education).

352. *Corfield*, 6 F. Cas. at 552.

353. See *supra* notes 113–15 and accompanying text.

354. This was one of the objections opponents of the Amendment made in the Indiana legislature:

Fourth. The first section places all persons, without regard to race or color, who are born in this country, and subject to its jurisdiction, upon the same political level, by constituting them "citizens of the United States, and of the State wherein they reside," thus conferring upon the negro race born in this country the same rights, civil and political, that are now enjoyed by the white race, and subject to no other conditions than such as may be imposed upon white citizens, including, as we believe, the right of suffrage.

Fifth. But lest there might still be power in a State to prescribe color and race as qualifications for voting, the second section reduces the congressional representation in any such State, "in the proportion which the number of male negroes over the age of twenty-one years so excluded, shall bear to the whole number of male citizens twenty-one years of age, in such State."

H.R. JOURNAL, 45th Gen. Assemb., Reg. Sess. 102–03 (Ind. 1867). Incidentally, these objections misstate what the Amendment actually says by claiming that race is explicitly mentioned.

355. See NELSON, *supra* note 25, at 123–33 (highlighting the various facets of the debate over whether the Fourteenth Amendment granted the right to vote).

356. The Fifteenth Amendment reads:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

Fourteenth Amendment guaranteed equal civil rights, but it did not touch the subject of political rights, which remained the province of the states. Congressmen and senators expressed this view repeatedly.³⁵⁷ In the debate on the Civil Rights Act of 1866, which did not protect African-American voting rights, Congressman James F. Wilson observed practically that “the fall elections lie between us and posterity, and some fear the result of the former more than they consider the welfare of the latter. . . . We will stop short of what most of us know we ought to do [which is to guarantee African-American men the right to vote].”³⁵⁸ Professor William Nelson concludes in his history of the Fourteenth Amendment that a large majority rejected the notion that the Amendment protected a right of African-American men to vote.³⁵⁹ The political climate changed dramatically in 1868 when Ulysses S. Grant was elected President, and when the former Confederate States were allowed to once again send delegations to Congress. Suddenly, the advocates of voting rights for African-American men had a politically popular war hero in the White House on their side.³⁶⁰ Moreover, Republicans in Congress had political reasons for wanting African-American men to be able to vote in the South.³⁶¹ As a result there was a sudden and dramatic shift between 1866 and 1870 such that voting rights for African-American men went from being unpopular to enjoying national support. During the debate over whether to adopt the Fifteenth Amendment, Senator Cragin announced, “I remember that it was announced upon this floor by more than one gentleman, and contradicted and denied by no one so far as I recollect, that [the Fourteenth] amendment did not confer the right of voting upon anybody”³⁶² Hence, the need for the Fifteenth Amendment. The Reconstruction generation’s belief that the Fifteenth Amendment was necessary to secure political equality is proof enough that the Fourteenth Amendment had only secured equality of civil rights.

Even without the legislative history that supports our understanding of Section One of the Fourteenth Amendment (that it only guaranteed equality as to civil rights), the textual argument that it did not extend to equality of political rights is very strong. Section Two of the Fourteenth Amendment clearly permits states to disenfranchise voters so long as the basis of repre-

357. See NELSON, *supra* note 25, at 125–26 (providing examples from the debate over the Amendment expressing the view that the Amendment did not confer the right to vote).

358. CONG. GLOBE, 39th Cong., 1st Sess. 2948 (1866). The same view was expressed about the Civil Rights Act of 1866 by Representative Thayer: “[N]obody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.” *Id.* at 1151.

359. NELSON, *supra* note 25, at 125.

360. See Ulysses S. Grant, President of the U.S., First Inaugural Address (Mar. 4, 1869) (supporting the ratification of the Fifteenth Amendment), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 145, 148 (1989).

361. See NELSON, *supra* note 25, at 46–47 (explaining that one way for Republicans to retain political power was to enfranchise Southern African-Americans).

362. CONG. GLOBE, 40th Cong., 3d Sess. 1004 (1869).

sentation is reduced proportionally.³⁶³ The inexorable conclusion one is left with from reading Section Two of the Fourteenth Amendment is that Section One of that Amendment did not grant anyone the political right to vote even though it mandated equality in civil rights. This textual evidence is, we think, the best evidence that Section One of the Fourteenth Amendment is about civil rights only and not a grant of any political rights.³⁶⁴

2. *Political Rights Have Long Been Understood to Imply Full Civil Rights.*—On their face, the Fifteenth and Nineteenth Amendments only forbid disenfranchisement, but originally they were understood to have implications beyond that. First, they were understood to guarantee *full political rights*, not simply the right to vote in elections. Second, they were understood to establish that race and sex are common but inappropriate subjects of discriminatory legislation, including legislation that only denies the most exclusive and rarely bestowed group of rights—political rights. If political rights may not be denied on a particular basis, then civil rights, which are by definition less exclusive, must not be denied on that basis either. In other words, political rights exist at the apex of a rights hierarchy, and a guarantee that they will not be denied on a particular basis creates a presumption that denying civil rights on that basis violates the Fourteenth Amendment.³⁶⁵

This second conclusion is our ultimate argument, but to get there, the preliminary argument that the Fifteenth and Nineteenth Amendments should be read to guarantee full political rights must be made. We agree with Professor Vikram Amar's argument that voting is the essence of all political activity—legislators and jurors vote—and so the voting-rights amendments pertain to these activities.³⁶⁶ There is significant support that suggests these amendments were understood to have applied to all these forms of voting both in 1870 when the Fifteenth Amendment was adopted and in 1920 when the Nineteenth Amendment was adopted.³⁶⁷ Although Professor Amar's

363. See *supra* note 115 and accompanying text.

364. The other prominent argument that political rights are excluded from Section One is that because the privileges and immunities of Article IV were only about civil rights, the privileges and immunities of Section One must be about civil rights only also. But it may be that the “privileges and immunities of citizens of the several states” are different than the “privileges or immunities of citizens of the United States,” so we find this argument somewhat less compelling.

365. Melissa Saunders says that at the time of the framing of the Fourteenth Amendment everyone “agreed that it should guarantee Blacks the same ‘civil’ rights as everyone else, [but] few believed it should guarantee them the same ‘political’ rights, and fewer still that it should guarantee them full ‘social’ equality.” Saunders, *supra* note 15, at 270.

366. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 206 (1995) (arguing that a juror's vote is just as important to healthy representative democracy as an electoral vote).

367. See *id.* at 239 (“This *in haec verba* formulation is itself strong evidence of the linkage between voting and jury service as part of a political rights package in the Fifteenth Amendment.”); Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1165 (1993) (noting that the passage of the Nineteenth Amendment helped to create the

argument that all political rights involve voting³⁶⁸ is in tension with the understanding of that Amendment espoused by those members of the Fortieth Congress who denied that the Fifteenth Amendment would guarantee the right to hold office,³⁶⁹ other members took the opposite position.³⁷⁰ And while it cannot be ignored that Congress failed to pass a proposed draft of the Fifteenth Amendment that explicitly included the right to hold office,³⁷¹ we believe that the inclusion would have been superfluous.

During the period between the adoption of the Fourteenth and Nineteenth Amendments, the understanding that the right to vote carried along with it other political rights held sway. It was central to an especially vicious attack on the women's suffrage movement made in 1885 by Orestes Brownson, a former abolitionist and women's-suffrage supporter who in his later years denounced equality and democracy with all the vigor he had once used to support them.³⁷² Brownson claimed that if women were given the vote, they would soon compete with their husbands for office, leaving "one or the other doomed to the mortification of defeat," and in either case, rendering the women "hideous monster[s]."³⁷³ More specifically, the political right to serve on a jury was also presumed by many to be included in the right to vote. Thus, Assemblyman James Shea of Essex, New York, warned in 1910 that "[i]f we give women the vote our wives will soon be absorbed in caucuses instead of in housekeeping. They will be drafted on juries too."³⁷⁴ Assemblyman Shea's conclusion is not a nonsequitur. One popular objection to enfranchising women was that women were unable to fulfill the duties that are connected to political rights: jury duty and military service.³⁷⁵ Both require time away from the home and care of children. The opponents of the Nineteenth Amendment thus argued that it was fair and appropriate to deny women the right to vote.

