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ARTICLES

Originalism and Same-Sex Marriage

STEVEN G. CALABRESI* & HANNAH M. BEGLEY**

This article examines the original meaning of the equality guarantee in American constitutional law. It looks at the seventeenth, eighteenth, and nineteenth century roots of the modern doctrine, and it concludes that the Fourteenth Amendment bans the Hindu Caste system, European feudalism, the Black Codes, the Jim Crow laws, and the common law's denial to women of equal civil rights to those held by men. It then considers the constitutionality of bans on same sex marriage from an Originalist perspective, and it concludes that State laws banning same sex marriage violate the Fourteenth Amendment.

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INTRODUCTION

One of the most important public civil rights issues of the modern era is whether the Fourteenth Amendment to the U.S. Constitution, as originally understood and modified by reading it through the lens of the Nineteenth Amendment, protects a right to same-sex

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marriage. We believe it does, and we seek in this article to briefly explain why we reach the conclusion we do. Further, we hope to add additional academic support for Justice Kennedy's recent majority opinion in *Obergefell v. Hodges*,¹ which we found to be lacking in originalist justification. Our conclusion that the Equal Protection Clause safeguards a right to same-sex marriage grows out of the original history of equality guarantees in Anglo-American laws as they have been applied by the U.S. Supreme Court. In other words, we seek here to offer an originalist argument for the right to same-sex marriage, bolstering Justice Kennedy's *Obergefell* opinion and addressing some of the concerns of the dissenting Justices in that case.

We must begin by noting that no Supreme Court Justice or legal scholar to date has made a clear case as to what the original meaning of the Equal Protection Clause really is. We do not think that originalists—including Justice Thomas and former Justice Scalia—could plausibly argue with a straight face, as William Rehnquist used to do, that the Equal Protection Clause applies only to race, while arguing that the Due Process Clause applies to all persons. The text of the Equal Protection Clause explicitly says that it applies to all persons, and the text of the Equal Protection Clause does not mention race as the only kind of discrimination the Clause protects against.² This is unlike the text of the Fifteenth Amendment, which does precisely that by singling out “race, color, or previous condition of servitude” as factors that cannot be used to limit an individual's right to vote.³ Former Chief Justice William Rehnquist was a conservative legal realist who, at best, was interested in the original “intent” underlying the Equal Protection Clause, and he showed no interest in the original public meaning of that Clause.⁴ In contrast, all modern originalists, including most definitely Justice Thomas and former Justice Scalia, were and are original public meaning textualists, and we can pretty much guarantee that if you look up the meaning of “person” in any dictionary from 1868, it is not going to

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

² U.S. CONST. amend. XIV, § 1.

³ U.S. CONST. amend. XV, § 1.

⁴ See generally Sue Davis, *Justice Rehnquist's Equal Protection Clause: An Interim Analysis*, 63 NEB. L. REV. 288 (1984). See also Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

say that only black and white people are persons. Originalist scholars and Justice Thomas need to come to terms with the fact that the Rehnquist reading of the original intent of the Equal Protection Clause in the 1970s is as out of step with modern day originalism as bell bottoms and sideburns are out of step with modern day modes of dressing and shaving.

Modern day originalism has been defined by Justice Clarence Thomas and by former Justice Scalia.⁵ According to Justice Scalia's theory, the original public meaning of constitutional texts are of paramount importance when determining what actions and laws are constitutional.⁶ Justice Scalia's methodology suggests that one ought to take a close look at state constitutions prior to 1868, and to contemporary speeches, articles, and dictionaries that were widely publicized at the time of the Fourteenth Amendment's passage in order to determine the original public meaning of the Amendment.⁷ Such sources provide the contextual background in which new constitutional law is made. Notably, the interpretation of the Fourteenth Amendment presented herein—that it bans systems of caste- and class-based discrimination—is supported by newspaper accounts, public speeches, and contemporary discussions of the Amendment.⁸ It is worth noting that the interpretation of the Fourteenth Amendment presented herein also happens to be supported by the legislative history of the Fourteenth Amendment in Congress, a legal source that Justice Scalia would have disfavored looking at.⁹

⁵ MODERN AMERICA AND THE LEGACY OF THE FOUNDING 65 (Ronald J. Pestritto & Thomas G. West eds., Lexington Books 2007).

