

ARTICLE

ORIGINAL MEANING AND MARRIAGE EQUALITY

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[Forthcoming Volume 52 of the *Houston Law Review* (2015)]

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In September 2014, nineteen states were issuing marriage licenses to same-sex couples; another three recognized lesbian and gay relationships as civil unions or domestic partnerships.¹ Conversely, twenty-eight states did not issue marriage licenses to same-sex couples, nor did they recognize out-of-state lesbian and gay marriages under their laws.² The typical pattern for the nonrecognition states was that they had until recent decades criminalized lesbian or gay romantic relationships and had never knowingly issued marriage licenses to same-sex couples, that the emergence of lesbian and gay marriage as a salient issue triggered new statutes specifically excluding lesbian and gay couples from civil marriage and other forms of recognition, and that those statutory bars have been reinforced by state constitutional amendments to the same effect.

The Commonwealth of Virginia was typical in this respect. From colonial times, Virginia considered sodomy (anal intercourse) to be a serious crime; in the twentieth century, the Legislature expanded the crime against nature felony to include oral sex as well.³ Because the authorities interpreted the statute to include consensual sodomy, lesbian and gay relationships consummated by oral or anal sex were, literally, felonies in the Commonwealth.⁴ It went without saying that Virginia did not issue marriage licenses to lesbian and gay couples, but when the issue emerged on the national agenda, the Virginia Legislature promptly adopted a statute explicitly limiting civil marriage to one man, one woman.⁵ Virginia's felony bar to consensual sodomy was invalid after the Supreme Court's 2003 decision in *Lawrence*

1. Campbell Robertson, *Judge, Bucking Trend, Affirms Louisiana's Gay Marriage Ban*, N.Y. TIMES, Sept. 4, 2014, at A12. Colorado and Nevada accord civil unions and domestic partnerships (respectively) the same legal rights, benefits, and duties as civil marriage but of course not the name. Colorado Civil Union Act, COLO. REV. STAT. §§ 15-15-101 to -103 (2013); Nevada Domestic Partnership Act, NEV. REV. STAT. ANN. § 122A.200 (Lexis-Nexis 2010). Wisconsin provides only some of those legal rights, benefits, and duties to domestic partners. WIS. STAT. ANN. § 770.001 (West Supp. 2014).

2. Lambda Legal's website reports whether each state issues marriage licenses or recognizes out-of-state marriages for same-sex couples. See LAMBDA LEGAL, <http://www.lambdalegal.org> (last visited Dec. 29, 2014).

3. See ARTICLES, LAWES, AND ORDERS, DIVINE, POLITIQUE, AND MARTIAL FOR THE COLONY IN VIRGINEA, cl. 9 (1610) reprinted in 3 PETER FORCE, TRACTS AND OTHER PAPERS, RELATING PRINCIPALLY TO THE ORIGIN, SETTLEMENT, AND PROGRESS OF THE COLONIES IN NORTH AMERICA, FROM THE DISCOVERY OF THE COUNTRY TO THE YEAR 1776, at 11 (1947) ((0)) ((0)); VA. CODE ANN. § 18.2-361(A) (2008), invalidated by *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), cert. denied, 134 S. Ct. 200 (2013).

4. VA. CODE ANN. § 18.2-361(A) (2008).

5. VA. CODE ANN. § 20-45.2 (2008) (adopted 1997).

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v. Texas, but the Commonwealth has continued to enforce the consensual sodomy crime and has expanded its bar to lesbian and gay relationship recognition.⁶ After the Vermont and California Legislatures passed laws according almost all the legal rights and duties of marriage for lesbian and gay couples joined in civil unions (Vermont, 2000) or domestic partnerships (California, 2003), the Virginia Legislature responded with a statute barring state recognition of any “civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage.”⁷ Responding to the possibility that judges would upend these statutes as a violation of the Virginia Constitution, the Legislature and the voters adopted a constitutional amendment barring the Commonwealth or its political subdivisions from recognizing lesbian and gay marriages, civil unions, partnerships, or any “other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”⁸

In July 2014, the Fourth Circuit struck down Virginia’s exclusion on the ground that plaintiff couples have a “fundamental right” to marry, which triggers strict scrutiny that the Commonwealth’s justifications could not satisfy.⁹ Supporters of the exclusion filed a petition for certiorari with the Supreme Court. In a big surprise, the Supreme Court on October 6, 2014, denied the petition in the Virginia Marriage Equality Case, as well as in similar appeals taken for circuit court decisions striking down marriage exclusions in Indiana, Oklahoma, Utah, and Wisconsin.¹⁰ The next day, the Ninth Circuit struck down

6. Compare *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the Due Process Clause prevents states from criminalizing private, consensual sexual conduct between adults), with Mark Joseph Stern, *You Can Still Be Arrested for Being Gay in Red-State America*, SLATE (Aug. 5, 2013, 2:05 PM), http://www.slate.com/blogs/xx_factor/2013/08/05/gay_people_are_still_being_arrested_for_having_consensual_sex_in_some_red.html (stating that the Virginia legislature reaffirmed the State’s anti-sodomy law the year after *Lawrence*).

7. VT. STAT. ANN. § 1202 (2010); Va. CODE ANN. § 20-45.3 (2008) (adopted 2004). On the face of the statute, in its preamble, the Legislature denigrated lesbian and gay marriages as relationships that “devalue the institution of marriage and the status of children.” H.D. 751, 2004 Gen. Assemb., 2004 Sess. (Va. 2004).

8. VA. CONST. art. I, § 15-A.

9. *Bostic v. Schaefer*, 760 F.3d 352, 377–84 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014).

10. Thus, the Supreme Court denied petitions for review in *Bostic* (the Virginia case), as well as *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014) (invalidating marriage exclusions in Indiana and Wisconsin), *cert. denied*, 135 S. Ct. 316 (2014); *Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir. 2014) (invalidating the Oklahoma marriage exclusion), *cert. denied*, 135 S. Ct. 271 (2014); and *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014) (invalidating the Utah marriage exclusion), *cert. denied*, 135 S. Ct. 265 (2014).

marriage exclusions in Idaho and Nevada.¹¹ Thus, in two days, seven states lost their marriage exclusions, and nine more states (those in the Marriage Equality Fourth, Ninth, and Tenth Circuits) seemed destined toward marriage equality in the near future.¹² Added to the nineteen states (and the District of Columbia) recognizing Marriage Equality before October 6, the total number of Marriage Equality jurisdictions almost doubled (literally) overnight. No fewer than thirty-five states now recognize Marriage Equality for lesbian, gay, bisexual, and transgender (LGBT) persons.

As of February 20, 2015 (as this article goes to press), Marriage Equality lawsuits are still pending in fifteen states, two of which (Alabama and Florida) are issuing marriage licenses pending appeal.¹³ One is Michigan, whose voters amended the state constitution in 2004: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”¹⁴ The Michigan Supreme Court has interpreted the Michigan Marriage Amendment to prohibit the state and its agencies, local governments, and state-supported colleges and universities from providing even health care benefits to persons designated as “domestic partners” of the same sex.¹⁵

In *DeBoer v. Snyder*, a federal district court ruled that the Michigan Marriage Amendment violated the Equal Protection Clause because the state had not even advanced a rational basis for the discrimination against lesbian and gay couples.¹⁶ Consolidating the Michigan Marriage Equality Case with similar appeals for the marriage exclusions in Kentucky, Ohio, and Tennessee, the Sixth Circuit denied relief to the lesbian and gay couples, ruling in *DeBoer v. Snyder* that their exclusion did not violate the Fourteenth Amendment.¹⁷ The Sixth Circuit’s decision

11. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

12. Those states are North Carolina, South Carolina, and West Virginia in the Fourth Circuit; Colorado, Kansas, and Wyoming in the Tenth Circuit; and Alaska, Arizona, and Montana in the Ninth Circuit.

13. *Marriage Litigation*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation> (last visited Feb. 9, 2015).

14. MICH. CONST. art. I, § 25.

15. *Nat’l Pride at Work, Inc. v. Governor*, 748 N.W.2d 524, 543 (Mich. 2008); *see also* *Attorney Gen. v. Civil Serv. Comm’n*, No. 306685, 2013 WL 85805, at *1–2 (Mich. Ct. App. Jan. 8, 2013) (declining to extend the Marriage Amendment to bar state benefits to cohabiting partners where partnership was not “similar” to marriage qualifications).

16. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 768–69 (E.D. Mich. 2014), *rev’d*, 772 F.3d 388 (6th Cir. 2014).

17. *DeBoer v. Snyder*, 772 F.3d 388, 388, 396–399 (6th Cir. 2014). ((0)) The other

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in *DeBoer* created a clear split in the circuit courts of appeals on this issue, and the Supreme Court granted the petitions for certiorari for the appeals in all four states on January 16, 2015, as *Obergefell v. Hodges* (the Ohio case).¹⁸

The primary constitutional issue before the Court is whether Michigan's and other states' exclusions of lesbian and gay couples from civil marriage and other family law regimes violate the Fourteenth Amendment's command that states may not "deny to any person . . . the equal protection of the laws."¹⁹ The courts of appeals have created a useful analytical roadmap for the Court, as the opinions supporting state exclusions as well as those supporting marriage equality are exploring the doctrinal and factual arguments with admirable rigor and detail.

One line of argument that the appellate judges have thus far neglected is whether state marriage exclusions of lesbian and gay couples violate the "original meaning" of the Equal Protection Clause. The Sixth Circuit came closest to engaging with this question, as the majority ruled that the plaintiff couples failed to show that "the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage."²⁰ In my view, the Sixth Circuit's focus on original *understanding* misses the point of the Supreme Court's focus on original *meaning*. And I shall now maintain that the latter is an important inquiry in the Marriage Equality Cases.

The main reason original meaning is a relevant inquiry is that a strong body of scholarly work and Supreme Court precedent maintain that the most legitimate approach to constitutional interpretation at least starts with original meaning.²¹ Because the Supreme Court is, for the most part, the

cases on appeal in the Sixth Circuit are *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky.), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (Kentucky); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky.), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn.), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (Tennessee); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (Ohio).

18. 2015 WL 213646 (Jan. 16, 2015).

19. U.S. CONST. amend. XIV, § 1. The exclusions might also violate the Due Process Clause, which *Loving* interpreted to protect the "fundamental" right to marry. *Loving v. Virginia*, 388 U.S. 1, 10–12 (1967). Like most other commentators, I believe that the better foundation for a fundamental rights analysis is under the Equal Protection Clause. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

20. *DeBoer*, 772 F.3d at 403.

21. On the importance of original meaning, start with Edwin Meese, III, Attorney Gen., *Speech Before the American Bar Association* (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9 (1986); see Steven G. Calabresi, A

final word on constitutional interpretation and because all of the Justices find original meaning relevant (and some believe it controlling),²² an original meaning account would be useful to the Court in the Marriage Equality Cases.

Additionally, original meaning analysis might add historical depth to the enterprise of evaluating state exclusions of lesbian and gay couples from state institutions of family law. The court of appeals decisions, thus far, have engaged the exclusions at the level of both constitutional (suspect classification/fundamental rights) doctrine and (the rationality of state) policy. Their policy analysis has been rigorous but rather routine, and I believe their understanding of Supreme Court doctrine has been incomplete. Unlike the courts of appeals, the Supreme Court has not relied on “suspect classification” or “fundamental rights” analysis when striking down anti-gay legislation. Original meaning might help us understand why the Court has proceeded in that way, and how the Court’s gay rights decisions fit with a broader history of equal protection decisionmaking.

Finally, I shall demonstrate that original meaning analysis demands that constitutional interpreters engage the history of both the Equal Protection Clause *and* the exclusion of lesbian and gay families from state marriage regimes. The history-based dialectic, I hope to show, adds a substantive element to constitutional deliberation that the lower courts have missed, for the most part. Consistent with original meaning theory, a deep historical account stands a chance of persuading the most skeptical, even prejudiced, audience that a constitutional equality claim is valid or at least plausible. Accordingly, I challenge any serious student of original meaning to consider the account that follows. Most judicial and academic students of original meaning analysis are “conservatives,” who for the most part have resisted constitutional claims by LGBT persons.²³

Critical Introduction to the Originalism Debate, 31 HARV. J.L. & PUB. POL’Y 875, 876–878 (2008); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 658–61 (2009). For leading defenses, explanations, and applications of original meaning, see, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY*, at xi (2005); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 75–77, 143–45, 154–55 (1990); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 629–30 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–852 (1989); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 63–64 (1989).

22. For recent cases where all nine Justices considered original meaning arguments to be dispositive or highly relevant, see, for example, *NLRB v. Canning*, 134 S. Ct. 2550 *passim* (2014) (majority and concurring opinions); *McDonald v. City of Chicago*, 561 U.S. 742 *passim* (2010) (majority and concurring opinions); *District of Columbia v. Heller*, 554 U.S. 570 *passim* (2008) (majority and both dissenting opinions).

23. For example, Justices Thomas and Scalia, the strongest original meaning

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By engaging the account that follows, my hope is that some originalists will be persuaded, which would strengthen the legitimacy of constitutional marriage equality.²⁴ To be sure, honest originalists may not be persuaded—but my challenge to them is to confront the historical evidence: respond with a more robust historical account, which would strengthen both original meaning theory and any Supreme Court disposition.

I. ORIGINAL MEANING OF “THE EQUAL PROTECTION OF THE LAWS”

Original meaning theories ask what meaning constitutional text would have had to a neutral reader of the English language at the time of the framing; this approach rejects one that focuses on “original intent,” namely, the subjective expectations the framers of the Fourteenth Amendment had for its application to specific issues.²⁵ Thus, an original meaning approach is not interested in how constitutional framers would have addressed the precise issue that has become salient today—but focuses, instead, on the general meaning constitutional text and structure would have had to neutral readers.

Professor Steven Calabresi and his co-author Andrea Matthews have argued that original meaning solves the problem for originalism long posed by *Loving v. Virginia*, where the Court invalidated different-race marriage bans as inconsistent with the Equal Protection Clause.²⁶ Few originalists have argued that

Justices, have dissented in the three cases where the Court reached the merits and ruled against anti-gay discriminations. *United States v. Windsor*, 133 S. Ct. 2675, 2697 (2013) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). The Republican-appointed “conservative” judges who have voted in favor of equal rights for LGBT persons have, almost without exception, been pragmatists who ignore or minimize original meaning arguments. *E.g.*, *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014) (Posner, C.J.).

24. My account complements that of Professor Steven G. Calabresi, whose draft article, co-authored with Hannah Begley, *Originalism and Same-Sex Marriage*, expands the original meaning account, grounded on the Privileges or Immunities Clause, that he and his co-author rendered in support of *Loving v. Virginia*, 388 U.S. 1 (1967). See Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1418–19.

