IF RACIAL DESEGREGATION, THEN SAME-SEX MARRIAGE? ORIGINALISM AND THE SUPREME COURT'S FOURTEENTH AMENDMENT

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I. INTRODUCTION

Whatever constitutional scholars may think of Robert Bork's other views, most would agree with his conclusion that "*Brown* [*v. Board of Education*][1] has become the high ground of constitutional theory. . . . [A]ny theory that seeks acceptance must . . . account for the result in *Brown*"[2] and its progeny.[3] The *Brown* Court itself disavowed a theory of originalism (or the theory that the original understanding of a constitutional provision is authoritative[4]) in concluding that racially segregated public schools contravene the Fourteenth Amendment; it deemed historical evidence of that Amendment's original meaning "inconclusive."[5] In agreeing that the *Brown* Court's assessment of history was less than forthright,[6] most scholars go one step further. As Michael McConnell explained recently, "there is something very close to a consensus [among constitutional theorists] that *Brown* was inconsistent with the original understanding of the Fourteenth

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1. 347 U.S. 483 (1954).

2. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 77 (1990). Others have made essentially the same point. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995); Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 999 n.4 (1986); Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 945 (1998).

3. Namely, the public facilities desegregation cases decided pursuant to the concept of "state action." *See infra* notes 220–21 and accompanying text. Although *Brown* was cited as authority for these public facilities cases, it is not clear that Brown's justification—based on the importance of education—was truly applicable. See McConnell, *supra* note 2, at 1136–37, for a discussion of the post-*Brown* public facilities desegregation cases.

4. *See* BORK, *supra* note 2, at 153–55. I discuss originalism *infra* in Part II.

5. *Brown*, 347 U.S. at 489–90.

6. *See* McConnell, *supra* note 2, at 950–53 & nn.6–16 (discussing sources reflecting the scholarly "consensus").

Amendment, except perhaps at an extremely high and indeterminate level of abstraction."[7]

If the conventional wisdom still is against an originalist explanation for *Brown*'s result, though, this "wisdom" certainly is not unchallenged. McConnell has written perhaps the best-known challenge,[8] but he is not alone. Michael Perry, for example, has concluded, "[The] consensus [McConnell described] . . . is mistaken."[9] McConnell,[10] Perry,[11] and other scholars[12] who challenge the supposed antioriginalism behind *Brown* and racial desegregation have insisted, albeit with important variations, that the Fourteenth Amendment was originally understood to represent a broadly defined equality norm.

Not a few constitutional scholars, however, remain unconvinced. More precisely, many question whether the norm or principle advanced by scholars such as McConnell and Perry in the name of the Fourteenth Amendment's original understanding reflects the Amendment's actual original understanding. In the opinion of these "skeptics" the Amendment's original meaning is much narrower than the equality principles defended by the "*Brown* is originalist" camp and too narrow to sustain *Brown*'s result, or racial desegregation generally.[13]

Contrariwise, if *Brown*'s result or racial desegregation can be defended in originalist terms, some scholars have suggested that it is at the expense of the "conservative" view of originalism's implications for constitutional interpretation.[14] According to Michael Klarman, this is true of McConnell's defense of *Brown*: "It . . . carries logical implications that one may doubt McConnell wishes to endorse . . . . [T]he same argument . . . would justify expanding protected groups to include women, aliens, gays, etc."[15] If Klarman is right,

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7. *Id.* at 952.

8. *See id.* at 953.

9. MICHAEL PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 91 (1999).

10. *See* McConnell, *supra* note 2, at 1041, 1135.

11. *See* PERRY, *supra* note 9, at 58–67; *see also infra* text accompanying notes 59–60.

12. *See, e.g.*, BORK, *supra* note 2, at 76–83.

13. *See, e.g.*, Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 227–28 (1996); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883–936 (1995).

14. To an extent, this is Perry's position. *See* PERRY, *supra* note 9, at 3–14, 117–50; *see also* Klarman, *supra* note 13, at 1919.

15. Klarman, *supra* note 13, at 1919.

McConnell defends a Fourteenth Amendment principle that "collapses the distinction between originalism and other, supposedly less constrained, interpretive theories."[16]

In the view of yet another camp of scholars, the debate about *Brown* and the Fourteenth Amendment's original understanding is an academic exercise of little relevance to the Court's actual decision making.[17] The Court has simply embraced a broad equality norm in the name of the Amendment.[18] Although this norm may be defined more broadly than originalism can account for, the Court will no more relinquish this embrace than repudiate the outcome of *Brown* and its other racial desegregation decisions.[19]

For those who have criticized the Court for its forays into the culture war[20] and demanded its retreat from this conflict, scholars' reactions to the *Brown*-originalism debate should be unsettling. The Court's "transgressions"—its usurpation of "political" authority to decide questions about the social and cultural order that properly belongs to citizens and their representatives—usually has been attributed by these critics to its adulteration of, or utter disregard for, the Constitution's original understanding.[21] However, assuming that fidelity to originalism would force the Court's withdrawal from the culture war, if *Brown*'s outcome cannot be justified as originalist, the enemies of originalism have scored a critical victory.[22] If originalism can be disregarded on such a crucial question, why not disregard it on other questions before the Court? Conversely, if Brown's outcome can be justified as originalist because the Fourteenth Amendment represented a broad equality norm, originalism may offer no defense against some of the judicial decisions that the conservative (or socially conservative) critics of the Court condemn as "activist" usurpations of political authority. Indeed, on the newest front in the

16. *Id.* at 1918.

17. *See, e.g.*, Boyce, *supra* note 2, at 935–40; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723 (1988).

18. *But cf. supra* text accompanying notes 10–12.

19. *See* Monaghan, *supra* note 17, at 723.

20. James Davison Hunter popularized the term "culture war." *See* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

21. According to Mary Ann Glendon, for example, "[t]he judiciary has ... usurped power over matters that the Constitution wisely left to ordinary political processes." *See* Mary Ann Glendon, *The End of Democracy? A Discussion Continued*, FIRST THINGS, Jan. 1997, at 19, 23. *See also* Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS, Nov. 1996, at 21, 22–23.

22. As McConnell has observed, the argument that *Brown* cannot be justified by the original understanding of the Fourteenth Amendment "is now a mighty weapon against ... [the theory of originalism]." See McConnell, *supra* note 2, at 952–53.

culture war, some scholars argue that true allegiance to originalism requires the Court to intervene and strike down the legal barriers to same-sex marriage. As these scholars would have it, if the discrimination forbidden in *Brown* offends the original equality principle in the Fourteenth Amendment, so does state discrimination restricting marriage to opposite-sex unions.[23] Nor does an originalist "strategy" for neutralizing the Court in the culture war appear to fare any better if, by dint of its previous decisions, the Court is irrevocably committed to a Fourteenth Amendment equality norm, or other norm, that—even if not originalist—validates supposedly activist (usurpative) judicial decisions.

My purpose in this essay, broadly speaking, is to assess scholars' reactions to defending *Brown*'s result in originalist terms. Can racial desegregation be rested on originalism without inviting more judicially authored social transformations, particularly the nullification of the legal barriers to same-sex marriage? Does it matter in view of the Court's Fourteenth Amendment precedent? Contrary to the opinion of many constitutional theorists,[24] I argue that these questions can be answered in the affirmative. Although my focus is on originalism's implications for *Brown*, racial desegregation, and same-sex marriage, the theoretical import of my analysis goes beyond these three issues.

Following a brief but essential detour in Part II to discuss overlooked features of the originalist method of constitutional interpretation, I turn in Parts III and IV to an examination of the original understanding of the Fourteenth Amendment. Notwithstanding the *Brown* Court's reliance on the Equal Protection Clause, there is wide agreement among students of originalism that, if the enactors of the Fourteenth Amendment bequeathed us a principle (or set of principles) that can account for the result in *Brown* and its progeny, it is found in the Privileges or Immunities Clause.[25] The

23. See PERRY, *supra* note 9, at 148–50.

24. *See supra* notes 13 and 23 for constitutional theorists' arguments taking exception to my claim.

25. *See* U.S. CONST. amend. XIV, § 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 ... ." Most scholars maintain that it is the Privileges or Immunities Clause that was intended to protect substantive "rights" from state governments. *See* RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 31–36 (1989); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22–30 (1980); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869 96–102, 106–20 (1990); John Harrison, *Reconstructing the*

words of this clause—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"[26]—present two critical questions: (1) What was the original understanding of "privileges or immunities?" (2) What was the original understanding of state action that abridged privileges or immunities?[27]

In Part III, I focus on the first question, which divides most scholars into roughly two schools of opinion. In one, there are those who hold that privileges or immunities were limited to a class of fundamental rights.[28] By contrast, those defending *Brown*'s result as originalist maintain that privileges or immunities represented a category or class of rights broader than fundamental rights. At some risk of oversimplification, I describe this as the equality norm position.[29] Michael Perry[30] and Michael McConnell[31] have proffered two of the most thoughtful and well-developed arguments for this position. I critique their arguments at length because the shortcomings in their arguments demonstrate that it is more probable that the original understanding of privileges or immunities was limited to fundamental rights. However, I also explain that, contrary to the opinion of scholars in the fundamental rights school,[32] *Brown*'s result and the Court's other desegregation decisions pursuant to the "state action"[33] concept (*Brown*'s progeny) are consistent with the probable original understanding of fundamental rights. Treating same-sex marriage as a constitutionally protected fundamental right, on the other hand, is not consistent with this understanding. Nor can it be smuggled into the original fundamental rights principle as a specific

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Privileges or Immunities Clause, 101 YALE L.J. 1385 (1992); McConnell, *supra* note 2, at 997–1005; PERRY, *supra* note 9, at 55–77. *But see* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 331–37 (1997) (arguing that the Equal Protection Clause was intended to grant broad substantive protections).

26. U.S. CONST. amend. XIV, § 1.

27. There is a third question: Does the clause protect all persons or only citizens? However, I consider this largely resolved by the research of Earl Maltz and John Harrison. *See* MALTZ, *supra* note 25, at 96–102; Harrison, *supra* note 25, at 1142–46. In any event, for purposes of my inquiry the answer to the question is not critical.

28. *See, e.g.*, BERGER, *supra* note 25, at 67–90; MALTZ, *supra* note 25, at 106–09; Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 336 (1988).

29. *See supra* notes 10–12 and accompanying text.

30. PERRY, *supra* note 9, at 57–77, 88–97.

31. McConnell, *supra* note 2.

32. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 117–33, 241–45 (1977); MALTZ, *supra* note 25, at 113.

33. *See infra* notes 220–21 and accompanying text.

instance of a more general or abstract constitutional right.

In Part IV, I focus on the question of the original meaning of abridgment of privileges or immunities. It is clear that the Fourteenth Amendment's enactors were concerned, in some respect, with race discrimination.[34] However, I argue that it misreads the historical evidence to maintain that the "racist" character of such discrimination explained this concern. Perry's observations in this regard[35] exemplify this misreading. The "egalitarian" principle that Perry defends as part of an originalist definition of abridgment and then deploys to demand judicial nullification of state legal barriers to same-sex marriage is not, in fact, originalist.

Nevertheless, there are two plausible explanations for the objections that the Fourteenth Amendment's enactors would have to conditioning the enjoyment of fundamental rights on race, and either of these explanations, as I hope to show, is compatible with the result in *Brown* and the Court's desegregation decisions. Neither of these explanations, however, lead to a conclusion that state policies prohibiting same-sex marriage constitute abridgments of a constitutional right. Nor is there any general theory of abridgment comporting with originalism that leads to this conclusion. I suggest that quite the contrary is true, and explain by addressing the importance of the Article V[36] constitutional amendment process on the establishment of such a general theory.

Finally, in Part V, I evaluate the related claims that originalist assessments of judicial decisionmaking ultimately do not matter in view of Fourteenth Amendment precedent, and that the precedent requiring an end to de jure race segregation also requires the Court to put an end to the legal barriers to same-sex marriage. I contend the claim that originalism is now obsolete because of the Court's precedent is exaggerated. The precise shape or definition of the values or "norms" the Court enforces pursuant to the Fourteenth Amendment is not fixed, nor is the original meaning of the Constitution necessarily irrelevant to shaping the definition of these norms. Moreover, the Court's Fourteenth Amendment norms, particularly when they are shaped by originalism, do not lead inexorably to the conclusion that laws against same-sex marriage are unconstitutional.

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34. *See* Part IV *infra*.
35. *See* PERRY, *supra* note 9, at 90–97.
36. U.S. CONST. art. V.

II. THE ORIGINALIST METHOD OF CONSTITUTIONAL INTERPRETATION AND THE FOURTEENTH AMENDMENT

I want at this juncture to address briefly the originalist method, particularly as it relates to the original meaning of the Fourteenth Amendment. The search for a constitutional provision's original understanding is premised, of course, on the proposition that this understanding ought to be considered authoritative.[37] But whose understanding is authoritative?

Whether for theoretical or practical reasons, most originalists treat the understanding or intention of those with authority to enact a constitutional provision as authoritative.[38] Starting from this position, students of the Fourteenth Amendment's original meaning usually turn to what seems the obvious question: what was the dominant understanding of the amendment's enactors?[39] This is perhaps the wrong question. The authoritative original understanding of a constitutional provision, as Richard Kay explains, is the understanding that was held in common by a *law-making majority* of those with authority to enact the provision.[40] As applied to the Fourteenth Amendment, this definition of an authoritative original

37. By "authoritative" I mean that the original principle represented by a constitutional provision should determine or control the Court's interpretation of the provision. *See also* BORK, *supra* note 2, at 153–55.

38. *See* Boyce, *supra* note 2, at 917. Some scholars have argued that, as a theoretical matter, it is the original "public understanding" of a constitutional provision that should be deemed authoritative, as opposed to the understanding or "subjective intent" of those with authority to enact the provision. *See, e.g.*, BORK, *supra* note 2, at 144. Others have insisted that the understanding of those with authority to enact a constitutional provision should be deemed authoritative. *See, e.g.*, Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 247 (1988); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1524 (1989) (book review); *see also infra* text accompanying notes 40–41. As a practical matter, the "public understanding" may well have been informed by what the "people" were told about the "purpose" of the constitutional provision by its "enactors" or originators. As Michael Perry has explained, "It is a reasonable working hypothesis that the understanding of a constitutional provision by those who represented the people in the constitutional process is a close approximation to how the provision was understood by the people." MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 32 (1994).

39. *See, e.g.*, Harrison, *supra* note 25, at 419 (stating that the "positive law, antidiscrimination reading [of the Privileges or Immunities Clause] ... was very common, and ... it was probably the dominant view."); Saunders, *supra* note 25, at 292 n.209 (arguing that her conclusion about the original intention reflects "the dominant understanding among the framers and ratifiers."). More typically, scholars proceed with an analysis that implicitly assumes that identifying the dominant or simple majority intention held by the enactors of the Fourteenth Amendment is sufficient for establishing the authoritative intention. *See, e.g.*, PERRY, *supra* note 38, at 116–35.

40. *See* Kay, *supra* note 38, at 247–51.

understanding has the virtue of consistency with the purpose of the Constitution's Article V supermajority requirements for amending the Constitution. The typical focus on "dominant understanding," or simple majority understanding, neglects the purpose of the supermajority requirements for preserving the federal character of the Constitution's division of power between the states and the national government.[41]

Most studies of the Fourteenth Amendment's original meaning also ignore the implications of Kay's commentary on identifying a single understanding of a constitutional provision when historical evidence indicates, as it often does, that a provision's enactors held multiple and varied understandings.[42] This "problem"—sometimes referred to as the problem of summing different intentions[43]—is magnified when the task is to find one intention held in common by extraordinary majorities at the several stages of the process for enacting a constitutional amendment. This is applicable, of course, to the Fourteenth Amendment. At least as a formal matter, it was added to the Constitution in accordance with the Article V[44] process requiring that amendments be proposed by a two-thirds majority in each house of Congress and ratified by three-fourths of the legislatures of the states.[45] There is abundant evidence that the Amendment's many enactors did not always share identical understandings of the crucial Privileges or Immunities, Due Process, and Equal Protection Clauses in § 1 of the Amendment.[46] Thus, the task of finding a single intention for these provisions may appear either too difficult or impossible. It is neither, if Kay is right. As he explains:

> the difficulty [of multiple, varying intentions] is intractable only if there are multiple and totally *contradictory* intentions. . . . Such contradiction is extremely unlikely, however, because though the intentions involved are held by different people, those intentions are associated with the adoption of identical language. The use of the same language suggests a common core of meaning shared by all. Any different intentions are, therefore, likely to be overlapping not contradictory.[47]

41. *See infra* notes 255–56 and accompanying text.

42. *See* Kay, *supra* note 38, at 248.

43. *Id.*

44. U.S. CONST. art. V.

45. *See id.*; S. Res. 166, 40th Cong. (1868) (enacted).

46. U.S. CONST. amend. XIV, § 1. *See, e.g.*, *supra* notes 28–31 and accompanying text; *see also* Boyce, *supra* note 2, at 967–1026.

47. Kay, *supra* note 38, at 248.

This does not mean that the authoritative original understanding of a constitutional provision is invariably coextensive with its core meaning. However, Kay cautions, "[a]s we move out from this core [area of application or meaning] to somewhat less obvious applications, we can expect to find fewer individuals who intend the law to extend so far."[48] What matters for identifying an authoritative meaning in Kay's terms is whether it is plausible that a meaning that was broader than the core one still held the allegiance of a Constitution-making majority.[49]

The implications of Kay's model of the originalist method are profound and too often unappreciated. According to his model, rival understandings of a constitutional provision are usually overlapping and, when they are, a broader understanding is not as likely to have been the original understanding as a competing narrower understanding. That is, there is an inverse relationship between the breadth of a constitutional provision's understanding and the probability that the understanding was assented to by a Constitution-making majority of its enactors.[50] If this is correct, as it is for the Fourteenth Amendment,[51] "[i]t would seem reasonable . . . to employ a presumption favoring the narrower of two competing meanings [of the Amendment's provisions] when historical inquiry leads to uncertainty regarding [their] breadth."[52] In contrast, the typical study of the Fourteenth Amendment's original meaning treats the rival intentions of the Amendment's enactors as mutually exclusive and treats the breadth of an intention as having no necessary import for conclusions about its authoritativeness.[53]

There is another implication of Kay's model of originalist constitutional interpretation that usually is overlooked. If a minority of an amendment's enactors adhered to a relatively narrow understanding of the amendment and the votes of this minority were necessary to constitute a Constitution-amending majority approving the amendment, this minority effectively determined the amendment's original understanding. An example I have cited elsewhere clarifies

48. *Id.* at 249.

49. *See id.*

50. *See id.* at 249–50.

