

CONSERVATIVES V. ORIGINALISM

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As Michael Perry reminded us, originalism does not necessarily entail either Thayerian minimalism or judicial restraint. As a vague rule of thumb, however, it seems fair to expect that honestly applied originalism should lead, at least occasionally, to results that the interpreter finds politically inconvenient and personally uncongenial. Call it the Frankfurtarian frisson: that exquisite moment when you look at the Constitution, clutch your breast, shake your head, and say, "The Framers made me do it." It is surprising, and perhaps a little telling, that the most self-congratulatory and aggressive proponents of originalism so seldom seem to experience the Frankfurtarian frisson.

This Article sketches very broadly and very tentatively a neoriginalist approach to three of the more contested Fourteenth Amendment questions before the current Court: race-conscious districting,¹ gay rights, and minority set-asides.² In each area, the jurisprudence of Justices Thomas and Scalia is arguably at odds with the jurisprudence of the Reconstruction Congress.

The voting rights cases are perhaps the most flamboyant example of the conservative Justices' betrayal of their originalist principles. If there is any principle on which all members of this Panel and every participant at this Symposium have agreed, it is that the Fourteenth Amendment, as originally understood, did not apply to political rights. Justice Harlan reviewed the historical evidence exhaustively, and he concluded in *Reynolds v. Sims*:³ "I think it demonstrable that the 14th Amendment does not impose this political tenet [of one man, one vote] on the States or authorize this Court to do so."⁴ Justice Harlan added that "state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republi-

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1. See *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

2. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

3. 377 U.S. 533 (1964).

4. *Id.* at 590 (Harlan, J. dissenting).

can Form of Government Clause.”⁵ Robert Bork has since endorsed this suggestion.⁶

Justice Harlan’s pride apparently was wounded that his colleagues on the Warren Court never bothered to respond to his historical arguments. It is even more peculiar that Justices Scalia and Thomas never have responded either, and instead have embraced the ahistorical position of Justice Harlan’s opponents.

Justice Thomas’s contortions on this subject are especially amusing. In his remarkable concurrence in *Holder v. Hall*,⁷ Justice Thomas refused to examine the original understanding of the Fourteenth Amendment. Instead, Justice Thomas invoked Harlan’s antagonist, William Douglas, for the proposition that “the assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”⁸ To make matters even more confusing, Thomas then quoted Harlan’s opinion in *Allen v. State Board of Elections*,⁹ which questioned whether the Constitution required an inquiry into vote dilution, without mentioning that the *Allen* opinion also questioned whether the Constitution requires population-based districting in the first place.

To exacerbate the confusion, Justice Thomas offered a plainly implausible view of the Voting Rights Act, claiming that Congress never intended the Act to cover claims of vote dilution.¹⁰ Since *Allen*, however, everyone has taken for granted the idea that Congress intended the Act to include claims of vote dilution, and the 1982 amendments to the Act explicitly direct courts to consider whether state practice results in members of a minority group having “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹¹

Are there to be any constitutional limitations on apportionment for a principled neoriginalist? As Justice Harlan suggested, a one-man, one-vote requirement might be found in the

5. *Id.*

6. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 84-90 (1990).

7. 114 S. Ct. 2581, 2591-619 (1994) (Thomas, J., concurring).

8. *Id.* at 2598 (citing *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)).

9. 393 U.S. 544 (1969).

10. I was not surprised to learn that the clerk who wrote this remarkable concurrence for Justice Thomas is now at Skadden Arps doing mergers and acquisitions.

11. 42 U.S.C.A. § 1973 (West 1995).

Guarantee Clause.¹² During the 40th Congress, some senators and representatives took the position that the government of Maryland was not republican because of gross malapportionment.¹³ The Fifteenth Amendment¹⁴ may impose some limitations upon race-conscious districting designed explicitly to disenfranchise one race or another. As the first Justice Harlan said in the *Civil Rights Cases*,¹⁵ "it appears that the right of suffrage is not a necessary attribute of national citizenship [under the Fourteenth Amendment], but that exemption from discrimination in the exercise of that right on account of race, etc., is [under the Fifteenth Amendment]."¹⁶