The U.S. Supreme Court has never drawn a connection between the right to vote and the right to serve on a jury. Professor Tushnet has argued that the decision in *Strauder v. West Virginia*, although it "rested on the

"indicia of full citizenship both in the minds of woman suffragists and in the attitudes of American society").

368. Amar, *supra* note 366, at 250.

369. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 888 (observing that a provision guaranteeing the right to hold office was removed in the process of drafting the Fifteenth Amendment).

370. *Id.* at 888 n.111.

371. *Id.* at 888.

372. PATRICK W. CAREY, ORESTES A. BROWNSON: AMERICAN RELIGIOUS WEATHERVANE 277–81 (2004).

373. Brownson, *supra* note 245, at 632–33.

374. KEYSSAR, *supra* note 43, at 196.

375. See Rogers M. Smith, "One United People": *Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229, 238 (1989) (tracing the roots of this argument to classical republican theorists).

Fourteenth Amendment,” must surely have been based conceptually on the Fifteenth.³⁷⁶ He says,

[B]ecause the Constitution guaranteed the most important political right there [which is the right to vote in the Fifteenth Amendment], it would have been senseless to insist that a less important political right [like the right to serve on a jury] was unprotected, even though the framers of the Fourteenth Amendment may have thought it protected no political rights at all.³⁷⁷

Professor Akhil Amar has made a similar claim.³⁷⁸

The Fifteenth Amendment guarantee of equal political rights for men clarified that race is an impermissible basis for discrimination in voting just as the Nineteenth Amendment would later do for sex.³⁷⁹ The Fifteenth Amendment did so first by enshrining a reminder that race discrimination is insidious and inappropriate as to political rights.³⁸⁰ Additionally, and more significantly, by prohibiting denials of political rights on the basis of race, the Fifteenth Amendment completed the process of making black men equal to white men under the law (although courts did not always honor the new social order). This effect was fully understood by at least some of the Framers of the Fifteenth Amendment. Senator John Sherman (younger brother of General William T. Sherman),³⁸¹ speaking in favor of the Fifteenth Amendment, expressed an understanding very close to our claim that political rights are at the apex of a rights hierarchy:

I hope yet before this session closes to have the satisfaction of bringing here the vote of the Legislature of Ohio to make the cap-sheaf upon the pyramid of liberty which will secure to every man in this country equal rights before the law, at the ballot-box, to hold public office³⁸²

Senator Allen G. Thurman challenged this view—sort of:

My colleague says that he hopes to have the privilege before this session adjourns of presenting from his State a ratification of the fifteenth amendment, the cap-sheaf of this great something or other—

376. Tushnet, *supra* note 330, at 1209.

377. *Id.*

378. See Amar, *supra* note 328, at 470 (“[T]he famous case of *Strauder v. West Virginia* is best understood, not as a pure Fourteenth Amendment case, but also as anticipating blacks’ Fifteenth Amendment right to equal political participation.” (footnote omitted)).

379. It must be remembered that the Fourteenth Amendment is thought by no one to prohibit all discrimination. Every law is discriminatory. The Amendment forbids a particular sort of discrimination. What sort is the topic of this Article.

380. Justice Scalia gives that distinction to the combined effects of the Thirteenth Amendment. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95–96 n.1 (1990) (Scalia, J., dissenting) (stressing the role of the Thirteenth Amendment in leaving “no room for doubt” that laws that discriminate on the basis of race are invalid). But the Fifteenth Amendment is a better textual hook for his assumption.

381. WINFIELD S. KERR, *JOHN SHERMAN: HIS LIFE AND PUBLIC SERVICES* 164 (1907).

382. CONG. GLOBE, 41st Cong., 2d Sess. 211 (1869).

pyramid, I believe he called it, of civil and human liberty—this thing which disregards color, which will reject no man because of the color of his skin, which utterly detests and abhors caste, and is to make this country the exemplar of that divine impartiality which prevails in the kingdom to come. Ah! when the question comes whether John Chinaman shall vote, I hope my friend will be able then to explain how it is that this fifteenth amendment excludes him.³⁸³

Senator James Nye responded to Thurman, saying, “My friend from Ohio inquired what we were going to do with the Chinese. Take care of them as men; give them all the rights to which they are entitled.”³⁸⁴ Later in the same speech, employing Senator Sherman’s cap-sheaf metaphor, Senator Nye said, “Is not the fifteenth amendment worthy of this labor? To my mind it is the cap-sheaf and the crowning stone and glory of the party of which it was born.”³⁸⁵

Reconstruction commentators in the states also understood that if black men were guaranteed the right to vote, they would be the full legal equals of white men. Governor Thomas Swann of Maryland, in his January 1867 message to the General Assembly, referring to Section Two of the Fourteenth Amendment said,

[T]he proposed change in the basis of representation, points to negro suffrage, and the equalization of the races. . . .

My opposition to any farther tampering with the Constitution, proceeds upon the honest belief, that Congress controls all the power needed to protect the country against disloyalty, whatever form it may assume, if any such exists, and that Constitutional Amendments, to force equality between the races, can only result in the ultimate annihilation of the weaker race. Some time ago, the absorbing topic among political agitators, was amalgamation: now it is “manhood suffrage,” which means amalgamation, and the power to hold office, without regard to race or color, and every other attribute of perfect equality between the races.³⁸⁶

The same sentiment was expressed years later by R.L. Gordon at the 1901–1902 Constitutional Convention of Virginia, where he stated:

I cannot do justice to my own feelings without . . . commenting upon . . . that great fifteenth amendment . . . the hearts of the Virginia people have never approved it, and true Virginians can never approve it. We do not believe that the colored man is the equal of the white man, and that is what the fifteenth amendment means.³⁸⁷

383. *Id.* at 212.

384. *Id.* at 221.

385. *Id.*

386. MESSAGE OF GOVERNOR SWANN, *supra* note 172, at 25.

387. KEYSAR, *supra* note 43, at 105 (alterations in original).

A post-ratification statement from an opponent of the Amendment is unlikely to have exaggerated the rights it guaranteed.

3. *The Conundrum of Alien Suffrage.*—One peculiarity of American history might initially seem to undermine our claim that political rights always and everywhere necessarily imply that the rights bearer also has civil rights. This peculiarity is the now-forgotten practice of alien suffrage or voting rights.³⁸⁸ Though allowing aliens to vote fell out of fashion and came to a final end in 1930, it was allowed in some jurisdictions for decades, beginning in the earliest days of the republic. This was the case despite the fact that prior to the Civil War aliens were not generally thought to be protected by the Constitution and did not have equal civil rights.³⁸⁹ Alien suffrage had lost popularity after the founding and had largely disappeared by the Jacksonian period, but within twenty years it began to experience resurgence.³⁹⁰ Support for alien suffrage had very little to do with ideology, and in any given area, it was the party that felt it had the most alien votes to gain that supported alien suffrage.³⁹¹ As of 1868, aliens could vote in at least some elections in ten out of thirty-seven states.³⁹² Nearly one quarter of the states in 1868 gave aliens the political right to vote.³⁹³ Yet at common law, aliens did not have equal civil rights.³⁹⁴ Property rights in particular were limited:

An alien cannot acquire a title to real property by descent, or created by other mere operation of law. . . . If an alien purchase land, or if land be devised to him, the general rule is, that in these cases he may take and hold, . . . but upon his death the land would instantly and of

388. One of the rationales of *Minor v. Happersett* was that citizenship and voting were not coextensive because children were citizens but could not vote, while aliens were not citizens yet some could vote. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 172–74 (1875) (exemplifying that voting rights are not given to all citizens in many states and explaining why the Framers did not intend for citizenship to necessarily include suffrage).

389. Gerald Neuman explains in *Strangers to the Constitution* that—although the issue was hotly debated during the Alien and Sedition Acts controversy (with Madison firmly of the opinion that aliens indeed had constitutional rights)—the Supreme Court steered clear of finding alien constitutional rights prior to the Civil War, but did so decisively afterward in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 61–62 (1996).

390. KEYSSAR, *supra* note 43, at 32–33.

391. *Id.* at 40.

392. Alabama (terminated 1901), Arkansas (terminated 1926), Florida (terminated 1895), Georgia (terminated 1877), Indiana (terminated 1921), Kansas (terminated 1917), Michigan (terminated 1894), Nebraska (terminated 1918), Oregon (terminated 1914), and Wisconsin (terminated 1908). *Id.* app. at 371–73 tbl.A.12.