51. *See* Kenyon D. Bunch, *The Original Understanding of the Privileges or Immunities Clause: Michael Perry's Justification for Judicial Activism or Robert Bork's Constitutional Inkblot?* 10 SETON HALL CONST. L.J. 321, 340 (2000).

52. *Id.* at 329–30.

53. *See, e.g.*, PERRY, *supra* note 38; Harrison, *supra* note 25; Saunders, *supra* note 25.

this:

> [L]et us assume that, for a constitutional amendment, x represents some relatively narrow area of application and y represents an area of application in addition to x. The choice of the originalist . . . in the context of overlapping definitions is between the relatively narrow definition represented by x and the broader definition x + y. If forty percent of those voting to propose an amendment (in either the House or Senate) meant to restrict the amendment's area of application to x and 60 percent meant to reach x *and* y (x + y), the only area of application that has attained the requisite imprimatur of a constitution-amending majority is x. This is equally applicable to the states. If forty percent of state legislatures meant x and 60 percent meant x and y, only the relatively narrow area of application represented by x was approved by a constitution-amending majority.[54]

As we shall see, McConnell insists that it is the intention of Congress when it enacted the Fourteenth Amendment that is authoritative because the Amendment's ratification by three-fourths of the states was attained by compulsion in the aftermath of the Civil War.[55] However, unless McConnell means to argue that the Article V process for amending the Constitution was entirely suspended by post-Civil War Reconstruction, the supermajority requirements to propose the Fourteenth Amendment were still operative. Thus, it is still possible that a minority of those voting to propose the Amendment could have blocked, in effect, a broad meaning. In any case, my analysis of historical evidence confirms Kay's theoretical observation that there is an inverse relationship between the breadth of a constitutional provision's definition and the number of its enactors who held that definition. When the Fourteenth Amendment was passed, as I will elucidate, it is probable that the dominant understanding of its key § 1 provisions was relatively narrow and it is improbable that a Constitution-amending majority existed for competing broader understandings of these provisions. Moreover, if there was an understanding of these provisions that was assented to by a Constitution-amending majority at the proposal and/or ratification stages, it is probable that it was a comparatively narrow understanding of these provisions.[56]

54. Bunch, *supra* note 51, at 330.
55. McConnell, *supra* note 2, at 1109.
56. *See infra* Parts III.A–B, V.A–B.

III. THE PRIVILEGES OR IMMUNITIES CLAUSE: FUNDAMENTAL RIGHTS OR EQUALITY NORM?

Recall that there is wide agreement among students of originalism that the Privileges or Immunities Clause is the most likely Fourteenth Amendment provision for supporting constitutionally mandated racial desegregation.[57] However, there is disagreement about the scope of rights or liberties that are protected as privileges or immunities.[58] The Court has no authority to protect a right that has been abridged, in the name of enforcing the original meaning of the Privileges or Immunities Clause, if the "right" does not fall within the original category of rights protected by this clause. Thus, I focus next on the positions of Michael Perry and Michael McConnell respecting the original definition of privileges or immunities and on my reasons for differing with their positions.

A. The Original Understanding of Privileges or Immunities According to Perry: A Critique

According to Perry, privileges or immunities originally protected all rights provided by states to any of their citizens and those provided by the national government to any U.S. citizen, except "political rights" such as the right to vote or hold public office.[59] Moreover, this category of rights is not fixed, but is open and dynamic. [60] That is, when a state or the national government creates and allocates a new right and/or benefit to some class of citizens, this new "right" is a protected privilege or immunity and a state may not abridge, deny, or interfere with access to it in a manner offending the Fourteenth Amendment. For example, the right to attend a public school, the right to sit in a particular seat on a public bus, and the right to marry are not political rights. Therefore, these rights are privileges or immunities that may not be abridged.

Perry correctly characterizes his definition of the original class of privileges or immunities as an "intermediate possibility" between "two polar possibilities."[61] But it is also true that his definition is only a small step from the most expansive extreme that would include all rights and/or benefits provided by a state or the national government

57. *See supra* note 25.
58. *See supra* notes 28–31 and accompanying text.
59. *See* PERRY, *supra* note 9, at 61.
60. *Id.*
61. *Id.* at 58–67.

to any of their respective citizens.[62] Moreover, as I have intimated, it is broader than most rival definitions. The Court adopted the most narrow definition in 1872 in the *Slaughter-House Cases*,[63] which restricted privileges or immunities to the class of U.S. citizenship rights that could be derived from federal law.[64] Rights that owed their existence to, or that originated in, state law—property rights, for example—were excluded from this class.[65] Virtually no student of the Fourteenth Amendment's original meaning takes this seriously, however.[66] Instead, most of those proffering relatively narrow definitions have insisted that the majority of the Fourteenth Amendment's enactors intended the Privileges or Immunities Clause to protect only the rights that they (the enactors) considered "fundamental" or "natural."[67]

Perry's definition of the original class of privileges or immunities is not only broad, but also encompasses the more narrow rival definitions. As he acknowledges, the enactors' fundamental rights are a "subset" of the rights covered by his definition of the privileges or immunities originally protected.[68] However, he assures us that the enactors' focus on certain privileges does not support the proposition that they intended to protect only these particular fundamental rights.[69] As Perry would have it, "the historical record simply fails to support the sad proposition that [the enactors of the Privileges or Immunities Clause intended to leave non-fundamental rights unprotected.]"[70]

However, the historical record does support the proposition, sad or otherwise, that many, and probably most, enactors took the position

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62. *See id.* at 58. William Nelson, for example, argues that the broadest definition of privileges or immunities was the authoritative original intention. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988). *Cf.* Bunch, *supra* note 51, at 349–68.

63. 83 U.S. 36 (1873).

64. *Id.* at 74–80.

65. *Id.*

66. *See* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 & n. 4 (1994). As McConnell has observed, the interpretation of privileges or immunities posited in *Slaughter-House* would have excluded from constitutional protection the rights secured by the 1866 Civil Rights Act—rights that unquestionably were intended to be protected by the Fourteenth Amendment. *See* McConnell, *supra* note 2, at 999.

67. *See* BERGER, *supra* note 25, at 67–90; Kay, *supra* note 38, at 266–69; Maltz, *supra* note 28, at 336; MALTZ, *supra* note 25, at 106–09; Bunch, *supra* note 51, at 342–47.

68. *See* PERRY, *supra* note 9, at 59–60.

69. *Id.* at 60.

70. *Id.*

that the Privileges or Immunities Clause protects only fundamental rights. Much of this historical evidence can be found in the explanation given by various enactors for excluding "political rights" from Fourteenth Amendment protection.

Perry concedes, as I have observed, that political rights were not among the Fourteenth Amendment's privileges or immunities.[71] However, he explains that the omission of political rights was no more than "an act of compromise" made necessary by the enactors' reading of the political landscape, leading them to conclude that the Fourteenth Amendment would never be ratified if it included a right to vote and thereby extended the franchise to the freedmen.[72] For Perry, the implications of the compromise end here.

To be sure, the historical evidence does indicate that the exclusion of voting rights was a compromise impelled by political circumstances.[73] Yet, the historical evidence relating to this compromise tells us more. The justification of many enactors for excluding political rights, such as voting, from protection opens a window to their political-constitutional philosophy and to their understanding of the term "privileges or immunities." The view through this window is contrary to Perry's assertion that the statements of the Fourteenth Amendment enactors do not support the fundamental rights definition of privileges or immunities. Consider, for example, these remarks by Senator Howard, the person who introduced the Fourteenth Amendment to the United States and an enactor on whom, not incidentally, Perry relies for his view:

> [T]he first section of the . . . [Fourteenth] [A]mendment does not give . . . the right of voting. The right of suffrage is not . . . one of the privileges or immunities . . . secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those *fundamental rights* lying at the basis of all society and without which a people cannot exist except as slaves . . . .[74]

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71. *Id.* at 67.

72. *Id.* at 68.

73. *See* MALTZ, *supra* note 25, at 79–120; VA. COMM'N ON CONSTITUTIONAL GOV'T, SUPPLEMENT TO THE RECONSTRUCTION AMENDMENTS' DEBATES: READER'S GUIDE xi (1967); Bunch, *supra* note 51, at 356–65. *See also* CONG. GLOBE, 40th Cong., 2d Sess. 2601–2748 (1868) (the congressional debate on fundamental conditions).

74. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (emphasis added). Perry notes the following remark of Senator Howard as evidence for his view of what privileges or immunities the enactors intended to protect: "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." *Id.*; *cf.* PERRY, *supra* note 9, at 64. If we examine the context of

Howard is not voicing some quaint political philosophy unfamiliar to his post-Civil War congressional colleagues. Many others repeated the same distinction between "fundamental or natural" rights and "conventional" rights. Note, for example, this statement by Representative John Bingham, lead author of the Fourteenth Amendment's Privileges or Immunities Clause:

> "[C]itizens of the United States . . . , although not equal in respect of political rights, are equal in respect of natural rights. Allow me . . . to . . . silence the demagogue cry of "negro suffrage," . . . . Political rights are conventional, not natural; limited, not universal; and are, in fact, exercised only by the majority of the qualified electors of any State . . . ."[75]

Assuredly, the enactors subscribing to the distinction between fundamental and non-fundamental rights dwelled on consigning political rights, and particularly voting rights, to the category of conventional or non-fundamental rights. However, this is not explicable on the ground that they thought voting rights or a narrowly defined set of political rights were the only non-fundamental rights; it is a reflection of historical events. Whether to guarantee voting rights to the freedmen and remove state authority over voter qualifications was one of the most contentious issues facing the post-Civil War Reconstruction Congresses.[76] The idea of displacing state authority was unpopular not only with Democrats but with moderate Republicans. Out of fear of sinking the passage of the Fourteenth Amendment, many Republican proponents of the Amendment anxiously dispelled the charge that the language of the Amendment was so ambiguous that it surreptitiously secured voting rights.[77] Thus,

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this remark, we discover that Howard actually cites the due process and equal protection clauses and not the Privileges or Immunities Clause as the constitutional authority for this claim. Moreover, immediately following the remark that Perry quotes, Howard added this, "[The last part of Section 1 stating the due process and equal protection clauses] prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his *fundamental rights* as a citizen with the same shield which it throws over the white man." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (emphasis added). As I will explain shortly, scholarship on the original meaning of the due process and equal protection clauses demonstrate that they are even less likely than the Privilege or Immunities Clause to form an original meaning foundation for the rights Perry claims were protected by the original Fourteenth Amendment. Howard's reference to equal protection from capital punishment, as it turns out, is consistent with a relatively narrow view of the original meaning of the due process and equal protection clauses. *See also* CONG. GLOBE, 39th Cong., 2d Sess. 185 (1866) (remarks of Senator Howard).

75. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

76. *See* DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 202 (1970); NELSON, *supra* note 62, at 125–26.

77. *See, e.g.*, APPENDIX TO CONG. GLOBE, 39th Cong., 1st Sess. 305 (1866) (remarks of Representative Miller). *See also* VA. COMM'N ON CONSTITUTIONAL GOV'T, *supra* note

the language of the Fourteenth Amendment implicitly recognized state authority to determine the qualifications of voters.[78]

Had Republicans excluded only voting rights from the definition of privileges or immunities, Perry's argument would be more convincing. However, as Perry acknowledges, they distinguished or excluded the whole class of political rights from privileges or immunities.[79] Political rights were often "defined" imprecisely, but clearly included more than a right to vote. The class of political rights included, Representative William Lawrence declared, "suffrage, the right to sit on juries, hold office, &c."[80] As Reconstruction Republicans saw it, these were rights "to take part in the governing power of the country."[81] They were rights traditionally left to the control of the states and therefore were not "fundamental."[82] In short, the exclusion of political rights from the definition of privileges or immunities was no mere act of political compromise. It was grounded in a philosophical distinction between fundamental and other rights.

Moreover, there is unequivocal evidence that those who thought in terms of fundamental versus non-fundamental rights did not believe that political rights exhausted the class of non-fundamental rights; their statements are to this effect. One such statement was made by Representative James Wilson, Chairman of the House Judiciary Committee during the Fourteenth Amendment's passage through Congress. Addressing himself to the meaning of the term "civil rights and immunities," terms often equated in the Nineteenth Century with fundamental or natural rights and closely associated with privileges or immunities,[83] Wilson asked, "Do . . . [these terms] mean that in all things civil, social, political, all citizens . . . shall be equal?"[84] His answer was this: "By no means can they be so construed. [They do

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73, at xi; MALTZ, *supra* note 25, at 118–20.

78. *See* U. S. CONST. amend. XIV, § 2. It states in pertinent part:

> But when the right to vote at any election ... is denied to any of the male inhabitants of ... [a] State, being twenty-one years of age, and citizens of the United States, ... 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.

Id.

79. PERRY, *supra* note 9, at 67.

80. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).

81. *Id.* at 1255 (remarks of Representative Wilson).

82. Representative Wilson, for example, noted that "the right to take part in the governing power of the country is a thing that has been regulated by the State in every State in the Union from the beginning of the Government." *Id.*

83. *See id.* at 474–75 (remarks of Senator Trumbull).

84. *Id.* at 1117.

not mean political rights such as voting.] Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools."[85]

Wilson's characterization of civil rights was prompted by the debate on the 1866 Civil Rights Bill. A precursor of the Fourteenth Amendment, the Civil Rights Bill included rights that most Reconstruction Republicans were not content to entrust to the protection of a statute subject to repeal by a simple majority of Congress. Whatever else its enactors may have intended, scholars agree that the Fourteenth Amendment was intended to constitutionalize the rights in the 1866 Civil Rights Act.[86]

When Senator Lyman Trumbull, the draftsman and Senate sponsor of the 1866 Civil Rights Act, was asked by a fellow Senator to explain his interpretation of the term "civil rights", Trumbull replied, "The first section of the bill defines what I understand to be civil rights[.]"[87] Trumbull then summarized the rights denoted in the bill's first section—the right to contract, the right to sue and give evidence in court, the rights of property, and the right to personal security.[88] Trumbull concluded, "These I understand to be civil rights, *fundamental rights* belonging to every man as a free man . . . ."[89] Following a remark from the Senator who posed the question about his interpretation of civil rights, Trumbull spoke more cryptically: "This bill has nothing to do with the political rights or *status* of parties."[90] A few years later Trumbull had occasion to clarify when a Republican colleague pressed the idea that the Civil Rights Bill was

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85. *Id.*

86. *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 44 (1949); HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 148–49 (1908); Bunch, *supra* note 51, at 381–82. Section One of the Civil Rights Act of 1866 defined citizenship of the United States to include the former slaves and then stated:

> Citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a 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, 14 Stat. 27.

87. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).

88. *Id.*

89. *Id.* (emphasis added).

90. *Id.* (emphasis added).

consonant with privileges or immunities and with the idea that congressional power extended to enforcing "an equality with the white citizen as it respected all rights of citizenship."[91] Trumbull replied, "[The 1866 Civil Rights Bill] was . . . confined exclusively to civil rights and nothing else, no political and no social rights."[92] The exact compass of Trumbull's "social rights" is not clear, but it is clear that they are not political rights. Furthermore, it is clear that Trumbull, like Wilson and others, thought a right to attend a desegregated public school was not a civil right. He vigorously protested against the idea that desegregated schools should be considered a civil right, couching this protest in the language of the nineteenth century fundamental rights philosophy: "I deny that a right . . . [created by the state is] . . . a civil right . . . . It is a right growing out of . . . legislation. Schools do not exist naturally . . . ."[93]

Equating privileges or immunities with fundamental rights was not an invention of congressional Republicans in the post-Civil War Reconstruction years. The connection was reflected much earlier in the understanding of the Privileges and Immunities (or Comity) Clause[94] in Article IV of the Constitution. As Earl Maltz has shown, "[m]ost courts [in the antebellum period] concluded that the concept of privileges and immunities did not encompass all rights which were associated with citizenship in a particular state; rather, only those rights which were in some sense 'fundamental' were viewed as protected."[95] The fundamentality of privileges and immunities was expressly emphasized in the important *Corfield v. Coryell*[96] opinion of 1823:

> [W]hat 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 . . . .[97]

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91. CONG. GLOBE, 42d Cong., 2d Sess. 900 (1872) (remark of Senator Edmunds).

92. *Id.* at 901.

93. *Id.* at 3191.

94. U. S. CONST. art. IV, § 2, cl. 1. "[T]he major clause of Article IV dealing with comity is Section two, clause 1, also known as the comity clause or the privileges and immunities clause of Article IV." RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 12.7 (3rd ed. 1999).

95. *See* Maltz, *supra* note 28, at 336.

96. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

97. *Id.* at 551.

Not surprisingly, given the similarities in language between the Privileges *and* Immunities Clause and the Privileges *or* Immunities Clause, antebellum case law on privileges and immunities was cited over and over by Reconstruction Republicans to explain privileges or immunities and civil rights.[98] Reconstruction Republicans, in particular, quoted *Corfield* frequently and at length for these purposes.[99] These Republicans cannot have thought that *Corfield* stood for the proposition that fundamental rights are inclusive of all rights and benefits available to citizens except voting rights and a narrowly defined class of political rights. The *Corfield* opinion is to the contrary: "we cannot accede to the proposition . . . that, under . . . [the Comity Clause] of the constitution, the citizens of the several states are permitted to participate in *all* the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens . . . ."[100] On this basis, the *Corfield* Court decided that there was no right to fish for oysters protected by the Comity Clause.[101]

Perry insists, however, that because the Comity Clause was originally understood to protect only some nonpolitical rights and was, to a degree, a precursor of the Fourteenth Amendment's Privileges or Immunities Clause does not mean that the latter clause was originally understood to protect only some nonpolitical rights created by a state for its citizens.[102] As Perry points out, the original purposes of the two provisions—the Comity Clause and the Privileges or Immunities Clause—are distinguishable. The Comity Clause was "understood to protect citizens of one state who are temporarily in another state from some [forms of] discrimination against them by the other state in favor of the state's own citizens."[103] It was not understood to obligate a state to spend its scarce resources—those belonging to its citizens—on the citizens of another state temporarily in the state.[104] In contrast, the Privileges or Immunities Clause, as Perry would have it, was understood to prevent a state from

98. *See* Maltz, *supra* note 28, at 335–39. *See also* CONG. GLOBE, 39th Cong., 1st Sess. 474–75 (1866) (remarks of Senator Trumbull); *id.* at 2764–65 (remarks of Senator Howard).

99. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (remarks of Senator Trumbull); *id.* at 2765 (remarks of Senator Howard).

100. 6 F. Cas. at 552 (emphasis added).