⁶ 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 A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1998).

⁷ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1988).

⁸ See Editorial, *Class Legislation*, CHI TRIB., Jan. 12, 1866, at 2; Editorial, DAILY NAT'L INTELLIGENCER, Jan. 5, 1866 at 2, col. 1; Editorial, *Constitutional Amendments*, PHILA. N. AM. & U.S. GAZETTE, Feb. 15, 1866, at 2; Editorial, *Southern Sentiment*, S.F. DAILY EVENING BULL., Nov. 9, 1866, at 2, col 2. See also CONG. GLOBE, 39th Cong., 1st Sess. 674, 674, 686 (1867); CONG. GLOBE, 36th Cong., 2d Sess. app. 119, 120 (1861); CONG. GLOBE, 32d Cong., 1st Sess. app. 712, 713 (1852).

⁹ Scalia, *supra* note 6, at 16–18.

In the Fall of 1996, former Justice Scalia—in a speech at Catholic University—explained his and our approach to constitutional interpretation:

The theory of originalism treats a constitution like a statute, and gives it the meaning the words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words The words are the law. I think that's what is meant by a government of laws, not of men. We are bound not by the intent of our legislators, but by the laws they enacted, which are set forth in words, of course.¹⁰

Former Justice Scalia's approach of focusing on the original meaning of the words included in the text allows for consideration of the public context and understanding of what an Amendment accomplished when it was enacted, but it wisely forbids recourse to the legislative history.¹¹ Consideration of state constitutions prior to 1868, public statements about caste and class legislation prior to 1868, and commentary in the public press when the Fourteenth Amendment was adopted are all relevant to the original *public* meaning under his approach. We think these sources all suggest that just as the word "person" in the Due Process Clause protects

¹⁰ BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* 246 (2014); see also Tom Levinson, *Confrontation, Fidelity, Transformation: The Fundamentalist Judicial Persona of Justice Antonin Scalia*, 26 *PACE L. REV.* 445, 447 n.10 (2006); Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 *HARV. J. L. & PUB. POL'Y* 103, 108–109 n.26 (2005).

¹¹ Scalia, *supra* note 6, at 16–18.

LGBTQ people, so too does the word “person” in the Equal Protection Clause. Both Clauses protect LGBTQ people from caste-based or class legislation.

For the purposes of this paper, we will rely on the definition of class- and caste-based legislation espoused in Professor Calabresi’s earlier article concerning crony capitalism.¹² Therein, Professor Calabresi defined class legislation as “any legislation which singles out groups or individuals or classes of people and grants them special privileges or imposes on them special burdens,” such that these “privileges or burdens are not shared by the rest of society.”¹³ Caste legislation, on the other hand, refers to divisions of the population based on “hereditary class traits which may be immutable (such as race, or other physical features) or which are theoretically mutable like gender, although they are practically immutable because of social attitudes.”¹⁴ During the antebellum period, class- and caste-based laws “were often called ‘special’ or ‘partial’ laws because they did not apply to the people as a whole and because they often granted monopolies or other special privileges to a favored group or imposed unique burdens on a particular disfavored group.”¹⁵ It is our contention that the Fourteenth Amendment bars such class- and caste-based legislation.

We recognize, of course, that the Fourteenth Amendment did not clearly bar sex discrimination—or its cousin sexual orientation discrimination—as a form of caste until the passage of the Nineteenth Amendment in 1920. That Amendment made clear that for political rights, sex discrimination was just as unconstitutional as race discrimination.¹⁶ At the same time, we think that it became very hard to explain, after 1920, why women ought to have equal political rights to vote for president, senators, and governors under the Nineteenth Amendment, but not also equal civil rights to make contracts

¹² Steven G. Calabresi & Larissa Price, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. PUB. POL’Y 983, 1024–25 (2013).

¹³ *Id.*

¹⁴ *Id.* at 1025.

¹⁵ Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 934 (2013).