25. Important sources for the rejection of original intent and the embrace of original meaning by originalists in the 1980s are Calabresi, *supra* note 21, at 883 (providing an account of the turn to original meaning in 1985, driven in part by Attorney General Meese); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003) (providing a broader account of the shift from “original intent” to “original meaning” jurisprudence in the 1980s); see also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

26. Calabresi & Matthews, *Originalism and Loving v. Virginia*, *supra* note 24, at

Loving is consistent with their theory because the Framers of the Fourteenth Amendment repeatedly (and sincerely) assured congressional and ratifying supporters that anti-miscegenation laws were consistent with equal protection as they understood it.²⁷ Once the focus of inquiry is no longer the subjective expectations of the framers and becomes the objective meaning of the text created by the constitutional amendment process, however, Calabresi and Matthews maintain that *Loving* becomes not only defensible but clearly correct, because the original meaning of the Equal Protection Clause was to protect the right of all Americans to enter into voluntary contracts, including and especially marital contracts backed up by the full authority of the state.²⁸ A key feature of original meaning jurisprudence is abstraction of the constitutional principle away from the immediate expectations of the framers and ratifiers.²⁹

In the spirit of original meaning jurisprudence, I shall suggest a legal genealogy of the term “equal protection of the law,” within the Fourteenth Amendment. And I shall do so within the evolving formal structure of the Constitution. (Another feature of original meaning jurisprudence is that it derives constitutional principles and purposes from the Constitution’s structure and its ongoing history.) The next part of this article will apply this genealogical and structural analysis to the equally interesting genealogy and history of the compulsory heterosexuality regime of which the marriage exclusion is the linchpin (just as it was for the apartheid regime interred in *Loving*).

A. *The Law of the Land, the Rule Against Class Legislation, and Equal Protection of the Laws*

Starting with Thomas Hobbes’s *Leviathan* (1651), social contract theorists have opined that the core purpose of government (the social contract) is to save us from the brutish state of nature by providing protection and peaceful means for social interaction and dispute resolution.³⁰ What modern

1473–74.

27. *Id.* at 1394–95 (collecting and analyzing examples of originalist skepticism or silence on *Loving*); see *id.* at 1399–1413 (broader examination of original intent jurisprudence and the desegregation cases).

28. See *id.* at 1413–33 (defense of *Loving*, based upon a detailed examination of the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment).

29. See JACK BALKIN, *LIVING ORIGINALISM* 6–7 (2011); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 668–69 (2009).

30. THOMAS HOBBS, *LEVIATHAN* 178–79, 185–89 (The Floating Press 2009) (1651).

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commentators sometimes forget is the Hobbesian assumption of equality and its correlative notion that the state is obliged to provide protection and public forums for *all* its citizens; any failure to provide such for any salient group of citizens would, in Hobbes's view, justify their departure or even rebellion, as the social contract was nullified for them.³¹ The same idea can be found in the Massachusetts Body of Liberties (1641), which directed that "[e]very person within this Jurisdiction, whether Inhabitant or forreiner [sic] shall enjoy the same justice and law, that is generall [sic] for the plantation, which we constitute and execute one towards another without partialitie [sic] or delay."³²

Not surprisingly, one of the fixed background assumptions for founding era constitutional documents and thinking was that the rule of law carries with it a presumption of generality and, thereby, equal treatment.³³ The Virginia Declaration of Rights (1776) was an early, detailed, and influential statement of this understanding of the social contract: because all people are born "equally free," and because government exists to assure each and every citizen of the protections of life, liberty, and property, all laws must be aimed at the "common benefit" and must be presumptively general in application, with no privileges carved out for only a portion of the population.³⁴ Like the Virginia

31. *Id.* at 471; see also THOMAS HOBBS, THE ELEMENTS OF LAW NATURAL AND POLITIC ¶ 20.5 (Thoemmes Press 1994) (1650). ((())) The same idea can be found in John Locke's *Second Treatise of Government* (1689), which expanded the role of the social contract to include protection of private property and opined that a regime attacking particular citizens' property rights would justify the people in "resum[ing] their original liberty." JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION ¶ 222 (Ian Shapiro ed., Yale Univ. Press 2003) (1689).

32. MASSACHUSETTS BODY OF LIBERTIES, art. 2 (1641), *quoted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 72 (1971).

33. See Calabresi & Begley, *supra* note 24, at 2–6 (examining Revolutionary and post-Independence state constitutions); Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1512–20 (2002) (discussing survival of the pre-Constitution equality-based understanding of the properly neutral role of government).

34. VA. DECLARATION OF RIGHTS, §§ 1, 3 (1776). The Virginia Declaration started with the proposition that

all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Id. § 1. Exactly as Hobbes and Locke suggested, "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community" *Id.* § 3. Thus, "when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal." *Id.* Finally, "no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, nor being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary."

Declaration, the Declaration of Independence (drafted by Virginian Thomas Jefferson) says that America's constitutional democracy is premised upon the notion that "all Men are created equal."³⁵

State constitutions implemented during and soon after the American Revolution encoded this precept explicitly and repeatedly in their foundational texts. As the Pennsylvania Constitution of 1776 expressed it, "[G]overnment ought to be instituted . . . for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights . . . without partiality for, or prejudice against any particular class, sect, or denomination of men."³⁶ The Massachusetts Constitution of 1780 put it this way: "Government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class of men"³⁷ The Delaware Declaration of Rights (1776) said that "all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society."³⁸

Not surprisingly, the baseline reflected in the state constitutions saturated the thinking of the framers and supporters of the Constitution of 1789. Summing up the principles that were already reflected in most of the state constitutions and that would undergird the Constitution, James Madison in 1785 maintained that "equality . . . ought to be the basis of every law," and the law should not subject some persons to "peculiar burdens" or grant others "peculiar exemptions."³⁹ The Constitution drafted at Philadelphia did not have the same clauses and articles found in state constitutions, though it did

Id. § 4. To the same effect was PA. CONST. of 1776, art. V.

35. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). (()) For a strong statement of how the equality pronouncements of the Declaration of Independence form an essential backdrop for the Constitution of 1787 (which explicitly refers to the Declaration in its final sentence), see Thomas, *supra* note 21, at 63–65. (())

36. PA. CONST. of 1776, pmbl.; see also Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 253–54 & n.34 (1997) (reporting other state constitutional provisions); accord Calabresi & Begley, *supra* note 24, at 2–6 (similar).

37. MASS. CONST. of 1780, art. VII. (()) For other common benefits articles and clauses, see N.H. CONST. of 1784, art. X; PA. CONST. of 1776, art. V.

38. DEL. DECLARATION OF RIGHTS, § 3 (1776).

39. JAMES MADISON, A MEMORIAL AND REMONSTRANCE, ON THE RELIGIOUS RIGHTS OF MAN ¶ 6 (S. C. Ustick 1828) (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, app. 63–72 (1947) (Rutledge, J., dissenting) (reprinted as *Memorial and Remonstrance Against Religious Assessments*).

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protect “Privileges and Immunities” when people traveled from state to state.⁴⁰ But the Constitution sought to guarantee generality of law and equal treatment through the structures of lawmaking and implementation. Thus, the independent judiciary created in Article III (and further empowered to conduct judicial review by Article VI) protected “particular classes of citizens” against “unjust and partial laws.”⁴¹ A national system with parallel state authority was a good way to minimize the costs imposed by temporary “faction[s]” on property owners and religious minorities in particular.⁴²

Important to the ratification of the Constitution was the assurance by its supporters that important individual rights would be explicitly protected as well. True to his word, Madison drafted and engineered the addition of the Bill of Rights in 1791.⁴³ Following the approach and the political philosophy of the Virginia Declaration of Rights, the Constitution’s Bill of Rights implemented the principles of generality and equal treatment directly, through specific protections for property owners in the Takings Clause of the Fifth Amendment and religious minorities in the First Amendment’s Religion Clauses.⁴⁴ Echoing the state common benefits clauses, the Due Process Clause of the Fifth Amendment reflected the generality principle and, implicitly, the equality baseline as well.

The principles of generality and equal treatment were fundamental to early American constitutionalism. For a famous example, Daniel Webster’s powerful oral argument in the *Dartmouth College Case*⁴⁵ invoked this principle. Defending his alma mater (a “small college” but “there are those who love it”) against a New Hampshire law revoking its private charter,

40. U.S. CONST. art. IV, § 2, cl. 1, *adapting* ARTICLES OF CONFEDERATION of 1781, art. IV (assuring “the free inhabitants of each of these states, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states”).

41. THE FEDERALIST NO. 78, at 396 (Alexander Hamilton) (Ian Shapiro ed., 2009).

42. THE FEDERALIST NO. 10, *supra* note 41, at 50–53 (James Madison) (avoiding oppression by “faction[s]” justified the large national governance); *see also* THE FEDERALIST NO. 51, *supra* note 41, at 265–67 (James Madison) (but also federalism).

43. *See also* 2 SCHWARTZ, *supra* note 32, at 1016–17.

44. Fears of unequal treatment, through special privileges or exclusions, were focused in this period on religious minorities, as religion was the great dividing ideology in those days. The South Carolina Constitution, for example, did not have a common benefits clause or an assurance of general laws—but did protect these values in matters of religion. *See* S.C. CONST. of 1778, art. XXXVIII (protecting religious free exercise and barring as established religion, as well as assuring “all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges”).

45. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

Webster denounced the statute as one, literally, not within the legislative authority, properly understood through the lens of Hobbesian/Lockean social contract theory.⁴⁶ “[The statutes’] effect and object are to take away, from one, rights, property, and franchises, and to grant them to another. This is not the exercise of a legislative power.”⁴⁷ In support of this proposition, Webster invoked the state and federal due process clauses, but the foundation of his winning argument was that the legislature must act generally and not target specific persons or institutions for penalty.

During the Jacksonian Era (1829–1837) and afterward, the Webster argument was a popular one against what contemporaries termed “class legislation,” namely, laws burdening or advantaging a minority without advancing a general public purpose.⁴⁸ The Iowa Supreme Court, for example, struck down a statute making it easier for the state to question land claims owned by so-called half-breeds.⁴⁹ The opinion for the Iowa Supreme Court in *Reed v. Wright* contained a classic statement of the rule against class legislation:

Laws affecting life, liberty and property must be general in their application, operating upon the entire community alike. It is the boast and pride of our institutions that we have no favored classes; no person so high that he does not require the care and protection of the law, no person so low as not to be entitled to them. The life, liberty, and property of one citizen rest upon the same legal foundation as those of another, and if these are taken from him, it must be by a law which operates upon all alike.⁵⁰

As in the *Dartmouth College* case, these state cases scrutinizing and often striking down class legislation usually involved

46. ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 155–56 (1997) (emphasis omitted).

47. DANIEL WEBSTER, *The Dartmouth College Case: Argument Before the Supreme Court of the United States, at Washington, on the 10th of March, 1818*, in THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 1, 5 (1879), available at http://www.constitution.org/dwebster/dartmouth_oral.htm (last visited Feb. 12, 2015).

48. See RODNEY L. MOTT, DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF THE “LAW OF THE LAND” 256–74 (1926); Saunders, *supra* note 36, at 251–68 (()); see also Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983, 1030 (2013).

49. *Reed v. Wright*, 2 Greene 15, 29 (Iowa 1849).

50. *Id.* at 27. Other important decisions along the same lines were *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206, 209–10 (1849); *Crow v. State*, 14 Mo. 237, 281–83 (1851); *Goepf v. Borough of Bethlehem*, 28 Pa. 249, 255 (1857); *Budd v. State*, 22 Tenn. (3 Hum.) 483, 491–92 (1842).

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statutes targeted at one or a few institutions or a small class of citizens. Reflecting the Jacksonian ideology, the rule against class legislation often focused on economic redistributions favoring corporate or moneyed insiders.⁵¹ As *Reed v. Wright* illustrates, however, sometimes the Jacksonians deployed the rule against class legislation to protect disadvantaged racial and other social minority groups.

In the era's most famous articulation of the anti-class legislation principle, President Jackson himself gave us the terminology that would be used in the Fourteenth Amendment. In 1832, Jackson vetoed the bill to recharter the Second Bank of the United States; the President believed that the Bank served only the interests of rich eastern financiers and cheated ordinary farmers, merchants, and the public generally.⁵² In his veto message, President Jackson announced that "every man is equally entitled to protection by law."⁵³ He continued: "If [law] would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing."⁵⁴ Although the class legislation cases (such as *Reed v. Wright*) continued to emphasize the traditional due process baseline, that laws ought to have general application, Jackson's equal protection language would gain traction in the generation leading up to the Civil War.

B. The Equal Protection of the Law and the Anti-Caste Principle

The Jacksonian opposition to "class legislation," as a violation of the equality precepts of the Declaration of Independence, as well as the Jacksonian endorsement of "equal protection," found their way into state constitutions in the middle of the nineteenth century. As new states entered the Union, they adopted explicit constitutional protections against class legislation, characteristically deploying the language of equality. Typical was the provision of the Iowa Constitution of 1846 that was applied in *Reed v. Wright*: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."⁵⁵

51. See Calabresi & Leibowitz, *supra* note 48, at 1023–41.

52. 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 590 (James D. Richardson ed., 1896).

53. *Id.*

54. *Id.*

55. IOWA CONST. of 1846, art. I, § 6. Very similar language can be found in IND. CONST. of 1851, art. I, § 23; OR. CONST. of 1846, art. I, § 20; WIS. CONST. of 1848, art. I, § 1.

The Ohio Constitution of 1851 explicitly guaranteed all citizens the “equal protection” of the law.⁵⁶

Litigants and judges invoking these common benefit and equal protection clauses trained their attention on legislation profiting the rich or targeting particular institutions (like Dartmouth College) or small groups. This was consistent with the Jacksonian tradition, which was often not sensitive to the claims of social groups based upon race, ethnicity, and color.⁵⁷ As *Reed v. Wright* illustrates, however, some Jacksonians as well as the “Conscience” Whigs in the 1840s and 1850s believed that laws discriminating against racial minorities (“half-breeds” in *Reed*) could be the sort of “class” legislation subject to constitutional question.⁵⁸ In the 1850s, anti-slavery politicians and voters flocked to the Free Soil and then the Republican Party—and this new generation of constitutionalists expanded the “equal protection” idea to target laws excluding large social groups from normal legal privileges and benefits.⁵⁹ Rhetorically, this expansion of the rule against class legislation found expression in criticisms of “caste” legislation. Consider the most important explication of this new attitude toward Jacksonian class legislation and equal protection of the law.