101. *Id.*

102. PERRY, *supra* note 9, at 66.

103. *Id.*

104. *Id.*

discriminating between its own citizens when it created and distributed any right or benefit, except for a relatively narrowly defined set of political rights.[105]

Perry assuredly is correct that the comity and privileges or immunities clauses were intended to have different purposes, but this misses the point of the congressional Republicans who equated the rights protected by the Comity Clause with those protected by the Privileges or Immunities Clause. Their purpose for quoting from the *Corfield* opinion was to illuminate the definition of privileges or immunities. It was not to compare the purposes of the comity and privileges or immunities clauses. When Howard introduced the Fourteenth Amendment to the Senate and explained its provisions, he quoted at length from *Corfield* to elucidate the meaning of its Privileges or Immunities Clause. After reading from *Corfield*, he concluded, "Such is the *character* of . . . privileges and immunities . . . ."[106] Those present could not have missed the essence of *Corfield*'s characterization of privileges and immunities or Howard's point that this characterization was applicable to the Privileges or Immunities Clause of the Fourteenth Amendment. The part of *Corfield* Howard cited repeats in unmistakable terms that the rights that are privileges and immunities are those that are fundamental in character. After stating this at the outset of its remarks defining privileges and immunities and then enumerating particular privileges or immunities, the *Corfield* opinion returned to its emphasis on the fundamentality of these rights: "[The rights enumerated] 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*."[107]

Perry writes that those who gave us the Fourteenth Amendment were "understandably focused on particular privileges or immunities, especially the fundamental rights to life and liberty, and basic rights of property and contract."[108] According to Perry, as I noted previously, this does not mean they intended to protect only fundamental rights.[109] Their focus on fundamental rights, however,

105. *Id.* at 67.

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

107. 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (emphasis added). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Senator Howard quoting from *Corfield v. Coryell*).

108. PERRY, *supra* note 9, at 59.

109. *See supra* note 69 and accompanying text.

cannot be put aside this easily. It is probable that they did not think of fundamental rights as indistinguishable from other rights except for their importance. Instead, it was common for the Republicans enacting the Fourteenth Amendment to speak of fundamental rights as though they constituted a class of rights conceptually distinct from conventional rights. It was also common to speak of privileges or immunities as closely correlated with civil rights and to speak of civil rights as fundamental rights.[110] When Trumbull introduced the 1866 Civil Rights Bill to the Senate, for example, he defined civil rights as the class of rights protected by the Comity Clause. "What rights are secured to the citizens of each State under that provision?"[111] Trumbull asked. His answer: "Such fundamental rights as belong to every free person."[112] As I explain shortly, the common definition of the class of fundamental rights was assuredly imprecise. Nevertheless, Perry is quite wrong to insist that the frequent references of Reconstruction Republicans to fundamental rights were mere rhetorical generalities that do not tell against the conclusion that privileges or immunities was understood to include all rights except a narrow set of political rights. The fact that attending a public school, occupying a particular seat on a public bus, or marriage are not considered political rights will not suffice to make these "rights" privileges or immunities as an original matter.

B. The Original Understanding of Privileges or Immunities According to McConnell: A Critique

Unlike Perry, McConnell appears to recognize that during the Reconstruction era fundamental rights ordinarily were thought of as a conceptually distinct class of rights.[113] Moreover, McConnell recognizes that it was common to think of political, social, and civil rights as separate classes of rights[114] and to think of civil rights and privileges or immunities as closely associated.[115] Indeed, in McConnell's opinion, Republicans thought of civil rights and privileges or immunities as congruent.[116] However, McConnell does not believe that the original category of privileges or immunities was

110. *See supra* note 83 and accompanying text.
111. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Senator Trumbull).
112. *Id.*
113. *See* McConnell, *supra* note 2, at 1036–41.
114. *Id.* at 1016.
115. *See id.* at 961–62.
116. *Id.*

confined to rights deemed fundamental.[117] Instead, he maintains that the original understanding of civil rights (and privileges or immunities) was, except for political and social rights, "the *same* rights that are secured by law to white people."[118] Stated at a more abstract level, in McConnell's words, "the measure of civil rights was . . . the rights accorded under positive law to the most favored class of citizens."[119]

McConnell derives his definition of the original understanding of civil rights and privileges or immunities from an analysis of the constitutional arguments made by members of Congress for and against the Civil Rights Act of 1875.[120] According to McConnell, it was the proponents of this Act who defined civil rights as the rights possessed by the dominant or white citizens of the state.[121] It was the opponents who defined civil rights with reference to fundamental rights.[122] McConnell's focus on the 1875 Civil Rights Act springs from his focus on what the Fourteenth Amendment imported for school segregation. As he observes, prior to consideration of this Act, Congress had not formally addressed the relation between the Fourteenth Amendment and school segregation.[123]

McConnell, of course, is aware that the Fourteenth Amendment was proposed in 1866 and was finally added to the Constitution in 1868. Moreover, he is aware that only a relatively small number of the Republicans who proposed the Fourteenth Amendment were still in Congress by the time the Civil Rights Act was considered and approved.[124] However, he argues that "[p]arty affiliation can serve as a proxy for support or opposition to the principles of the [Fourteenth] Amendment."[125] That is, Republicans had supplied the votes for the Amendment, and thus, McConnell assumes, the Republican understanding of the Fourteenth Amendment's rationale for the 1875 Civil Rights Act accurately reflects the original understanding of rights protected by the Amendment.[126] As McConnell observes, a majority of Republicans voted in committee and on the floor of each

117. *Id.* at 1041.
118. *Id. See also id.* at n.450.
119. *Id.* at 1041.
120. *See id.* at 954, 984–85.
121. *See* McConnell, *supra* note 2, at 1041.
122. *See id.* at 1023–29.
123. *See id.* at 984.
124. *Id.* at 1096–99.
125. *Id.* at 1097.
126. *See id.* at 1105–07.

House for the 1875 Civil Rights Act, with the school desegregation provision attached.[127] Although the school desegregation provision was struck from the Act because it never quite mustered the two-thirds support necessary to overcome procedural obstacles,[128] McConnell emphasizes that in the Senate, "[e]xcept when the [1875 Civil Rights] [B]ill was caught up in the controversy over amnesty [for former leaders of the Confederacy], every Senator except Trumbull who had voted for the [Fourteenth] Amendment now voted for school desegregation."[129] Likewise, in the House, all those voting for the Fourteenth Amendment also voted for the Civil Rights Act and for school desegregation until the 1874 elections.[130] Even after the 1874 elections indicated public disapproval of the Civil Rights Act and school desegregation, large majorities of those who had voted to propose the Fourteenth Amendment voted for these measures in the House.[131]

Critics argue that one of the difficulties with McConnell's representation of the Fourteenth Amendment's original meaning is that there is every reason to believe that Republicans' understanding of civil rights or privileges or immunities in 1875 was not the same as it was in 1866.[132] In McConnell's view, this is untrue. The shifts in Republican opinion during these years were offsetting. He explains that "[w]hile Reconstruction fervor apparently increased between 1866 and 1870, there is reason to believe that it cooled considerably in the years after 1870."[133]

From a theoretical perspective, as Keith Whittington observes, there is reason to "discount . . . post hoc statements of intent in which the speaker has an interest in a particular outcome."[134] As I explain below, the empirical evidence tends to reinforce the conclusion that many Republicans' statements about the original meaning of the Fourteenth Amendment in the 1870s were motivated by their political agenda. Before reaching this point, however, I want to bring to light a difficulty with McConnell's argument that has received little if any attention.

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127. *Id.* at 1094.
128. *Id.* at 1095.
129. *Id.* at 1096.
130. *Id.*
131. *See id.* at 1097.
132. *See* Boyce, *supra* note 2, at 999–1000; Klarman, *supra* note 13, at 1903–11.
133. McConnell, *supra* note 2, at 1106.
134. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 194 (1999).

Assuming arguendo that it is correct that the understanding of privileges or immunities held by the Fourteenth Amendment's enactors and that held by the enactors of the 1875 Civil Rights Act was the same, it is not clear that the understanding of civil rights that McConnell attributes to those who voted for the Civil Rights Act was their actual understanding. Based on the proponents' statements it is possible, and probable, that a number of them may have voted for the Civil Rights Act on the theory that it protected fundamental rights. As McConnell acknowledges, congressional authority to forbid racial discrimination in the rights covered by the Act was repeatedly said to exist because the rights were common law rights.[135] As McConnell also acknowledges, the "leading exemplars [of fundamental rights] were common law rights."[136] Even Senator Sherman's statement, quoted by McConnell, that the Civil Rights Act was intended to secure to black citizens "the same rights that are secured by law to white people"[137] was preceded in the same speech by an argument that authority to forbid racial desegregation in public conveyances rested on the common law. In Sherman's words, such conveyances "are made for the common convenience; and [are] under the common law of England, which is part of the immunity of every citizen of the United States."[138]

Senator Edmunds, one of the most adamant and outspoken proponents of the 1875 Civil Rights Act, more expressly connected authority to pass the Act with the proposition that the Act stated fundamental rights. In the last remarks to be made before the Senate voted to pass the 1875 Civil Rights Act, Edmunds asked rhetorically, "What is it to be a citizen of the United States if being that the citizen cannot be protected in those *fundamental* privileges and immunities which inhere in the very nature of citizenship?"[139] In rebuttal to opponents' assertions that the Act rested on a constitutional theory that was too expansive, Edmunds went on to say that, "[I]t never has been contended that a *fundamental* right of a citizen was to be a lawyer or a schoolmaster or a judge or a Senator."[140] These are not

135. *See* McConnell, *supra* note 2, at 994–96.

136. *Id.* at 1028.

137. *Id.* at 1041.

138. CONG. GLOBE, 42d Cong., 2d Sess. 3192 (1872).

139. 43 CONG. REC. S2, 1870 (daily ed. Feb. 27, 1875) (statement of Sen. Edmunds) (emphasis added).

140. *Id.* (emphasis added). This is not to suggest that we know that Senator Edmunds voted for the 1875 Civil Rights Act on the theory that it protected privileges or immunities. Earlier Edmunds had spoken as if the Equal Protection Clause mandated an

remarks that can be reconciled with the proposition that civil rights were understood to be the "rights accorded under positive law to the most favored class of citizens."[141]

McConnell is correct that opponents of the 1875 Civil Rights Act sought to turn the concept of fundamental rights against school desegregation by arguing that the right to attend a public school is not a fundamental right.[142] It does not follow, however, that none of those voting for the Civil Rights Act held to a position that civil rights were fundamental rights and the Act protected fundamental rights. Significantly, the opposition to the Civil Rights Act of 1866 did not argue that the rights enumerated by the Act were other than of the character of fundamental rights, despite repeated assertions that authority to protect these rights derived from precisely this character. Instead, it was typical for the opposition to, in essence, argue with Senator Saulsbury that "[a] man may be a free man and not possess the same civil rights as other men."[143]

On the other hand, statements made by several proponents of the 1875 Civil Rights Act suggest an understanding of civil rights that is broader than the understanding McConnell attributes to these Republicans. Indeed, it is even broader than the original understanding of privileges or immunities that Perry attributes to those enacting the Fourteenth Amendment. McConnell, for example, points to Senator Boutwell as one of those who adhered to the proposition that, except for political or social rights, civil rights and privileges or immunities were defined by the rights enjoyed by white citizens.[144] In fact, Boutwell's definition of privileges or immunities is more broadly stated than this. Boutwell believed that privileges or immunities included "*any right*, privilege or immunity that is conceded to the citizens of [a] [s]tate generally."[145] Likewise, Senator Butler, during the debate on the 1875 Civil Rights Act, interpreted the

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equality of all civil rights and was the basis for his support of the school desegregation provision in the Act. *See* CONG. GLOBE, 42d Cong., 2d Sess. 3192 (1872). Edmunds may have relied on the Equal Protection Clause out of necessity after *Slaughter-House*. Nevertheless, it seems possible that he thought civil rights were fundamental rights.

141. McConnell, *supra* note 2, at 1041 and accompanying text.

142. *See id.* at 1036–37.

143. CONG. GLOBE, 39th Cong., 1st Sess. 477 (1866) (statement of Sen. Saulsbury). Saulsbury's contention is precisely what Republicans denied. For them, no man was free unless he possessed the rights fundamental to citizenship. *See supra* notes 74, 89 and accompanying text. *See also* CONG. GLOBE, 39th Cong., 1st Sess. 602 (1866) (remarks of Sen. Hendricks in opposition to the 1866 Civil Rights Act).

144. McConnell, *supra* note 2, at 1041 n.450.

145. 43 CONG. REC. S2, 1792–93 (daily ed. Feb. 26, 1875) (statement of Sen. Boutwell) (emphasis added).

Fourteenth Amendment to mean that "[n]o state has a right to pass any law which inhibits the full enjoyment of *all the rights* she gives her citizens by discriminating against any class of them provided they offend no law."[146] If these statements are to be credited as the original understanding of privileges or immunities, even political rights would be privileges or immunities. Indeed, these statements echoed those made years earlier by a group of radical Republicans, to the effect that the Fourteenth Amendment established a general equality principle.[147] In their opinion, the Amendment protected even a right to vote and thus made the Fifteenth Amendment's extension of suffrage to black males unnecessary.[148] In fact, Senator Sumner, the lead author of the 1875 Civil Rights Act, was one of the Republicans who made this argument.[149] The argument was overwhelmingly rejected by the Republicans proposing the Fifteenth Amendment, in part by pointing to the Fourteenth Amendment's language implying that the argument was bogus[150] and in part by pointing to the original meaning of the Comity Clause.[151]

Deciphering the original meaning of civil rights or of privileges or immunities from the 1875 Civil Rights Act debates is further complicated by the fact that many of the Act's proponents "invented" Equal Protection Clause arguments to provide constitutional cover for their position. Proponents, or at least many of them, turned to the Equal Protection Clause as the constitutional rationale for the Act after the Court's opinion in the *Slaughter-House* cases so narrowed the definition of privileges or immunities that the Privileges or Immunities Clause no longer could serve that purpose.[152] These proponents began to argue that the Equal Protection Clause required "equality of rights" generally.[153] Congressman William Lawrence, for example, insisted "the word 'protection' [in the Equal Protection Clause] must not be understood in any restricted sense, but must

146. 43 CONG. REC. S1, 340 (daily ed. Dec. 19, 1873) (statement of Sen. Butler) (emphasis added).

147. *See* CONG. GLOBE, 40th Cong., 3rd Sess. 1000–01 (1869) (remarks of Senators Sumner and Edmunds).

148. *See id.*

149. Senator Sumner asked rhetorically, "Is there any word of human conception broader than 'privilege'? When that was given, did it not give everything?" *Id.* at 1000.

150. *See, e.g., id.* at 1003 (remarks of Sen. Howard); *Id.* at 980 (remarks of Sen. Frelinghuysen). *See also* Bunch, *supra* note 51, at 358–60.

151. *See, e.g.*, CONG. GLOBE, 40th Cong., 3rd Sess. 1003 (1869) (remarks of Sen. Howard).

152. *See* McConnell, *supra* note 2, at 1001.

153. *See* 43 CONG. REC. S1, 409 (daily ed. Jan. 6, 1874) (remarks of Rep. Elliott).

include every benefit to be derived from laws."[154] As McConnell concedes, this is not consistent with the probable original meaning of the Equal Protection Clause.[155] Nor can it be true that this was actually Lawrence's opinion respecting the scope of privileges and immunities. When President Andrew Johnson vetoed the 1866 Civil Rights Act on the ground that it was unconstitutional, Lawrence defended congressional authority to enact the measure by emphasizing that national citizenship entails certain rights, particularly the rights protected by the Civil Rights Act. These civil rights, as Lawrence explained, were fundamental and thus were protected by the Privileges and Immunities (Comity) Clause:

> [T]he privileges referred to in the Constitution are such as are fundamental civil rights, not political rights *nor those dependent on local law* . . . . This [Privileges and Immunities] clause of the Constitution . . . recognizes but one kind of fundamental civil privileges equal for all citizens . . . . There it stands, the palladium of equal fundamental civil rights for all citizens.[156]

This can hardly be confused with the notion that civil rights or privileges and immunities included all rights and "benefits . . . derived from laws."[157] The distinction Lawrence makes between fundamental civil rights and rights dependent on local law plainly expresses a common tenet of Republicans' political and constitutional philosophy in 1866.[158]

Whether the Republicans enacting the 1875 Civil Rights Act sincerely believed that the Privileges or Immunities Clause was originally intended to protect all benefits or rights from forms of discriminatory abridgement, or that the language of the Equal Protection Clause, coupled with their objectives for the Civil Rights Act, lead them to this position is less than clear. However, it is clear that Republicans' constitutional justifications for the 1875 Act do not add up to a coherent theory of authority. If the Fourteenth Amendment was intended to protect citizens' access to every state-created benefit or right from unwarranted discrimination, it was unnecessary to argue that constitutional authority for the Act derived from the common law character of the rights Congress sought to protect. Common law rights ordinarily were not thought of as every

154. *Id.* at 412.
155. *See* McConnell, *supra* note 2, at 1001–02.
156. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (emphasis added).
157. *See supra* note 154 and accompanying text.
158. *See, e.g., supra* notes 74–75 and accompanying text.

right or benefit created by a state. Instead, they were defined as a subset of civil rights.[159] As McConnell concedes they were rights that inhered in citizenship, such as were "possessed of all free persons."[160] The reason citizens' use of public conveyances or common carriers and the other business entities denoted in the Civil Rights Act were deemed common law rights was because, as McConnell also concedes, "even before the Fourteenth Amendment . . . the carriers' legal duty [was] to serve all customers equally, subject only to reasonable restrictions and regulations."[161] That the right to use public conveyances, places of accommodation and the other "public" businesses noted in the Civil Rights Act was a legally enforceable, traditional and relatively uniform right, as I am about to elaborate, helps explain the nineteenth century perception that this was a fundamental right.

When the 1875 Act was in its infancy in the early 1870s, invoking the common law as constitutional authority for passing the Act was standard.[162] After *Slaughter-House*, the emphasis appears to have shifted to the argument that the Fourteenth Amendment enacted an equality of rights principle.[163] The obvious conclusion is that the shift may have been, in part, a matter of political expediency. McConnell shows that in the1870s most Republicans in Congress supported the Civil Rights Act of 1875 and a law to desegregate public schools. He does not show that the original understanding of the compass of privileges or immunities was broader than fundamental rights.