¹⁶ U.S. CONST. amend. XIX.

and own property without their husbands consent under the Fourteenth Amendment. Instead, we believe that under the Fourteenth Amendment—which bans systems of caste or of class-based law-making—women are guaranteed equal civil rights as well as political rights. Otherwise, they would be second-class citizens. We thus think that the Nineteenth Amendment changed the way in which American legal scholars and judges ought to think about the Fourteenth Amendment. The Constitution is a holistic document and the Nineteenth Amendment altered everything that went before it including the meaning of the “no discrimination” guarantee in the Fourteenth Amendment.

We think that the Fourteenth Amendment banned, as a matter of its original public meaning, all systems of caste or of class-based legislation. Many of our reasons for thinking this are set out in Professor Calabresi’s law review article with Julia Rickert on “Originalism and Sex Discrimination.”¹⁷ The evidence suggests that the Framers of the Fourteenth Amendment thought the Amendment would have banned introduction of the Hindu Caste system into the United States or a return to European feudalism where some people are born nobles and others serfs.¹⁸ The evil of slavery was, in part, that people were born either slave owners or slaves. This was also the evil of the Hindu Caste system and of European feudalism. There is abundant evidence from the time period even prior to the Civil War that state constitutions banned European style feudalism.¹⁹

Moreover, we think that laws against miscegenation were unconstitutional, as the Supreme Court rightly held in *Loving v. Virginia*, because they did not give an individual black person the same right to enter a marriage contract with an individual white person as a white person enjoyed.²⁰ Such laws thus formally discriminated against individuals on account of race. Professor Calabresi and An-

¹⁷ See generally Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

¹⁸ *Id.* at 35–42.

¹⁹ *Id.* at 40–41. See also PA. CONST. OF 1776, arts. I–V; S.C. CONST. OF 1778, art. XXXVIII.

²⁰ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

drea Matthews have made an originalist argument to this effect entitled “Originalism and *Loving v. Virginia*.”²¹ Using the same reasoning, a law that allows a man to marry a woman but not another man formally discriminates against that individual on account of sex. Under *United States v. Virginia (the VMI Case)*, such laws can only be upheld if there is an exceedingly persuasive justification for them that survives skeptical scrutiny.²² There is no such justification here.

Our argument proceeds in the following steps. In Part I, we address the history of constitutional equality guarantees. In Part II, we apply the constitutional equality guarantee of the Fourteenth Amendment, as it is modified by the subsequent adoption of the Nineteenth Amendment, to the question of the constitutionality of bans on same-sex marriage given the original meaning of those amendments. We conclude that originalism must lead to the conclusion that bans on same-sex marriage are unconstitutional, and that *Obergefell v. Hodges* was thereby correctly decided.

I. HISTORY OF CONSTITUTIONAL EQUALITY GUARANTEES

In an article in the New York University Journal of Law & Liberty, Professor Calabresi presents an argument concerning the history of equality guarantees in the United States.²³ Therein, he said that:

The [modern] concern with equality . . . grew out of the Reformation, which emphasized that all men and women were equally children of God; capable themselves of reading and interpreting for themselves the Bible; which was written not in Latin, Greek, or Hebrew, but in the vernacular; and which was available to everyone thanks to the invention of the printing press. Thus one can find from the 1640’s on various

²¹ See generally Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393 (2012).

²² *United States v. Virginia*, 518 U.S. 515, 531–34 (1996).

²³ Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein’s The Classical Liberal Constitution*, 8 N.Y.U. J.L. & LIBERTY 839, 882–884 (2014).

striking assertions about human equality. The Massachusetts Body of Liberties, 1641, for example, provided in Article 2 that: “Every person within this Jurisdiction, Whether Inhabitant or forreiner shall enjoy the same justice and law, that is general for the plantation, which we constitute and execute one towards another without partialitie or delay.”²⁴ This would seem to be on its face a forerunner of the Equal Protection Clause.