393. See *id.* (showing that by 1868, ten states had enacted constitutional provisions that recognized the rights of declarant aliens to vote).

394. See 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* *64 (John M. Gould ed., 14th ed. 1896) (noting that aliens had an incentive to become citizens “since they are unable, as aliens, to have a stable freehold interest in land, or to hold any civil office, or vote at elections, or take any active share in the administration of the government”).

necessity (as the freehold cannot be kept in abeyance), without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent.³⁹⁵

New York and other states were reportedly in the practice of granting particular aliens, by name, the special privilege of being able to legally hold real property.³⁹⁶

The Taney Court stayed out of such matters and only scrutinized state laws for conflicts with the commerce power, treaties, or foreign relations.³⁹⁷ In no case before the Civil War did the Court hold that aliens possessed civil rights.³⁹⁸ The Framers of the Fourteenth Amendment discussed the question of alien rights, and they made a deliberate decision to give aliens some but not all of the civil rights enjoyed by citizens.³⁹⁹ The Framers conferred equal civil rights only on all citizens who were the class of persons who enjoyed the privileges or immunities of citizenship. Citizens were defined as all persons born in the United States and subject to the jurisdiction thereof.⁴⁰⁰ The Framers of the Fourteenth Amendment did extend some civil rights to resident aliens because they protected the due process and equal protection rights of all “person[s].”⁴⁰¹ The decision to give citizens greater civil rights than were given to aliens was made deliberately and knowingly.⁴⁰²

It was not until 1886 that the U.S. Supreme Court held that aliens are persons under Section One of the Fourteenth Amendment who are entitled to due process and equal protection rights. In its landmark 1886 decision in *Yick Wo v. Hopkins*,⁴⁰³ a case that concerned the issuance of licenses for Chinese owners of laundries in San Francisco, the U.S. Supreme Court, relying on “the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States,” held that aliens “still . . . subject[s] of

395. *Id.* at *54.

396. *Id.* at *69–70.

397. NEUMAN, *supra* note 389, at 61.

398. *Id.*

399. As Professor Harrison has explained,

It was clear in the nineteenth century that citizens had rights that aliens, who were persons but not citizens, did not. Most importantly, aliens generally were not permitted to own real property except as specifically provided by state law. . . . This commonplace about the rights of citizens and aliens arose during the debates on the Civil Rights Act. The word “inhabitants,” which had appeared in the original draft of Section 1, was changed to “citizens” in order to avoid any implication that it would enable aliens to own real property.

Harrison, *supra* note 15, at 1442 (footnotes omitted).

400. U.S. CONST. amend. XIV, § 1.

401. *Id.*

402. See NELSON, *supra* note 25, at 52 (“[W]hat ultimately became section one [of the Fourteenth Amendment] was designed to give constitutional stature to a basic distinction in mid-nineteenth-century American law between the rights of aliens and the rights of citizens.”); Harrison, *supra* note 15, at 1442 (“A striking feature of the second sentence of Section 1 is that the first clause refers to citizens while the latter two refer to persons.”).

403. 118 U.S. 356 (1886).

the Emperor” were nonetheless entitled to equal protection of the laws.⁴⁰⁴ Such aliens would not have been citizens with full civil rights but for the Court holding that a law that was racially neutral on its face could not be applied by executive officials in a racially discriminatory way.⁴⁰⁵ Executive officials who applied facially neutral laws in a racially discriminatory way denied an alien his rights as a person who was entitled to the equal *protection* of the laws. This was the case as well in states where laws against murder and assault were not as equally enforced for the protection of African-Americans as for whites.⁴⁰⁶

Seven years after its landmark decision in *Yick Wo v. Hopkins*, the U.S. Supreme Court held in *Fong Yue Ting v. United States*⁴⁰⁷ that the government could expel even resident aliens who had been in the country for twenty years without judicial review of the expulsion.⁴⁰⁸ The three dissenters in *Fong Yue Ting* protested passionately, saying it was a violation of the due process rights of aliens to allow executive officials to deport them without the concurrence of an Article III federal court.⁴⁰⁹ The Court in *Fong Yue Ting* did affirm that aliens within the U.S. were entitled to some of the same

404. *Id.* at 358, 373–74. The case additionally held that even though the law in question was facially neutral, it was effectively class legislation and violated Yick Wo’s Fourteenth Amendment rights:

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373–74. The Court has more recently held that the Equal Protection Clause guarantees alien children in the United States illegally the same public education as citizens. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982) (explaining that the state must show some substantial state interest is furthered in order to deny free public education to children in the United States illegally).

405. *Yick Wo*, 118 U.S. at 373–74.

406. Harrison, *supra* note 15, at 1448 (“If a state refuses to enforce its criminal battery laws when ex-slaves are attacked, it has violated the Equal Protection Clause.”).

407. 149 U.S. 698 (1893).

408. *See id.* at 731 (explaining that whether and under what conditions aliens should be allowed to remain within the United States is a question for Congress to decide).

409. *Id.* at 733 (Brewer, J., dissenting) (“[T]hey are within the protection of the Constitution, and secured by its guarantees against oppression and wrong”); *id.* at 750 (Field, J., dissenting) (“And it will surprise most people to learn that any such dangerous and despotic power lies in our government . . . a power which can be brought into exercise whenever it may suit the pleasure of Congress, and be enforced without regard to the guarantees of the Constitution”); *id.* at 763 (Fuller, C.J., dissenting) (“No euphuism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial.”).

civil rights as citizens, but apparently they were not entitled to be accorded due process of law.⁴¹⁰ Professor Gerald Neuman describes the U.S. government's summary power to deport even longtime resident aliens without an Article III court's permission as being "an anomalous qualification to the general recognition of aliens' constitutional rights within [the confines of the] United States."⁴¹¹ In light of the original history of Section One of the Fourteenth Amendment,⁴¹² this conclusion seems overly optimistic even though it is clearly morally desirable.

U.S. immigration law for many years did perpetuate distinctions that can only be described as distinctions of caste. Federal law limited naturalization rights to "free white person[s],"⁴¹³ although the law was later amended to include "aliens of African nativity and to persons of African descent."⁴¹⁴ Those aliens who fell outside those racial classifications were excluded from eligibility to become U.S. citizens. Shockingly, the determination of whether an Asian-Indian alien was white could depend in part on his caste! The case of *In re Mohan Singh*⁴¹⁵ is a notable example. It concerned Mohan Singh, "a high caste Hindu, competent in all moral and intellectual respects," who had applied for citizenship.⁴¹⁶ After explaining that Singh was a member of the Aryan branch of the Caucasian race, and therefore arguably white,⁴¹⁷ the district court concluded:

In the absence of an authoritative declaration or requirement to that effect, it would seem a travesty on justice that a refined and enlightened high caste Hindu should be denied admission on the ground that his skin is dark, and therefore he is not a "white person," and at the same time a Hottentot should be admitted merely because he is "of African nativity."⁴¹⁸

If aliens were allowed to vote but their civil rights were not protected, our argument that when political rights are accorded to a group, civil rights are also conferred would be somewhat undermined. But the jurisdictions that gave aliens the right to vote also protected the aliens' civil rights. Generally, these jurisdictions gave voting rights and full civil rights to aliens who had declared their intent to become citizens, "declarant aliens."⁴¹⁹ The Alabama

410. *See id.* at 723–24 (explaining that although Chinese aliens are entitled to the safeguards of the Constitution, Congress may still order them to be removed and deported).

411. NEUMAN, *supra* note 389, at 62.

412. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (stating that revised Section One of the Fourteenth Amendment prevents a state from denying equal protection and due process to any person, not just a citizen).

413. 2 KENT, *supra* note 394, at 64.

414. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

415. 257 F. 209 (S.D. Cal. 1919).

416. *Id.* at 209.

417. *Id.* at 212.