This conclusion is buttressed by what we know of the probable opinion of state legislators ratifying the Fourteenth Amendment. Numerous scholars have underscored the racist and segregationist views of Americans during the years when the Amendment was enacted.[164] It seems unlikely that, in such an environment, a majority of state legislators in most states thought they were adding a principle to the Constitution that prohibited racial discrimination in all state-created rights or benefits, save a narrowly defined category of political rights. To maintain that a majority of legislators in three-fourths of the states thought they were adding such a principle strains

159. *See* McConnell, *supra* note 2, at 1028.
160. *Id.* at 962.
161. *Id.* at 980–81.
162. *See id.* at 993–97.
163. *See id.* at 998–1005.
164. *See infra* notes 268–70 and accompanying text. *See also* Bunch, *supra* note 51, at 375.

credibility.

Little is known about the substance of the ratification debates,[165] but what is known indicates that the dominant understanding of supporters of the Amendment was that its purpose was to constitutionalize the principle of the 1866 Civil Rights Act.[166] As one legislator in Indiana stated in reply to the argument that the rights protected by the Privileges or Immunities Clause are already protected by the 1866 Civil Rights Act: "Well, we propose to make those principles permanent by writing them in the fundamental law."[167] Given the emphasis in Congress on the notion that the 1866 Civil Rights Act protected fundamental rights, it is likely that most state legislators understood the Privileges or Immunities Clause as providing protection of the fundamental rights that appertain to citizenship.[168]

McConnell does not take exception to the conclusion that it is probable that the understanding of privileges or immunities in the states was likely narrower than the understanding he attributes to Congress. He simply finds it irrelevant. Since the Fourteenth Amendment was enacted by coercing the Southern states, in the opinion of McConnell, "it is a fiction to treat the opinions of the people of the various states as controlling; it is Congress that effectively exercised the amendatory power."[169] However, in the course of chiding the *Brown* Court, McConnell states, "The question . . . is what the [Fourteenth] Amendment *meant*—not to its most avid proponents or most virulent enemies, but to the great mass of citizens and their representatives, who had the authority to add this Amendment to the Constitution."[170] Congress, of course, had authority to propose the Amendment, but it was the state legislatures that had authority to add it to the Constitution.[171]

Irrespective of opinion in the states, the evidence of opinion in Congress indicates that it is probable that the dominant understanding of the Privileges or Immunities Clause when it was proposed was that it protected fundamental rights.[172] Moreover, it seems likely that

165. *See* Bunch, *supra* note 51, at 382–84.
166. *See id.* at 382.
167. *See* FLACK, *supra* note 86, at 175.
168. *See* Bunch, *supra* note 51, at 382–84.
169. McConnell, *supra* note 2, at 1109.
170. *Id.* at 1133.
171. *See* U.S. CONST. art. V.
172. *See supra* Part III.A–B.

nearly all those in Congress who voted to propose the Fourteenth Amendment supported protecting at least fundamental rights, but unlikely that a two-thirds majority thought they were proposing an amendment protecting a more expansive equality principle.

McConnell concedes, in fact, that Alexander Bickel was correct to conclude in his article on segregation and originalism that moderate Republicans dominated consideration of the Fourteenth Amendment and "would not have supported a sweeping provision outlawing all forms of racial discrimination."[173] However, the principal concern of the moderate Republicans, in McConnell's view, was that the Fourteenth Amendment not be construed as extending suffrage to blacks, and the common understanding of privileges or immunities satisfied this concern.[174]

Thus, McConnell finds implausible Bickel's further conclusion that when the congressional committee drafting the Fourteenth Amendment, the Joint Committee on Reconstruction, adopted the Privileges or Immunities Clause and rejected a civil rights and immunities clause, it was a choice calculated to narrow the Amendment's reach.[175] As McConnell explains, language protecting "civil rights or immunities" generally had been deleted from the 1866 Civil Rights Act because some Republicans had argued that such language might be read to bar racial discrimination that burdened rights that the Act was not intended to protect.[176] Bingham, in particular, protested that the term "civil rights" would be interpreted to include "every right that pertains to the citizen under the Constitution, laws, and Government of this country"[177] including even "political rights".[178] Since Trumbull, the main author to the 1866 Act, had equated civil rights or immunities to privileges and immunities,[179] McConnell contends that, "[t]he [Fourteenth] Amendment contains a provision identical to the clause of the 1866 bill that was dropped on account of being too broad."[180] McConnell adds: "Not only did Lyman Trumbull specifically equate the terms [civil rights or immunities to privileges and immunities], but supporters linked both

173. McConnell, supra note 2, at 961. *Compare* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 57–58 (1955).

174. *See* McConnell, *supra* note 2, at 962.

175. *Id.* at 961.

176. *Id.* at 960.

177. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866).

178. *Id.*

179. *See id.* at 474.

180. McConnell, *supra* note 2, at 961.

the substance of the 1866 Act and the meaning of the new Privileges or Immunities Clause of the Fourteenth Amendment to the rights protected under the Privileges and Immunities Clause of Article IV . . . ."[181]

For the reasons that follow, it is Bickel's understanding of the import of these events and not McConnell's that should be credited. True, Trumbull equated civil rights or immunities to privileges and immunities in the debate on the 1866 Civil Rights Bill, but recall that he also equated civil rights to fundamental rights.[182] As Trumbull put it: "[T]he rights of citizens [are] . . . . [t]he great fundamental rights set forth in this bill."[183] More generally, the Republicans who sought to put to rest Bingham's concern about the breadth of civil rights relied largely on the claim that civil rights were only fundamental rights. For example, James Wilson's characterization of civil rights as those that are fundamental in nature (as referenced earlier) was likely prompted by the concern of Bingham and others about the bill's general references to civil rights.[184] Although Wilson was not convinced that striking the general language respecting civil rights "materially change[d]" the bill, those Republicans who balked at the inclusion of these terms had their way.[185]

The Joint Committee on Reconstruction could not have forgotten this struggle over the term "civil rights" when, only a short time later, it began the task of choosing language for the Fourteenth Amendment. It had before it a choice between the civil rights language struck from the 1866 Act and language, proposed by Bingham, that provided for "equal protection 'in the rights of life, liberty and property,' plus a privileges and immunities clause."[186] In view of the struggle over the civil rights language, as Bickel concludes: "[I]t is difficult to interpret the deliberate choice against using the term 'civil rights' as anything but a rejection of what were deemed its wider implications."[187] To put the point differently, it seems most unlikely that the privileges or immunities language was chosen because the Joint Committee understood it to have the scope Bingham attributed to civil rights. Nor is it likely that the Joint

181. *Id.*
182. *See supra* note 89 and accompanying text.
183. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).
184. *See supra* notes 84–85 and accompanying text.
185. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1366–67 (1866).
186. *See* Bickel, *supra* note 173, at 57.
187. *Id.*

Committee understood privileges or immunities to include all "rights" except political and social rights, unless political and social rights were understood to encompass all non-fundamental rights.

C. The Original Understanding of Fundamental Rights and Racial Desegregation

Whether the result in *Brown* and the Court's other racial desegregation decisions are consistent with the original meaning of the Fourteenth Amendment thus most likely depends on the original understanding of fundamental rights. That understanding was not characterized by precision, as noted earlier. Furthermore, from a present-day perspective, that "understanding" seems inscrutable as it relates to the importance of voting rights and certain other political rights.[188] Nevertheless, we do know something about that understanding.

Remember that the reason common law rights were thought of as fundamental rights was explained by the Reconstruction Republicans by referencing the character or nature of such rights: they were uniformly recognized, stable or traditional and legally enforceable. That fundamental rights were understood to be of this character is evident from the *Corfield* opinion. The relevant language from *Corfield* bears reemphasis. It declares that privileges and immunities are rights "which are, in their nature, fundamental."[189] It then describes fundamental rights as those "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."[190] This conceptualization of fundamental rights was repeated in similar terms throughout the deliberations of the Reconstruction Congresses. For example, when the 1866 Civil Rights Act was under consideration, Representative Moulton, after describing civil rights as fundamental rights, said that "a civil right is a right that a party is entitled to and that he can enforce by operation of law."[191] Representative Thayer described fundamental rights (or civil rights) as "rights which constitute the essence of freedom, and which are common to the citizens of all civilized States . . . ."[192] In like manner, Trumbull

188. *See* McConnell, *supra* note 2, at 1024–25.
189. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).
190. *Id.*
191. CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866).
192. *Id.* at 1152.

referred to civil rights or fundamental rights as "those general rights that belong to mankind everywhere . . . ."[193] Fundamental rights, then, were a body of national citizenship rights. They were the rights traditionally possessed in common by the citizens of free governments.

There is no question that the Fourteenth Amendment's enactors thought the rights of contract, property and personal security guarded by the 1866 Act were fundamental rights. Nor is there any question that the enactors considered these privileges or immunities. As McConnell has explained: "[T]he Civil Rights Act of 1866 . . . defined the uncontroversial core of 'civil [and fundamental] rights.'"[194] But can the original understanding of fundamental rights sustain the Court's racial desegregation decisions?

It is apparent, even on its face, that the 1875 Civil Rights Act was intended to require racial desegregation of certain public facilities. It provided that "all citizens of the United States, without distinction of race . . . are entitled to the . . . enjoyment of *any* accommodation . . . furnished by common carriers, . . . inn-keepers[,] . . . [and] other places of public amusement . . . ."[195] Both proponents and opponents read this language as requiring racial desegregation.[196] Indeed, opponents sought advantage in arguing that it commanded "association" of the races,[197] and proponents defended the Act as mandating desegregation.[198] More importantly, proponents defended the Act, especially before the *Slaughter-House* cases, in the same terms used to defend the 1866 Civil Rights Act. As McConnell acknowledges: "To [the 1875 Act's] supporters, the constitutional basis for the [1875 and 1866] Acts was the same."[199] That is, both were defended as enforcing common law rights against racial discrimination.[200] The defenders of the 1875 Act, in fact, often spoke, at least implicitly, the language of fundamental rights—language suggesting that the Act's requirements met the *Corfield* test of fundamentality. As they pointed out, the Act did not create rights.[201]

193. CONG. GLOBE, 42d Cong., 2d Sess. 3191 (1872).

194. McConnell, *supra* note 2, at 1028.

195. CONG. GLOBE, 42d Cong., 2d Sess. 244 (1871) (emphasis added).

196. McConnell, *supra* note 2, at 989.

197. *See infra* note 233 and accompanying text; McConnell, *supra* note 2, at 1014–23.

198. *See infra* notes 232–34 and accompanying text; McConnell, *supra* note 2, at 984–90, 1014–23.

199. McConnell, *supra* note 2, at 995.

200. *Id.* at 994–95.

201. *Id.* at 994.

Rather, it protected the existing common law right of access to certain facilities. This was a uniformly recognized, traditional and legally enforceable right of citizens in state law. Consider the remarks of Senator Sumner, the author and Senate sponsor of the original bill: "[T]he rule with regard to [public hotels or inns] may be traced to the earliest period of the common law."[202] Citing from numerous legal authorities, he described the rule as "opening the doors of inns to all travelers, without distinction, to the extent of authorizing not only an action but an indictment for the refusal to receive a traveler . . . ."[203] Sumner then averred that the same rule was applicable to public conveyances, state licensed places of amusements and other "public" entities.[204] Respecting conveyances, he said: "[T]hey, too, have obligations not unlike those of inns. Common carriers are grouped [by legal authorities] with innkeepers, especially in duty to passengers."[205] According to Sumner and others, these legal arguments followed from the fact that the proposed law was "supplementary to the existing [1866] Civil Rights Law . . . and it stands on the same requirements of the Constitution."[206]

Sumner, of course, would not have limited privileges or immunities or the rights protected by the Fourteenth Amendment to fundamental rights. As noted earlier, as a radical Republican, Sumner was prepared to push the amendment's scope well beyond what more moderate Republicans could accept.[207] Nevertheless, Sumner's remarks are clear evidence that defense of the 1875 Act's provisions in common law terms necessarily entailed speaking in terms of *Corfield*'s fundamental rights criteria—the same criteria deployed to defend the 1866 Civil Rights Act.

Even the proposition that access to public education, as a matter of Constitutional right, must be free of racial discrimination was rested on the common law. To quote from Sumner again: "The common school falls naturally into the same category [as the other public facilities denoted in the 1875 Act]. Like the others, it must be open to all or its designation is a misnomer . . . . It is not a school for whites or a school for blacks, but a school for all . . . ."[208] However, the

202. CONG. GLOBE, 42d Cong., 2d Sess. 383 (1872).
203. *Id.*
204. *Id.* at 383–84.
205. *Id.* at 383.
206. *Id.* at 382; McConnell, *supra* note 2, at 994–95.
207. *See supra* note 149 and accompanying text.
208. CONG. GLOBE, 42d Cong., 2d Sess. 383–84 (1872).

common law's connection with fundamental rights made this a difficult proposition to defend. A right of access to public or common schools was not a uniformly established and stable tradition in state law. Public education barely existed in the South and, compared to today, it was in a fledgling stage in the North.[209] Well before *Brown*, of course, the character of public education had changed dramatically. In every state, public education was well established as a benefit available to all, much as access to "public" conveyances was available to all under the common law.[210]

Despite McConnell's apparent skepticism about the idea that the Privileges or Immunities Clause was intended to protect only fundamental rights, he believes that the result in *Brown* could have been reached even under a fundamental rights theory.[211] I suggest that he is right, but for the wrong reason. He explains that while there may have been a genuine question as to whether public education was sufficiently widespread and entrenched in 1875 to be considered a fundamental right, there was no question that in 1954 "[t]he right to education had become stable, uniform and legally enforceable."[212] From a fundamental rights perspective, however, this misstates the issue. The issue is not whether a right to a public education was, *in and of itself*, a fundamental right in 1954, but whether there was a fundamental right to access, use or "enjoy" any part of this benefit when it was provided. It was the right to use *whatever* common carriers (transportation systems), public accommodations (inns and places of public amusement), and common schools available in a state that was the common law or civil rights issue for Republicans in the 1870s.[213] If it is a fundamental right to have available a system of public education, public swimming pools, or public transport, a state arguably would be constitutionally required to provide such services. The Court's decisions in *Palmer v. Thompson*[214] and in *San Antonio Independent School District v. Rodriguez*[215] indicate that it is unwilling to take that step. Nor does the original understanding of fundamental rights require such a step.

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209. Brown v. Bd. of Educ., 347 U.S. 483, 489–90 (1954); *see also* McConnell, *supra* note 2, 1039–40.

210. *See* McConnell, *supra* note 2, at 1104, 1136.

211. *See id.* at 1104.

212. *Id.*

213. *See supra* notes 202–06, 208 and accompanying text.

214. 403 U.S. 217 (1971).

215. 411 U.S. 1 (1973).

Was there, then, a fundamental right to access, or to enroll in, whatever public education services were offered by a state in 1954? To reframe this question in terms of the test for identifying fundamental rights, was this right of access so widely recognized and entrenched in public policy that it could be considered fundamental? At the very least, an affirmative answer is plausible. By the time of *Brown* there was an expectation, uniformly recognized and enforceable in law in every state, that the "common" school really was, in Sumner's sense, a common school.[216] Access could not be denied arbitrarily. As McConnell reports, "[i]t had become unthinkable that any state would abolish its schools—as unthinkable as it was, in 1871-75, that any state would abrogate the common law rights of its white citizens."[217] More to the point, in originalist terms, the right of access by 1954 had become uniformly entrenched or stable and, in this sense, "traditional."

Recall, however, that *Brown* despaired of reaching any decision about the original understanding of the Fourteenth Amendment as it related to public education. Because of the rudimentary state of public education in the Reconstruction era, according to the Court, "it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education."[218] McConnell demonstrates that this conclusion probably was overstated, but it also is beside the point, so far as the theory of originalism is concerned. That the enactors of the Fourteenth Amendment may not have thought much about the Amendment's implications for access to public schools, or that they thought access was not a fundamental right does not preclude a present-day jurist from deciding that it is fundamental and that it should be protected from hostile state action based on the original understanding of the fundamental rights principle embodied in the Privileges or Immunities Clause. This is not to deny the informative value of the position of the enactors of a constitutional principle regarding what their principle imported for a specific issue. However, there is wide agreement among originalist scholars that it is the original principle embodied in a constitutional provision that is binding and not how the enactors of the principle would have decided a particular issue using their

216. *See* McConnell, *supra* note 2, at 1104, 1135–36.
217. *Id.* at 1104.
218. *See Brown*, 347 U.S. at 490.

principle.[219]

There is little doubt that the original fundamental rights principle described in *Corfield* would support a conclusion that access to public schools was a fundamental right or a privilege or immunity by 1954. The same conclusion is applicable to the other public facilities desegregated by the Court pursuant to the state action concept[220]—*Brown*'s progeny.[221] Access to these facilities was of the same general character as access to public education: it was a right held open by public policy to all persons against arbitrary denial or interference. Moreover, this right was stable and uniformly recognized in the public policies of the states or their agencies. It was, in short, a right comparable in nature to the right of access to inns or conveyances underscored by Sumner in 1872. The fact that in some states in the 1950s and 1960s access to public facilities was available only on a racially segregated basis does not detract from this conclusion. Rather, it poses the different question of whether segregation was an abridgment of the fundamental right of access to public facilities operated by the state and to facilities so pervasively regulated by the state that they were "public" facilities—open to all comers—in the sense of the common law.

However, the conclusion that *Brown* and its progeny were consonant with a fundamental rights theory of the Fourteenth Amendment faces an additional hurdle. Reconstruction Republicans usually equated fundamental rights with natural rights.[222] As they saw it, natural rights were rights that were not created by government;[223] they exist in a state of nature.[224] As discussed earlier, on this basis some Republicans insisted that there was no fundamental right or civil

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219. *See* McConnell, *supra* note 2, at 1101.

220. See Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), for a discussion on the concept of "state action."

221. *See, e.g.*, Schiro v. Bynum, 375 U.S. 395 (1964) (per curiam) (municipal auditoriums); Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam) (public court rooms); Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) (restaurants in municipal airports); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (per curiam) (athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (public park facilities); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (public transportation); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (municipal golf courses); Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches and bathhouses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (per curiam) (municipal amphitheaters).

222. *See, e.g.*, CONG. GLOBE, 39th Cong. 1st Sess. 474 (1866) (remarks of Senator Trumbull); *id.* at 1152 (remarks of Representative Thayer).

223. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull).

224. *Id.*

right to attend a racially desegregated public school. As Trumbull put it, "schools do not exist naturally; they are artificial."[225] Thus, in Trumbull's view, there was no civil right to attend school.[226]

Be Trumbull's opinion as it may, however, the result in *Brown* is as much a natural right as many of the other rights that Reconstruction Republicans deemed "natural". Republicans consistently, for example, said that the right to sue, to give evidence, and the other rights denoted in the 1866 Civil Rights Act are natural rights, or rights that inhere in the nature of things.[227] It is not easy to fathom how a right to sue or to give evidence is less "artificial" than a right to attend a public school. These rights presuppose the existence of at least a rudimentary judicial system or similar government institution. The right to sue or to give evidence does not exist, in any meaningful sense, apart from the governmental system that makes these rights available. In Trumbull's terms they "do not exist naturally."[228] By extension of Trumbull's reasoning there must be no civil right to seek relief for a legal injury in a court. Courts do not exist naturally. Yet, this is a position he clearly did not accept.