In England in 1649, the famous poet John Milton—who was the house intellectual of Oliver Cromwell before he gave up on politics to be a poet—justified the execution of King Charles I and the rejection of the Divine Right of Kings on equality grounds. Milton wrote that:

No man who knows aught, can be so stupid to deny that all men naturally were born free, being the image and resemblance of God himselfIt follows . . . that since the king or magistrate holds his authority of the people, both originally and naturally for their good in the first place, and not his own, then may the people as oft as they shall judge it for the best, either choose him or reject him, retain him or depose him, though no tyrant, merely by the liberty and right of freeborn men to be governed as seems to them best.²⁵

Thomas Hobbes, writing in *Leviathan*, said that:

Nature has made men so equal in their faculties of the body and mind as that . . . when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he. For as to the strength of the body,

²⁴ *Id.* at 883 (quoting BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 72 (1971)).

²⁵ *Id.* (quoting John Milton, *The Tenure of Kings and Magistrates* (1649), reprinted in *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY* 72, 74 (Douglas W. Kmiec & Stephen B. Presser eds., 1998)).

the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself. As to the faculties of the mind . . . I find yet a greater equality among men than that of strength.²⁶

John Locke, writing in *The Second Treatise of Government*, said much the same thing. Locke wrote that:

To understand political power right and derive it from its original we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions and possessions and persons as they think fit, within the bounds of nature, without asking leave or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature and the use of the same faculties, should also be equal one amongst another without subordination or subjection; unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him by an evident and clear appointment an undoubted right to dominion and sovereignty.²⁷

We contend that this Lockean focus on equality and freedom—born primarily out of the unrest inherent in the volatile state of nature—had a visible and clear impact on the written work of the American revolutionaries.²⁸ In the Virginia Declaration of Rights, published roughly one month before the Declaration of Independence in June of 1776, George Mason penned the following:

²⁶ *Id.* at 883 (quoting Milton, *supra* note 25, at 77–78).

²⁷ *Id.* at 884 (quoting Milton, *supra* note 25, at 102).

²⁸ See Steven G. Calabresi & Hannah M. Begley, *The Law and the Dissenting Opinions in Obergefell v. Hodges*, 8 ELON L. REV. 1 (2016).

A declaration of rights made by the Representatives of the good People of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and Foundation of Government.

SECTION I. 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.

SECTION 2. That *all power is vested in, and consequently derived from, the people*; that Magistrates are their trustees and servants and at all times amenable to them.

SECTION 3. That government is, or ought to be, instituted for *the common benefit, protection, and security of the people, nation, or community*. Of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

SECTION 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of Magistrate, Legislator, or Judge, to be hereditary.²⁹

²⁹ VA. DECLARATION OF RIGHTS, § 1–4 (1776) (emphasis added).

Implicit in the italicized language above are the equality-centric ideals of John Milton, Thomas Hobbes, and John Locke. All three scholars contended that all people were born free and equal, and that the status of personhood intrinsically grants all individuals the right to be treated in substantively similar ways by the government. In the same vein, the Virginia Declaration of Rights emphasized the importance of equality alongside its focus on the inalienable rights of life, liberty, and property. Taken together, these documents indicate that equality requires the government to protect individuals from class- and caste-based discrimination, since no person should be treated as inherently lesser than another for arbitrary reasons such as heredity. These same ideals were embraced by Thomas Jefferson when he included George Mason's equality-centric language in the Declaration of Independence:

We hold these truths to be self-evident, that *all men are created equal*, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, *Governments are instituted among Men, deriving their just powers from the consent of the governed*; that whenever any Form of Government becomes destructive of these ends, it is *the Right of the People* to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.³⁰

This Lockean language championing freedom and equality appears not only in the Virginia Declaration of Rights, but also in several other state declarations of rights, all of which were adopted during roughly the same time period.³¹ For example, in 1977, New York fully incorporated the Declaration of Independence in its own state constitution—evidence that individuals drafting the New York state

³⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

³¹ Calabresi, *supra* note 23, at 885.

constitution valued these equality-centric ideals.³² Likewise, in 1776, the state of Delaware incorporated similar ideals into its state constitution, writing that “all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole,” and in Section 3 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.”³³ Maryland offers an additional example in Section XXXIII of its 1776 Declaration of Rights, stating “[t]hat, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty”³⁴ In the same vein, the Pennsylvania Constitution of 1776, adopted on September 28th, declared in comparatively strong language:

I. That *all men are born equally free and independent*, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. ***

II. That *all men* have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: ***

III. That *the people of this State* have the sole, exclusive and inherent right of governing and regulating the internal police of the same.