418. *Id.*

419. The Michigan Constitution of 1850 provided that "every white male inhabitant residing in this State on the first day of January, one thousand eight hundred and fifty, who has declared his

Constitution, for example, provided that “all persons resident in this State, born in the United States, or naturalized, or who shall have *legally declared their intention to become citizens* of the United States, are hereby declared citizens of the State of Alabama, possessing *equal civil and political rights and public privileges*.”⁴²⁰ As the Alabama example shows, it was at one time thought possible to be a state citizen even if you were not a United States citizen,⁴²¹ and naturally these “citizens” were able to vote and were given full civil rights under state law. Alien suffrage was particularly widespread in the territories, where frequently alien electors would become citizens automatically when the territory gained statehood.⁴²² The State of Vermont took a slightly different approach by allowing alien voting rights until 1828 without requiring aliens to declare their intention to become citizens.⁴²³ Instead, upon completing a one-year residency requirement and taking an oath of allegiance, aliens were given all the political and civil rights of citizens.⁴²⁴

Illinois had a unique experience with alien voting rights, one that illustrates how constitutional language can bind a court even when the legislature may have “intended” no such thing. (And it came long before the Framers of the Fourteenth Amendment’s drafters chose the word *person* in the Equal Protection and Due Process Clauses—so the Framers of the Fourteenth Amendment were effectively forewarned.) The Illinois Constitution of 1818 read, “In all elections, all white male *inhabitants* above the age of twenty-one years, having resided in the state six months next preceding the election, shall enjoy the right of an elector”⁴²⁵ So, in 1840, the Illinois Supreme Court held that lack of U.S. citizenship was *not* grounds for denying voting rights in Illinois.⁴²⁶ Then, in 1848, the

intention to become a citizen of the United States . . . shall be an elector and entitled to vote” MICH. CONST. of 1850, art. VII, § 1. The Michigan constitution also protected the property rights of alien residents: “Aliens who are, or who may hereafter become, *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property, as native born citizens.” *Id.* art. XVIII, § 13.

420. ALA. CONST. of 1867, art. I, § 2 (emphasis added).

421. NEUMAN, *supra* note 389, at 64–65. A number of Supreme Court cases dealt with this issue. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (concluding that state citizenship exists for internal purposes); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817) (deciding that the federal government has exclusive right to confer citizenship); *Collet v. Collet*, 2 U.S. (2 Dall.) 294, 296 (1792) (finding that state and federal governments have concurrent right to bestow citizenship). In 1867, Alabama still believed it had the right to declare state citizenship. See *supra* note 420.

422. KEYSAR, *supra* note 43, at 38.

423. VT. CONST. of 1777, ch. II, § XXXVIII; see also WILLIAM C. HILL, *THE VERMONT STATE CONSTITUTION: A REFERENCE GUIDE* 13–14 (1992) (describing the change to citizenship-voting requirements made in the 1828 Vermont Constitution).

424. NEUMAN, *supra* note 389, at 64.

425. ILL. CONST. of 1818, art. II, § 27 (emphasis added).

426. *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 415 (1840).

Constitution was amended to limit suffrage to “every white male citizen above the age of twenty-one years, having resided in the state one year.”⁴²⁷

The point is that when a class of people has been granted political rights, equal civil rights are traditionally guaranteed as well. And this makes a good deal of sense given the presumptions about a group’s capabilities that underlie the decision to confer the right to vote. Simply put, it is irrational to deny civil rights to a person on a basis that may not be used to deny political rights to that same person. What kind of a government would allow someone to vote for President, Congress, and Governor without allowing that person the right to own property or enter into contracts? Consider that the exercise of civil rights generally has a less direct impact on the fate of other members of society than does the exercise of political rights. To grant political rights, especially to a large group that could easily become a perpetual majority (women, for example) is to say, “We trust you to make important decisions.” To say otherwise by permitting sex inequality in civil rights is certainly unreasonable. This is precisely what the Court decided in *Adkins v. Children’s Hospital*,⁴²⁸ the 1923 post-Nineteenth Amendment case that found that women had the same civil right as men to enter into employment contracts. Justice Sutherland, writing for the majority following the adoption of the Nineteenth Amendment, proclaimed that “we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract, which could not lawfully be imposed in the case of men under similar circumstances.”⁴²⁹ This case severely undermined *Muller v. Oregon*, and it extended Lochnerian liberty of contract equally to women as well as to men. Strikingly, Justice Sutherland’s opinion for the Court followed the change wrought in the legal status of women as to their civil rights as a result of the adoption of the Nineteenth Amendment.

C. *Calls for an End to Sex Discrimination: More on the History of the Nineteenth Amendment*

Most people living between 1868 and 1920, including majorities of the Supreme Court during this period of time, did not believe women fell totally outside of the protection of Section One of the Fourteenth Amendment. Rather, they believed that it was not arbitrary or irrational to limit women’s civil rights any more than it was arbitrary or irrational to limit children’s civil rights. This conclusion was based on the facts as people living in 1868 knew and understood them, and these views were enshrined to some degree in Section Two. Considering that the Constitution did not yet protect women’s right to vote, it must have seemed reasonable and proper to give women less control over their own lives, including lesser civil rights. Many people living

427. ILL. CONST. of 1848, art. VI, § 1.

428. 261 U.S. 525 (1923).

429. *Id.* at 553.

then simply did not think that sex discrimination created a system of caste.⁴³⁰ Today, we know better.

The Nineteenth Amendment was the culmination of fifty years of people fighting for equal rights for women. As Professor Siegel explains in her article *She the People*, the ongoing struggle for women's rights that began with the Fourteenth Amendment and continued unceasingly for decades resulted in the adoption of the Nineteenth Amendment in 1920.⁴³¹ Professor Siegel shows that the supporters of the Nineteenth Amendment viewed it as a repudiation of married women's legal subordination to their husbands.⁴³² The legislative history shows that the Nineteenth Amendment was the final step in enabling the Constitution to protect women as well as racial minorities from discriminatory legislation that created a system of caste.⁴³³ The first Supreme Court case to address the issue of sex discrimination following adoption of the Nineteenth Amendment, *Adkins v. Children's Hospital*, embraced the congressional understanding that the Amendment would end sex discrimination,⁴³⁴ but the enlightenment was to be short-lived.

1. The Congressional Debates.—The legislative history of the Nineteenth Amendment reveals important things about its original public meaning in 1920: supporters of the Nineteenth Amendment believed and said that it would make women equal to men under the law. The Nineteenth Amendment was seen by both those who supported it and by those who opposed it as being nothing less than the final step in a process begun by the Reconstruction Amendments. The opponents' objection to giving women the right to vote was that they were unfit for work outside of the home and that they were unable to serve in the military or on juries because of the damage this would cause to family life.⁴³⁵ This objection was soundly rejected.

a. The goal was full equality.—Senator William H. Thompson of Kansas praised Susan B. Anthony during the debates over the Amendment (which was named for her),⁴³⁶ and he proclaimed that “[s]lowly all thinking and justly disposed peoples are moving up to her advanced position. Her dream has all but become a grand reality.”⁴³⁷ Of course, Susan B. Anthony's

430. See *supra* notes 247–52 and accompanying text.

431. Siegel, *supra* note 6, at 968–69.

432. See *id.* at 951 (stating that ratifying the Nineteenth Amendment broke with “understandings of the family that had organized public and private law” and that “equal citizenship for women includes freedom from subordination in or through the family”).

433. See *infra* subsection III(C)(1)(b).

434. *Adkins*, 261 U.S. at 553.

435. See *infra* note 461 and accompanying text.

436. See Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 6 (2000) (referring to the Nineteenth Amendment as the “Susan B. Anthony Amendment”).

437. 56 CONG. REC. 8345 (1918).

dream of equality for women was not confined to giving them voting rights,⁴³⁸ nor did members of Congress think that the constitutional change they were proposing meant only that women would henceforth be able to vote. Instead, they thought the Nineteenth Amendment would make women equal to men under the law. By returning the Constitution to sex-neutrality and guaranteeing women the right to vote, the proponents of the Nineteenth Amendment achieved their goal. In support of the Amendment, Congressman Edward C. Little of Kansas declared that “[i]f common sense is more potent than the sword . . . woman should now be accorded the same opportunity to take part in life that men have always had.”⁴³⁹ He firmly rejected the idea that physical differences between men and women should limit a woman’s legal rights: “God Almighty placed upon her certain duties from which you escape, and you are wonderfully fortunate that you do, and every time you think of it you should blush for shame that you would deny any rights you have because of the responsibility that God has placed upon her.”⁴⁴⁰

Even women’s unequal status in the family was condemned during the debates, and the measure under consideration, the Nineteenth Amendment, was seen as a remedy. Congressman Little rather sentimentally called for a change in the status of wives and mothers:

I hope, as my dear wife holds my hand for the last time as I pass out into the starlight, and as my dear mother extends her sainted hand to me as the trumpets sound the reveille on the other side, both will know that the sons for whom they went down into the valley of the shadow have granted to the mothers of this most august and stateliest Republic of all time *the same power, authority, and opportunity to fashion and preserve the lives of their sons that is possessed by their fathers.*⁴⁴¹

Senator Miles Poindexter of Washington made an appeal for full equality by pointing out that the Western states had “long since overcome the prejudices which heretofore have discriminated against women in the suffrage” with the result that women were recognized “as equal partners in the State as well as in business and in the home.”⁴⁴² “With us,” Poindexter explained, “it has ceased to be an experiment, and most of the antisuffrage arguments, based upon theory and dire prophecy, have no effect in the face of realities.”⁴⁴³

b. The Nineteenth Amendment was tied to the Reconstruction Amendments by supporters and opponents.—The Nineteenth Amendment

438. See, e.g., KATHLEEN BARRY, SUSAN B. ANTHONY: A BIOGRAPHY OF A SINGULAR FEMINIST 127–29 (1988) (discussing Anthony’s campaign for coeducation).