Perhaps the justification for protecting such rights was not that they were natural or existed in a state of nature, but rather that they were thought necessary to preserve what Republicans considered the most basic fundamental rights: life, liberty, and property. Some Republicans' statements could be construed this way,[229] although it is doubtful that this was what they had in mind. If it was, the exclusion of political rights, such as the right to vote, from the protected class of fundamental rights is puzzling. Surely a right to vote could be considered crucial to preserving the basic fundamental rights.

Another of the rights protected from racially discriminatory public policies by the 1866 Civil Rights Act was the right to make and enforce contracts.[230] It too was deemed natural. Perhaps it could be said that unlike a right to sue, a right of persons to make agreements with other persons existed in a state of nature. A contract, however, is

225. CONG. GLOBE, 42d Cong., 2d Sess. 3191 (1872).

226. *Id.*

227. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull); CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866) (remarks of Rep. Thayer); CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (remarks of Rep. Windom); CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (remarks of Rep. Lawrence).

228. CONG. GLOBE, 42d Cong., 2d Sess. 3191 (1872).

229. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (remarks of Rep. Wilson).

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

not always created by an agreement between persons. Contracts entail the idea of a legally binding agreement.[231] Any agreement of this character is contingent upon a legal or governmental system's recognition of the agreement.

Even assuming, however, that a right to contract (or to make an agreement) is a natural right, it is not clear that this distinguishes it from the right that is actually at stake in *Brown*. The originalist right at stake in *Brown*, as I observed above, is not a right to public education per se; it is the right of admission to the public schools a state sees fit to create. Whether schools exist naturally is beside the point. If there is a "natural right" at stake in *Brown*, it is perhaps a right to associate (or not associate) with persons of other races. Such a right arguably would exist in a state of nature, as would a right to form agreements (or exchange promises). Yet, why a right not to associate with persons of other races in a public school must trump a right to associate in that setting is not apparent from any natural rights theory. In fact, the Republicans enacting the 1875 Civil Rights Act implicitly rejected the idea that there was any natural right "not to associate" or right not to share the same facility with persons one finds unacceptable in the "civil" or "public" spheres covered by the Act.[232] When the Act's opponents accused Republican proponents of trying to impose racial equality by compelling the races to associate, proponents answered that in the public sphere, as distinct from the private severe, you cannot choose your company.[233] To cite but one such response, Senator Pratt said, "if you will travel in a public conveyance, you must be content to share your convenience with the Indian, Negro, Turk, Italian, Swede, Norwegian or any other foreigner who avails himself of the same facility, because it is public, and should therefore be open to all."[234]

I do not wish to suggest, however, that the result in *Brown* can be explained with reference to a well-defined theory of natural rights that can be teased from the historical record. Whether Reconstruction Republicans had any such theory is arguable. My point, rather, is that is seems unlikely that Trumbull and the other Republicans opposing racial desegregation measures could articulate a natural rights theory that clearly distinguished between the rights they deemed natural as

231. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. b (1981).

232. *See* McConnell, *supra* note 2, at 1021–22.

233. *Id.* at 1020–22.

234. 2 CONG. REC. 4082 (1874). *See also* 2 CONG. REC. app. at 479–80 (1874) (remarks of Rep. Darrall).

part of the common law in the Civil Rights Act of 1866 and a right to attend a public school or use other public facilities.

The natural rights enigma aside, the *Corfield* "test" for identifying fundamental rights is intelligible, even if imprecise. Rights or privileges or immunities that are widely recognized (uniform), entrenched (stable), and legally enforceable can be identified, although reasonable differences of opinion about what these rights are may sometimes exist. Indeed, as I explain in Part V, the Court already uses a similar test for discerning fundamental rights.[235]

D. The Original Understanding of Fundamental Rights and Same-Sex Marriage

I called attention, at the outset of our inquiry, to the claim that defending *Brown*'s outcome as originalist comes at the expense of a conservative view of originalism's implications for constitutional interpretation. To be sure, this claim derived from the proposition that the Fourteenth Amendment was originally understood to represent an equality norm.[236] Nevertheless, I want to consider next whether the same claim is applicable to the implications of the fundamental rights norm for a public policy prohibiting same-sex marriage. This requires a more complete definition of the original understanding of fundamental rights. "To define a legal . . . principle involves simultaneously stating its content and its limits."[237]

The historical evidence shows that Reconstruction Republicans' frame of reference for discerning fundamental rights that were uniform, stable and legally enforceable was, at least in part, the public policies of the states.[238] Yet they never attempted to state with exacting precision how uniform or stable a right had to be before it was a fundamental right or a privilege or immunity. Nor is most antebellum case law especially helpful in this regard.[239] Nonetheless, we can say with reasonable certitude that the class of fundamental rights was not thought to be open-ended. The criteria for defining fundamental rights clearly are not so loose that, excepting a narrow class of political rights, every right or benefit created by the public

235. *See* discussion *infra* Part V.A.

236. *See supra* notes 14–19 and accompanying text.

237. BORK, *supra* note 2, at 150.

238. Republican's repeatedly cited *Corfield's* definition of fundamental rights or privileges and immunities, which referred to these rights as those "enjoyed by the citizens of the several states." CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

239. *See* Bunch *supra* note 51, at 343–44.

policies of a state could be considered fundamental or part of the body of national citizenship rights. Nor are these criteria so broad that even a right recognized by the public policy of a simple majority of states could qualify. Rather, fundamental rights were described as rights established by public policy in a supermajority of states. That is, fundamental rights were rights that were nationally distributed. In *Corfield*'s terms, fundamental rights are rights "enjoyed by the citizens of the several states."[240] In addition, a fundamental right was a stable right, deeply rooted in the public policy tradition of an extraordinary majority of states. Again in *Corfield*'s terms, fundamental rights are rights that "have, at all times, been enjoyed by the citizens."[241] In practice, *Corfield*'s absolutes probably were not taken literally. As their concern with slave state policies attests, the enactors of the Fourteenth Amendment recognized that not every state government could be counted on to protect the fundamental rights of citizens. Still, as they saw it, there was widespread agreement that no state government should infringe certain "fundamental" rights for invidious or impermissible reasons.

It should be added that fundamental rights were often identified in concrete or specific terms. Apart from references to natural rights and general references to property rights, life or personal security, and liberty or the right of locomotion, fundamental rights were not discussed in the antebellum courts or in the Reconstruction congresses in highly abstract terms.[242] Rather, the practical and theoretical test for fundamental rights merged. They were rights such as the right to make and enforce contracts or to use transportation systems. They were the rights reflected in the deeply rooted public policy traditions of the states and the nation.[243]

Given the historical evidence, it would be difficult to conceive of a fundamental rights case less tenable than one for same-sex marriage. No state legislature has ever recognized a right of persons of the same sex to marry. While this may appear to dispose of the fundamental

240. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).

241. *Id.*

242. My point respecting the antebellum courts is highlighted in Earl Maltz's excellent analysis of antebellum usage of the terms fundamental rights or privileges and immunites. *See* Maltz, *supra* note 28, at 336–39. The record of the congressional debates, confirms this point as it relates to the Reconstruction debates. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull); CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (remarks of Rep. Wilson).

243. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull); CONG. GLOBE, 39th Cong., 1st Sess. 1117–18 (1866) (remarks of Rep. Wilson). *See also* McConnell, *supra* note 2, at 1036–37.

rights and same-sex marriage question, it does not. There is a relevant and more difficult question: is there a fundamental right to marry? If there is, so far as originalism is concerned, it only remains to be resolved whether a state policy against same-sex marriage abridges this right.

Although the Fourteenth Amendment's enactors may have regarded marriage a "right," few spoke directly to what class of rights marriage belonged. Among the exceptions, Senator Howard lumped "the right of having a family, a wife" with a fundamental civil right—"the right of acquiring property."[244] In contrast, Representative Moulton, argued that marriage is a social right, "not a civil right . . . as contemplated by . . . the [1866 Civil Rights] bill."[245]

In any case, we need not resolve the question of the enactors' view of marriage's classification as a right, if it can be resolved. The modern Court, without violating the theory of originalism, can deem marriage a fundamental right irrespective of the enactors' views.[246] Indeed, the modern Court does consider marriage, in some sense, a fundamental right. "The decision to marry", it has declared, "is a fundamental right,"[247] and on another occasion, that marriage "is one of the 'basic civil rights of man.'"[248]

If the Court means to claim that there is a fundamental *general* right to marry, however, the claim is dubious. Just how dubious this claim is, is revealed by comparing it with the fundamental right of access to public facilities under the common law. The common law duty of the public inn or conveyance was to serve all comers, a well-established legal duty that provided a general public benefit. To recall Sumner's words respecting public hotels, "[t]he inn was open to 'every man.'"[249] Civil marriage regulations are of a different character. The states uniformly and traditionally have refused to recognize relationships in which the individuals do not meet certain requirements as a lawful marriage or union. To claim that there is a uniform and stable right of citizens to any marital relationship they please is contradicted, for example, by age, residency and mental health requirements, the states' unwavering refusal to recognize polygamous marriages, the nearly unanimous rejection of same-sex

244. CONG. GLOBE, 39th Cong. 1st Sess. 504 (1866).
245. *Id.* at 632.
246. *See supra* note 219 and accompanying text.
247. *Turner v. Safley*, 482 U.S. 78, 95 (1987).
248. Loving v. Virginia, 388 U.S. 1, 12 (1967).
249. CONG. GLOBE, 42d Cong. 2d Sess. 383 (1872).

marriage and the long standing policies of many states against recognition of incestuous marital relationships.[250] These regulations are bottomed on the premise that the states have authority to define, in a legal sense, what it means to be married.

To be sure, even the fundamental right of access to public inns was subject to certain conditions. Sumner's remarks in this vein were typical: "[T]he duty [of the innkeeper] is to receive all paying travelers decent in appearance and conduct."[251] A comparable restriction on "access" to civil marriage would limit state regulations to a requirement that couples seeking to marry must apply for a state marriage license. This is a world away from the authority in our federalist system, traditionally assumed to lie with the states, to say what civil marriage is and to exclude certain persons on that basis.

That some states may have dropped or relaxed certain requirements for eligibility to marry[252] cannot be transmuted into a general right to marry, as an originalist matter, except by resort to jurisprudential alchemy. All the states still impose various requirements on marriage that reflect the long-standing view that the states can define what marriage is. That the nation is caught up in a rancorous debate about legal recognition of same-sex marriage[253] is powerful evidence that there is no uniform and stable national recognition of a right to marry. The Court's role, per the theory of originalism, is to protect *existing* fundamental rights by discerning what the nation considers a fundamental right. It is not to *create* new rights by dictating to American society and to the states what is a fundamental right based on its own preferences.[254] For the Court to define a right to marry at a level of generality that treats a state policy prohibiting same-sex marriage as presumptively unconstitutional is effectively to do what the original fundamental rights norm forbids: it is to create a fundamental right.

Granted, as I said above, there is some play in the joints of the fundamental rights principle. However, the play is limited; the fact that a simple majority of states protect some right will not suffice to

250. *See* Zablocki v. Redhail, 434 U.S. 374, 398–99 (1978) (Powell, J., concurring).

251. CONG. GLOBE, 42d Cong. 2d Sess. 383 (1872).

252. *See, e.g.*, HARRY D. KRAUSE ET. AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 86 (4th ed. 1998).

253. *See generally*, Jacob M. Schlesinger, *As Gay Marriage Roils the States, The Right May Gain*, WALL ST. J., May 5, 2004, at A1 (noting that gay marriage is on the political agenda of many states).

254. *See* Michael H. v. Gerald D., 491 U.S. 110, 127, n.6 (1989) (Scalia, J., concurring).

transform it into a fundamental right. Moreover, I suggest that there is even less room for judicial discretion in identifying fundamental rights consistent with originalism than may appear at first blush. Originalism does not require that a constitutional provision must be interpreted in isolation from other provisions. There is no reason to conclude that the Fourteenth Amendment was intended to undo the probable original purpose of the requirements for amending the Constitution or to totally eviscerate the original purpose of federalism. Originalism requires that the original understanding of the Fourteenth Amendment, Article V,[255] and federalism be reconciled.

As Martin Diamond shows, "the real aim and practical effect of the complicated amending procedure was . . . to ensure that passage of an amendment would require a *nationally* distributed majority."[256] This, in concert with the federalist principle, insured that the scope of a state's policy-making or police powers could not be diminished unless the specified supermajority of states agreed that the power withdrawn was one that the states should not exercise. From an originalist perspective, then, unless the Court finds some way to take into account the deference to state police power entailed in the original purpose of the processes for amending the Constitution, that purpose may be defeated by the lack of explicit historical direction for determining how uniform and stable a right must be before it is considered fundamental. Accordingly, before the Court adds to the class of fundamental rights, originalism would seem to require that the "right" asserted has been embodied in the public policies of at

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255. Article V states:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for purposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one of the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

256. MARTIN DIAMOND, *Democracy and the Federalist: A Reconsideration of the Framers' Intent*, *in* AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT 17, 23–24 (William A. Schambra ed., 1992) (emphasis in original). Henry Monaghan corroborates Diamond's conclusion. *See* Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 125–26 (1996). That Diamond and Monaghan are correct about this matter is affirmed by James Madison in the Federalist Papers. *See* THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

least three-fourths of the states for a period sufficiently long that it is deeply entrenched or stable. There is no room in originalism, as I explain in Part V, for treating new or emergent recognition of a right in the public policies of a majority of states as conferring the status of fundamentality.

Richard Posner is right that the "epithet 'usurpative' would . . . fit"[257] a decision by the Court that the Constitution compels the states to recognize a right of persons of the same sex to marry. However, if conformity to originalism is required, he is wrong to treat public policy and public opinion as extra-constitutional or as non-textual reasons for this conclusion.[258] A state's policy to not recognize a relationship between persons of the same sex as a civil marriage does not implicate, much less violate, a fundamental right defined in originalist terms.

Is there, then, any fundamental right at stake respecting civil marriage? There is one, if no other: a right to enter a civil union of one woman and one man. "[T]he roots of the institution of marriage," as one jurist has observed, "are deeply set in history as a civil union of a single man and a single woman."[259] Every state legislature recognizes, and has long recognized, such a lawful union as marriage. Indeed, although it is swept aside in a rush to proclaim a "right" to same-sex marriage, even the Supreme Judicial Court of Massachusetts conceded that "the long-standing statutory understanding, derived from the common law, [is] that 'marriage' means the lawful union of a woman and a man."[260] This is not to claim that a state must create an opportunity for civil marriage. "Civil marriage is . . . created by the [s]tate."[261] Nevertheless, when a state creates a right to enter a civil marriage, there is a strong case for a fundamental right of a single woman and a single man to enter into that legal union. This fundamental right exists, from an originalist perspective, in the same sense that there exists a fundamental right to access or enroll in whatever public schools a state chooses to create. Whether a law discriminating on the basis of race in allocating the fundamental right to enter a traditional marriage between a man and

257. Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585 (1997).

258. *Id.* at 1585–86.

259. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 977 (2003) (Spina, J., dissenting).

260. *Id.* at 953 (Marshall, C. J., plurality).

261. *Id.* at 984 (Cordy, J., dissenting).

woman is constitutional depends on the answer to the second question posed by the Privileges or Immunities Clause: what was the original understanding of state action that abridged privileges or immunities?

IV. RACIAL DESEGREGATION, SAME-SEX MARRIAGE, AND THE ORIGINAL UNDERSTANDING OF "NO STATE SHALL ABRIDGE"

To abridge a privilege or immunity protected by the Fourteenth Amendment is to either deny it or interfere with its "enjoyment" for some constitutionally impermissible reason.[262] Neither logic nor history support a conclusion that the Privileges or Immunities Clause was intended to preclude every state action that might interfere to some degree with a citizen's fundamental rights. As a matter of logic, that would expose to constitutional challenge even the most reasonable and innocuous state action burdening one or more of these rights. And historically, as the important *Corfield* decision acknowledged, the constitutional protection of fundamental rights is "subject . . . to such restraints as the government may justly prescribe for the general good of the whole."[263] Enjoyment of certain fundamental rights obviously could be forfeited, for example, when necessary during the punishment of a citizen for criminal conduct. The 1866 Civil Rights Act explicitly provided for this exception to the protection it extended to certain fundamental rights.[264] Thus, as Perry observes, the determination of which state actions impermissibly encumber a privilege or immunity requires that the "reasonableness" of these actions be assessed.[265]

Those who enacted the Fourteenth Amendment obviously thought the racially discriminatory state actions they confronted were constitutionally unreasonable when such actions interfered with a citizen's enjoyment of privileges or immunities. In Perry's opinion, this is because these actions were "racist,"[266] and Reconstruction Republicans intended to constitutionalize an egalitarian principle. That principle outlaws discriminatory state action when it is, in Perry's words, "based on a view . . . that the disfavored citizens are not truly or fully human—that they are at best, defective, even

262. *See* PERRY, *supra* note 9, at 71–77.

263. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

264. The Civil Rights Act provided that certain rights could not be abridged on account of "any previous condition of slavery or involuntary servitude, except as a punishment for crime.... " *See* Civil Rights Act of 1866, 14 Stat. 27 (1866).

265. *See* PERRY, *supra* note 9, at 77.

266. *See id.* at 90.

debased or degraded, human beings . . . ."[267]

It is doubtful that this principle can be reconciled with the view of race that predominated among congressional Republicans proposing the Fourteenth Amendment, much less with the opinion about race that likely prevailed among Northern state legislators in the 1860s. Most of these Republicans were not modern egalitarians. Senator Henry Wilson, Sumner's Massachusetts colleague and a radical Republican supporter of the Fourteenth Amendment, probably reflected the view of a majority of Republicans when he said, "I believe the African race inferior to the white race. . . [and] I do not believe in the equality of the Indian race with us . . . but I believe . . . the inferior man and the superior have equal natural rights."[268] Numerous historians have emphasized that antipathy toward blacks in the Reconstruction era was not confined to the South. David Donald, for example, reports that "racism ran deep in the North . . . ."[269] Similarly, Russell Nye states, "What lies beneath the politics of Reconstruction, so far as it touched the Negro, is the prevailing racist policy tacitly accepted by both parties and by the general public."[270]

This does not mean that the Republicans enacting the Fourteenth Amendment shared the racist philosophy of the typical slave state Democrat. Indeed, Abraham Lincoln probably came much closer to the view of a majority of Republicans than does Perry's representation of their view. Referring to a black woman, Lincoln remarked, "In some respects she certainly is not my equal; but in her natural right to eat the bread she earns . . . she is my equal, and the equal of all others."[271] As Henry Monaghan explains, mid-nineteenth century Americans "opposed slavery and racial equality with equal intensity. They could logically believe that emancipation required that the freed man possess certain rights to personal security and property. Simultaneously, they could favor rank discrimination against blacks in political and social matters."[272]

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267. *Id.* at 76.