In 1849, abolitionist leader Charles Sumner (a Conscience Whig and soon to be a founder of the Free Soil Party) explained this new anti-caste norm in his celebrated argument against public school racial segregation before the Massachusetts Supreme Judicial Court in *Roberts v. City of Boston*.⁶⁰ The Massachusetts Constitution contained a provision, typical in the founding era, that recognized the presumptive equality of all

56. OHIO CONST. of 1851, art. I, § 2.

57. Recall that Chief Justice Taney (President Jackson’s Attorney General and twice his nominee to the Supreme Court) led the Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, which found that Americans of African descent, as a class, “had no rights which the white man was bound to respect.”

58. See *Reed v. Wright*, 2 Greene 15, 27–28, 33 (Iowa 1849).

59. See JONATHAN H. EARLE, JACKSONIAN ANTISLAVERY & THE POLITICS OF FREE SOIL, 1824–1854, at 192–93, 197 (2004); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer’s Social Statics*, 88 MICH. L. REV. 1366, 1380 (1990) (book review).

60. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 201–02 (1849). Sumner is significant as the most articulate of the anti-slavery political leaders before, during, and after the Civil War. He was a Conscience Whig, then a Free Soiler, and finally one of the most important Republican statesmen of the era. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 955, 980, 1098, 1132, 1138–39 (1995) (relying on Sumner’s persistent campaign against any kind of race-based segregation to argue that *Brown* was correct as a matter of original meaning).

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citizens.⁶¹ Linking this constitutional provision to the rule against class legislation, Sumner expanded upon the social contractarian vision embedded in the founding era constitutionalism and recently applied in *Reed v. Wright*:

Within the sphere of their influence no person can be *created*, no person can be *born* with civil or political privileges not enjoyed equally by all his fellow-citizens; nor can any institution be established recognizing any distinction of birth. Here is the Great Charter of every human being drawing the vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble, or black; he may be of Caucasian, Jewish, Indian, or Ethiopian race; he may be of French, German, English, or Irish extraction, but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black—nor is he Caucasian, Jew, Indian, or Ethiopian—nor is he French, German, English, or Irish; he is a Man, the equal of all his fellow men. He is one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care. To some it may justly allot higher duties, according to higher capacities, but it welcomes all to its equal, hospitable board.⁶²

The last portion of this important passage bears repetition: Equality before the law means that all citizens, whatever their race, religion, physiology, or wealth, are “children of the State, which, like an impartial parent, regards all its offspring with an equal care.”⁶³

A big chunk of Sumner’s argument consisted of an elaboration of the concept of “caste,” partly by reference to the Indian (“Hindoo”) caste system, where the state excluded “outcastes” and lower castes from a variety of civil benefits.⁶⁴ Strongly arguing that division of schoolchildren by race is the worst form of class or caste legislation, Sumner announced a broad understanding of class/caste to include exclusions based upon the ethnicity, religion, income, or occupation of the

61. MASS. CONST. of 1780, art. I.

62. ARGUMENT OF CHARLES SUMNER, ESQ., BEFORE THE SUPREME COURT OF MASSACHUSETTS, IN THE CASE OF *SARAH C. ROBERTS VS. THE CITY OF BOSTON*, DECEMBER 4, 1849, at 7 (F. & J. Rives & Geo. A. Bailey 1870) (1849) [hereinafter ARGUMENT OF CHARLES SUMNER, ESQ.].

63. *Id.* The Court rejected Sumner’s argument, in an even more famous opinion by Chief Justice Lemuel Shaw, namely, *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 210 (1849).

64. ARGUMENT OF CHARLES SUMNER, ESQ., *supra* note 62, at 4.

parents.⁶⁵ Elsewhere in the address to the Justices, he denounced legislation that made legal rights and duties dependent on physiological traits.⁶⁶

The Massachusetts Supreme Judicial Court rejected Sumner's arguments in 1849; the Legislature followed them when it desegregated public schools in 1855.⁶⁷ A similar debate occurred in *Van Camp v. Board of Education*, where the Ohio Supreme Court used the terms class and caste legislation interchangeably in applying Ohio's equal protection clause to another school segregation case.⁶⁸ Like the Massachusetts court in *Roberts*, the Ohio court in *Van Camp* allowed school segregation—over the sharp dissent of Justice Milton Sutliff, a Republican in the Sumner mold. Sutliff's opinion not only used the terms class and caste interchangeably, but also understood class/caste legislation to include laws making classifications grounded upon supposed “difference in races, religion, language, color, or any physiological peculiarities.”⁶⁹

Abolitionist lawyers (like Sumner) and judges (like Sutliff) build upon the longstanding constitutional admonition against class legislation (described above). What they added to the traditional principle was the notion of “caste” legislation, which they used interchangeably with “class” legislation. The caste language not only represented a more open critique of legislation separating citizens based upon their race or ethnicity, but also reflected an understanding that legislation created “favored” or “disfavored” classes (*Reed v. Wright*) might be systematic and not just episodic (as it was treated in *Reed*). That is, class or (now)

65. Said Sumner:

In determining that the Committee have no *power* to make this discrimination, we are strengthened by another consideration. If the power exists in the present case it cannot be restricted to this alone. The Committee may distribute all the children into classes, according to mere discretion. They may establish a separate school for Irish or Germans, where each may nurse an exclusive nationality alien to our institutions. They may separate Catholics from Protestants, or, pursuing their discretion still further, may separate different sects of Protestants, and establish one school for Unitarians, another for Presbyterians, another for Baptists, and another for Methodists. They may establish a separate school for the rich, that the delicate taste of this favored class may not be offended by the humble garments of the poor. They may exclude the children of mechanics, and send them to separate schools. All this, and much more, can be done in the exercise of that high-handed power which makes a discrimination on account of race or color.

Id. at 13.

66. *Id.* at 11.

67. *Roberts*, 59 Mass. (5 Cush.) at 210; MASS. GEN. LAWS ch. 256, § 1 (1855).

68. *Van Camp v. Bd. of Educ.*, 9 Ohio St. 406 *passim* (1859) (Peck, J.); *see also id.* at 415–16 (1859) (Sutliff, J., dissenting).

69. *Id.* at 416 (Sutliff, J., dissenting).

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caste legislation might be a *regime* of interconnected laws entrenching one group of citizens or persons as outside the normal protections and benefits of law.⁷⁰

Like the Republican Party itself, the broad Sumner-Sutliff understanding of class or caste legislation was not the majority position in the 1850s—but the Civil War (1861–1865) changed that. Even President Lincoln did not start the war as an abolitionist, but his Emancipation Proclamation in 1863 was the first constitutional step toward a fundamental rethinking (and expansion) of the rule against partial laws. The leading Republican constitutionalist of the post-war generation “hailed the end of the [Civil War] with the statement ‘it is [now] settled that this government is of and for the people with no privileged classes,’”⁷¹ including social and racial or ethnic as well as economic classes. With the ratification of the Thirteenth Amendment abolishing slavery and the adoption of the Civil Rights Act of 1866, which barred race discrimination in contract and property law,⁷² the Republicans enshrined racial minorities as the classic victims of class or caste legislation.⁷³

An important purpose of the Fourteenth Amendment (and especially its Equal Protection Clause) was to provide a firm basis for congressional and federal judicial policing of state efforts to entrench social groups as inferior castes through a series of laws known as the “Black Codes.” Although the freed slaves (a racial group) were the new model for a core violation of the rule against class/caste legislation, Congress refused to limit the Equal Protection Clause to legislation discriminating against classes defined by race, ethnicity, or color. Indeed, the Joint Committee that drafted the Fourteenth Amendment specifically

71. “Under a system of caste, personal liberty and the right of property are controlled by laws restraining the activity of a class of persons, more or less strictly defined, to a particular course of life, and allowing only a limited enjoyment of property and relative rights.” JOHN C. HURD, TOPICS OF JURISPRUDENCE CONNECTED WITH CONDITIONS OF FREEDOM AND BONDAGE 44 (1856).

71. Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”: A Reconsideration*, 53 J. AM. HIST. 751, 767 (1967) (quoting an oration by Cooley delivered July 1865).

72. U.S. CONST. amend. XIII, § 1; Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

73. See Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. xvii (1866) (discussed in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3039–43 (2010)). On the intellectual background of the Fourteenth Amendment in abolitionist thought, see generally JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003 (1999); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); David A.J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187 (1992).

considered and rejected proposals to limit the equality guarantee to race-based discriminations, obviously supporting the conclusion that the Equal Protection Clause must be read in light of the same assumption of equality and principle of statutory generality suggested by social contract theory and the founding era constitutionalists.⁷⁴

Original meaning theory suggests that the Equal Protection Clause encoded the precepts Sumner and other abolitionists had advanced as a gloss on the rule against class or caste legislation.⁷⁵ Contemporaries understood the meaning of the Equal Protection Clause in precisely this way. Introducing the Fourteenth Amendment, Senator Jacob Howard confirmed that the Equal Protection Clause “establishes equality before the law, and . . . gives to the humblest, the poorest, [and] the most despised . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.”⁷⁶ The clause plainly “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.”⁷⁷ House Speaker Thaddeus Stevens explained that the obvious meaning of the clause was that “the law which operates upon one man shall operate equally upon all.”⁷⁸

Senator Howard’s explanation of the Equal Protection Clause was widely reported in newspapers all over the country and was discussed among the citizenry.⁷⁹ Typical was the coverage in the *Cincinnati Commercial*, which said this amendment would place “[everybody] throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation.”⁸⁰ After the amendment takes effect, “it will be impossible for any Legislature to enact special codes for one

74. BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 46, 50, 83 (1914); see *J.E.B. v. Alabama*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring).

75. Reinforcing the idea that this background norm was pervasive is the fact that a large majority of state constitutions explicitly encoded a broad equal treatment norm as well. See Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 19–21, 114 (2008).

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

77. *Id.*; see also *id.* at 2961 (adding that the clause sought to “uproot and destroy . . . partial State legislation” (statement by Sen. Poland)).

78. *Id.* at 2459 (statement of Rep. Stevens).

79. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1299–1300 (2013); accord *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3074 (2010) (Thomas, J., concurring).

80. *The Constitutional Amendment*, *Cincinnati Com.*, Aug. 20, 1866, at 2.

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class of citizens.”⁸¹ In the press coverage and in the state ratifying conventions, there was no significant dissent from the understanding that the meaning of “equal protection” was the anti-caste meaning similar to that articulated by Charles Sumner in 1849.⁸²

This view of the original meaning is confirmed by contemporary commentators, the most notable of whom was Thomas Cooley, an abolitionist Republican who after the Civil War served on the Michigan Supreme Court and the Interstate Commerce Commission. Cooley authored the leading constitutional law treatise of his era and was the editor for an update of the leading treatise before his (namely, Story’s *Commentaries*).⁸³ Cooley presented the Fourteenth Amendment as nationalizing the anti-class legislation principle and expanding it to include racial and other forms of caste legislation.⁸⁴ Summarizing his view of the rule against class legislation, Cooley’s 1868 *Treatise* explained:

[A] statute would not be constitutional which should proscribe a class or party for opinion’s sake, or which should [identify] particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt.⁸⁵

The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are obnoxious, and discriminations against persons or classes are still more so, and as a rule of construction are always to be leaned against as probably not contemplated or designed.⁸⁶

In his 1873 edition of Story’s *Commentaries*, Cooley opined that the Fourteenth Amendment generally codified and expanded upon the rule against class legislation and reaffirmed that ours is a “government whose fundamental idea is, the equality of all its

81. *Id.* at 4.

82. *See generally* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 67, 73, 79 (1988) (leading account of the ratifying debates for the Fourteenth Amendment).

83. *See generally* THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (4th ed. 1878) ((0)); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* ch. XLVII (Thomas M. Cooley ed., 4th ed. 1873) (additional materials covering the Fourteenth Amendment and other mid-nineteenth century developments).

84. 2 STORY, *supra* note 83, at 690–91.

85. COOLEY, *supra* note 83, at 390–91.

86. *Id.* at 393.

citizens.”⁸⁷

Just as important, Cooley explained the limit of the rule against class/caste legislation. Thus, “there may be discriminations between classes of persons where reasons exist which make them necessary or advisable,” such as laws establishing an age of majority and prohibiting minors from entering into contracts—“but no one would undertake to defend upon constitutional grounds an enactment that, of the persons reaching that age, those possessing certain physical characteristics, in no way affecting their capacity or fitness for general business or impairing their usefulness as citizens, should remain in a condition of permanent disability.”⁸⁸ In other words, government has a wide discretion to treat different persons differently if the “discrimination” is related to a public-regarding reason, such as protecting minors from improvident decisions.

C. *Application of the Anti-Class Legislation Meaning of Equal Protection: The Supreme Court’s Race and Sex Discrimination Precedents*

The aspiration of the Equal Protection Clause was grand—but its immediate application less so. Doctrinally, a limitation of the rule against class/caste legislation was one Cooley and other commentators had not discussed at length: There had to be “discrimination,” creating “classes” of citizens with different rights, for the Fourteenth Amendment to be mobilized in all its force. Thus, in the wake of the Reconstruction Amendments, southern states reentering the Union knew they could not revive pre-Civil War statutes refusing to recognize marriages for the new African-American citizens (most of them former slaves). But most of those states, and many others, refused to recognize marriages between persons of different races.⁸⁹ Because the state treated black and white persons exactly the same, most judges declined to find that this was class/caste legislation because they found no “discrimination,” a position confirmed by the Supreme

87. STORY, *supra* note 83, at 677. In his analysis, which probably reflected the original meaning, Cooley considered the Privileges or Immunities Clause of the Fourteenth Amendment to be an important bulwark against class/caste legislation because it protected important rights against state regulation. The Supreme Court’s decision in *The Slaughter-House Cases* narrowed the Privileges or Immunities Clause in a manner strongly inconsistent with original meaning, as many commentators have maintained.

88. *Id.* For a similar analysis of pre-Civil War class legislation doctrine, see COOLEY, *supra* note 83, at 393.

89. See generally RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 214–43 (2003) (detailed account of state anti-miscegenation laws).

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Court in *Pace v. Alabama*.⁹⁰

Today, we consider “apartheid,” the legal regime of racial segregation, to be a classic example of legislation consolidating a racial caste regime, a point made by Justice Harlan’s dissent in *Plessy v. Ferguson*,⁹¹ the decision that legitimated apartheid. Notice that the original meaning of the Equal Protection Clause provides strong support for Justice Harlan’s dissent.⁹² Everyone agreed that the Fourteenth Amendment barred caste legislation. What was caste legislation? The Sumner argument in *Roberts* was the clearest explanation: Not only did Sumner specifically argue that segregation of the races amounted to discrimination harming minorities, but his example of a caste regime was the “Hindoo” caste regime in India.⁹³ Separation through a systematic array of rules was the primary mechanism for that caste system, and the mark of the “Untouchables” was their segregation from polite society. If Harlan had been aware of this and other evidence of original meaning, his dissent would have been even more powerful as a legal argument (and not just as an argument about political viability and social justice).