439. 58 CONG. REC. 80 (1919).

440. *Id.*

441. *Id.* (emphasis added).

442. 56 CONG. REC. 8343 (1918).

443. *Id.*

was understood to be a continuation of the constitutional reform that began with the Reconstruction Amendments, a fact that strongly supports our argument that the same principles were at stake. Senator Thompson spoke of the Amendment as a measure coming fifty years later than it should have:

Woman suffrage is coming as certainly as the sun is sure to rise to-morrow. The struggle is almost over. The victory is about won. A story is told of one of our soldier boys returning to camp from an afternoon off and who was stopped by a sudden call of "Halt!" from a sentry. "Halt? . . . Don't halt me; I am a half hour late as it is." So when Senators cry "Halt!" to the Federal amendment I reply, "Great heavens, our Nation is a half century late with this reform now!"⁴⁴⁴

Senator Robert L. Owen of Oklahoma, responding to Connecticut Senator Frank B. Brandegee's opposition to the Nineteenth Amendment on federalism grounds, argued that the Nineteenth Amendment was justified and appropriate for the same reasons that the Fourteenth and Fifteenth Amendments were needed:

I merely call the attention of the Senator from Connecticut to the fourteenth and fifteenth amendments, which were advocated by the particular party to which he belongs, and which were the fruit of the Civil War, and the adoption of which was brought about by the fact that a moral question arose concerning human slavery, and the Constitution was amended by a vote of the States. The Senator, if he recognizes that principle in the case of enfranchising the negro race, can not, I think, consistently argue against the application of the same principle in amending the Constitution with regard to the white women of this country.⁴⁴⁵

Congressman Frank Clark of Florida also acknowledged the relationship between the Nineteenth Amendment and the Reconstruction Amendments, but to his thinking, this was part of the problem: "The fourteenth and fifteenth amendments were the offspring of the bitterest sectional hate and most unreasoning party passion that ever blighted any land," he explained, concluding, "God grant that our beloved country may never be cursed with its like again."⁴⁴⁶

There were of course still those who argued that sex and race were not relevantly similar. The old fears of family disruption were put forward again. But the enlightened Congressman Little responded to such arguments with a dose of reality, reiterating that the struggle for women's rights was entwined with the struggle against race discrimination:

Men have argued here for 50 years that woman suffrage would break up the home. But in the Western States, where we have had woman

444. *Id.* at 8345.

445. *Id.* at 8349.

446. 58 CONG. REC. 91 (1919).

suffrage in one form and another for years, we know of no family that has ever been disrupted by quarrel over politics.⁴⁴⁷

Continuing, he vividly espoused the race–sex analogy, making very clear that the same principles were at stake:

The long and short of the whole matter is that for centuries you have treated woman as a slave, dragged her over the pages of history by the hair, and then you pretend to think she is an angel, too good to interfere in the affairs of men. Give her now a fixed, reasonable status, as becomes a rational human being like yourself.⁴⁴⁸

Senator Brandegee dismissed the idea that women were in any sense slaves, but his argument was trite:

All this lingo about the women of America being enslaved is pure trumpery and foolishness. You can not get on a trolley car without having to take off your hat and give up your seat to every woman who gets aboard the car, and they are petted and flattered, and are the queen bees in this country, and there is no nation in the world where a woman’s lot is so happy as it is in the United States of America.⁴⁴⁹

In the same vein, Senator Brandegee also said that “all this talk about striking the manacles and the shackles off the limbs of the enslaved women of this country is perfect tommy-rot. . . . That is all there is to it.”⁴⁵⁰ Brandegee apparently agreed with Congressman Clark, who declared that “no woman in Florida has ever yet needed protection that she did not get it [sic] and the day will never come when the men of my State will decline to come to the rescue of a woman in distress.”⁴⁵¹

Brandegee and Clark’s specious claim that women did not face discrimination akin to race discrimination is further eroded by other portions of the debates, which reveal that those men opposed the Nineteenth Amendment largely because of their belief that it would finish the job the Reconstruction Amendments had begun. The Nineteenth Amendment, they said, would precipitate a “second Reconstruction” in the South by reigniting the fight for equal rights.⁴⁵² According to Congressman Clark:

While the great masses of the negroes in the South are contented with existing conditions, some of the alleged leaders of the race are agitators and disturbers and are constantly seeking to embroil their people in trouble with the white people by making demands for social recognition which will never be accorded them; and the real leaders in

447. *Id.* at 80.

448. *Id.*

449. 56 CONG. REC. 8350 (1918).

450. *Id.*

451. 58 CONG. REC. 89 (1919).

452. *See id.* at 90 (statement of Rep. Clark) (“I warn my colleagues from the South who are supporting this measure that they are ‘playing with fire,’ which is likely to produce another ‘reconstruction’ conflagration in our Southland.”).

these matters are the negro women, who are much more insistent and vicious along these lines than are the men of their race.

Make this amendment a part of the Federal Constitution and the negro women of the Southern States, under the tutelage of the fast-growing socialistic element of our common country, will become fanatical on the subject of voting and will reawaken in the negro men an intense and not easily quenched desire to again become a political factor.⁴⁵³

Senator Brandegee expressed the same sentiment when he quoted approvingly from a letter written to him by Charles S. Fairchild, president of the American Constitutional League: “[U]pon ratification, [the Nineteenth Amendment] would immediately renew the ‘reconstruction’ and racial problems in the South, as well as double the Socialist and Bolshevist menace in the North.”⁴⁵⁴ Along the same lines, Senator John S. Williams of Mississippi asked in horror, “Are you going to arm all the Chinese and Japanese and negro women who come to the United States with the suffrage?”⁴⁵⁵

Senator Thomas W. Hardwick of Georgia, also in fear of a second Reconstruction inspired by Bolsheviks, female voters, and African-Americans, called the attention of his fellow Senators to a February 27, 1918 article from the *New York Journal* that described the visit of a white female activist, Mrs. Howard Gould, to a campaign meeting in support of Reverdy C. Ransom, a black candidate for Congress.⁴⁵⁶ Mrs. Gould, with inspiring boldness, arrived to the meeting “[u]naccompanied by a white escort” and “[w]ith the exception of three reporters, [she] was the only white person in the hall.”⁴⁵⁷ “[S]tunningly dressed[,] [she] did not seem at all embarrassed by her environment.”⁴⁵⁸ Mrs. Gould called for black people to vote for Mr. Ransom, and she delivered this message: “Now that the black women of the North have political power, they must band together for the black women of the South. You black people must strangle the solid South.”⁴⁵⁹ Senator Hardwick, shaking in his boots, thought this story sufficiently demonstrated

453. *Id.*

454. 56 CONG. REC. 8347 (1918).

455. *Id.* at 8346.

456. *Id.* at 10,894.

457. *Id.*

458. *Id.* Perhaps unknown to Senator Hardwick, Mrs. Gould was a divorced New York socialite, born Katherine Clemmons. Ralph W. Tyler, *Mrs. Howard Gould and Her Mission*, CLEV. ADVOC., Mar. 30, 1918, at 8. She had acted on the stage and was rumored to have had a relationship with William F. “Buffalo Bill” Cody before her marriage to Howard Gould. *Sordid Troubles of the Married Rich*, SUN (Fort Covington, N.Y.), Apr. 16, 1908, at 1. The *Cleveland Advocate* explained at the time of the Ransom campaign that “Mrs. Gould has taken up the fight to secure justice for a race that has suffered, and is still suffering, more injustices than are Russian serfs” and that “[o]ccasionally, so occasional as to impel unusual admiration on the one hand, and bitter criticism on the other, a white woman emerges from the drawing room of luxury to espouse the cause of the weak.” *Id.* Mrs. Gould’s sister Ella, a “San Francisco slum worker,” was notorious for having married a “Chinaman.” *S.P. Clemmons Insane*, N.Y. TIMES, Mar. 10, 1908, at 1.