268. CONG. GLOBE, 36th Cong., 1st Sess. 1685–86 (1860); *see also* CONG. GLOBE, 36th Cong., 1st Sess. 1683 (1860) (remarks of Senator Harlan, Republican, Iowa).

269. DONALD, *supra* note 76, at 202.

270. R. Nye, *Comment on C. V. Woodward's Paper, in* NEW FRONTIERS OF AMERICAN RECONSTRUCTION 148, 152 Harold Hyman ed., 1966). *See also* Phillip S. Paludan, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 54 (1975); W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865-1867 285 (1963).

271. Speech at Springfield, Illinois (Jun. 26, 1857), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 405 (Roy P. Basler ed., 1953).

272. Henry P. Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L.

To be sure, the laws and practices that the 1866 Civil Rights Act sought to prevent were, as Perry contends, "conspicuously racist"[273] in the sense that they were rooted in the idea that blacks are inferior to whites. Moreover, in important respects, the 1866 Act led to the Fourteenth Amendment. However, that the Fourteenth Amendment forbade racially discriminatory state actions stigmatizing blacks as inferior does not mean that the Amendment's enactors forbade such discrimination *because* it stigmatized blacks as inferior. Perry confuses result with motivation. Based on historical evidence, it is probable that McConnell's conclusion about the position of the Republicans who enacted the 1875 Civil Rights Act is also applicable to the position or motivation of those who gave us the Fourteenth Amendment: "[It] was based not so much on abhorrence of racial discrimination as a general moral evil as on a particular understanding of the concept of citizenship."[274] Citizenship entails certain fundamental rights or privileges or immunities. No state should interfere with the enjoyment of a fundamental right of a citizen on some unreasonable basis.

There is no question that in some sense the enactors of the Fourteenth Amendment thought race an unreasonable basis for state policies interfering with the fundamental rights of citizenship. If not because of the racist character of such policies, in what sense was this true? So far as the historical record shows, the enactors did not proffer an abstract general principle or standard to distinguish reasonable from unreasonable interference with fundamental rights. They objected to the racially discriminatory state actions they confronted, but not in terms of an abstract principle.[275]

We are left, then, with two plausible originalist explanations for their objections to racial distinctions in the public policies of the states. They may have thought that discrimination based on race was unreasonable per se, or irrespective of the justification for reliance on race-based distinctions between citizens. When racial discrimination by a state interfered with a citizen's enjoyment of fundamental rights, it was unequivocally condemned as unreasonable. They entertained no exceptions. Thus, it is plausible that adherence to the original understanding of racially discriminatory state actions requires that all such actions interfering with the enjoyment of privileges or

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REV. 117, 126 (1978).

273. PERRY, *supra* note 9, at 100.

274. McConnell, *supra* note 2, at 1016.

275. *See infra* note 276.

immunities should be deemed constitutionally unreasonable.[276]

On the other hand, the racially discriminatory state actions the enactors confronted did not have any "reasonable" justification. These actions had only the odious purpose and effect of interfering with the fundamental rights of certain citizens. Thus, it is also plausible that adherence to the original understanding of racially discriminatory state actions requires that only racial discrimination that has no better purpose than interfering with the enjoyment of fundamental rights should be deemed constitutionally unreasonable. Racial distinctions by a state with more "benign" purposes may or may not be constitutionally impermissible.[277]

Brown's result is consistent with either of these conceptions of the "reasonableness" of race discrimination by a state. If admission to public schools was a fundamental right by 1954, as I have argued it was, there is no doubt that to condition admission on race was an abridgment of this right. Such discrimination was constitutionally unreasonable with or without reference to its purpose. If the purpose of racial segregation should matter, this was race discrimination with no better purpose than denying the enjoyment of a fundamental right.

In the same way, the result in *Loving v. Virginia*—forbidding a state from refusing to recognize a marriage between a woman and a man of different races—was consistent with either conception of the reasonableness of race discrimination. The right to enter a traditional marriage between a woman and a man was probably a fundamental right and the discrimination at issue in *Loving* was unreasonable whether or not the purpose of such discrimination was constitutionally relevant. If the purpose of race discrimination was constitutionally relevant, this was race discrimination lacking a permissible purpose. Its purpose was to deny the enjoyment of a fundamental right.

I argued that there is no fundamental right to marry, as a general matter. Even if I were wrong, however, it would not follow that a public policy against same-sex marriage is an abridgment of this

276. Consider, for example, this statement by Senator Edmunds: "[The states' bills of rights] only say that these common rights, which belong necessarily to all men alike in the reason of things, shall not be invaded on the pretense that a man is of a particular race or a particular religion." 43 CONG. REC. 2, 1870 (1875) (remarks of Senator Edmunds).

277. There is still a strong case to be made for subjecting racially discriminatory distribution of government benefits (affirmative action) to strict judicial scrutiny. *See* PERRY, *supra* note 9, at 108; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–95 (1989) (emphasizing the need to apply strict scrutiny even to "benign" racial classification, as a means to "smoke out" potentially illegitimate uses of race).

right. To be sure, once we move beyond interference with a privilege or immunity based on race, the history of the Fourteenth Amendment's enactment supplies no definitive answer as to what should be considered unreasonable or unconstitutional. However, an originalist answer can be supplied by turning again to the probable original purpose of the requirements to amend the Constitution. Recall that "the real aim and practical effect of the complicated amending procedure was . . . to ensure that passage of an amendment would require a *nationally* distributed majority."[278] Thus, as I noted before, curtailing a state's policy-making power required the agreement of the specified supermajority of states. As with the definition of fundamental rights, unless the Court finds some way to take into account the deference to state policy-making power and federalism entailed in the original purpose of the processes for amending the Constitution, these purposes may be defeated by the lack of historical direction for determining what constitutes an abridgment of the Fourteenth Amendment. It is consistent with originalism, then, to insist that before the Court concludes that state action discriminating between persons on some basis in addition to race is presumptively unconstitutional or unconstitutional per se, the public policy choices of at least three-fourths of the states should reflect an enduring rejection of the moral propriety of this action.[279]

There is nothing remotely approaching an enduring national agreement that discrimination against same-sex marriage is unreasonable. To the contrary, the public policy choices of the states indicate that the nation is far from such agreement.[280] It remains to ask, however, whether the Court presently enforces, in the name of the Fourteenth Amendment, a nonoriginalist norm that would compel

278. Diamond, *supra* note 256, at 63. *See also* sources cited *supra* note 256 (highlighting the founders' conscious efforts to craft a demanding set of supermajoritarian requirements for amending the Constitution).

279. That the southern states may have been compelled to ratify the Fourteenth Amendment does not nullify this argument. If the Amendment does not derive its moral and legal legitimacy from having survived the amendatory gauntlet, it must be derived from such widespread acceptance that the Amendment has achieved, or, as Perry put it, "virtual constitutional status." *See* PERRY, *supra* note 9, at 21. But, how widespread must this acceptance be to achieve such status? In my view, the acceptance must be sufficiently widespread (nationally distributed) so that, in effect, the Amendment's understanding comports with the original purpose of the Article V supermajority requirements for amending the Constitution.

280. *See* Pam Greenberg, *State Laws Affecting Lesbians and Gays*, 9 NAT'L CONF. OF STATE LEGISLATURES NCSL LEGISBRIEFS, April 1, 2001, at 1 (reporting that, as of April 2001, thirty-six states had enacted "defense of marriage" statutes). *See also* 1 U.S.C. § 7 (2000) (Definition of "marriage"); 28 U.S.C. § 1738C (2000) (Federal Defense of Marriage Act).

the states to recognize same-sex marriages.

V. RACIAL DESEGREGATION, SAME-SEX MARRIAGE, AND THE COURT'S FOURTEENTH AMENDMENT

Suppose that I am correct to this point, but the Court is irreversibly committed to enforcing norms in the name of the Fourteenth Amendment that are not originalist. As I observed at the outset, some scholars contend that the original meaning of the Constitution's provisions, including those of the Fourteenth Amendment, has little to do with the Court's actual justification for its opinions, notwithstanding its occasional lip service to the Constitution's original understanding.[281] If this is accurate, whatever value a resort to the original meaning of the Fourteenth Amendment has as a theoretical critique of the Court, reliance on originalism is a recipe for irrelevance so far as its actual impact on the Court's Fourteenth Amendment opinions. But is the Court irreversibly committed to nonoriginalist Fourteenth Amendment norms? Furthermore, if it is, is this fatal to conservative criticism of judicially mandated same-sex marriage? Does it render an originalist justification for the result in *Brown* and its progeny no more than an exercise in academic theorizing? I want finally to focus on answering these questions.

The questions I hope to answer require us to first delineate, if possible, the Fourteenth Amendment norms to which the Court is committed. There is no shortage of claims from constitutional theorists in this regard. Typically these theorists find in the Court's Fourteenth Amendment decisions some norm, or set of norms, that purportedly must be stated at a high level of generality or abstraction.[282] These claims are so many and so diverse that a comprehensive review is beyond the scope of this paper. Moreover, I regard this review as unnecessary; the very diversity of these claims is telling. Not only do scholars contest one another's claims,[283] but the Court has never expressly committed to any of these abstract definitions of its Fourteenth Amendment standards.

What it is expressly committed to in the name of the Fourteenth Amendment is both the protection of fundamental rights from hostile state action[284] and an anti-discrimination or equality principle that

281. *See supra* notes 17–19 and accompanying text.
282. *See* BORK, *supra* note 2, at 187–265.
283. *See id.*
284. The Court's opinions on privacy offer a discussion of this commitment. *See, e.g.,*

treats the constitutionality of certain discriminatory state action as presumptively suspect.[285] Thus, I focus on the fundamental rights and equality "norms" to assess the argument that the Court's Fourteenth Amendment jurisprudence is hopelessly irreconcilable with the theory of originalism and with modern social conservatives' view of judicial restraint. It should be underscored, at the outset, that the Court's fundamental rights and equality norms are constitutional norms only in a loose sense. Although the Court is committed to these norms or constitutional values, their precise shape or definition, in important respects, is not settled.

A. The Court's Fundamental Rights Norm and Originalism

The fundamental rights that the Court has recognized include many of the Bill of Rights freedoms and certain decisional rights of individuals respecting marriage, family relationships, child rearing, and procreation.[286] When the Court decides that a state action encumbers a fundamental right, it presumes that this state action is unconstitutional. To overcome that presumption is extraordinarily difficult; the state must bear the burden of convincing the Court that its action is necessary to achieve a compelling purpose.[287] The Court describes this standard of review as "strict scrutiny,"[288] which contrasts with the "rational basis"[289] standard the Court ordinarily invokes to review state action interfering with a liberty not considered fundamental. This lower level of scrutiny or review requires only that the challenged state action be rationally related to a legitimate purpose.[290]

According to the Court, its concern for guarding fundamental rights, both those of a procedural and of a substantive nature, against hostile state action is commanded by the meaning of the Fourteenth Amendment's Due Process Clause.[291] If so, it probably is not by the original meaning of this clause. Even on its face, the language of the

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Troxel v. Granville, 530 U.S. 57, 65 (2000).

285. The Court's opinions on affirmative action offer a discussion of this commitment. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

286. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

287. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214–15 (1972); *cf.* PERRY, *supra* note 9, at 101 (describing the exacting standard of review deployed by the Court to enforce its so-called "equality norm").

288. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31, 44 (1973).

289. *See* Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

290. *See id.*

291. *See* CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 495–500 (7th ed. 2000).

clause—"nor shall any state deprive any person of life, liberty, or property, without due process of law"[292]—seems to guard only against governmental taking of a person's basic fundamental rights except in accordance with a process to which the person is entitled. The historical record confirms that this was the likely understanding of a Constitution-amending majority of those who proposed and ratified this clause.[293] The broader understanding of the clause as a guarantee not only of a process of law but also of substantive rights, such as free speech, as most scholars affirm, is not consistent with the remarks of the Fourteenth Amendment's enactors.[294] When these enactors spoke of protecting fundamental rights, they almost invariably rested their argument on the Privileges or Immunities Clause, at least before *Slaughter-House*.[295] Indeed, the Court's reliance on the Due Process Clause to protect fundamental rights probably can be explained as an unintended consequence of its decision in *Slaughter-House* to treat the Privileges or Immunities Clause as a virtual nullity.

The Courts "mistake" with the Due Process Clause, however, does not rule out a conclusion that its fundamental rights norm is originalist. What matters for that conclusion is whether this norm is consistent with the original understanding of *some* provision in the Constitution.[296]

I have maintained that the more probable original understanding of the Privileges or Immunities Clause is that it protects fundamental rights. But is the fundamental rights norm of the Fourteenth Amendment's enactors the same as that norm enforced by the Court? To state this question in less abstract terms, when the Court makes a decision about whether a right is a fundamental constitutional right, is that decision made consistently with the original criteria or test for identifying fundamental rights? As a practical matter, the test for what constitutes fundamental rights is the fundamental right's norm.

The Court frequently characterizes fundamental rights as those "deeply rooted in this Nation's history and tradition."[297] When the Court invokes this test it comes close to invoking the original fundamental rights test. This version of the "traditions" test, however, is probably broader and more imprecise than the fundamental rights

292. U.S. CONST. amend. XIV, § 1.
293. *See* PERRY, *supra* note 9, at 52–53.
294. *See id.*
295. *See supra* Part III.A– B.
296. *See* PERRY, *supra* note 9, at 89; *see also* PERRY, *supra* note 38, at 137.
297. *See, e.g.*, Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977).

criteria relied upon by the enactors of the Privileges or Immunities Clause. The enactors' criteria were not stated in terms of a loosely defined general tradition that may or may not be shaped by the specific public policy choices of the states. As an original matter, it was the deeply rooted public policies of an extraordinary majority of the states that was their practical frame of reference for identifying fundamental rights.[298]

Justice Antonin Scalia has refined the Court's traditions test in a way that comes closer to the probable original meaning of fundamental rights than any test relied upon by members of the Court. He defines the relevant tradition for discerning a fundamental constitutional right at "the most specific level at which [it] . . . can be identified"[299] and treats the public policy decisions of the states as crucial for identifying this tradition.[300] However, no majority of the Court has ever agreed, in express terms, to abide by Scalia's refinement of the Court's traditions test for fundamental rights. When Scalia proffered this refinement in 1989 for *Michael H. v. Gerald D.*, only Chief Justice Rehnquist joined his opinion on this point.[301]

Moreover, the Court has never professed to rely solely on the traditions test for identifying fundamental constitutional rights. It also frequently identifies fundamental rights as those "implicit in the concept of ordered liberty."[302] Although the Court often deploys this test in conjunction with the traditions test, it is not clear that these two tests yield the same conclusion about fundamental rights. In fact, despite the long-standing statutory restrictions on abortion, the Court in *Roe v. Wade* turned to the argument that a woman's decision about abortion is a private decisional right implicit in ordered liberty.[303] In the words of the *Roe* opinion, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in . . . [the] guarantee of personal privacy."[304]

Why *ordered* liberty implies a fundamental right to have an abortion is anything but apparent.[305] Such a conclusion surely depends

298. *See supra* notes 97, 238 and accompanying text.

299. Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989).

300. *See id.* at 127 n.6.

301. *See id.* at 113.

302. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937).

303. *See* Roe v. Wade, 410 U.S. 113, 152 (1973).

304. *Id.* (citation omitted).

305. It is apparent that the "right" to choose an abortion is, as Scalia has said, a "liberty of great importance to many women." Planned Parenthood v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part). However, it is no less

on some assumption or set of assumptions about the nature of fundamental rights that the "ordered liberty" test does not specify. The test begs the question it poses: what rights inhere in ordered liberty? Since the answer to this question depends on assumptions that are not supplied by the test, the test standing alone cannot be said to be analogous to the criteria for identifying fundamental rights that were widely invoked by the enactors of the Fourteenth Amendment.

The plurality decision on abortion in *Planned Parenthood v. Casey*[306] appears to posit another test for deciding what substantive rights are guarded by the Due Process Clause, namely "reasoned judgment."[307] Surely, however, Scalia is right: reasoned judgment amounts to decision-making by "philosophical predilection."[308] When reasoned judgment leads to different conclusions because those doing the reasoning rely on different philosophical premises, whose conclusion is to be preferred? Like the ordered liberty test, without more it is not possible to say where reasoned judgment will lead. It may not lead to fundamental rights as defined by the theory of originalism.

The *Casey* opinion, of course, never expressly proclaims abortion to be a fundamental right.[309] Indeed, it appears to flirt with the idea that the traditions test is moribund, and thus it is unnecessary to find a right is fundamental before according it heightened judicial protection. Drawing on Justice Harlan's dissenting opinion in *Poe v. Ullman*,[310] the plurality indicated that "[d]ue process has not been reduced to any formula; its content cannot be determined by reference to any code."[311] Rather than reliance on a "formula" for defining the

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apparent that a right to choose an abortion is, in Rehnquist's words, "*sui generis*, different in kind from" other privacy rights meriting heightened judicial scrutiny. *See id.* at 952 (Rehnquist, C.J., concurring in part and dissenting in part). That "ordered liberty" necessarily entails a preference for a right to choose an abortion over the right of a state to protect "potential life" is not apparent. *See also infra* note 307.

306. 505 U.S. 833 (1992).

307. *Id.* at 849.

308. *Id.* at 1000 (Scalia, J., concurring in part and dissenting in part). The *Casey* opinion assigns greater importance to the right to choose an abortion than to the right of the state to protect the "potential" life of the fetus in the period before fetal viability. This is consistent with some persons' opinion of the relative importance of the competing interests. The Court's insistence that this "ordering" of preferences is a constitutional requirement, as opposed to an extra-constitutional moral/philosophical choice, is less than convincing.

309. Chief Justice Rehnquist explained this in his opinion. *See id.* at 954 (Rehnquist, C.J., concurring in part and dissenting in part).

310. 367 U.S. 497 (1961).