In any event, after a tremendous educational campaign and dramatic social change, the Supreme Court ultimately did recognize that the series of race-based laws and rules constituting “apartheid” was a caste regime, a proposition that was fatal to segregation in *Brown v. Board of Education*.⁹⁴ In my view, Justice Harlan was right all along, for the same reasons given by Sumner and Sutliff earlier: apartheid was caste legislation that did not reflect the “equal care” for all citizens that was the public meaning of equal protection in 1868.⁹⁵ But I also agree with Judge Bork, that even if *Plessy* were defensible as a matter of original meaning, *Brown* was nonetheless correct, because by 1954 it was clear that apartheid had never tolerated

90. *Pace v. Alabama*, 106 U.S. 583, 585 (1883); *see also Plessy v. Ferguson*, 163 U.S. 537, 548, 552 (1896) (rejecting an equal protection challenge to laws requiring racial segregation in railroad transportation).

91. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

92. *E.g.*, Thomas, *supra* note 21, at 65–67 (endorsing the Harlan dissent, based upon its consistency with the equality norm of the Declaration of Independence).

93. This was an analogy Senator Sumner made again almost two decades later, during the congressional debate to pass the Fourteenth Amendment. *See* CONG. GLOBE, 39th Cong., 1st Sess. 686 (1866) (statement of Sen. Sumner).

94. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954). On the realization that apartheid consolidated a caste system, *see* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 67 (2004).

95. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 201–04 (1849) (referencing Charles Sumner’s oral arguments from which the “equal care” language is taken).

equality for minority races and would never do so; original meaning applied to *those circumstances* required judges to find an equal protection violation, even if they were unprepared to say that *Plessy* was wrong when it was decided in 1892.⁹⁶

I would fill in this gap in Judge Bork's justification—why it was no coincidence that equal treatment was (quite dramatically) not possible under the apartheid regime. The reason was that apartheid rested upon and entrenched the ideology that minority races were inferior and degraded and that ideology encouraged pervasive violence and discrimination against Americans of color.⁹⁷ The ideology of malignant racial variation and white supremacy itself rested upon prejudice against interracial sexuality and obsession with the fantasy that such unions would produce a “mongrel race” of citizens.⁹⁸ Such an understanding of the ideology of racism helps us to understand why other Justices did not join Justice Harlan's *Plessy* dissent: because they were not from the South (as Harlan was), they did not understand how the practice and ideology of apartheid entrenched African Americans as a subordinated caste; also, like most Americans, those Justices agreed with or acquiesced in a naturalized understanding of minority races as different and inferior.⁹⁹ Only when America's legal culture was able to grasp and largely agree that segregation rested upon and entrenched the idea of racial inferiority was that culture able to understand apartheid as the caste regime that Justice Harlan said it was. Such an understanding, of course, was also fatal to laws barring different-race marriages. Although the Supreme Court ducked the issue for more than a decade after *Brown*, the Justices understood that such laws could not withstand the Equal Protection Clause, properly understood. Once most state legislatures had abandoned

96. BORK, *supra* note 21, at 81–82. Bork's argument is a relatively dynamic understanding of original meaning. For less dynamic versions of original meaning that have also been advanced in support of *Brown*, see Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 156–57, 167 (forthcoming 2014); McConnell, *supra* note 60, at 1131–33. The consensus among law professors is that *Brown* is hard to defend on originalist grounds. See Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1866 (1997).

97. Brief for Appellant at *4–5, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), No. 1, 1952 WL 47265 app., at *4–*5; accord Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421–24 (1960).

98. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 654–57.

99. See generally Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157 (1996). See also J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315, 320–22 (1991).

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anti-miscegenation laws, the Court struck them down in *Loving v. Virginia*.¹⁰⁰

The foregoing dynamics of original meaning jurisprudence that marks the Borkian defense of *Brown* and my defense of *Loving* are even more dramatically revealed in the Supreme Court's sex discrimination jurisprudence.¹⁰¹ In the nineteenth century, American constitutional culture did not consider legal exclusions of women from property, contract, and employment rights to have been "discrimination" because Americans (including most women) considered sex differences fundamental and different treatment "natural." Like racial apartheid, the apartheid of domesticity came under sustained and increasingly successful attack in the twentieth century. Once American legal culture came to reject the ideology of pervasive sex difference, older exclusions of women, once considered natural, suddenly were viewed as elements in a caste regime that isolated women as second-class citizens.¹⁰² Just as the Court's race jurisprudence today rejects any policy resting upon and entrenching race prejudice and stereotypes, so the Court's sex discrimination jurisprudence rejects sex-based rules that "create or perpetuate the legal, social, and economic inferiority of women."¹⁰³

Recall that the original meaning of the Equal Protection Clause allows discriminations when founded on an important public policy. Hence, the law may constitutionally deny driver's licenses to persons who suffer from certain disabilities such as blindness or epilepsy; as Cooley pointed out, "discriminations" may survive when justified.¹⁰⁴ But even if government may sometimes discriminate against persons with disabilities, that does not mean the government may always do so—especially when the excluded class is denied important rights such as

100. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

101. See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 15–41, 46, 60–66 (2011) (arguing that sex discrimination jurisprudence is consistent with original meaning); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 377–79 (1985); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 308 & n.17 (1986).

102. William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2136–37 (2002); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953–56 (2002).

103. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996). In the process, the Court has nullified longstanding state policies, including the Virginia Military Institute's 150-year exclusion of women. *Id.* at 520–23, 536–46.

104. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 393 (1868).

marriage, as *Loving* illustrates.¹⁰⁵

For example, states throughout our history did not allow people with intellectual or some physical disabilities to marry,¹⁰⁶ in order to limit marriage to persons who could responsibly procreate and raise children.¹⁰⁷ At the time they were enacted, legislators did not consider these laws to be part of a caste system because the legal culture believed them eugenically necessary.¹⁰⁸ That consensus has been reversed: as our constitutional culture came to realize that these marriage exclusions rested upon discredited stereotypes about persons with mental disabilities, they have all but vanished.¹⁰⁹ If a state revived a law barring all people with mental disabilities from marrying because they could not engage in what the state considered “responsible procreation and childrearing,” would that not be presumptively unconstitutional as a revival of a discredited caste regime?¹¹⁰

The case of disability-based marriage exclusions illustrates the difference between original intent/expectations and original meaning theories of the Equal Protection Clause. Exclusion of people with certain physical and mental disabilities from marriage would never have occurred to lawyers or statesmen to have been a “discrimination,” similar to the laws barring different-race marriages. As such, an original *intent* theorist could easily conclude that the Fourteenth Amendment has nothing to say about this exclusion. But an original *meaning* theorist would start with the objective meaning of the Equal Protection Clause, to bar class or caste legislation, and would inquire whether the marriage exclusion, in light of the array of

105. *Zablocki v. Redhail*, 434 U.S. 374, 389–91 (1978) (striking down a law barring remarriage for persons defaulting on spousal support obligations). For an argument that marriage is a fundamental right protected by the original meaning of the Fourteenth Amendment, see Calabresi & Matthews, *Originalism and Loving v. Virginia*, *supra* note 24, at 1419.

106. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1465 & n.92 (citing Robert F. Drinan, *The Loving Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358, app. D at 389–98 (1968) (explaining that thirty-five states excluded persons with mental disabilities from marrying in 1968)).

107. Jonathan Matloff, Comment, *Idiocy, Lunacy, and Matrimony: Exploring Constitutional Challenges to State Restrictions on Marriages of Persons with Mental Disabilities*, 17 AM. U. J. GENDER SOC. POL’Y & L. 497, 510–12 (2009).

108. For a brilliant introduction to that eugenics-saturated culture, see VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 93–96 (2008).

109. ALLISON C. CAREY, ON THE MARGINS OF CITIZENSHIP: INTELLECTUAL DISABILITY AND CIVIL RIGHTS IN TWENTIETH-CENTURY AMERICA 157–59, 172–73, 188 (2009).

110. For an argument that such a law would be invalid, see Matloff, *supra* note 107, at 507–13.

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laws affecting people with disabilities and the cogency of their public justification, was an example of unjustified class legislation. Because people with disabilities are now considered a “class” of people with capabilities and agency, the Fourteenth Amendment would be mobilized today in ways that social, linguistic, and cultural assumptions would not have allowed in 1868.

II. ORIGINAL MEANING OF EQUAL PROTECTION AS APPLIED TO MARRIAGE EQUALITY FOR SEXUAL AND GENDER MINORITIES

The original meaning of the Equal Protection Clause obliges the state to treat each of its citizens as “one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care. To some it may justly allot higher duties, according to higher capacities, but it welcomes all to its equal, hospitable board.”¹¹¹ Consistent with this original meaning, the Equal Protection Clause disapproves state laws or policies that (a) discriminate against a person (b) because of acts or traits marking her as a member of a disparaged class (c) without a firm grounding in public need.¹¹² (This is an articulation of the anti-caste principle as applied to a particular law or policy.) Understood in light of the historical sources, original meaning helps us understand and appreciate the Supreme Court’s doctrine in the desegregation and the sex discrimination cases, as well as its probable reaction to the hypothetical revival of disability-based marriage exclusions. Thanks to Judge Bork, we can also appreciate how original meaning jurisprudence operates over time, because an exclusion or rule that the legal culture considers (a) natural and (c) public-regarding in an earlier time might, in light of experience and new evidence, be revealed as (a) discriminatory and (c) not serving the public interest today.

Indeed, whether the excluded person is being (a) discriminated against as (b) a member of a disparaged class also changes over time. In 1868, there was no anti-gay caste regime that the Equal Protection Clause might have interrogated—in large part because there was no social class of “gay people,” or even of “homosexuals” (a term coined only in the 1890s¹¹³). Walt Whitman, America’s greatest poet, was romantically attracted to men and probably enjoyed intimate relations with men in the 1860s, when the Fourteenth

111. This is the language from Sumner’s argument in *Roberts*. ARGUMENT OF CHARLES SUMNER, ESQ., *supra* note 62, at 7.

112. See *Romer v. Evans*, 517 U.S. 620, 632–36 (1996).

113. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

Amendment was drafted and ratified as part of the Constitution.¹¹⁴ But he was a member of no caste nor any social group that was the focus of a state exclusionary regime; indeed, the law did not even criminalize or discourage his intimacies.¹¹⁵ To be sure, if Whitman had applied for a license to marry another man, the licensing officials would have considered his application unintelligible—but not because of any animus against “homosexuals” or “gays” (terms that did not even exist in the English language then), but simply because family law in that era followed the Blackstonian assumption of marriage as a procreation-based institution. “Homosexuals” or “gays” or “LGBT people” are a social class created during the twentieth century, in part through medical and social discourse identifying and stigmatizing persons who violated accepted gender norms and in part through state laws targeting, excluding, and persecuting people whose sexual orientation is toward persons of the same sex.¹¹⁶

By World War II, “homosexuals” (a) constituted a coherent social class, and the laws excluding them constituted a caste regime, branding them as outlaws. But our legal culture (b) was incapable of viewing the many legal rules harming and excluding gay people as “discriminations” and, instead, (c) firmly understood those rules as amply supported by the public interest, in precisely the same way that Thomas Cooley justified laws protecting minors. That is, legal culture defined “homosexuals and other sex perverts” (terms of the era) as sterile, selfish, mentally ill persons who were often predatory toward children and always disruptive to workplace and other (quasi) public spheres. Given this cultural and legal consensus, laws criminalizing gay people’s sexual behaviors, excluding them from public employment (especially as school teachers), and denying them professional licenses were no more offensive to the Equal Protection Clause than similar laws against rapists and burglars.¹¹⁷

114. Apparently, Whitman engaged in frottage and probably oral sex with consenting adult men. MARTIN DUBERMAN, *ABOUT TIME: EXPLORING THE GAY PAST* 109–20 (1991).

115. Frottage and oral sex (fellatio) were activities that were not included in traditional sodomy/crime against nature laws, which focused only on anal sex. *See* 2 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* § 1028, at 731 (2d ed. 1859); 2 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 49 (1847). Indeed, no state made oral sex of any kind a crime in 1868. *See* WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003* app. at 388–407 (2008).

116. On the late nineteenth century’s construction of “homosexuality” as a classification for certain men having sex with other men, *see* JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995).

117. As the Chief Justice of the United States claimed (anachronistically) in 1986,

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Please note that this public understanding of gay people was never founded in fact and was always a hysterical fantasy entertained by our social and legal culture—but was for a long time hard to falsify because gay people were afraid to identify themselves. In the last generation, now that gay people have, increasingly, come out of their closets and claimed the attention of serious academics and public officials, the laws and policies excluding and stigmatizing that group have come under serious scrutiny. Repeatedly, the Supreme Court has ruled that anti-gay discriminations violate the Equal Protection Clause, and in this part I argue that the Court has been doing nothing more than enforcing the original meaning of the Equal Protection Clause.

And I shall also maintain that the new anti-gay marriage exclusions are, like the racist exclusion at issue in *Loving v. Virginia*, the last major discriminations to be challenged—and ultimately the most important to strike down. Just as anti-miscegenation laws were the last stand for the ideology of white supremacy and its underlying stereotype/fear of “colored” people as anti-purity, so the anti-gay marriage exclusions are the last stand for the ideology of compulsory heterosexuality and its underlying stereotype/prejudice of gay people as anti-family. If the original meaning of the Equal Protection Clause has any legal bite, the broad anti-gay exclusions from family law such as those adopted by Virginia and Michigan (quoted in the introduction to this article) must be invalidated.

A. *The Creation of the Anti-Homosexual Caste Regime, 1921-69*

In 1868, there was no anti-gay or anti-homosexual caste regime, because there was no social class of gay or homosexual persons. With America’s rapid urbanization, however, our nation’s cities revealed populations of people who were sexual and/or gender nonconformists. While falling short of the coherence needed to be a social class, these populations stimulated increasing social anxiety in the nineteenth century, with the “concept of the homosexual as a distinct category of person” emerging after 1890.¹¹⁸ In the twentieth century, as sexual and gender nonconformists became more visible, that social anxiety morphed into a nationwide panic, which motivated public officials all over the country to create a caste regime, entrenching “homosexuals” as social pariahs and outlaws

“homosexual sodomy” between consenting adults in private was, at common law, considered to be an offense *worse* than rape. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

118. *Lawrence*, 539 U.S. at 568.

(literally, outside the law).¹¹⁹ The broad scope and cruelty of the anti-homosexual terror between 1921 and 1969 has been well-documented.¹²⁰ By 1969, an anti-homosexual caste regime was firmly entrenched in American law and culture, much as the racial apartheid regime had been entrenched in the two generations after the Civil War.