459. 56 CONG. REC. 10,894 (1918).

the dangers of women voting. But Senator James K. Vardaman of Mississippi responded to Hardwick's condemnation of Mrs. Gould with the observation that "every idea of justice and sense of right is outraged by a condemnation of women for doing things in politics or anywhere else that men are applauded for doing," explaining, "I am in favor of treating women fairly."⁴⁶⁰

c. Political rights, military duties, and women's abilities.—A long-standing objection to women voting was that they could not fulfill all the duties that political rights entail. It was most vociferously alleged that they could not serve in the military, and this argument was again put forward during the Nineteenth Amendment debates. Congressman Clark, the man who claimed that no woman in Florida had ever been victimized, declared that women were unfit for combat and thus must not have the vote:

No class of persons ought to have the right to vote, I think everyone will agree, unless that class can perform all of the duties of citizenship. They ought not to have the privileges of citizenship unless they can perform the duties. I think that is a proposition which no one will dispute. Women can not do that. We have heard a great deal here about what they can do. We can not create our armies out of women. We can not depend upon them.⁴⁶¹

This argument, like others put forward by those opposed to the Amendment, was soundly defeated by the Amendment's supporters, because the First World War had provided a new response to the military service argument. In a turnaround, President Wilson told the Senate:

This war could not have been fought, either by the other nations engaged or by America, if it had not been for the services of the women—services rendered in every sphere—not merely in the fields of efforts in which we have been accustomed to see them work, but wherever men have worked and upon the very skirts and edges of the battle itself.

....

I propose it as I would propose to admit soldiers to the suffrage, the men fighting in the field for our liberties and the liberties of the world, were they excluded.⁴⁶²

Senator Thompson and others echoed this argument in terms strongly implying that the Nineteenth Amendment was understood to be the path to full equality:

460. *Id.* Vardaman should really have stopped there. He instead concluded, "It is my purpose to continue the fight for the repeal of the fifteenth amendment, and finally the completed elimination of the negroes, both male and female, from the politics of America. And I expect the white women of America to help me in that great undertaking." *Id.*

461. 58 CONG. REC. 90 (1919).

462. 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8601–02 (1927).

While women stand ready to forge cannon, make guns, and even to use them on the field of battle, and to do man's work wherever necessary for the good of the Nation, it is a gross injustice amounting to nothing less than outrage to deny them the right of suffrage, *or any other right that man may be entitled to or permitted to enjoy*. If the people of this country had never before looked upon woman suffrage with favor they should do so now in recognition of woman's sacrifice in defense of our citizenship and the natural and inalienable rights of life, liberty, and the pursuit of happiness.⁴⁶³

Congressman Little added that World War I was a struggle between brutality and reason, in which it was decided that "right, not might, shall rule the world."⁴⁶⁴ The world, he went on, "is about ready to substitute the rule of reason for the rule of force in the government of reasoning creatures."⁴⁶⁵ He continued,

The time is opportune for marking an era's close. Civilization has reached a stage, a period, a moment, when we can ring the liberty bell again and announce that this great step forward has been taken.

They tell us that woman should not vote merely because she is a female. No other reason has been advanced except that form which says that she can not bear arms. Every mother who bears a son to fight for the Republic takes the same chance of death that the son takes when he goes to arms.⁴⁶⁶

Congressman Little also described how the war had revealed that women were capable of all types of "men's work" and explained that women's presence in the workplace made denying them the vote much worse:

[I]n my great country, women throng the shops, the offices, the factories, in their strife with men to earn a living. In uncivilized nations they still treat her as a slave and as an angel. Your great civilization gives woman the glorious privilege that man has to battle for a livelihood if she will do so for smaller wages, but denies her the use of the ballot in her struggle. What are you afraid of?⁴⁶⁷

What *were* those who opposed women voting afraid of? If the legislative history is any indication, most of them feared racial minorities and

463. 56 CONG. REC. 8345 (1918) (emphasis added).

464. 58 CONG. REC. 79 (1919).

465. *Id.*

466. *Id.* at 80. Interestingly, Mrs. Howard Gould, the white woman who attended the campaign meeting of black congressional candidate Reverdy Johnson, in 1918 became the first woman admitted to "active membership in the Army and Navy Union, U.S.A." *Mrs. Gould To Be Veteran*, WASH. POST, Oct. 1, 1918, at 16. She was given the honorary military title "colonelette" and was "accorded the full honors of comradeship" when she was "received with ceremony into the President's Own Garrison." *Id.* No lightweight, she delivered an address on the occasion entitled "The American Advance from Bunker Hill to Gettysburg; from Santiago to Chateau Thierry." *Id.*

467. 58 CONG. REC. 80 (1919).

emancipated women. For example, the unenlightened Senator Brandegee had the audacity to claim that passing the Amendment would “prostitute the Constitution of the United States,”⁴⁶⁸ and in a desperate attempt to convince his colleagues to reject the Amendment, Brandegee warned that “[t]he minute the ladies get the privilege of voting, if they do get it, they will forget all about the gentlemen who gave it to them, and they will vote just as they please.”⁴⁶⁹ Senator Owen made the best possible rejoinder: “I hope so.”⁴⁷⁰ Clearly many who contemplated the Nineteenth Amendment understood it to put women on equal constitutional footing with men.

2. *Adkins v. Children’s Hospital*.—The Supreme Court acknowledged the implications of the Nineteenth Amendment in *Adkins v. Children’s Hospital*, the first sex discrimination case to be decided by the Supreme Court following the adoption of the Amendment in 1920. *Adkins* considered the constitutionality of a law that set a minimum wage for women and children.⁴⁷¹ Under *Lochner v. New York*, it would have been unconstitutional to set a minimum wage for men.⁴⁷² The Supreme Court ruled 5–3 in *Adkins* that a minimum-wage law for women only could not be squared with the Fourteenth Amendment *in light of the Nineteenth Amendment*.⁴⁷³ Justice Sutherland, writing for the majority, reasoned much like the supporters of women’s voting rights in Congress:

[T]he ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* has continued “with diminishing intensity.” In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to

468. 56 CONG. REC. 8350 (1918). When Senator Brandegee’s arguments do not avoid substance entirely, they show a failure to know his opponent:

Mr. SHAFROTH: “Does not the Senator believe that the just powers of government are derived from the consent of the governed?”

Mr. BRANDEGEE: “What does the Senator believe about the Philippine Islands?”

Mr. SHAFROTH: “I must say that I have always been in favor of giving independence to the Philippine Islands, and I fought upon the floor of the Senate for that very principle.”

Id.

469. *Id.*

470. *Id.*

471. *Adkins v. Children’s Hospital*, 261 U.S. 525, 539 (1923).

472. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

473. *Adkins*, 261 U.S. at 553. Justice Brandeis took no part in the case, while Chief Justice Taft and Justices Sanford and Holmes dissented. *Id.* at 562, 567.

restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.⁴⁷⁴

Less persuasively, the Court attempted to salvage *Muller* by maintaining that the maximum-hours law at issue in that case was merely an acknowledgement of the actual physical differences between men and women, while a minimum-wage law implicated women's minds.⁴⁷⁵ This is a false distinction: if women have the same capacity as men to enter into contracts for wages, then they have the same capacity as men to contract for limited hours. The constitutionally sound response to this problem is the modern one: reasonable minimum-wage and maximum-hours laws that protect both men and women. But when *Adkins* was decided, *Lochner* stood in the way of such a conclusion for most of the Court, although Justice Holmes, in his *Adkins* dissent, said he thought *Bunting v. Oregon*⁴⁷⁶ left *Lochner* in "deserved repose."⁴⁷⁷

The *Adkins* dissenters had two main objections to Justice Sutherland's opinion for the Court. First, they claimed with good reason that the decision was inconsistent with *Muller*. Justice Oliver Wendell Holmes wrote: "I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. . . . *Muller v. Oregon*, I take it, is as good law today as it was in 1908."⁴⁷⁸ Chief Justice William Howard Taft said he was "not sure from a reading of the opinion whether the court thinks the authority of *Muller v. Oregon* is shaken by the adoption of the Nineteenth Amendment."⁴⁷⁹ Second, Justice Holmes and Chief Justice Taft both denied that the Nineteenth Amendment should have any effect on the constitutional analysis. Holmes said bluntly, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."⁴⁸⁰ But presumably he would not have thought it proper to take false differences into account.