Even under this expansive reading of the Fifteenth Amendment, it is difficult to identify what injury the white plaintiffs in the minority districting cases suffered. Their votes have not been diluted, and they clearly have no right or legitimate expectation of being placed in one district rather than another. Justice O'Connor in *Shaw v. Reno*¹⁷ suggested that race-conscious districting may create stigmatic injuries because racial gerrymandering makes the country more race-conscious. It "may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters. . . ."¹⁸ Justice O'Connor undercuts her argument, however, by conceding that the Fourteenth and Fifteenth Amendments do not require the government to be colorblind in matters of apportionment.¹⁹ It is difficult to sympathize with her decision to convert an inspiring moral principle into an unintelligible constitutional one. The coherent originalist position is that the Voting Rights Act permits race-conscious districting and the Fourteenth and Fifteenth Amendments do not forbid it. Had Justices Thomas and Scalia explicitly taken the position in *Miller v. Johnson*²⁰ that they have previously taken only implicitly, namely that the Voting Rights Act, as amended, violates the Fourteenth

12. See *Reynolds v. Sims*, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting).

13. See CONG. GLOBE, 40th Cong., 1st Sess. 440 (1867) (Senator Drake).

14. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

15. 109 U.S. 3 (1883).

16. *Id.* at 49 (Harlan, J., dissenting).

17. 113 S. Ct. 2816 (1993).

18. *Id.* at 2832.

19. See *id.*

20. 115 S. Ct. 2475 (1995).

Amendment, I am sure the entire membership of the Federalist Society would have risen up in principled indignation.

Let us turn to *Evans v. Romer*,²¹ the antigay rights ordinance case from Colorado that the Court agreed to hear this Term. I will not soon forget the spectacle of Martha Nussbaum wrangling on the witness stand with John Finnis of Oxford about the proper translation of Plato's word *tolmena* to describe homosexual acts. Finnis said it meant "abomination"; Nussbaum preferred "deed of daring," or "adventure."

The en banc opinion in the *Romer* case is especially interesting for originalists because of the concurring opinion by Justice Scott, who took it upon himself to overturn the *Slaughter-House Cases*²² and to resurrect the Privileges or Immunities Clause.²³ Amendment 2 to the Colorado Constitution, ratified by fifty-three percent of the Colorado voters on November 3, 1992, provides the following:

No protected status based on homosexual, lesbian or bisexual orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.²⁴

Chief Justice Rovira held for the majority that the Equal Protection Clause of the United States²⁵ Constitution protects the fundamental right to "participate equally in the political process [and] that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny."²⁶ Rovira derived this right from three groups of Supreme Court cases that are difficult for originalists to accept: the right-

21. (*Evans II*) 882 P.2d 1335 (Colo. 1994).

22. 83 U.S. (16 Wall.) 36 (1872).

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

24. COLO. CONST. art. 2, § 30(b).

25. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

26. *Evans II*, 882 P.2d at 1339 (citing *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993)).

to-vote cases, the reapportionment cases, and the ballot access cases.

In concurrence, however, Justice Scott made a creative bid for originalist sympathies. After lamenting the “unfortunate history and refusal to rely upon the plain text of the Constitution”²⁷ that led the *Slaughterhouse* Court to write the Privileges or Immunities Clause out of the Constitution, Justice Scott argued that the right to participate equally, “although not assuring any political result . . . [includes] the right of the people peaceably to assemble and petition the government for redress of grievances.”²⁸ Scott argued that “[t]his right to participate, an attribute of the new national citizenship, was meant by the framers of the Fourteenth Amendment to be a personal right guaranteed and secured by the Privileges or Immunities Clause.”²⁹ He cited Senator Howard’s speech introducing the Fourteenth Amendment to the 39th Congress, which defined privileges or immunities by invoking the rights listed by Justice Washington in *Corfield v. Coryell*³⁰ as well as the eight amendments to the Bill of Rights, specifying the rights to assemble and petition.³¹ On the same page that Scott cited, however, Senator Howard made the following disclaimer:

But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus 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, subject to a despotism.³²

Scott’s conclusion that “[b]ecause these political rights are fundamental and inherent in national citizenship they are protected by the Privileges or Immunities Clause” is clearly inconsistent with Howard’s understanding.³³ If what Scott intended by the right to participate is some permutation of the right to vote, then his Privileges or Immunities argument is wrong. If Scott had in mind nothing more than the First Amendment right to peti-

27. *Id.* at 1352 (Scott, J., concurring).

28. *Id.* at 1354.

29. *Id.* at 1355.

30. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

31. See *Evans II*, 882 P.2d at 1355 (Scott, J., concurring) (citing CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866)).

32. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

33. *Evans II*, 882 P.2d at 1356 (Scott, J., concurring).

tion, however, then the right almost certainly is protected by Section 1, as Senator Howard emphasized.

The boundaries of Scott's right to petition are very slippery. He suggested that the right to petition implies the ability of duly-elected representatives to respond. Therefore, Amendment 2 would be unconstitutional because it would prevent the General Assembly "from enacting or adopting certain new laws."³⁴ But Scott cannot be correct that the people's right to petition guarantees the legislators' right to respond. This reasoning would invalidate all citizens' initiatives that remove a particular issue from an ordinary legislative debate, such as the Colorado amendment prohibiting Mothers Against Drunk Driving from lobbying for compulsory breathalyzer tests. Furthermore, Scott's theory would exalt the right of legislators above the right of the people, which turns the architecture of Article V on its head.

Do the opponents of Amendment 2 have any plausible case before the U.S. Supreme Court? It is arguable that the language of Amendment 2, which prohibits Colorado representatives from authorizing claims of discrimination on the basis of homosexual, lesbian, or bisexual orientation, but not on the basis of heterosexual orientation, violates the original understanding of the Privileges or Immunities Clause requiring all States to extend to all citizens the same civil rights. Does Amendment 2, therefore, deny to unmarried homosexuals the same civil rights that are guaranteed to unmarried heterosexuals? Maybe so. But if this were true, the problem with Amendment 2 would be cured if the amendment prohibited antidiscrimination laws on the basis of sexual orientation rather than homosexual, lesbian, or bisexual orientation.

In a pre-New Deal world of employment-at-will, the right not to be fired on the basis of heterosexual orientation might not have been a privilege or immunity to citizens of Colorado. In recent years, the civil rights laws of Colorado have prohibited private employers from discriminating against their employees on the basis of any legal off-duty conduct. Sodomy is legal in Colorado and, in many cases, homosexuality is simply defined as the propensity or habit of practicing sodomy. If protection against arbitrary discrimination is indeed the baseline of equal rights rather than special rights in Colorado, then singling out homosexuals as

34. *Id.* at 1355.

uniquely unprotected by the web of protections that others enjoy might plausibly be seen as a denial of the equal protection of the laws.

Nevertheless, striking down Amendment 2 as entirely irrational would be a very aggressive position for a judge to take. Few citizens really believe that classifications based on sexual orientation are, in all circumstances, unreasonable. In the spirit of judicial restraint, it might be possible to read the Amendment in a way that minimizes the constitutional difficulties. At the trial and in its briefs, the State of Colorado insisted that firing a state employee because she was gay would indeed be arbitrary and illegal under current state and federal law. The intention of Amendment 2, they insisted, was to prevent the State from passing special laws that *said so* explicitly. Perhaps the Amendment could be construed to forbid the State from passing laws that *explicitly* forbid discrimination on the basis of homosexual orientation, but not to prevent gays and lesbians from invoking neutral laws that prohibit arbitrary discrimination against all citizens. This would be enough to satisfy the narrow Reconstruction understanding of *protection* of the laws, which required States to protect all persons in their persons and property, and to administer and enforce protective laws equally.

Finally, let us consider the question of minority construction set-aside along the *Fullilove v. Klutznick*³⁵ model, which are exemplified in the *Adarand Constructors, Inc. v. Peña*³⁶ case. The first question is whether Congress is bound to respect the privileges or immunities or equal protection guarantees at all. The *Bolling v. Sharpe*³⁷ question of reverse incorporation has been the Achilles heel of originalism; Robert Bork, for example, ducked it with impressive nonchalance. One can make a textual and historical case for *Bolling*, however, which might be anchored in the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States . . . are citizens of the United States . . ." ³⁸ The Citizenship Clause has no state action requirement, and in his famous dissents in the 1880s, Justice Harlan made clear that the central purpose of Section 1 was to require

35. 448 U.S. 448 (1980).

36. 115 S. Ct. 2097 (1995).

37. 347 U.S. 497 (1954).

38. U.S. CONST. amend. XIV, § 1.

Congress and the States to establish an equality among all citizens as rights holders.