While sodomy or the crime against nature (namely, anal sex against a nonconsenting person or animal) had long been a serious crime in America, most states and the federal government in the twentieth century expanded their sodomy laws to include oral sex and to target consensual as well as nonconsensual activities. In 1969, homosexual activities with a consenting adult partner were criminal in forty-nine states and the District of Columbia, with increasingly draconian penalties.¹²¹ In Virginia, for example, a lesbian engaged in consensual private activities with another woman could be charged with the crime against nature, a felony, and, if convicted, spend up to three years in prison, a maximum expanded to five years in 1975.¹²² In most states, the accused “homosexual” might be committed to a mental institution as a “sexual psychopath,” where they were subjected to experimental medical treatments¹²³ and sterilization if the doctors found them mentally defective.¹²⁴ Hundreds of thousands of lesbians and gay men were harassed,

119. WILLIAM N. ESKRIDGE JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999); LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 130-50 (1991).

120. The account in this Part II.A draws liberally from JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970*, at 57-71 (1983); ESKRIDGE, *supra* note 115, at 73-108 (()); Estelle B. Freedman, “*Uncontrolled Desires: The Response to the Sexual Psychopath, 1920-1960*,” 74 J. AM. HIST. 83, 83-106 (1987). For the creation of the nation’s most pervasive anti-gay regime in this period, namely, that of California, see William N. Eskridge, *The Supreme Court of California, 2007-2008—Foreword: The Marriage Cases: Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1789-97 (2009).

121. ESKRIDGE, *supra* note 115, at app. 388-407 (showing a state-by-state account of sodomy laws and their consequences); see also Jon J. Gallo et al., *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643, app. E (1966) (enforcement of this regime).

122. 1975 Va. Acts 79 (amending VA. CODE ANN. § 18.2-361(a) to increase the penalty for the crime against nature, which had in the 1920s been expanded to include cunnilingus).

123. JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEAN IN THE U.S.A.* 134-207 (1976); John LaStala, *Atascadero: Dachau for Queers?*, *ADVOC.*, Apr. 26, 1972, at 11, 13 (giving a first person account of medicalized torture of “homosexuals” at state mental health facility).

124. *E.g.*, 1929 Mich. Pub. Act 81; 1924 Va. Acts 569. On the sterilization of “degenerates,” see MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 30 (2009).

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arrested, and sometimes incarcerated pursuant to sodomy and other sexual misconduct laws.¹²⁵

Even without a criminal conviction, the suspected “homosexual” was a presumptive outlaw who was subject to a wide array of civil discriminations. Thus, a woman thought to be a lesbian could lose her professional license, be discharged from her job as a public schoolteacher or civil servant, was ineligible for many jobs in the private sector, would lose her security clearance, could not serve in the armed forces or in local police forces, and might be deported from this country (if an immigrant).¹²⁶ If a person dared associate with other “homosexuals” for social purposes or to advocate for better treatment, she or he could expect governmental surveillance and harassment. Lesbian and gay bars, for example, were relentlessly targeted by state liquor authorities and local police.¹²⁷

The law disrespected and sought to disrupt the lives of those lesbians and gay men who were involved in committed relationships and families. Lesbian and gay couples faced judicial refusal to enforce their contracts, wills, and trust documents.¹²⁸ If either partner had children, most states were prepared to take them away or restrict visitation at the behest of the estranged non-homosexual spouse/parent, based upon the fantastic notion, unsupported by expert evidence, that even “exposure” to homosexuality is destructive for children.¹²⁹

The anti-homosexual caste regime was created in an era of increasing anxiety about nonmarital sexuality and the decline of traditional gender roles.¹³⁰ The rhetoric that justified the

125. ESKRIDGE, *supra* note 115 (estimating the numbers of gay and lesbian persons arrested for consensual sex offenses, based upon police records for a variety of municipalities).

126. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015, 1079–81 (1999) (reprinting 1979 article); *see also* FADERMAN, *supra* note 119, at 140–50; DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 125–26, 137, 166–68 (2004).

127. *E.g.*, 1956 Va. Acts 750 (revoking liquor licenses for bars that were a “meeting place” for “homosexuals”). On the police and regulatory harassment of lesbian and gay bars, *see* NAN ALAMILLA BOYD, *WIDE OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965*, at 108–47 (2003); ESKRIDGE, JR., *supra* note 119, at 74–76; GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940*, at 131–50, 331–51 (1994).

128. Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 232–48, 262–63 (1981).

129. *E.g.*, J.P. v. P.W., 772 S.W.2d 786, 792–94 (Mo. Ct. App. 1989) (citing cases); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985); *see also* Rivera, *supra* note 126, at 1102–23 (discussing cases). On contagious homosexuality, *see* D’EMILIO, *supra* note 120, at 42–43 (()); Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 630–31 (2013).

130. *Cf.* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is*

pervasive discrimination was the view that lesbians and gay men are sex-obsessed predators who are a threat to the American family.¹³¹ In justifying its denial of visitation to a homosexual parent, an Ohio court explained:

[G]iven its concern for perpetuating the values associated with conventional marriage and the family as the basic unit of society, the state has a substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric, and in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles.¹³²

A few examples will further illustrate the ideology undergirding the anti-homosexual caste regime.

During World War II, the armed forces adopted a hard policy of excluding lesbian and gay persons from military service and demonizing such persons more generally. For example, the Navy's educational materials for recruits warned: "By her [homosexual] conduct, a Navy woman may ruin her chances for a happy marriage" and will poison relationships with her family.¹³³ State as well as federal governments taught their citizens that homosexuality was the antithesis of monogamous marriage devoted to the well-being of children. Instead, "homosexuals have an insatiable appetite for sexual activities and find special gratification in the recruitment to their ranks of youth."¹³⁴ "[H]omosexuality is unique among the sexual assaults . . . in that the person affected by the practicing homosexual is first a victim, then an accomplice, and finally himself a perpetrator of homosexual acts."¹³⁵

In the period after World War II, Congress accepted these pernicious stereotypes: "[P]erverts will frequently attempt to entice normal individuals to engage in perverted practices. This

Sex Discrimination, 69 N.Y.U. L. REV. 197, 238, 284–85 (1994) (arguing that anti-gay prejudice is centrally a revulsion based on gender role).

131. ESKRIDGE, *supra* note 115, at 76–84; FADERMAN, *supra* note 126, at 130–50; JOHNSON, *supra* note 125, at 55–64.

132. *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985); *accord* *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (stating that children growing up in a home with "active lesbianism" can be harmful to the child).

133. Chaplain's Presentation (WAVE Recruits) (Nov. 1952), *reproduced and analyzed in* Allan Bérubé & John D'Emilio, *The Military and Lesbians During the McCarthy Years*, 9 SIGNS 759, 768–69 (1984) (reproducing this and other anti-homosexual "indoctrination and education" materials).

134. FLA. LEGISLATIVE INVESTIGATION COMM., HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA 10 (1964); *see* JAMES T. SEARS, *LONELY HUNTERS: AN ORAL HISTORY OF LESBIAN AND GAY SOUTHERN LIFE, 1948–1968*, at 48–107 (1997) (giving an account of the Florida Legislative Investigation Committee's activities and reports).

135. FLA. LEGISLATIVE INVESTIGATION COMM., *supra* note 134, at 10.

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is particularly true in the case of young and impressionable people who might come under the influence of a pervert.”¹³⁶ At the beginning of the Cold War against Godless Communism, federal officials maintained that “homosexuals” were anti-American.¹³⁷ According to the Senate Minority Leader, “You can’t hardly separate homosexuals from subversives,” including Communists.¹³⁸

In short, the classic stereotype about “homosexuals”—the notion that inspired the caste regime—has been that they are “promiscuous recruiters and corrupters of children, who cannot have committed relationships.”¹³⁹ Thus, as late as 1985, the Virginia Supreme Court treated a committed relationship between two gay men as an “intolerable burden” on one man’s biological daughter, a burden worse and more abhorrent than adultery.¹⁴⁰ “The father’s unfitness [to retain parental rights] is manifested by his willingness to impose this burden upon [his daughter] in exchange for his own gratification.”¹⁴¹

The year after the Virginia court’s decision, the U.S. Supreme Court denigrated or dismissed gay people’s romantic relationships when a majority upheld consensual sodomy laws in *Bowers v. Hardwick*.¹⁴² The critical fifth vote in that case came from Justice Lewis Powell. Although he was troubled by mandatory prison terms for consensual activities harming no one, Justice Powell was not able to overcome his deeply held views that the *constitutional* privacy right protected “families,” and that the “fundamental reason for the condemnation of [homosexual] sodomy has been its *antithesis* to family.”¹⁴³

B. The Anti-Caste or Class Legislation Principle Applied to the Anti-Homosexual Terror Regime

The ideology of the “homosexual” as mentally ill, predatory,

136. SENATE COMM. ON EXPENDITURES IN THE EXEC. DEPTS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT 4 (1950) (()) (()) see also JOHNSON, *supra* note 125, at 101–18 (account of the “Hoey Committee” deliberations).

137. See JOHNSON, *supra* note 125, at 30–33.

138. SENATE COMM. ON EXPENDITURES IN THE EXEC. DEPTS, *supra* note 136, at 30–38 (quotations linking homosexuality and Communism). (())

139. Angela Simon, *The Relationship Between Stereotypes of and Attitudes Toward Lesbians and Gays*, in 4 STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 62–63 (Gregory M. Herek ed., 1998). (())

140. *Roe v. Roe*, 324 S.E.2d 691, 693–94 (Va. 1985).

141. *Roe*, 324 S.E.2d at 694.

142. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

143. LFP/SS Memorandum to *Bowers* File (May 24, 1986) (Lewis F. Powell, Jr. Archives) (on file with Washington & Lee University School of Law). (())

and anti-family (the ideology underwriting the anti-homosexual caste regime) was grounded in inaccurate stereotypes and prejudice, as some contemporary observers recognized.¹⁴⁴ The skeptics slowly gained ground as social science evidence accumulated against these stereotypes; indeed, soon after the peak of the anti-homosexual terror, experts within the mental health field abandoned the notion that “homosexuals” are mentally ill or defective.¹⁴⁵ Social scientists and child specialists have refuted the canard that “homosexuals” are child molesters; in fact, gay men are no more likely than straight men to molest children, and lesbians are much less likely to do so.¹⁴⁶ Most important, lesbians and gay men form committed relationships and raise children. Indeed, more than 100,000 lesbian and gay couples are now legally married in this country; 31% of them are raising children within their marital households.¹⁴⁷

In light of these facts, widely accepted among experts by the 1980s and virtually beyond question today, the expansive consensual sodomy laws, especially those targeting “homosexual sodomy,” were inconsistent with the original meaning of the Equal Protection Clause. Because such laws rendered a class of productive and non-harmful citizens presumptive “outlaws” and potentially excluded those citizens from a wide array of civil rights and privileges, homosexual sodomy laws reflecting popular disgust with homosexuality were classic class or caste legislation, of the sort that the Fourteenth Amendment rendered invalid, if its original meaning has any bite today. The majority opinion in *Bowers* did not address this issue¹⁴⁸—and the Supreme Court in 1986 passed up opportunities to address discriminatory legal regimes in Texas and Oklahoma.¹⁴⁹

144. Indeed, the empirical evidence assembled in the widely read Kinsey Reports of 1948 and 1953 (as well as other objective science of the 1950s) was strongly inconsistent with the anti-gay stereotypes undergirding the anti-homosexual terror of the 1950s. See ESKRIDGE, *supra* note 115, at 109–27.

145. See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS*, 41–66, 112–38 (1981) (describing the speedy institutional volte-face of the psychiatric profession in the face of evidence inconsistent with its earlier view that homosexuality is a mental defect).

146. *E.g.*, Carole Jenny, Thomas A. Roesler & Kimberly L. Poyer, *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 42–44 (1994).

147. GARY J. GATES & ABIGAIL M. COOKE, WILLIAMS INST., UNITED STATES CENSUS SNAPSHOT: 2010, at 1–3, 6 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf> (last visited Feb. 5, 2015).

148. *Bowers v. Hardwick*, 478 U.S. 186, 196 n.8 (1986) (not addressing the equal protection issue because it was not raised as a basis for defending the lower court’s judgment invalidating the consensual sodomy law), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

149. Thus, the Court declined the petition for review of the Texas “homosexual

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The Court's erroneous history and sloppy analysis in *Bowers* stood in contrast to state judicial and legislative responses to the legal apparatus of the anti-homosexual terror. Before *Bowers*, the California Legislature had revoked its consensual sodomy law, and the California Supreme Court had announced a new regime where both public and private job discrimination against gay people because of their status (i.e., class legislation) was illegal.¹⁵⁰ Other states followed California, with both statutes and judicial decisions revoking discrete elements of the caste regime setting gay people apart as second-class citizens or even outlaws. Perhaps the most remarkable court decision was *Commonwealth v. Wasson*, where the Kentucky Supreme Court ruled that its homosexual sodomy law violated both privacy and equality protections of the state constitution.¹⁵¹ In the next decade, state supreme courts followed *Wasson* rather than *Bowers* in Arkansas, Georgia (the state whose law generated the *Bowers* decision), Montana, and Tennessee.¹⁵² Each time a legislature or court revoked an anti-gay discrimination, it overrode traditionalist claims that "promoting" gay rights would imperil children and disrupt the body politic—and each time gay rights were advanced the scary consequences never materialized and the polity flourished.

To the surprise of almost everyone, the Supreme Court, after *Bowers*, has repeatedly applied the original meaning of the Equal Protection Clause to chip away at the anti-homosexual caste regime. In *Romer v. Evans*, the Court held that a Colorado constitutional initiative barring government from adopting laws or other legal measures protecting lesbian, gay, and bisexual people from discrimination violated the Equal Protection Clause.¹⁵³ Justice Kennedy's opinion for the Court invoked original meaning: "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor

sodomy" law (criminalizing consensual sodomy only when between persons of the same sex) in *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) (denying review after the disposition in *Bowers*). ((0)) ((0)) After *Bowers*, the Court also declined to review the Oklahoma Supreme Court's decision extending a privacy right for heterosexual but not homosexual sodomy. *See Post v. State*, 715 P.2d 1105, 1109–1110 (Okla. Crim. App. 1986), *cert. denied sub nom. Oklahoma v. Post*, 479 U.S. 890 (1986).

150. On California's disentanglement of the anti-gay caste regime (through courts, executive action, and legislative enactments), see Eskridge, *supra* note 120, at 1797–1807.

151. *Commonwealth v. Wasson*, 842 S.W.2d 487, 496, 500 (Ky. 1992).

152. *Jegley v. Picado*, 80 S.W.3d 332, 346, 350 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 24, 26 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112, 125–26 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996), *abrogated by* Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008).