311. *Casey*, 505 U.S. at 849 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

content of due process, the plurality cites with approval Harlan's position that due process protects "a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and . . . recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[312]

Whether *Casey* charts a new direction in the Court's due process jurisprudence is unclear, but is open to considerable doubt. *Casey* relies on "reasoned judgment" in part, no doubt, to avoid the implications of the deeply rooted traditions test. The pre-*Roe* statutory restrictions on abortion were not easily gotten around under the deeply rooted traditions test[313] and to find abortion a fundamental right under the traditions tests would have made it difficult to justify the new, more relaxed "undue burden" standard for reviewing state restrictions on abortion advocated by the plurality.[314]

In any event, the *Casey* opinion should not be read as discarding the Court's traditions test and fundamental rights analysis. Five years after *Casey*, in the *Washington v. Glucksberg*[315] decision on physician-assisted suicide, five members of the Court, including two members of the *Casey* plurality, expressly rejected the proposition that substantive-due-process review should be controlled by Harlan's *Poe* dissent. "True, the Court relied on Justice Harlan's dissent in *Casey*," *Glucksberg* concedes, "but . . . we did not in so doing jettison our established approach."[316] The established approach, according to the *Glucksberg* majority, has two principal features:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition" . . . and "implicit in the concept of ordered liberty" . . . . Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the

312. *Id.* at 848 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

313. As then Justice Rehnquist noted:

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication ... that the asserted right to an abortion is not "so rooted in the traditions ... of our people as to be ranked as fundamental."

Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

314. *See Casey*, 505 U.S. at 876.

315. 521 U.S. 702 (1997).

316. *Id.* at 722 n.17.

> crucial "guideposts for responsible decisionmaking" that direct and restrain our exposition of the Due Process Clause.[317]

Notice that the Court not only disavows abandonment of its usual fundamental rights test, it also treats the legal traditions part of the test as controlling. Accordingly, it made short work of the proposition that a right to physician-assisted suicide exists as a matter of personal autonomy: "The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted 'right' . . . is not a fundamental liberty."[318]

Neither does *Lawrence v. Texas*[319] stand for the proposition that the Court has abandoned its traditions test, notwithstanding that some of its sweeping language may appear to the contrary. Although *Lawrence* proclaims, often in unguarded terms, that the Due Process Clause "gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"[320] and characterizes recognition of this "right" as "emerging"[321] rather that grounded in history and tradition, its conclusions circumvent, but do not reject, the fundamental rights traditions test. The opinion never proclaims the right it decrees fundamental[322] because the *Lawrence* majority apparently regarded a fundamental rights analysis as unnecessary. According to the opinion, the "statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[323] Whether or not this bold assertion is persuasive, it suggests that the Texas statute at issue is not subject to the "established" standard of review for fundamental rights because the state fails the less demanding rational basis review.

To be sure, the *Lawrence* Court attempts to discredit the Court's earlier conclusion in *Bowers v. Hardwick*[324] that, in view of the history of sodomy law, it would be "facetious" to find a freedom to engage in homosexual sodomy a fundamental right, "'deeply rooted

317. *Id.* at 720–21 (citations omitted).

318. *Id.* at 728.

319. 539 U.S. 558 (2003).

320. *Id.* at 572.

321. *Id.*

322. Justice Scalia noted that the Court leaves untouched *Bower*'s conclusion that there is no fundamental right to engage in homosexual sodomy. *See id.* at 586 (Scalia, J., dissenting).

323. *Id.* at 578.

324. 478 U.S. 186 (1986).

in this Nation's history and tradition.'"[325] *Lawrence* observes that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[326] That, of course, is irrelevant to *Bowers*'s conclusion. What mattered for *Bowers*'s conclusion, as Scalia emphasizes, is that sodomy was criminalized, whether heterosexual or homosexual.[327] *Lawrence*, disingenuously, tries to have it both ways: the right decreed is not at variance with the nation's history and legal traditions and yet its recognition in public policy is "emerging." Be this as it may, however, *Lawrence* is far from inaugurating a new test for fundamental rights and far from suggesting that the "established" fundamental rights analysis is thrown into discard.

None of this is to claim that the Court is committed to a "pure" originalist definition of fundamental rights. No judge will conform her opinions to that definition. Remember, for example, that political rights such as voting were excluded from the original class of fundamental rights on philosophical grounds.[328] This philosophical distinction is not one the Court will adopt. Precedent clearly has established voting and other "political" rights as fundamental constitutional rights.[329] Yet, it overstates the problem this poses for reliance on originalism to claim that the theory is irrelevant to, or hopelessly inconsistent with, the Court's fundamental rights precedents. There is no bedrock constitutional norm for identifying rights the Court will treat with special solicitude, unless it is the deeply rooted traditions test. And, importantly, the Court's traditions test, especially the Scalia-Rehnquist version, rather closely tracks original criteria for identifying fundamental rights. The traditions test still provides an opportunity to shape many of the Court's constitutional rights decisions in conformity with the original understanding of the Privileges or Immunities Clause.

If the question before the Court is whether same-sex marriage is a constitutional right, the Court's traditions test and originalism lead to the same answer: same-sex marriage, as such, is not a right. Public opinion, as Posner has observed, is not irrelevant to deciding whether a right to marry a person of the same sex exists.[330] In his words,

325. *Id.* at 194.
326. 539 U.S. at 568.
327. *See id.* at 596 (Scalia, J., dissenting).
328. *See supra* notes 74–82 and accompanying text.
329. *See* Shaw v. Reno, 509 U.S. 630, 633 (1993).
330. Posner, *supra* note 257, at 1585.

"[J]udges must accord considerable respect to the deeply held views of the democratic majority."[331] Thus, in Posner's opinion, the Court ought not recognize a new right of persons to marry someone of the same sex.[332] Posner, however, offers no textually grounded reason for this counsel. I suggest that respect for the nation's legal traditions—respect for the outcome of democracy—is commanded by the Constitution's text. It is not a mere extra-constitutional consideration attendant to the exercise of judicial prudence, as Posner apparently believes.[333] If originalism (or the legal traditions test) is the touchstone for discerning constitutional rights, it is a mistake to argue, as Michael Perry does, that it is "judicial capitulation to politics"[334] for the Court to refuse to recognize a right to same-sex marriage on the ground that a majority of Americans oppose such a decision, at least when that opposition has been manifested in the legislative policies of the states from the nation's inception.

The apparent assumption of Posner[335] and other scholars[336] that the question for the Court is whether same-sex marriage, as such, should be considered a constitutional right ignores the truly crucial question: is there a general right to marry? The traditions test, however, is as inconsistent with a general right to marry as the original *Corfield* test. Restrictive state marriage laws are anchored in the long-standing constitutional authority of the states to define the character or nature of marriage, at least so long as the traditional protection accorded the one-man-one-woman marriage is not abridged.[337] The Court's decision in *Loving v. Virginia* to strike down state laws barring racially mixed marriages is not to the contrary.[338] It was the race discrimination that attended the Virginia miscegenation statutes that was the constitutional problem from a fundamental rights perspective. As *Loving* put it, "[To deny a right to marry] on so unsupportable basis as the racial classifications embodied in these statutes . . . is . . . to deprive all the State's citizens of liberty without due process of law."[339]

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331. *Id.* at 1586.

332. *See id.* at 1585.

333. *See id.* at 1585–86.

334. PERRY, *supra* note 9, at 149.

335. *See* Posner, *supra* note 257, at 1585–86.

336. Perry apparently assumes that the issue for the Court to resolve is whether same-sex marriage is a constitutional right. *See* PERRY, *supra* note 9, at 146.

337. *See supra* notes 249–53 and accompanying text.

338. 388 U.S. 1 (1967).

339. *Id.* at 12.

There is no question that the Court considers the choice to marry and the marital relationship important. It has described the freedom to marry "as one of the vital personal rights essential to the orderly pursuit of happiness"[340] and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[341] However, there is no reason to believe the Court understood itself to be speaking of marriage except in its historic sense as a civil union of a woman and a man. As Justice Cordy stressed in his opinion dissenting from the declaration of a right to same-sex marriage in *Goodridge v. Department of Public Health*, "In context, all of . . . [the Supreme Court's] discussions [of the importance of marriage] are about the 'fundamental' nature of the institution of marriage as it has existed and been understood in this country, not as . . . redefined [to encompass a right to same-sex marriage]."[342] Moreover, the Court's *Glucksberg* opinion makes it clear that "[not] all important, intimate, and personal decisions are . . . protected [by the Due Process Clause]."[343] Rather, "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty . . . are protected by the Fourteenth Amendment."[344] As we saw earlier, it is the "traditions" component of this formula that is purportedly controlling. "Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking' . . . ."[345]

I noted previously that the second principal feature of the Court's established method of substantive-due-process review requires a "'careful description' of the asserted fundamental liberty interest"[346] and rights deemed fundamental by the Fourteenth Amendment's enactors, in practice, often reflected the specific deeply rooted public policy traditions of the states.[347] This being the case, rights defined at a high level of generality rarely are likely to be fundamental as gauged by the Court's legal traditions test[348] or the *Corfield* "test."[349]

340. *Id.*
341. Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
342. 798 N.E.2d 941, 984 (Mass. 2003) (Cordy, J., dissenting).
343. 521 U.S. 702, 727 (1997).
344. *Id.*
345. *Id.* at 721.
346. *Id.*
347. *See supra* notes 97, 238 and accompanying text.
348. *See supra* notes 298, 318 and accompanying text.
349. *See supra* notes 240–41 and accompanying text.

Without a more precise definition, for example, neither "'the right to be let alone'"[350] nor the right of "controlling the nature of . . . intimate associations with others,"[351] advanced by Justice Blackmun in his *Bowers* dissent, is a fundamental right. It would be preposterous to maintain that there exists a uniform and stable (traditional) right to be left alone, if this suggests a general right to be free of government constraint. Similarly, the longstanding public policy proscriptions of bigamy, adultery and prostitution clearly contradict any assertion that there exists a uniform and stable (traditional) freedom to engage in any and every form of intimate association or conduct. The truth about defining rights or liberties at a high level of generality is that this is not infrequently an effort to escape the historic public policy proscriptions of some specific practice. This is not less true of extruding a right of persons of the same sex to marry from a general right to marry.

Unlike same-sex marriage or a "right to marry," the result in *Brown* and its progeny is as reconcilable with the Court's traditions test as with *Corfield*. This is not to deny that some members of the Court and some scholars apparently believe that national tradition, particularly national "legal" tradition, was at odds with the Court's racial desegregation decisions.[352] Even assuming the enactors of the Fourteenth Amendment were untroubled by racial segregation, however, such opinion is mistaken. It misapprehends the question the Court would answer if *Brown* and progeny were decided as fundamental rights cases. The question is not whether public education, marriage and so forth were traditionally segregated by race. Rather, the question is whether the right of "access" to public education, other public accommodations and to one-man-one-woman marriage was established by legal tradition. Was there, so to speak, a traditionally established right of a citizen to these benefits? If there was, it only remained for the Court to find that racial segregation abridged this fundamental right.

From an originalist vantage, *Brown* and the Court's other desegregation decisions pursuant to the state-action concept are grounded in the wrong constitutional justification. "Although a right answer for the right reasons is better than a right answer for the wrong

350. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

351. *Id.* at 206.

352. For example, the Court's plurality decision in *Casey* notes that the nation's legal tradition was at odds with racial intermarriage. *See* Planned Parenthood v. Casey, 505 U.S. 833, 847–48 (1992).

reasons, a right answer for the wrong reasons is still better, if fidelity to the Constitution is our aim, than a wrong answer."[353]

B. The Court's Equality Norm and Originalism

Unlike a fundamental rights norm, a general command that all state-created benefits and burdens are to be allocated "equally" probably has no connection to the original meaning of the Fourteenth Amendment. There is no doubt, however, that an "equality norm" is constitutional bedrock. In a long line of decisions, the Court has read the Equal Protection Clause[354] of the Fourteenth Amendment as a general equality command.[355] As the Court put it in the 1886 *Yick Wo vs. Hopkins* decision, "the equal protection of the laws is a pledge of the protection of equal laws."[356]

Obviously, the allocation of public policy benefits and burdens does not and cannot conform to a literal requirement of absolute equality. Thus, in practice, the Court does not consider most forms of state or government discrimination constitutionally suspect.[357] It need only have a rational basis. That is, so long as it is reasonable to believe that the state's discriminatory action serves some legitimate public policy purpose to some degree, it will pass constitutional muster.[358] On the other hand, the Court is suspicious of the constitutionality of some government discrimination. In the Court's terminology, some discriminatory state action is constitutionally "suspect"[359] and some is "quasi-suspect."[360] If constitutionally suspect discrimination, such as racial discrimination, is challenged in a lawsuit, the Court places the burden on the state to demonstrate that its discrimination is "necessary" to serve a compelling public policy purpose.[361] Quasi-suspect discrimination subjects the state to slightly less demanding judicial scrutiny. The state has the burden of demonstrating that its discrimination is substantially related to an

353. *See* PERRY, *supra* note 9, at 89.

354. *See* U.S. CONST. amend. XIV, § 1.

355. *See* Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y. L. F. 385, 385 (1966).

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

357. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U. S. 307, 312 (1976).

358. *See id.*

359. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).

360. *See id.* at 218, 220.

361. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). *See also* PERRY, *supra* note 9, at 101–02.

important state purpose.[362] Although not literally demanding absolute equality in the allocation of all benefits and burdens created by the state, the Court's equal protection scheme potentially subjects every "state action" discriminating between persons to judicial review.

It is quite unlikely that this reflects the originally intended purpose of the Equal Protection Clause. Even on their face, the words of the clause "No state shall . . . deny to any person within its jurisdiction equal protection of the laws"[363] is a command to provide *protection* of the law *that is equal*. *Yick Wo* stands the language of the clause on its head. Moreover, before *Slaughter-House*, it was rare to hear enactors of the Fourteenth Amendment attribute the meaning to "equal protection of the laws" that was ascribed to that phrase in *Yick Wo*. Instead, as Alfred Avins[364] and Earl Maltz[365] have demonstrated, during the antebellum and early Reconstruction eras, protective laws commonly were described as they were in the 1866 Civil Rights Act, as "laws and proceedings for the security of person and property."[366] When these protections were provided to white citizens, the Act declared that other citizens were entitled to "full and equal benefit" of that protection.[367]

Thus, the historical evidence relevant to the original meaning of the Equal Protection Clause confirms my earlier theoretical observation that when competing definitions of a constitutional amendment's provisions overlap, the more narrow (or most narrow) definition was probably the only meaning consented to by a Constitution-amending supermajority.[368] That is, the Equal Protection Clause probably was intended to command equality of protective laws and not equality of all laws. Nor is it probable that the Privileges or Immunities Clause originally was intended to represent a norm commanding equality of all rights except a narrow class of political rights. Thus, it is unavailing to argue that the Court's only mistake with a general equality norm was to rely on the wrong Fourteenth Amendment provision.

Still, it is too late for the Court to disavow enforcement of a general equality standard. Too many of its Fourteenth Amendment decisions,

362. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).
363. U.S. CONST. amend. XIV, § 1.
364. Avins, *supra* note 355, at 386–429.
365. Maltz, note 28, at 320–26.
366. Civil Rights Act of 1866, § 1, 14 Stat. 27.
367. *Id.*
368. *See* discussion *supra* Part II.

including *Brown*, rest on this standard.[369] Moreover, a general equality norm is too widely accepted to expect the Court to give it up.[370]

However, while an equality norm, as a general matter, is a fixed part of the Court's Fourteenth Amendment jurisprudence, not all the elements of this norm are fixed. Although it is unlikely that the Court will abandon the idea that certain state discrimination is, to some degree, suspicious and therefore subject to heightened judicial scrutiny, the criteria or test the Court should invoke for deciding what state discrimination triggers this heightened scrutiny is still perhaps somewhat malleable. Scholars' efforts to influence the Court's understanding of these criteria affirm this conclusion.[371]

As may be obvious, at its roots, the debate about the criteria for distinguishing suspect state discrimination from discrimination that is not suspicious is, in effect, an argument about what constitutes an abridgment of the Court's equality command. If originalism is to play any role in shaping the decisions the Court reaches with the Equal Protection Clause, it is likely in the debate about the definition of abridgment.

I explained previously that we have very little evidence about how the enactors of the Fourteenth Amendment understood the concept of abridgment. Although they agreed that invidious racial discrimination abridged the Fourteenth Amendment, they did not proffer an *authoritative* abstract rationale to explain this conclusion. The most historical evidence can tell us is that there was a firm and widespread agreement among the Republicans who gave us the Fourteenth Amendment that race ordinarily was not considered a constitutionally acceptable basis for distributing many of the benefits and burdens allocated by a state.[372] Thus, an originalist may with reason insist that the Court make such widespread agreement the "test" for determining whether the discriminatory action of a state is constitutionally suspect.

Moreover, I have suggested that an originalist strategy for constraining the Court's Fourteenth Amendment decisions need not

369. *See* Avins, *supra* note 355, at 385.

370. Although it is probable, on my analysis, that Perry's definition of the Court's anti-discrimination or equality norm is neither originalist nor reflective of the Court's actual norm, it is true that there is wide support for a general equality principle. *See* PERRY, *supra* note 9, at 84.

371. Perry's effort to "define" these criteria is an example. *See* PERRY, *supra* note 9, at 71–77.

372. *See supra* notes 275–76 and accompanying text.

be tied exclusively to the original meaning of that Amendment. The original purpose of the procedures for amending the Constitution, cited earlier, reinforces the argument that widespread agreement approaching a national consensus or sufficient to amend the Constitution should be the measure of whether a particular discriminatory state action on some basis other than race is constitutionally impermissible.[373] It would seem reasonable as well, in view of a "national agreement" standard, to urge that the agreement not be fleeting. Rather, it should be an enduring agreement, as reflected in the states' public policies.

But are the Court's Equal Protection Clause decisions so averse to these originalist considerations that they are irrelevant? In fact, the Court has expressly acknowledged that such considerations are important to its equality norm jurisprudence. In *San Antonio Independent School District v. Rodriguez*,[374] a case based in part on the assertion that Texas's method of financing public primary and secondary schools constituted unconstitutional discrimination against the poor, the Court stressed that:

> [E]very claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "the maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action," it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education in existence in virtually every state.[375]

The *Rodriguez* Court also said, however, that whether a state action classifying persons on a certain basis, such as national origin, is subject to heightened judicial scrutiny or to a presumption of unconstitutionality traditionally turns on whether the class of persons has been "saddled with such disabilities, or subjected to such a history of unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the

373. *See supra* notes 278–79 and accompanying text.
374. 411 U.S. 1 (1973).
375. *Id.* at 44.

majoritarian political process."[376] If the Court determines per these criteria that the basis for discriminatory state action is suspect, its concern for federalism will not trump that determination. Nevertheless, according to the Court's own light, this determination should be tempered by sensitivity to the federal character of our government. The *Rodriguez* Court concluded that there was no suspect class of poor persons created by the Texas system of financing public schools.[377] That conclusion was "buttress[ed]" by concern for federalism.[378] If the Court is reticent, as it appears, to overturn a virtual national consensus concerning the moral propriety of a particular basis for discriminatory state action, that reticence harmonizes with originalism.