Chief Justice Taft dissented at greater length and with less clarity:

474. *Id.* at 553 (internal citation omitted).

475. *Id.* at 552-53.

476. 243 U.S. 426 (1917).

477. *Adkins*, 261 U.S. at 569-70 (Holmes, J., dissenting).

478. *Id.* at 569.

479. *Id.* at 567 (Taft, C.J., dissenting).

480. *Id.* at 569-70 (Holmes, J., dissenting).

The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests. The amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment.⁴⁸¹

Chief Justice Taft did not explain what physical difference makes women more in need of a minimum wage than men. The majority's assessment of the Nineteenth Amendment's effect was much more cogent, and something like the *Adkins* majority's approach to sex discrimination doctrine should be revived by the modern, present-day Supreme Court. The fact that the majority opinion in *Adkins* considered and rejected the Holmes and Taft dissents bolsters the argument that the Nineteenth Amendment changed the meaning of the no-caste rule of the Fourteenth Amendment. The majority in *Adkins* is premised on the idea that after 1920, sex discrimination was, as a constitutional matter, a form of caste.

The Supreme Court revisited the issue of sex discrimination after the overruling⁴⁸² of *Adkins* in a bad landmark opinion by Justice Felix Frankfurter—*Goesaert v. Cleary*.⁴⁸³ *Goesaert v. Cleary* involved the constitutionality of a Michigan law that forbade any woman from serving as a bartender unless she was the wife or daughter of the man owning the bar.⁴⁸⁴ Justice Frankfurter disposed of the case dismissively using extreme New Deal judicial restraint as his rationale. He applied the rational basis test and had no trouble concluding that the States could have banned women from serving as barmaids under all circumstances as well as when they were not related to bar owners.⁴⁸⁵ Justice Frankfurter's opinion did not cite any of the Reconstruction history of the Fourteenth Amendment that we have discussed in this Article or the dispute about the Nineteenth Amendment in *Adkins*. He instead reasoned,

The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards,

481. *Id.* at 567 (Taft, C.J., dissenting). Louis Brandeis—by this time Justice Brandeis—took no part in the *Adkins* decision; he would not have cast the deciding vote anyway. *Id.* at 562.

482. *See* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386–87 400 (1937) (upholding a minimum-wage law for women and overruling precedent in which a similar labor law had been invalidated on substantive due process grounds).

483. 335 U.S. 464 (1948).

484. *Id.* at 465.

485. *Id.* at 465–67.

any more than it requires them to keep abreast of the latest scientific standards.⁴⁸⁶

Justice Wiley Rutledge wrote a solid two paragraph dissent joined by Justices Douglas and Murphy but also did not mention the origins of the Fourteenth Amendment's no-caste rule or the discussion of the Nineteenth Amendment in both the *Adkins* majority and dissenting opinions.⁴⁸⁷ The dissent did, however, correctly say that the "statute arbitrarily discriminates between male and female owners of liquor establishments" and that it was therefore "invalid as a denial of equal protection."⁴⁸⁸ The majority's failure to agree with this statement likely reinforced the view of some activists that only adoption of the Equal Rights Amendment could protect women's rights.⁴⁸⁹ They were mistaken, but this would not be proven until the Court decided *Reed v. Reed* over twenty years after *Goesaert*.

The question of the original meaning of the Fourteenth and Nineteenth Amendments as to sex discrimination is in some respects still open for the Court to address. The Supreme Court can address the sex discrimination issue today under the no-caste rule of the Fourteenth Amendment, as modified by any implications to be drawn from the Nineteenth Amendment, without any prior case law interfering. In our view, the Fourteenth Amendment no-caste rule, as modified by the implications that should be drawn from the Nineteenth Amendment, lead to the conclusion and doctrinal test that Justice Ginsburg argued for in *VMI*. We think we have offered originalist reasons that Justices Scalia and Thomas should find compelling as to why Justice Ginsburg is right. We also hope our research will be helpful to the new Justices on the Supreme Court who have yet to participate in a major sex discrimination case. These four new Justices include Chief Justice Roberts, Justice Alito, Justice Sotomayor, and Justice Kagan. We hope they not only follow the *VMI* precedent as doctrinalists but that they also root any future holding in the text and history of the Constitution and not merely in doctrine. It is time for the Supreme Court to acknowledge the central importance of the Nineteenth Amendment in Fourteenth Amendment sex discrimination cases. Susan B. Anthony, Elizabeth Cady Stanton, and even Justice Sutherland thought the Nineteenth Amendment would do a lot more for women's rights than the Court has ever acknowledged. We think they were absolutely right and that the Court has missed the boat.

IV. Conclusion

An infinite number of questions could be asked about if and how the anticaste rule of the Fourteenth Amendment should be applied to classifica-

486. *Id.* at 466 (citations omitted).

487. *Id.* at 467–68 (Rutledge, J., dissenting).

488. *Id.* at 468.

489. *See supra* note 314.

tion beyond race and sex. While no group aside from women and African-Americans were discussed at length by the Framers of the Fourteenth Amendment, there is nothing in the text to prevent application of the no-caste rule to other groups if the group classification is relevantly similar to race or sex and the legal disabilities the group suffers are as arbitrary as those that once accompanied being female or being black. Yet a definitive showing that a law relegates a group to caste status—and is therefore a violation of Section One—is not easy to make and, in Professor Calabresi's view, ought only to be made where there is an Article V consensus of three-quarters of the states. The courts must look for—but not dictate—the content of the objective social meaning today of the anticaste command of the Fourteenth Amendment. This present-day objective social meaning is to be found in the evolving standards of equality of *the whole* of American society and not merely in the evolving social standards among the judicial and legal elite. Ms. Rickert disagrees and believes it is appropriate for the Supreme Court to unilaterally recognize new forbidden castes whenever it has before it unequivocal evidence that a group is being arbitrarily denied equal protection of the laws. In her view, an Article V amendment that protects a particular group's voting rights is the strongest evidence that a law discriminating on the basis of membership in that group is arbitrary, but she disagrees with Professor Calabresi's argument that the existence of an Article V amendment protecting a group is almost a prerequisite for that group to be protected from discriminatory legislation by the Fourteenth Amendment. As explained throughout this Article, race and sex are given a special status in our Constitution—discrimination in political rights cannot be made on those bases—and so, in both authors' view, full civil rights must be accorded also. An Article V consensus of three-quarters of the states forbade discrimination as to voting rights both on the basis of race and on the basis of sex.⁴⁹⁰ There is no other alleged caste that can make this claim. Professor Andrew Koppelman, however, has argued that sexual-orientation discrimination is actually a forbidden form of sex discrimination, but assessing his argument is outside the scope of this Article.⁴⁹¹

We also will not go deeply into other possible applications of the no-caste rule in this Article, but we will briefly address an issue that must be acknowledged before concluding: what do our conclusions mean for legislation that discriminates on the basis of age, given the Twenty-sixth Amendment, which prohibits denying the vote to citizens eighteen years or older on the basis of age?⁴⁹² Are laws forbidding eighteen-to-twenty-year-olds from buying or consuming alcohol unconstitutional?

490. And, crucially, the Nineteenth Amendment returned the Constitution to sex neutrality.

491. Koppelman, *supra* note 321, at 147.

492. The language of the Amendment is as follows:

Perhaps, but such laws are not certainly unconstitutional. The Twenty-sixth Amendment—although it was inspired by the military service of class members much like the Fifteenth Amendment and the Nineteenth Amendment were—surely does not invalidate all age-based legislation. For one thing, the Twenty-sixth Amendment itself arbitrarily discriminates on the basis of age by excluding those under the age of eighteen from voting. And age is undeniably different from race and sex: all people who live a normal lifespan go through the same stages of development and ages, and competence does in fact tend to correlate to age, particularly during the earlier periods of the human life span. Infants, obviously, cannot be left to make very many of their own life choices if we want the human race to continue. Infants also cannot exercise the right to vote, because they are utterly unaware of what exercising that right means. This helplessness and ignorance of youth decreases over time, very slowly. We continue to learn and grow throughout our lives. Age does not become irrelevant to lawmaking all at once. The Constitution was drafted with this in mind, and so the Constitution itself discriminates on the basis of age by setting age requirements for federal office holding. Eligibility to be a representative requires that one have attained the age of twenty-five.⁴⁹³ Eligibility to be a senator requires that one have attained the age of thirty.⁴⁹⁴ And, eligibility to serve as President requires that one have attained the age of thirty-five.⁴⁹⁵ Age discrimination is an important issue, but preventing it in all its forms is a job for the political process under the U.S. Constitution.