153. *Romer v. Evans*, 517 U.S. 620, 626–27, 635–36 (1996). *See generally* Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361 (1997).

tolerates classes among citizens.’ Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”¹⁵⁴ The Court’s specific analysis eschewed the complex doctrinal apparatus that scholars and lower court judges have taken from the Court’s equal protection jurisprudence and returned to first principles. Carving out gay people, and gay people alone, from law’s protection against discrimination, Colorado’s initiative “impose[d] a special disability upon those persons alone,” took away from an unpopular minority family law rights that were “taken for granted by most people either because they already have them or do not need them,” and was “unprecedented in our jurisprudence.”¹⁵⁵ The Court concluded that Colorado’s exclusionary regime was “a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests,” and was “a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”¹⁵⁶

Was *Romer* a one-time intervention, a fluke responding to an unprecedented and limitless expression of discrimination encoded in a state constitution? Although most lower court judges treated *Romer* as outlier jurisprudence, it decidedly was not, as the Court demonstrated in *Lawrence v. Texas*.¹⁵⁷ Again writing for the Court, Justice Kennedy invalidated the Texas homosexual sodomy law as inconsistent with the Due Process Clause.¹⁵⁸ In overruling *Bowers*, Justice Kennedy relied in part on its inconsistency with the class legislation analysis of *Romer*:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in

154. *Romer*, 517 U.S. at 623 (citation omitted) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

155. *Id.* at 631, 633.

156. *Id.* at 635.

157. *Lawrence v. Texas*, 539 U.S. 558, 574, 578–79 (2003). See generally Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004); Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733 (2004) (exploring the role of *Lawrence* in creating a respectful democratic culture).

158. *Lawrence*, 539 U.S. at 578.

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and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.¹⁵⁹

Obviously, this language follows and builds upon the original meaning analysis of *Romer*.

One Justice made the connection even more directly. Concurring in the Court's judgment in *Lawrence*, Justice O'Connor relied only on the Equal Protection Clause. "The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction," as well as to civil exclusions, such as licenses "to engage in a variety of professions, including medicine, athletic training, and interior design."¹⁶⁰ "Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement."¹⁶¹ In short, "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."¹⁶² Although a majority of the Court relied on the Due Process Clause, which swept away all consensual sodomy laws and not just the ones (like Texas's) that penalized only "homosexual sodomy," there is every reason to believe that the majority Justices (all of whom joined *Romer*) agreed with Justice O'Connor's *Romer*-based analysis.

In the wake of *Lawrence*, not only did consensual sodomy laws become immediately unenforceable, but gay people were liberated from their prior status as presumptive outlaws. State discriminations in property law, employment and benefits, and even family law have diminished, sometimes through dramatic court decisions or statutes and sometimes through abandonment of informal discriminatory policies. Within several months of *Lawrence*, the Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health*, ruled that the Massachusetts Constitution required the Commonwealth to extend civil marriage recognition to lesbian and gay couples.¹⁶³ Massachusetts became the first state to eradicate every plank and every facet of the anti-homosexual caste regime—except for

159. *Id.* at 575.

160. *Id.* at 581 (O'Connor, J., concurring in the judgment). (())

161. *Id.*

162. *Id.*

163. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

the 1,100 legal rights and duties associated with civil marriage that were permanently deprived lesbian and gay married couples by Section 3 of the Defense of Marriage Act of 1996 (DOMA).¹⁶⁴ The most sweeping anti-gay legislation in American history, DOMA sought to entrench lesbian and gay couples as a permanent underclass.¹⁶⁵

In the decade after *Goodridge*, more than a dozen states and the District of Columbia recognized lesbian and gay marriages—and DOMA swiftly became a focus of equal protection attention for federal courts and for the executive branch.¹⁶⁶ The White House of President Barack Obama took the full equality of lesbian, gay, bisexual, and transgender citizens as its baseline and looked askance at DOMA's sweeping caste regime from the beginning of his Administration.¹⁶⁷ After Attorney General Eric Holder (in February 2011) and President Obama (in May 2012) articulated their support for marriage equality (and full equality for gays more generally), DOMA became the Supreme Court's next opportunity to consider the ongoing legacy of the anti-gay caste regime.

In *United States v. Windsor*,¹⁶⁸ the Court invalidated DOMA's Section 3, which excluded lesbian and gay married couples from all federal marriage and spouse-based rights and duties.¹⁶⁹ Again writing for the Court, Justice Kennedy's opinion started with the observation that such a sweeping federal law relating to family and marriage is remarkable in our federal system,¹⁷⁰ and then homed in on DOMA's remarkable exclusionary breadth.

DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than

164. Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 (2012)); (Maura T. Healey, *A State's Challenge to DOMA: Federalism and Constitutional Rights*, 5 ALB. GOV'T L. REV. 422, 429 (2012).

165. For a scathing history and analysis of DOMA, see ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 127–40 (2002).

166. Thus, enforcement of the Fourteenth Amendment's principle against class or caste legislation falls to executive as well as judicial officials.

167. See Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

168. *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

169. 1 U.S.C. § 7 (2012).

170. *Windsor*, 133 S. Ct. at 2689–93.

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the marriages of others.¹⁷¹

Invoking the same original meaning analysis that he had used in *Romer* and *Lawrence*, Justice Kennedy ruled that “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”¹⁷²

C. *The Principle Against Class or Caste Legislation and the Supreme Court’s Precedents Applied to State Marriage Exclusions*

Now put together the original meaning of the Equal Protection Clause and the Supreme Court’s precedents applying that clause to discriminations against sexual minorities. It is quite striking how little attention the federal courts of appeals have paid to the analytical structure demanded by these classic sources for constitutional interpretation. Specifically, both original meaning and constitutional precedent require reviewing courts to examine state marriage exclusions against the backdrop of the history of state treatment of the petitioning minority group. Almost entirely ignoring this history, the reviewing courts have engaged in a largely unilluminating debate about how strictly to scrutinize these marriage exclusions and in a highly illuminating debate on the state justifications for the marriage exclusion. I shall now argue that none of these doctrinal and policy debates can be fully appreciated without reference to the history and ideology of the anti-homosexual caste regime relentlessly constructed in the mid-twentieth century.

A leading case is *Bostic v. Schaefer*, where the Fourth Circuit invalidated Virginia’s anti-gay family law regime, described above.¹⁷³ Judge Floyd’s opinion for the court ruled that Virginia denied the lesbian and gay plaintiff couples access to the fundamental right to marry and that such fundamental rights discrimination required strict scrutiny,¹⁷⁴ which the defenders could not carry.¹⁷⁵ The dissenting opinion by Judge Niemeyer

171. *Id.* at 2695–96.

172. *Id.* at 2696.

173. *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014). (())

174. *Id.* at 375–77. The majority ruled that denial of this fundamental right violated both the Due Process and Equal Protection Clauses. *Id.* at 384. (()) My analysis will focus on the Equal Protection Clause. See *Zablocki v. Redhail*, 434 U.S. 374, 388–91 (1978) (ruling that a state statute limiting marriage rights of divorced persons not meeting alimony and support obligations denied deadbeat dads a fundamental right and that the state interest failed strict scrutiny).

175. *Bostic*, 760 F.3d at 377–84 (examining the various justifications set forth by the defenders of the exclusion).

argued that the exclusion did not involve a fundamental constitutional right because the “marriage” right entrenched in American tradition has always been grounded in procreation and, therefore, has always been limited to one man, one woman couples.¹⁷⁶ The dissent also argued that the exclusion had a rational basis: Because “children are born only to one man and one woman” and “marriage provides a family structure by which to nourish and raise those children,” the defenders claimed that nonprocreative lesbian and gay couples do not belong in such a state institution.¹⁷⁷

Adjudicating the Michigan, Ohio, Kentucky, and Tennessee exclusions, the Sixth Circuit also divided 2-1, but with a majority upholding the exclusions. Judge Sutton’s opinion for the court followed Judge Niemeyer in finding neither a fundamental right nor a suspect classification that would justify heightened scrutiny and in justifying the discrimination based upon the goal of state marriage laws to channel sexually active straight couples into “stable relationships within which children may flourish.”¹⁷⁸ That these marriage laws do not cover nonprocreating lesbian and gay couples only makes them a bit “underinclusive,” which the court believed is not fatal under ordinary rational basis review.¹⁷⁹ In dissent, Judge Daughtery criticized the court’s willingness to justify discrimination against committed lesbian and gay couples, and the children they are rearing within their households, based upon the misbehavior of straight couples.¹⁸⁰

For reasons developed in earlier books, I agree with Judge Floyd and Judge Daughtery, that exclusion of lesbian and gay couples from state marriage law triggers the Supreme Court’s fundamental right to marry jurisprudence,¹⁸¹ and that the discrimination cannot meet any kind of heightened scrutiny.¹⁸²

176. *Id.* at 388–93 (Niemeyer, J., dissenting) (focusing overwhelmingly on the Due Process Clause, a focus that misses the point of the original meaning of the Equal Protection Clause).

177. *Id.* at 393–95.

178. *DeBoer*, 772 F.3d at 404.

179. *Id.* at 405.

180. “How ironic that irresponsible, unmarried, opposite-sex couples in the Sixth Circuit who produce unwanted offspring must be ‘channeled’ into marriage and thus rewarded with its many psychological and financial benefits, while same-sex couples who become model parents are punished for their responsible behavior by being denied the right to marry.” *DeBoer*, 772 F.3d at 422 (Daughtery, J., dissenting); *accord*, *Baskin*, 766 F.3d at 662 (Posner, J.).

181. I originated this precise argument in WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 123–52 (1996).

182. *Id.* at 153–82 (arguing that sexual orientation classifications require heightened scrutiny, which would be fatal to the marriage exclusion). For an earlier and influential articulation of the argument for heightened scrutiny, see *Watkins v. United States Army*,

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But the original meaning analysis developed above makes a somewhat different, albeit complementary, doctrinal case against the remaining exclusions in states like Kentucky, Michigan, Ohio, and Tennessee (the Sixth Circuit states whose exclusions are at issue in the pending appeals the Supreme Court will consider in *Obergefell*).

Indeed, the original meaning case against gay marriage exclusions is a mirror of the case against Virginia's anti-miscegenation law in *Loving v. Virginia*. Like laws barring different-race marriage in earlier eras, laws barring same-sex marriage today are the last remnants of a systematic caste regime obnoxious to the original meaning of equal protection. Such discriminations would require a powerful public justification to survive—but in *Obergefell*, as was the case in *Loving*, the public justifications are not only weak, but they are open expressions of the stereotype-based ideology that underwrote the two caste regimes.

That is the case in a nutshell, but the lessons of original meaning and history are just as powerful for the unhistorical doctrinal analyses followed by the judges in *DeBoer* and *Bostic*. Start with level of scrutiny: Are these state marriage exclusions deploying a “suspect classification”? Depriving a minority of a “fundamental right”? Then consider the rational basis or the public justifications advanced by the defenders of the exclusion in Michigan, Virginia, and other states.

First, although neither *Bostic* nor *DeBoer* explores the historical context of Virginia's or Michigan's exclusionary regime and its link to the anti-homosexual caste system those states created in the twentieth century, that history is relevant to a court's evaluation of an important discrimination against this persecuted minority. To recap the earlier-mentioned evidence, Virginia and Michigan (as well as other exclusionary states such as Kentucky, Ohio, and Tennessee) not only constructed lesbian and gay citizens as felonious criminals, but relied on their outlaw status to deprive those persons of a wide range of ordinary rights, including the right to rear their own biological children. In *Bottoms v. Bottoms*,¹⁸³ to take an infamous example, the Virginia Supreme Court ruled that because a lesbian mother was a presumptive felon under state law, the trial court was justified in depriving the lesbian of all parental rights for her biological

837 F.2d 1428, 1444–48 (9th Cir. 1988) (Norris, J.), *vacated*, 875 F.2d 699 (9th Cir. 1989) (en banc).

183. *Bottoms v. Bottoms*, 457 S.E.2d 102, 108–09 (Va. 1995).

child, and in awarding all rights to the child's grandmother.¹⁸⁴

Virginia's regime of anti-gay legislation and administration is highly relevant to an equal protection evaluation of the Commonwealth's more recent laws specifically excluding lesbian and gay couples from marriage (1997) as well as "civil union[s], partnership contract[s] or other arrangement[s] . . . purporting to bestow the privileges or obligations of marriage" (2004).¹⁸⁵ The sweeping nature of the Commonwealth's exclusion parallels its official effort, on the face of the 2004 statutory exclusion, to denigrate "homosexuals" as interested only in seeking to "devalue the institution of marriage and the status of children," and not in actually getting married themselves.¹⁸⁶

The same can be said of Michigan. Instead of repealing its anti-homosexual caste regime, Michigan has (like Virginia) *expanded* it. Thus, the Legislature amended Michigan's marriage code to exclude lesbian and gay marriages, to promote the "welfare of society and its children,"¹⁸⁷ even though thousands of Michigan children would benefit from the marriage of their gay parents. In 2004, acting for the benefit of "future generations of children," the voters amended the state constitution to assure that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."¹⁸⁸

That Michigan and Virginia went out of their way to ensure that committed lesbian and gay couples and their families would have no legal institution within which to structure their

184. For a recent case applying *Bottoms* to impose conditions on visitation, see *A.O.V. v. J.R.V.*, Nos. 0219-06-4, 0220-06-04, 2007 WL 581871, at *4 (Va. Ct. App. Feb. 27, 2007).

185. VA. CODE ANN. § 20-45.3 (2008); accord VA. CONST. art. I, § 15-A (barring recognition of any "union, partnership, or other legal status" assigned the rights of marriage).

186. H.D. 751, 2004 Gen. Assemb., 2004 Sess. (Va. 2004). In a further affront, the 2004 law included a "legislative finding" regarding the "life-shortening and health compromising consequences of homosexual behavior." H.D. 751.

187. 1996 Mich. Pub. Act 324 (codified at Mich. Comp. Laws § 551.1).

188. Mich. Const. art. I, § 25. The Michigan Supreme Court applied this sweeping bar to deprive lesbian and gay municipal employees of health insurance and other contract-based benefits. *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (2008). After some cities and the state civil service commission created a new category of "other qualified persons" who could be awarded employment benefits without seeming to recognize a "similar union" for gays, the Legislature overrode those humane efforts and reinstated the contract-based discrimination. See Public Employee Domestic Partner Benefit Restriction Act, 2011 Mich. Pub. Act 297, a discrimination found to be unconstitutional caste legislation in *Bassett v. Snyder*, No. 12-10038 (E.D. Mich. Nov. 14, 2014).