In *Gibson v. Mississippi*,³⁹ and again in his *Plessy v. Ferguson*⁴⁰ dissent, Justice Harlan explicitly noted the links between incorporation and reverse incorporation: “[T]he constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race.”⁴¹ Chief Justice Warren in *Bolling* quoted the relevant sentence from Justice Harlan,⁴² although he failed to discuss the argument in detail. The argument might be buttressed by Professor Maltz’s research on the overlap between notions of due process and equal protection in antebellum cases. For neoriginalists, *Bolling* may have been right for the wrong reasons.

The next question is whether the prospect of being hired by government to build highways, which is the benefit disputed in both *Fullilove* and *Adarand*, is a privilege or immunity of citizenship. Professor Harrison has suggested that it is not. “If we regard services provided by general taxation as privileges of citizens, we must then ask whether eligibility to be among those who provide the services also constitutes a privilege,” writes Harrison. “Although answering this question is not easy, my thought is that the taxpayer’s money purchases the service, not the opportunity for employment.”⁴³

From the perspective of untranslated, 1868 originalism, Harrison is probably right. The dominant idea in a pre-New Deal world was that the government, acting as employer, was free to contract with whomever it wanted. But in a post-New Deal world, perhaps the right to work on federally funded highway projects should not be considered a privilege or immunity of citizenship. Perhaps government highway contracts today are a fundamental benefit of the welfare state, more a form of pork than an exclusive franchise, and because the government is monopolizing the guardrail business, the contracts must be available to all citizens on equal terms.

39. 162 U.S. 565 (1896).

40. 163 U.S. 537 (1896).

41. *Id.* at 556 (Harlan, J., dissenting) (quoting *Gibson*, 162 U.S. at 565).

42. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

43. John Harrison, *Reconstructing the Privileges of Immunities Clause*, 101 YALE L.J. 1385, 1463-64 (1992).

Assuming that the opportunity to build highways is considered a privilege or immunity of citizenship, would a twenty-five percent set-aside for businesses owned by minorities violate the Fourteenth Amendment? Professors Harrison and Maltz have argued that the Constitution is colorblind only within a carefully limited sphere of absolute equality.⁴⁴ If a privilege or immunity is involved, racial classifications are absolutely forbidden; if not, then they are absolutely permitted. Under this perfectly formal theory of classification, laws that on their face extend a benefit or privilege to blacks that is absolutely denied to whites are clearly invalid under the clause. The Fourth Circuit in *Podberesky v. Kirwan*⁴⁵ probably was right to strike down University of Maryland's scholarship program for black students alone. If the program is at least formally open to whites, however, the Fourteenth Amendment may not prohibit all racial classifications that result in an uneven distribution of benefits, unless one interprets the anti-caste principle to forbid all racial classifications.

Liberals often invoke the Freedman's Bureau, which was adopted by the same Congress that enacted the Fourteenth Amendment, for the proposition that government is free to extend benefits to blacks that it denies to whites. This creative defense of the Brennan-Marshall position is not entirely convincing because, as Herman Baltz has argued, the only way to secure passage of the bill was to ensure that it was formally open to white refugees as well as freedmen. Once the program was formally open to whites, however, the Reconstruction Congress was unconvinced by the fact that most of its benefits went, in practice, to blacks.⁴⁶ Is a twenty-five percent set aside for blacks, Hispanics, and Aleuts all that different from a ninety percent set aside for freedmen rather than refugees? Or does the fact that the freedmen were tangible victims of discrimination mean that they were being made whole as victims, not as blacks, and therefore that the Freedman's Bureau did not involve racial classifications in the first place?

These arguments have been offered in the most tentative spirit, but they suggest that the neooriginalist approach to the voting rights, affirmative action, and gay rights cases might lead

44. See, e.g., Earl M. Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J.L. & PUB. POL'Y 451 (1996).

45. 38 F.3d 147 (4th Cir. 1994).

46. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 760-61 (1985).

to positions dramatically at odds with the ones that Justices Scalia and Thomas have taken and are likely to continue to take. Perhaps each of them soon will release another set of opinions declaring, with that wonderful hyperbole that rivals the best *Wall Street Journal* editorials, that the Constitution is color-blind in all circumstances and that all affirmative action and all race-conscious districts are, therefore, unconstitutional. I hope each of us will then exercise what Charles Black called one of the sovereign prerogatives of philosophers: laughter.⁴⁷

⁴⁷. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960).