The second possible application of the no-caste rule of the Fourteenth Amendment that is suggested by clauses in the U.S. Constitution occurs with respect to discrimination on the basis of religion. Article VI of the Constitution requires that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁴⁹⁶ The Constitution thus recognizes a political right to hold office, which absolutely forbids discrimination on the basis of religion. Does this mean that civil rights discrimination on the basis of religion is also a forbidden form of caste under the Fourteenth Amendment?

The Framers of the Fourteenth Amendment, who we quoted above,⁴⁹⁷ said that a paradigmatic example of a system of caste is the low status

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XXVI.

493. *Id.* art. I, § 2.

494. *Id.* art. I, § 3.

495. *Id.* art. II, § 1.

496. *Id.* art. VI.

497. *See supra* note 193 and accompanying text.

accorded to Jewish people in Western Europe prior to the 1800s. We agree with this statement. We also think the Religious Test Clause protects a political right from discrimination on the basis of religion (or lack of religion). Under the reasoning of this Article, that does suggest that civil rights discrimination on the basis of religion is a forbidden system of caste. For these reasons, Professor Calabresi endorses Justice Scalia's dissenting opinion in *Locke v. Davey*,⁴⁹⁸ which suggests that state-constitutional Blaine Amendments unconstitutionally discriminate on the basis of caste in violation of the antidiscrimination command of the Fourteenth Amendment.⁴⁹⁹

As we have tried to show, the Fourteenth Amendment's original public meaning bans all systems of caste once three-quarters of the states—an Article V consensus—find that a classification is in fact caste-like. We have also shown that since 1920 sex discrimination is forbidden as to civil rights just as it is as to political rights. The Nineteenth Amendment, read together with the Fourteenth Amendment, provides a legitimate basis for striking down almost all sex-discriminatory laws. By bestowing on women the most exclusive of all rights—the right to vote—our Constitution finally guaranteed that a person's sex will not determine his or her rights.

We should emphasize that in agreeing with the U.S. Supreme Court's opinions as to sex discrimination in *Adkins v. Children's Hospital* and in *VMI*, we mean to express no shared opinion on the constitutionality of laws against abortion. Professor Calabresi has publicly and repeatedly expressed the view that such laws are generally constitutional.⁵⁰⁰ There are countries like Germany whose constitutions ban sex discrimination but which also constitutionally protect fetal life.⁵⁰¹ There are other countries that take a different approach, such as Canada, whose Charter of Rights and Freedoms bans sex discrimination but does not protect fetal life.⁵⁰² We leave it to our readers to make whatever judgment they choose to make on this matter. A facial rule of no sex discrimination does not answer the question of when human life begins nor does it definitively answer the question of whether a

498. 540 U.S. 712 (2004).

499. *See id.* at 726 (Scalia, J., dissenting) (characterizing the majority's holding as "sustain[ing] a public benefits program that facially discriminates against religion").

500. *See, e.g.*, Calabresi & Fine, *supra* note 9, at 695–98 (arguing that laws against abortion are constitutional). Ms. Rickert's view on the degree to which the Constitution protects the right to abortion is nuanced and will be explained in some future article.

501. *Compare* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 3, cl. 2 (Ger.) ("Men and women shall have equal rights."), *with* PARENTHOOD AND MENTAL HEALTH 92 (Sam Tyano et al. eds., 2010) (explaining that "the Federal Constitutional Court of Germany held that the constitution guaranteed the right to life from conception").

502. *Compare* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c. 15(1) (U.K.) ("Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law . . . without discrimination based on . . . sex . . ."), *with* PARENTHOOD AND MENTAL HEALTH, *supra* note 501, at 92 (noting that "in Canada, the fetus is a human being only when it has completely proceeded, in a living state, from the body of its mother").

legislature or a court ought to be empowered to say when life begins. The question addressed in this Article is solely the question of whether sex discrimination is unconstitutional under the U.S. Constitution as amended. We conclude that it is.

Our experience as a nation since the adoption of the Fourteenth Amendment in 1868 has shown that the Framers of the Fourteenth Amendment's "factual" assumptions about women's capabilities, as well as their belief that enfranchised women would pose a serious threat to the family, were unfounded. We now know that women are as capable as men of exercising their rights responsibly. For that reason, women have had a constitutional right to vote in all federal and state elections since 1920.

Women have had a big impact on American politics since they won the right to vote. Women played a decisive role in electing the first African-American president,⁵⁰³ and two women have been nominated to be Vice President.⁵⁰⁴ Four women have now been appointed to the Supreme Court, and three of those four are currently serving on the Court and constitute one-third of its membership. The progress that American women have made since 1920 is mind-boggling and has affected the status of women and men all over the world. Research conducted in rural India, the original home of the caste system, found that six to seven months after getting cable television, "men and women alike had become more open to the idea of women's autonomy, and more accepting of female participation in household decision making."⁵⁰⁵ This is encouraging, and it may be evidence that, if the Framers of the Fourteenth Amendment knew what we know now, they would not have included the word *male* in Section Two of the Amendment.

In conclusion, we ask our readers to think back to the Court's most recent big step toward a sex discrimination doctrine that comports with the original meaning of the Fourteenth and Nineteenth Amendments—*VMI*. We think that case shows the wisdom of the Framers of the Fourteenth and Nineteenth Amendments. Recall that in *VMI* it was said that there were facts in dispute. The State of Virginia said that the Virginia Military Institute's unique educational experience could not survive the admission of women; the United States claimed that women would not destroy the unique experience of VMI for men and that women were in fact entitled to a share of it.

As it turns out, Justice Ginsburg and the majority's assessment of the facts has been vindicated. Ms. Rickert recently spoke with Colonel Michael Strickler, who was in charge of public relations for VMI during the six-year-

503. Fifty-six percent of women went for Obama, compared to forty-nine percent of men. *Election Results 2008*, N.Y. TIMES (Nov. 5, 2008), <http://elections.nytimes.com/2008/results/president/exit-polls.html>.

504. See Gail Collins, Op-Ed., *McCain's Baked Alaska*, N.Y. TIMES, Aug. 30, 2008, at A19 (taking note of the increasing role of women in presidential politics).

505. Rana Foroohar, *The Real Emerging Market*, NEWSWEEK (Sept. 11, 2009), <http://www.thedailybeast.com/newsweek/2009/09/11/the-real-emerging-market.html>.

long court case and who is now Assistant to the Superintendent. He reports that the addition of female cadets to VMI has been an unquestionable success.⁵⁰⁶ Very few changes had to be made to the facilities of VMI and none to the curriculum.⁵⁰⁷ Women come to VMI, he says, for the same reasons that men are attracted to the school: military discipline, competitive athletics, and rigorous academics.⁵⁰⁸ And importantly, VMI's famed "adversative method"—a mentally and physically challenging process that involves lower-classmen having to do push-ups at the behest of upper-classmen—has survived fully intact.⁵⁰⁹ There are now 115 women enrolled at VMI, and Colonel Strickler and the rest of the administration hope to see that number rise.⁵¹⁰

VMI's recent experience, combined with the original meaning of the Fourteenth Amendment and Nineteenth Amendment, means that the time has come for the U.S. Supreme Court to overrule *Rostker v. Goldberg*.⁵¹¹ Women should be required to register along with men at the age of eighteen for the draft. May the pockets of faux originalists still opposed to applying the Fourteenth Amendment in full force shrink steadily. The original public meaning of the Fourteenth Amendment, when read in light of the Nineteenth Amendment, renders sex discrimination as to civil rights unconstitutional.

506. Interview with Col. Michael Strickler, Assistant to the Superintendent, Virginia Military Institute (Jan. 8, 2010) (notes on file with author).

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. 453 U.S. 57 (1981).