The Court's concern for federalism surely would apply to a legal challenge to the public policy barriers to same-sex marriage. "It would be difficult to imagine a case having a greater potential impact on our federal system."[379] To declare the barriers unconstitutional would require the Court to "abrogate . . . [the definition of civil marriage] in existence in virtually every state."[380] There obviously is no national agreement that the basis for legal barriers to same-sex marriage constitutes a morally or constitutionally suspect form of discrimination.

Recall, however, Perry's contention that a significant component of the equality norm established by the Fourteenth Amendment was that it outlawed government discrimination against a class of persons based on the view that the class is not fully human.[381] In Perry's view, the Court enforces a substantially equivalent principle and will not abandon it because the principle has become constitutional bedrock, irrespective of its originalist pedigree.[382] He cites *City of Cleburne v. Cleburne Living Center*,[383] an opinion overturning a zoning ordinance, as confirming the Court's commitment to this principle. Although Perry is not explicit, he no doubt finds evidence for his argument in *Cleburne's* statement that the presumption of constitutionality accorded most legislative classifications of persons

376. *Id.* at 28.
377. *Id.*
378. *Id.* at 44.
379. *Id.*
380. *Compare with id.*
381. *See supra* note 267 and accompanying text.
382. *See* PERRY, *supra* note 9, at 77.
383. 473 U.S. 432 (1985).

"gives way . . . when a statute classifies by race, alienage, or national origin. These factors are . . . deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."[384] According to Perry, public policies discriminating against homosexual conduct rest on the impermissible ideology that homosexuals are not fully human and thus should be subjected to strict judicial scrutiny, or to a presumption or inference that they are unconstitutional.[385] Moreover, he insists that legal barriers to same-sex marriage cannot survive strict scrutiny. There is no argument (including a contrary national agreement) that can rebut the inference that these barriers are rooted in the constitutionally forbidden ideology.[386]

However, assuming the Court takes seriously Perry's argument for strict judicial scrutiny of government discrimination rooted in the forbidden ideology, Perry's claim that government discrimination against same-sex marriage is so rooted is unpersuasive. As Perry concedes, at least implicitly, government discrimination against most forms of *conduct* is not presumptively unconstitutional.[387] Nonetheless, in Perry's opinion, public policies that treat same-sex sexual conduct differentially—a policy, for example, of refusing to recognize same-sex marital unions but recognizing opposite-sex unions—must be rooted "in a cultural milieu that is . . . pervasively homophobic—that does . . . pervasively regard the homosexual not merely as a different human but as a lesser, inferior, defective human . . . ."[388] For Perry, this is evident from analogizing a law that criminalizes non-marital sex only when it occurs between two persons of different races to a law that criminalizes non-marital sex only when it occurs between two persons of the same sex. "Just as [the first law] . . . is rooted in and expresses the racism in a culture, [the second law] . . . is rooted in and expresses the homophobia in a culture."[389]

Perry's analogy is flawed. To be sure, the historical reason for laws criminalizing sex between two persons of different races was that at least one of the persons was considered to be from an inferior or

384. *Id.* at 440.

385. *See* PERRY, *supra* note 9, at 131–50.

386. *Id.* at 147–48.

387. For example, Perry does not believe that laws against polygamy are presumptively unconstitutional because such laws are based on "moral disapproval of polygamy itself." *See id.* at 245 n.81.

388. *Id.* at 142.

389. *Id.*

"defective" race. However, the class of persons deemed inferior in the United States, consisting of African Americans and other nonwhites, was considered inferior or defective *wholly apart* from the sexual activity or conduct condemned by anti-miscegenation laws or laws prohibiting sex between two persons of different races. This is not true for a law that disapproves same-sex sexual conduct. It is precisely the conduct that is discouraged by such a law. A law that criminalizes same-sex sodomy, for example, is not written with reference to a person's so-called sexual orientation. It criminalizes such conduct even if it is a one time act engaged in by someone who does not consider himself homosexual.[390]

One may insist, in concert with Justice O'Connor, that a law criminalizing homosexual sodomy but not heterosexual sodomy "target[s] . . . conduct that is closely correlated with being homosexual."[391] That is, the law targets not just conduct but also targets a proclivity for the conduct and thus is "directed toward gay persons as a class."[392] Of course, all criminal law targets particular conduct and could be said, in this sense, to target persons with a proclivity (inclination or desire) for such conduct.

Nonetheless, if prohibiting particular conduct is the purpose of a sodomy law, why might a state choose to criminalize sodomy only when it occurs between persons of the same-sex? The answer, presumably, is that the state's policymakers see a moral distinction between homosexual and heterosexual sexual conduct. If they act on that perception and enact a law criminalizing sodomy only when it occurs between persons of the same sex, it undoubtedly stigmatizes homosexual conduct and thus may stigmatize, whether intentionally or not, the proclivity for such conduct—a proclivity associated with being homosexual. It does not follow, however, that the law is motivated by mere animus toward homosexuals, unconnected with the objective of discouraging particular conduct.

Thus, to analogize a law prohibiting homosexual conduct to miscegenation law reflects confusion about cause and effect. Whatever stigma attaches to being homosexual is the *effect*, not the cause, of a law criminalizing homosexual conduct. The law's

390. The Texas same-sex sodomy law voided by the Court in *Lawrence v. Texas*, for example, provided, "A person commits an offense if he engages in deviant sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (2003).

391. Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring).

392. *Id.*

motivation is to prohibit the sexual conduct itself. To the extent that homosexuals are identified with the conduct or desire for the conduct, homosexuals may be stigmatized. By contrast, the stigma that attached to being nonwhite in early America was the *cause*, not the effect of a miscegenation law. The law's motivation was the stigma (or presumption of inferiority) that attached to being nonwhite. A miscegenation law, of course, may have reinforced the stigma of being nonwhite, but a nonwhite was considered inferior regardless if she had sex with (or married) a "white" person. This distinction matters if we are not to expose to constitutional challenge much of our criminal law.

In any event, most states decriminalized same-sex sodomy even before the *Lawrence* decision,[393] but the states continue to resist same-sex marriage. How should a judge understand this resistance? The legal barriers to same-sex marriage probably are explicable, in no small part, by opposition to the moral implications of extending legal recognition to same-sex sexual conduct or to same-sex sexual relationships. Although Perry disagrees, the motivation for these barriers is more analogous to that for laws that prohibit polygamous marriage than to the motivation for enacting laws that prohibit sex between persons of different races. As Perry appears to recognize, the Court would not presume that a law that prohibits polygamy implies that polygamists are inferior or less than human.[394] The law's impetus is moral disapproval of a polygamist marital relationship and the associated sexual conduct. Neither, then, should the Court presume that a law that prohibits same-sex marital unions implies that homosexuals are inferior or less than human. The law's impetus is moral disapproval of a homosexual marital relationship and the associated sexual conduct.

Perry, however, stresses that, "[I]t is widely agreed [in the United States] that not all deliberately non-procreative genital acts are immoral."[395] Thus, he concludes that the Court should presume that a state's refusal to recognize same-sex unions violates the anti-discrimination norm because such refusal rests on the "forbidden

393. As the *Lawrence* Court reported, the states still criminalizing homosexual sodomy "are reduced now to 13." *Id.* at 573. *Lawrence*, however, brushes over the fact that in eleven of the states decriminalizing homosexual sodomy, a state court—and not the legislature—was responsible for the "decriminalizing." *See* DUCAT, *supra* note 291, at 807.

394. *See* PERRY, *supra* note 9, at 245 n.81.

395. *Id.* at 146.

ideology." That is, in Perry's opinion, it rests more on "who" homosexuals are than on "what they do."[396]

In fact, however, Perry's conclusion is not a necessary implication of his assertion about public opinion, even if the assertion is accurate. A person could have moral reservations about homosexual genital acts but no such reservations about deliberately non-procreative genital intercourse in a traditional opposite-sex marital union. To validate the conclusion that a state's refusal to recognize same-sex unions is not and cannot be about conduct, Perry must claim that it is widely agreed that all deliberately non-procreative genital acts are moral, or that homosexual genital acts are moral. The nation apparently does not agree with this. Certainly there is no nationally distributed agreement to this claim sufficient to amend the Constitution. That most state legislatures elected to decriminalize sodomy, including homosexual sodomy, does not validate a claim that this action rests on the conclusion that all deliberately non-procreative genital acts are moral, or that homosexual genital acts are moral. As Justice Scalia explains, "[T]he society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the lives of citizens."[397] Because a state is willing to "tolerate" homosexual conduct does not mean that it wishes to endorse and support a relationship presumed to entail that conduct.

If a state's reason for withholding its "blessing" from same-sex marriage is moral objection to the sexual relationship, then of course the policy treats same-sex conduct differently than opposite-sex conduct. For Perry, this must be based on homophobia. "For one who is not in the grip of some degree of fear and loathing of homosexuals, the morality or immorality of sexual activity does not depend on whether the sexual activity is between two persons of the opposite sex or between two persons of the same sex."[398] In effect, Perry claims that discrimination against what homosexuals do (homosexual conduct) is discrimination against who homosexuals are ("homosexual"). In the sense discussed previously, but only in that sense, he is correct: when a state discriminates against a particular

396. *Id.* at 141.
397. Romer v. Evans, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting).
398. *See* PERRY, *supra* note 9, at 142.

conduct, it may stigmatize the inclination or desire for such conduct. Assuming that it stigmatizes a homosexual "lifestyle" when a state refuses to recognize same-sex marriage, however, this observation does not distinguish the effect of discrimination against homosexual conduct from the effect of discrimination against polygamy. Nor does it distinguish the motivation for discriminating against a homosexual lifestyle from the motivation for discriminating against a polygamous lifestyle. Many lawmakers, of course, may consider a homosexual lifestyle (and state endorsement of the lifestyle) morally problematic. Indeed, they may also consider the *desire* for such lifestyle morally problematic. If that makes state legal barriers to same-sex marriage unconstitutional, then the legal barriers to polygamous marriage must also be unconstitutional.[399]

Perry understands his contention about discrimination against homosexual conduct as one rooted, in part, on a cultural-anthropological claim: America is homophobic.[400] He points, for example, to "gay bashing" for evidence of this claim.[401] He is correct, in my view, that this is a "horrible phenomenon."[402] It is also, however, a criminal act, even in states where it is not a hate crime. No state endorses gay bashing; surely, that is what matters constitutionally. A policy against same-sex marriage is no more intended to promote gay bashing than a policy against polygamy is intended to promote vigilantism against polygamists. Moreover, it seems difficult to reconcile with "fear and loathing" of homosexuals the decision of most states to "tolerate" private consensual homosexual sodomy, even before such tolerance was mandated in *Lawrence*.

My point is not that a law against same-sex marriage survives strict scrutiny, although it may. Rather, my quarrel with Perry is with his claim that strict scrutiny is the correct standard of review for this law.[403] Whether a law discriminating against homosexual conduct or against same-sex marriage is motivated by "homophobia" is open to reasonable dispute. If it is, then the Court ought not treat the law as presumptively unconstitutional. Rather, the Court ought to rely on the

399. Perhaps Perry and Justice O'Connor believe that "homosexuality" is an immutable characteristic, although that is not clear. Whether it is or not, of course, still is open to dispute. Nor does it matter constitutionally, unless we are to believe that, unlike polygamy, homosexual conduct is not a matter of choice.

400. *See* PERRY, *supra* note 9, at 142.

401. *Id.* at 137.

402. *Id.*

403. *Id.* at 145–50.

rational basis test to assess the constitutionality of laws against same-sex marriage.

It can hardly be said that if a state chooses to define civil marriage as the legally recognized union of one woman with one man, its choice is not rationally related to the objective of exercising its own judgment about the appropriate moral definition of marriage.[404] Moreover, despite Perry's apparent presumption to the contrary[405] and the *Goodridge* court's conclusion to the contrary,[406] laws discriminating against same-sex marriage are rationally related to the purpose of defining marriage in terms of procreation. Since such laws are not "narrowly tailored" or precisely tailored to this purpose, of course, this rationale for discriminating against same-sex marriage could not withstand strict scrutiny.[407] Yet, as Justice Cordy has explained:

> As long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes.[408]

For the Court to strike down discrimination because it is rooted in the idea that a class of persons is not fully human is not consistent with the original understanding of the Fourteenth Amendment. Assuming, however, that the modern Court is committed to enforcing Perry's anti-discrimination norm in the name of the Equal Protection Clause, the Court's professed sensitivity to federalism still requires that it defer to the moral judgment of the states' legislatures on same-sex marriage. That deference is consistent with and supported by original constitutional principles. Contrariwise, deference to a state

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404. The Court has not said that "moral choice" can never serve as a legitimate state purpose. Notwithstanding *Lawrence* Court's unguarded language in this regard (*See* 539 U.S. at 577), *Lawrence* is best understood as indicating that *not all* policy decisions can be successfully defended by pointing to preservation of traditional morality as the purpose for the policy. If it were understood as sweeping away all reliance on "morality" as a legitimate state interest, the decision's effort to distinguish other "morals" legislation from the liberty it protects would make no sense. *See id.* at 578.

405. *See* PERRY, *supra* note 9, at 146–47.

406. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003).

407. Marriage laws are not "narrowly tailored" to procreation. *See id.* at 1001–03 (Cordy, J., dissenting).

408. *Id.* at 1002.

policy that segregates access to public education, other public facilities, and one-woman-one-man marriage according to race is forbidden by original constitutional principles.

The Court will not conform its equality norm jurisprudence to a "pure" version of originalism. This would require the Court to ground many of its Equal Protection Clause decisions in the Privileges or Immunities Clause and abandon others. However, the claim that the Court's anti-discrimination norm and originalism are completely at odds is overstated.

VI. SUMMARY AND CONCLUSIONS

In one sense, the originalist explanations advanced by Perry and McConnell to account for Brown's result are not novel. Other scholars have argued that this result can be defended by an "originalist" principle that mandates equality in more than fundamental rights.[409] So far as I am aware, however, no scholar has suggested that, pursuant to originalism, *Brown* and its progeny can and *ought* to be accounted for by a fundamental rights principle. In my view, this is in part because the historical evidence has been misread. It is true that congressional opponents of the Civil Rights Act of 1875 tried to turn the argument that the Fourteenth Amendment's Privileges or Immunities Clause represented a fundamental rights principle against public school desegregation.[410] Considering what had been said about the nature of the rights guarded by the Civil Rights Act of 1866 and the rationale for excluding political rights from Fourteenth Amendment protection, this is hardly surprising. In both instances, the Republicans who gave us the Fourteenth Amendment emphasized the distinction between rights that are fundamental and rights that are conventional.[411]

Scholars have also misconceived the fundamental right at stake in Brown. Contrary to McConnell's understanding, there was no patent inconsistency in describing civil rights as "rights pertaining to citizens as such," as "general rights that belong to mankind everywhere" or as "common law rights."[412] These descriptions were meant to reflect the *Corfield* criteria defining privileges or immunities as rights

409. *See, e.g.*, BORK, *supra* note 2, at 81–82; Bickel, *supra* note 173, at 59–65.
410. *See* McConnell, *supra* note 2, at 1026–29.
411. *See supra* notes 74–75, 87–89 and accompanying text.
412. *See* McConnell, *supra* note 2, at 1026.

fundamental in nature.[413] There undeniably is some evidence from the period of the Fourteenth Amendment's enactment, albeit limited, that the Privileges or Immunities Clause was not thought by its proponents to mandate racial desegregation of public facilities.[414] Scholars in the fundamental rights camp, however, have made too much of this evidence. Proponents of the Civil Rights Act of 1875 were correct that there was a persuasive case for treating access to "public" conveyances, inns and places of amusement as equivalent to the rights secured by the Civil Rights Act of 1866. The rights denominated in both civil rights acts met the fundamental rights criteria set forth in *Corfield*.[415] Although in the 1870s there was no convincing case for concluding that racially segregated public schools were a violation of the Privileges or Immunities Clause, the case for this conclusion was overwhelming by 1954. This is not, however, as McConnell suggests, because public education had become a fundamental constitutional right.[416] Rather, it was because, under the public policies of the states, enrolling in (accessing) whatever public education opportunities a state created was a fundamental right enforceable against arbitrary discrimination. That it was arbitrary to segregate students seeking to exercise the constitutional privilege of enrolling in a public school by race and therefore an abridgment of this privilege follows from either of the originalist objections to predicating enjoyment of fundamental rights on race—race was invariably objectionable or it was objectionable when it had no better justification than denying enjoyment of a fundamental right.[417]

By contrast, the *Corfield* (or originalist) conception of fundamental rights does not support a conclusion that there exists a "general" right to marry. Although the right of a woman and a man to marry is, in fundamental rights terms, a uniform, legally enforceable and stable tradition in state law, there is no comparable state recognition of a more general right to marry.[418] Nor, if there is a general right to marry, is there any originalist definition of abridgment that would justify the conclusion that laws prohibiting same-sex marriage are unconstitutional. While no abstract theory of abridgment can be wrung from the history of the Fourteenth Amendment's enactment,

413. *See supra* notes 96–101 and accompanying text.
414. *See* McConnell, *supra* note 2, at 955–84.
415. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).
416. *See supra* notes 212–215 and accompanying text.
417. *See supra* Part IV.
418. *See supra* Part III. D.

scholars have overlooked the relevance of the original purposes of the Article V process for amending the Constitution in supplying such a theory. To the extent the Court values the original understanding of these Article V purposes, it is constrained from ignoring a "national agreement" about the moral propriety of state action discriminating on some basis other than race.[419]

My conclusions about the implications of originalism for state action mandating racial segregation and state policies against same-sex marriage are not rendered obsolete by the Court's Fourteenth Amendment precedent. To the contrary, the Court's decisions about what constitutes a fundamental right and forbidden state discrimination are sufficiently unsettled that originalism can and should be understood as reinforcing certain of these decisions.[420] Yet, even assuming that the equality norm that led the Court to strike down state mandated race segregation is at variance with originalism, it does not follow that state legal barriers to same-sex marriage are unconstitutional.[421] There is no congruity between constitutional arguments for judicial abrogation of de jure racial segregation and constitutional arguments for judicial abrogation of state laws against same-sex marriage, whether the Court relies on originalism or its own Fourteenth Amendment precedent.

419. *See supra* Part IV.
420. *See supra* Part V. A–B.
421. *See supra* notes 381–407 and accompanying text.