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relationships is strong evidence linking the new family law exclusions to those states' longstanding (and largely unreformed) anti-homosexual caste regime. Both the caste regime and the family law exclusions reveal that these states were not concerned with the well-being of all its citizens, the equal protection aspiration laid out by Sumner's argument in *Roberts*. Michigan's and Virginia's anti-gay family law regime is almost as sweeping, unprecedented, and unjustified as Colorado's anti-gay constitutional amendment that was invalidated in *Romer*—and in Virginia's case the evidence of animus was evident on the face of the 2004 legislation and the 2006 constitutional amendment.

Second, the original meaning of the Equal Protection Clause provides an important and relevant legal context to the fundamental rights inquiry debated among the circuit court judges. Set aside the debate whether a state denying marriage rights violates the Due Process Clause, which asks whether the fundamental right is deeply rooted in American history and legal tradition. One's answer to that inquiry depends completely on the level of generality at which one views the fundamental right to marry: Is it the traditional freedom enjoyed by potentially procreating couples (Judge Sutton's and Judge Niemeyer's view), or is it the traditional freedom enjoyed by adult couples who want to commit to lifetime union (Judge Daughtery's and Judge Floyd's view)?

For the Equal Protection Clause, the proper question is whether the exclusion of lesbian and gay couples from civil marriage, domestic partnerships, civil unions, and any "other arrangement purporting to bestow any of the privileges or obligations of marriage" (Virginia's 2006 language, echoing Michigan's 2004 amendment) is of a piece with a pattern of laws and policies embedding lesbians and gay men as second-class citizens. I believe it is. Central to the proper equal protection inquiry is whether states like Michigan and Virginia provide the same legal rights for lesbian and gay citizens to enter contractual arrangements (such as domestic partnerships as well as marriage) as those states provide to non-gay citizens. Thus, it is for this precise reason that Steven Calabresi and Andrea Matthews have argued from the Civil Rights Act of 1866, and its focus on equal contract-based privileges and immunities, that *Loving* is consistent with original meaning—and for the same reason so is *Bostic*, with *DeBoer* being wrongly decided under this standard¹⁸⁹

189. See generally Calabresi & Matthews, *Originalism and Loving v. Virginia*, *supra* note 24.

Third, and most interestingly, original meaning analysis is highly relevant to the state interests invoked by states like Michigan and Virginia. Indeed, the reason Virginia's anti-miscegenation law violated the Fourteenth Amendment in *Loving* applies in *Obergefell* (the pending Supreme Court marriage equality appeals). What was fatal in *Loving* was that the reason for excluding different-race couples from civil marriage was the ideology of "white supremacy" and racial purity—in other words, the ideological foundation of the caste regime was the justification for the miscegenation law, and if the former cannot stand then neither can the latter. Likewise, in *Obergefell* the ideological foundation of the state anti-gay regimes is compulsory heterosexuality and the stereotype of gay people as anti-family—pretty much the same justifications offered by Virginia and Judge Niemeyer for the marriage exclusion in *Bostic* and by Michigan and Judge Sutton for the marriage exclusions in *DeBoer*.¹⁹⁰

Consider this point in greater detail. Judge Sutton's and Judge Niemeyer's defense of state marriage exclusions for lesbian and gay couples is circular: *Because* marriage has always been about procreation between straight partners, and *because* gay and lesbian couples are not family in the same way, *then* it remains rational to exclude lesbian and gay couples. What the anti-caste principle gives us is a normative lever against which to evaluate that circularity: when the definition of the institution is the public justification for excluding a social group that has been unjustly discriminated against, it is useful to compare the reason for the exclusion to the reason for the caste regime. As the Table below illustrates, this matching game gives *Loving* much of its power—and ought to have bite for the Justices as they deliberate in *Obergefell*.

190. *Bostic v. Schaefer*, 760 F.3d 352, 393–95 (4th Cir. 2014) (Niemeyer, J., dissenting).

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TABLE: PARALLELS BETWEEN *LOVING V. VIRGINIA* AND THE MARRIAGE EQUALITY CASES

	Anti-Miscegenation Laws	Same-Sex Marriage Bans
Underlying Caste Regime	Apartheid Compulsory Segregation of Racial Minorities	The Sexual Closet Emotional Segregation for Sexual/Gender Minorities
Emotional/Hysterical Foundation for Caste Regime	Sexualization of Racial Minorities as Morally Degenerate, Predatory, and Genetically Inferior	Sexualization of Gender and Sexual Minorities as Sterile, Morally Degenerate, Predatory
Ideology Undergirding Caste Regime	White Supremacy	Compulsory Heterosexuality
How Marriage Discrimination Fits with Caste Regime	Preservation of the Purity of the (Superior) White Race	Reaffirmation of Sexual and Gender Minorities as Anti- Family
Deeper Fears Motivating Marriage Discrimination	Fear that Race Coherence Will Erode—No “White Race” to Be Supreme	Fear that Gender Coherence Will Erode—No Fixed Role for Married Couples Heading Families

The power of the *Loving* analogy also helps us understand why marriage discrimination was, for both racial and sexual minorities, the last explicit discrimination to fall. After the Civil War, the most racist states were willing to let African Americans get married—but they were not willing to allow European Americans to marry African Americans.¹⁹¹ And many supporters of Reconstruction were also reluctant to go along with the

191. See Katherine M. Franke, *Becoming a Citizen: Reconstructions Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 277–78 (1999); Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation on Marriage*, 86 N.Y.U. L. REV. 1361, 1376–77 (2011).

latter.¹⁹² What most troubled both rabid racists and more “moderate” ones was the consequences of interracial marriage—the decline of race as an organizing characteristic and, hence, the literal decline of the “white race” as well as the “black race” as coherent classes.¹⁹³ The marriage exclusion for different-race couples was not only the apotheosis of the ideology of apartheid, it was also the deepest fear that many “tolerant” Americans had for the demise of the racist caste regime.

Likewise, the marriage exclusion for same-sex couples is not only the apotheosis of the ideology of compulsory heterosexuality, but it is also the deepest fear that many “tolerant” Americans harbor for the demise of the anti-gay caste regime. Will it dislocate coherent gender roles? Once a woman no longer must see her romantic destiny (wife) as one tethered to a man who can impregnate her, will gender roles become unsettled or dissolve entirely? While many Americans view the erosion of traditional gender roles with celebration,¹⁹⁴ others view the possibility with anxiety.¹⁹⁵ Many of these critics are also alarmed at the Supreme Court’s sex discrimination jurisprudence, which is explicitly grounded as an attack on a caste regime of rigid gender stereotypes.¹⁹⁶

Does original meaning jurisprudence require the Supreme Court to invalidate the same-sex marriage exclusion maintained in the four states of the Sixth Circuit (and, probably, the remaining states with marriage exclusions)? In my view, it does, but I am happy to say that there are serious issues as to which original meaning jurisprudence does create counterarguments to the foregoing analysis.

To begin with, there is a potential disconnect between the anti-homosexual terror and the marriage exclusion. That is, no state recognized same-sex marriages in eighteenth or nineteenth century America, when there was no conception of “homosexuality”; the limitation of marriage to one man, one

192. Senator Sumner was an outlier on this issue, as many moderate pro-Reconstruction Republicans were personally opposed to different-race marriage.

193. Thus, many people of color opposed different-race marriage, for this kind of reason.

194. *E.g.*, Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9, 18–19 (1991) (celebrating the possibility that marriage equality will undermine traditional gender roles within marriage).

195. *E.g.*, Stanley N. Kurtz, *What Is Wrong With Gay Marriage?*, COMMENT. (Sept. 1, 2000, 12:00 AM), <http://www.commentarymagazine.com/article/what-is-wrong-with-gay-marriage/>.

196. *See, e.g.*, Carlos Maza, *Breitbart.com’s Shapiro Attacks Supreme Court Decision Decriminalizing Gay Sex*, EQUALITYMATTERS BLOG (Oct. 6, 2014, 4:30 PM), <http://equalitymatters.org/blog/201410060001>.

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woman is, for many Americans, as old as Adam and Eve.¹⁹⁷ In other words, there is not as tight a connection between state definitions of marriage as one man, one woman and the modern anti-homosexual caste regime. In partial contrast, there is a direct and deep connection between American racism and the longstanding refusal of the American colonies and states to recognize different-race marriages. That refusal was important to the regimes of both slavery and apartheid. Racist ideology was always the justification for this exclusion, while the exclusion of same-sex couples over the course of American history owes more to compulsory (or encouraged) procreation than to anti-homosexual stereotypes and prejudice.

In my view, this is the kind of argument opponents of marriage equality ought to be making—and the answer to the argument recalls the excesses that gave rise to the *Romer* and *Windsor* decisions. The Marriage Equality Cases today are not focused on the age-old limitations of civil marriage to one man, one woman but are, instead, focused on the post-DOMA explosion of marriage exclusions such as those described above for Michigan and Virginia.¹⁹⁸ Virginia's 1997 and 2004 statutes, and its 2006 constitutional amendment created a new regime that went well beyond the state's traditions. Not only did the new laws expand the exclusion from any form of family law recognition, and not only did they target "homosexual" unions by name, but they seethed with homophobia and discredited anti-gay stereotypes.¹⁹⁹ Virginia's anti-gay family law regime constituted a core violation of the Equal Protection Clause and fits snugly into the holding of *Romer*. Although not as dramatic, Michigan's 2004 Marriage Amendment was adopted in a fit of anti-gay spleen by the voters—and then interpreted with breathtaking and lawless breadth by the Michigan Supreme Court.²⁰⁰

197. So many Americans believe that marriage originates with Adam and Eve. But consider this: Where in Genesis does it say that Adam and Eve were ever "married"?

198. All or almost all of the fifteen states with marriage exclusions on appeal (as of February 20, 2015) adopted some kind of new marriage or relationship exclusion after 1996 (when DOMA was enacted).

199. Thus, the 2004 Virginia Act officially denigrates "homosexuals" as interested only in seeking to "devalue the institution of marriage and the status of children," and not in actually getting married themselves. H.D. 751, 2004 Gen. Assemb., 2004 Sess. (Va. 2004). In a further affront, the 2004 Act sought to add to the Virginia Code a "legislative finding" regarding the "life-shortening and health compromising consequences of homosexual behavior." *Id.*

200. *Nat'l Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524, 543 (Mich. 2008). I deem the court's decision "lawless," because there is no discernible support in the text of the amendment for the broad reading. Thus, the court applied the amendment to bar Kalamazoo from providing health care and other benefits to employees who certified

Other states have posed a less blatant attack on the core equal protection principle—but most of the remaining nonrecognition states in the last twenty years have adopted new and specific exclusions of lesbian and gay couples from marriage and “similar” family rights in *both* the state code and in the state constitution.²⁰¹ The remaining nonrecognition states have adopted new exclusions since 1993, when the marriage equality issue burst onto the public law agenda.²⁰² Thus it has been the excesses of anti-gay crusaders that have actually undermined the claims these states might make to have neutral marriage policies unconnected with the anti-homosexual caste regime. Indeed, the newer laws and constitutional amendments both *confirm* and often *amplify* or *broaden* the connection between anti-gay stereotyping and marriage discrimination.

A much harder case was posed by Colorado and Nevada, whose state constitutions barred recognition of lesbian and gay marriage, but whose statutes created a family law regime of “civil unions”²⁰³ and “domestic partnerships”²⁰⁴ that provided all the legal rights and benefits of civil marriage but not the name. Original meaning constitutionalism must credit these states with attention to equal protection norms. Hence, my theory rejects the suggestion made by the Solicitor General in *Hollingsworth v. Perry* (the California Proposition 8 Case), that states offering “separate but equal” family law regimes are particularly offensive to equal protection.²⁰⁵ A complete exclusion of lesbian and gay unions from state family law, such as that engineered in Virginia and Michigan, is much more offensive to the anti-caste principle than the virtually complete inclusion represented by Colorado civil unions and Nevada domestic partnerships.²⁰⁶

Note, however, that, post-DOMA, the federal government will generally not accord domestic partners or persons joined in civil union the hundreds of benefits, rights, and duties of federal

that they were living with a domestic partner. *Id.* Nowhere did Kalamazoo “recognize” (the statutory language) an “agreement” (ditto) that was “similar” (ditto) to marriage. *Id.* at 533–38. Yet the court glided over all these textual gaps to insist that the plain meaning of the amendment covered these fringe benefits. *Id.* at 543.

201. See WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW tbl.7 (2014 Supp.) (listing all state marriage exclusions as of July 2014).

202. See *id.*

203. Colorado Designated Beneficiary Agreement Act of 2009, COLO. REV. STAT. § 15-22-103 (2013); see also COLO. CONST. art. II, § 31.

204. Nevada Domestic Partnership Act, NEV. REV. STAT. § 122A.200 (2009).

205. Brief for the United States as Amicus Curiae Supporting Respondents at 11–12, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

206. See generally WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002).

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marriage regulations.²⁰⁷ That huge inequality might create a big equal protection problem—perhaps for the Colorado and Nevada laws, but perhaps, instead, for the federal discrimination against domestic partners and persons joined in civil union. Assume that this problem does not exist. Do Colorado and Nevada violate the original meaning of the Equal Protection Clause? This was surely a debatable issue—but the Attorneys General of both Nevada and Colorado have refused to defend the validity of their marriage exclusions, and marriage licenses are available to lesbian and gay couples in both states today.²⁰⁸

My view is that even these virtually equal regimes ultimately would violate the anti-caste principle, for the same kind of reason the Supreme Court gave in *Sweatt v. Painter*.²⁰⁹ *Sweatt* was one of the early challenges to segregated higher education, specifically, Texas's segregation of law students of color into the separate Texas State University for Negroes School of Law.²¹⁰ In his submission to this Court, the Texas Attorney General offered evidence that the new law school offered its students all the legal benefits enjoyed by students at the (all-white) University of Texas, which was accepted by the lower court as fact.²¹¹ Even though the Supreme Court remained unwilling in 1950 to question *Plessy's* allowance of separate but equal facilities for citizens of color, the Justices unanimously held that Texas violated the equality mandate.²¹² Notwithstanding the formal equality of resources and educational experience accepted by the court below, the Court held that its “traditions and prestige” rendered the University of Texas a unique institution from which qualified applicants could not constitutionally be excluded.²¹³ In my view, marriage is an institution imbued with

207. See Memorandum from Elaine Kaplan, Acting Dir., U.S. Office of Pers. Mgmt. to Heads of U.S. Exec. Dep'ts and Agencies (June 28, 2013) (extending marriage benefits to federal employees in same-sex marriages but not in civil unions or domestic partnerships); Memorandum from U.S. Attorney Gen. to the U.S. President (June 20, 2014) (similar survey, for various departments and agencies).

208. Sandra Chereb, *Nevada Governor, Attorney General Won't Defend Gay Marriage Ban*, ASSOCIATED PRESS (Feb. 10, 2014), http://www.huffingtonpost.com/2014/02/10/nevadaHgayHmarriage_n_4763229.html.

209. *Sweatt v. Painter*, 339 U.S. 629 (1950). My analysis closely follows Gabriel J. Chin, *Sweatt v. Painter and Undocumented College Students in Texas*, 36 T. MARSHALL L. REV. 39, 45–49 (2010).

210. *Sweatt*, 339 U.S. at 631–33.

211. Brief for Respondents at 109–14, 120–22, *Sweatt*, 339 U.S. 629 (1949 Term, No. 44); see *Sweatt v. Painter*, 210 S.W.2d 442, 445–47 (Tex. Civ. App.—Austin 1948, writ ref'd).

212. *Sweatt*, 339 U.S. at 635–36.

213. *Id.* at 634–35; accord, *United States v. Virginia*, 518 U.S. 515, 553–54 (1996) (following *Sweatt* to reject the state's separate-but-equal remedy to its exclusion of women

every bit as many “traditions and prestige” as the University of Texas.

To be sure, *Sweatt* is only one (largely forgotten) precedent, but I should say that it sets forth a relevant and persuasive principle for anti-caste analysis. Hence, I should ultimately agree with the Solicitor General that even states with parallel regimes probably would violate the Equal Protection Clause. Consider this analogy. Assume that Wyoming in 1967 did not recognize different-race marriages, but afforded such couples recognition as domestic partners, with all the rights and duties under state law that married partners enjoyed. Would such a hypothetical Wyoming law have survived *Loving v. Virginia*? Given the history of apartheid and its association with hysteria or nervousness about interracial relationships, and given the inclination of southern states to create any kind of denigration to interracial couples, it is hard to imagine that the Supreme Court would have allowed the Wyoming statute to stand. For similar reasons, given escalating popular support for marriage equality today, it is doubtful that the Colorado-Nevada approach will be constitutionally acceptable in the long term.

III. WHAT IS AT STAKE IN THE ENCOUNTER BETWEEN ORIGINAL MEANING AND MARRIAGE EQUALITY?

If no one else in America were truly interested in the original meaning of the Equal Protection Clause, the fact that Supreme Court Justices find it relevant is sufficient reason for scholars, lawyers, and judges to be interested in the foregoing account. In my view, original meaning analysis is also intrinsically interesting, apart from its value for the Justices’ deliberations in *Obergefell*. In this concluding part, I suggest that the Marriage Equality Cases offer originalists and social movement lawyers important opportunities that they must not ignore or pass up.

First, the Marriage Equality Cases provide the defenders of original meaning jurisprudence with a golden opportunity to demonstrate the objectivity of, and expand the audience for, their methodology. From Judge Bork to Justice Scalia, the defenders and fans of original meaning defend that jurisprudence as superior because it is (they claim) the only method of constitutional interpretation that neutrally applies the

from Virginia Military Institute); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954) (following *Sweatt* to strike down segregated schools even when all tangible facilities are the same for each race).

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Constitution and actually constrains judges.²¹⁴ As far as I can determine, there is no empirical evidence to support that claim, and skeptical scholars have relentlessly attacked that claim, both empirically across large populations of cases²¹⁵ and in connection with specific cases, such as *Heller*.²¹⁶

Additionally, scholars have demonstrated that original meaning has a narrow appeal, namely, to those Americans who are (like Justice Scalia and the late Judge Bork) politically conservative and are hierarchical, traditionalist, and libertarian in personal philosophy.²¹⁷ The limited constituency of originalism risks further shrinkage if that theory were to stand against landmark precedents like *Brown v. Board of Education*—and so it is no coincidence that original meaning theorists have been busy justifying previous landmark decisions, such as *Brown*, as consistent with original meaning.²¹⁸ Professor Steven Calabresi has made a new career for himself justifying landmark constitutional decisions by reference to original meaning—not just *Brown*, but also *Loving* and the sex discrimination precedents.²¹⁹

214. BORK, *supra* note 21, at 143–50; Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (Amy Gutmann ed., 1997) (()); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 401–07 (2012); Barnett, *supra* note 21, at 620–21; Scalia, *supra* note 21, at 851–52.

215. *E.g.*, FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 177–79 (2009) (finding that textualism is no more constraining than other methods based on empirical examination of textualism in statutory interpretation); see Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 283–84 (2004) (finding that reliance on original meaning in federalism cases is like looking out over the crowd and picking out your friends); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1151, 1154 tbl.20 (2008) (finding that original statutory meaning does not constrain Justices Scalia and, especially, Thomas, who find originalist support for conservative agency interpretations they do not find for liberal ones—and contrasting the record of Justice Breyer, who always considers legislative history and other context and has a more politically neutral voting record in statutory cases). (())

216. For critical analysis of *Heller* from the nation's leading lower court conservatives, see Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32, 33 (denouncing the Court's opinion as exactly the opposite of what original meaning would have dictated); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 264–66, 271, 274 (2009) (raising concerns that the Court was not evaluating the legal evidence in a neutral manner).

217. Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 373–75 (2011).

218. The best-regarded originalist defenses of *Brown* are BORK, *supra* note 21, at 76 and McConnell, *supra* note 60, at 1132–34.

219. See Calabresi & Matthews, *supra* note 24, at 1399–1400, 1462–63, 1472–73;

This is fascinating scholarship, worth extended study and debate, but it is one thing for original meaning to demonstrate, after the fact, that it is consistent with constitutional decisions that have become landmarks beyond question. The tougher question for original meaning is this: Does it have bite for ongoing controversies? Can original meaning actually persuade skeptical, or even anti-gay, jurists that it is unconstitutional for Michigan to exclude lesbian and gay couples from the entire structure of its family law? Michigan's broad and virtually limitless exclusion of lesbian and gay families from its family law structure ought to be easy cases for original meaning theory: These state exclusions are examples of caste legislation, closely linked to the vicious and irrational anti-homosexual terror of the mid-twentieth century. I now challenge every original meaning scholar in the United States to consider the original meaning evidence I have assembled, as applied to the discriminatory family law regimes in Michigan, Kentucky, Ohio, and Tennessee (the four states involved in *Obergefell*). Most of these scholars (not all) are politically conservative, older men who are, demographically, among the least likely to show sympathy for gay marriage. I challenge each of these scholars to join an *amicus* brief, either endorsing the originalist case for marriage equality (from their point of view) or explaining why my case is not convincing to them.²²⁰ If this does not happen, and these theorists and scholars do not step up to the plate, that is evidence that original meaning jurisprudence is hogwash, just another way for scholars and judges to filter their preferred constitutional results through a purportedly neutral mechanism, precisely the charge that critical academics have been making.²²¹

The Supreme Court itself faces a similar test. An older conservative white Republican male whose religion opposes gay marriage might be considered an unlikely vote to strike down Michigan's broad anti-gay discrimination. Five Justices on the current Court fall into this narrow demographic category. One (Justice Kennedy) has shown himself to be open to argument on gay rights issues, but the other four always vote against gay

Calabresi & Perl, *supra* note 96, at 23–24; Calabresi & Rickert, *supra* note 101, at 46. (())

220. For example, the Michigan exclusion is so broad, that an original meaning argument might suggest that the Court apply *Romer* to strike down the discrimination, but remand and give the state an opportunity to adopt a regime, with judicial review to assure equality. Or, as my *Sweatt* analogy suggests, the argument might demand marriage equality simpliciter.

221. *E.g.*, Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 52–57 (2011). (()) (())

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rights on the merits, consistent with their presumed political preferences. Assume that many conservative scholars join an *amicus* brief making an original meaning case against the family law regimes in Michigan, Kentucky, Ohio, and Tennessee. (I plan to file an *amicus* brief along these lines for a conservative group.) Will it move any of the Justices expected to support the Michigan regime, i.e., Chief Justice Roberts and Justices Scalia, Alito, and Thomas? Will these original meaning Justices neutrally evaluate the evidence? Will they accept the suggestions in this article? If not, will they have persuasive responses?

Again, I insist that the original meaning case against Michigan's exclusionary regime, and a number of similar regimes, is very powerful. And the original meaning account is both confirmed and strengthened by *Romer*, *Lawrence*, and *Windsor*, precedents of the Court entitled to *stare decisis* effect (another rule of law argument against the Michigan regime). If none of these four Justices finds reason to doubt the constitutionality of Michigan's regime, that is further evidence that using original meaning is like looking over a crowd and picking out your friends, precisely as the critics of original meaning have been saying all along.

Second, the Marriage Equality Cases provide the supporters of marriage equality with an opportunity to explain how the right to marriage equality for LGBT persons is grounded in something historically deeper than just pluralist politics. If Michigan's exclusionary regime falls simply because the American people have changed their minds about LGBT persons, then the gay rights social movement will have won a great victory, but the challenge for gay rights *lawyers* is to justify that victory in ways that link the current value (gay is good and cannot be excluded) with historical commitments made by the nation itself. As Jane Schacter has argued, one role of landmark, precedent-setting campaigns and judicial explanations is the fostering of a respectful democratic culture.²²²

For the most part, the briefs supporting Marriage Equality have provided judges highly useful social science and demographic information about lesbian and gay partnerships, unions, marriages, and families. The briefs have done an excellent job examining the increasingly tenuous justifications that continue to be made for exclusions of lesbian and gay couples from state family law. But the briefs generally treat history and precedent in a wooden and mechanical way, lifting quotes out of context and weaving them into advocacy

222. Schacter, *supra* note 157, at 753.

documents. The history of equal protection (before and after 1868) provides a priceless opportunity for lesbian and gay couples, and their supporting *amici*, to provide persuasive context for the precedents that get cited.

For the advocates of Marriage Equality, there is a deep and not just exploitable storyline connecting John Locke's warning that the social contract cannot move forward if government ignores the needs or persecutes its own citizens, *with* the Constitution of 1789 as defended by Hamilton and Madison, *and with* the abolitionist movement and Charles Sumner's speech to the Massachusetts Justices about the duty of "equal care" the state owes all its population, *and also with* Justice Harlan's *Plessy* dissent, *and with* the NAACP's campaign against lynching and apartheid and its great victories in *Sweatt* and *Brown* and *Loving*, *and further with* Ruth Bader Ginsburg and the feminist constitutional moment of the 1970s, *and finally with* Justice Kennedy's great opinions in *Romer*, *Lawrence*, and *Windsor*.

Third, the Supreme Court's deliberations in *Obergefell* provide the opponents of Marriage Equality with an opportunity to reflect on the historical justice of their skepticism. Because the tide of public opinion seems to have turned decisively against their position, they have a strong incentive to reconsider. The Obama Administration's Department of Justice engaged in precisely this kind of reevaluation between 2009 and 2011, when Attorney General Eric Holder announced that the Department would no longer defend DOMA. Both the Attorney General and then the President explained why they supported marriage equality, but they respected the democratic and legal process by continuing to apply DOMA until the Supreme Court struck it down in *Windsor*.²²³ The Obama-Holder approach has been increasingly popular at the state level as well.²²⁴ In *Bostic*, for example, the Governor and the Attorney General of Virginia abandoned the Commonwealth's previous defense and supported the plaintiffs' constitutional arguments.²²⁵

Former opponents do their constituents as well as themselves a great service when they articulate precisely why they now support or acquiesce in Marriage Equality for LGBT persons. My recommendation is that these public officials and

223. This is the approach explicated and defended in Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 29 (2000). See also *Windsor*, 133 S. Ct. at 2683–84.

224. Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 237–44 (2014); see also Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 687, 691–92 (2012).

225. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

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institutional leaders ought to consider the historical case for Marriage Equality, and not just the collapse of popular opposition. When President Obama supported Marriage Equality in his January 2013 Second Inaugural Address, he eloquently connected that issue to equality campaigns by racial minorities and women, as well as to our nation's founding traditions, starting with the equality language of the Declaration of Independence (quoted at the beginning of his Address). Consider the President's words:

We, the people, declare today that the most evident of truths—that all of us are created equal—is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth.

It is now our generation's task to carry on what those pioneers began. For our journey is not complete until our wives, our mothers and daughters can earn a living equal to their efforts. Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law—for if we are truly created equal, then surely the love we commit to one another must be equal as well. Our journey is not complete until no citizen is forced to wait for hours to exercise the right to vote. Our journey is not complete until we find a better way to welcome the striving, hopeful immigrants who still see America as a land of opportunity—until bright young students and engineers are enlisted in our workforce rather than expelled from our country. Our journey is not complete until all our children, from the streets of Detroit to the hills of Appalachia, to the quiet lanes of Newtown, know that they are cared for and cherished and always safe from harm.²²⁶

Many Americans skeptical or opposed to Marriage Equality have reconsidered in light of inspirational words from President Obama, as well as equally inspirational words from former Solicitor General Ted Olson, who represented the plaintiff couples in *Bostic*.

What advice to the Americans who are still not persuaded?

226. President Barack Obama, Second Inaugural Address (Jan. 21, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>. For an excellent exegesis, tying the President's Address with social transformation, see Nan D. Hunter, *Reflections on Sexual Liberty and Equality: "Through Seneca Falls and Selma and Stonewall"*, 60 UCLA L. REV. DISCOURSE 172, 174–75 (2013).

My main suggestion is to implore these colleagues and fellow citizens to credit the historical gravity of Marriage Equality claims and to respect the families that benefit from state and social recognition of their marriages, unions, and partnerships. In my view, opponents do need to articulate their opposition in terms that are respectful, neutral, and historical. In Utah, for example, Governor Gary Herbert vigorously defended his state marriage exclusion through the legal process—and when the Supreme Court rejected his state’s petition for review on October 6, 2014, he promptly instructed officials to start issuing marriage licenses.²²⁷

Another model here is Charles Cooper, who served with Ted Olson in the Bush-Cheney Administration’s Department of Justice. Cooper ably represented the defenders of California’s Proposition 8 with arguments rooted in what he and his clients viewed to be the public good and the orderly evolution of American family law.²²⁸ When his arguments ultimately did not prevail in *Hollingsworth*, he accepted the constitutional verdict gracefully and humanely. Indeed, in the wake of Marriage Equality in California, Cooper embraced the marriage of his step-daughter to her lesbian partner and hosted a gracious reception for her and her spouse.²²⁹

Marriage equality is an idea whose time has come. Can the same be said for original meaning as a neutral theory of constitutional interpretation?

227. Marissa Lang, *Utah Clerks Issue Marriage Licenses to Same-Sex Couples*, SALT LAKE TRIBUNE (Oct. 6, 2014, 9:19 AM), <http://www.sltrib.com/specialreports/1676131-155/marriage-sex-court-utah-states-monday>.

228. Sunnive Brydum, *Prop. 8 Defense Attorney “Evolves” on Marriage*, ADVOC. (Apr. 17, 2014, 1:09 PM), <http://www.advocate.com/politics/marriage-equality/2014/04/17/prop-8-defense-attorney-evolves-marriage>.

229. *Id.*