IV. That *all power being originally inherent in, and consequently derived from, the people*; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

V. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett of men, who are a part only of that community, ***³⁵

On December 18, 1776, North Carolina made a similar declaration, that:

I. That all political power is vested in and derived from the people only.

II. That *the people of this State* ought to have *the sole and exclusive right* of regulating the internal government and police thereof.

III. That no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services. ***

XXII. That no hereditary emoluments, privileges or honors ought to be granted or conferred in this State.

XXIII. That *perpetuities and monopolies* are contrary to the genius of a free State, and ought not to be allowed.³⁶

Notably, other state constitutions from the Founding Era contain similar sentiments. Even South Carolina's equality guarantee, which was the narrowest of the bunch, mentioned equality-centric ideals in Article XXXVIII, stating:

[t]hat all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The

³⁵ PA. CONST. OF 1776, arts. I–V (emphasis added); Calabresi, *supra* note 23, at 885–86.

³⁶ N.C. DECLARATION OF RIGHTS, § 1–3, 22, 23 (1776) (emphasis added); Calabresi, *supra* note 23, at 886.

Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. *That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges.*³⁷

In comparison, other states protected equality to a significantly greater extent. The Massachusetts' Constitution of 1780 said that:

Art. I.—*All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.*

II.—It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great creator and preserver of the universe. *And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship. ****

VI.—No man, nor corporation, or association of men, have any other ***title to obtain advantages, or particular and exclusive privileges, distinct from those of the community***, than what arises from the consideration of services rendered to the public; and this title being in nature *neither hereditary, nor transmissible to children, or descendants, or relations by blood*, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

³⁷ Calabresi, *supra* note 23, at 886 (quoting S.C. CONST. of 1778, art. XXXVIII) (emphasis added).

VII.—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; Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.³⁸

At the same time, the New Hampshire Constitution of 1784 said that:

All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

II. *All men* have certain natural, essential, and inherent rights. among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness. ***

X. Government being instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government.³⁹

Finally, a few states—such as New Jersey and Georgia—”did not use Lockean Bill of Rights language, and Connecticut and

³⁸ *Id.* at 886–87 (quoting MASS. CONST. arts. I–II, VI–VII (1780)) (emphasis added).

³⁹ *Id.* at 887 (quoting N.H. CONST. of 1784) (emphasis added).

Rhode Island stayed with their colonial charters.”⁴⁰ These states were the rare localities that did not emphasize Lockean equality guarantees in their own constitutional documents. However, we would like to note that the Rhode Island Charter issued by King Charles II in 1663 to Roger Williams stated:

That our royal will and pleasure is, that no person within the said colony, at any time hereafter shall be any wise molested, punished, disquieted, or called in question, *for any differences in opinion in matters of religion*, and do not actually disturb the civil peace of our said colony; but *that all and every person and persons may, from time to time, and at all times hereafter, freely and fully have and enjoy his and their own judgments and consciences, in matters of religious concernments*, throughout the tract of land hereafter mentioned, they behaving themselves peaceably and quietly, and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others, any law, statute, or clause therein contained, or to be contained, usage or custom of this realm, to the contrary hereof, in any wise notwithstanding.⁴¹

In the end, we think that there is a plethora of evidence supporting the idea that the language of the Declaration of Independence was not an “isolated rhetorical frill from the pen of Thomas Jefferson, a slave owner.”⁴² Quite the contrary, this language reflects “widespread social acceptance of Lockeanism in 1776 and during the founding period more generally.”⁴³ As such, American history and tradition—at least concerning constitutional matters—rests upon a respect for equality that mandates the prohibition of caste- and class-based legislation. This conclusion follows from an understanding that since all men are born free and equal, they must be

⁴⁰ *Id.*

⁴¹ *Id.* at 887–88 (quoting R.I. COLONIAL CHARTER of 1663) (emphasis added).

⁴² *See id.*

⁴³ *Id.*

treated with fundamental parity and must not be treated preferentially based on their hereditary background. The Articles of Confederation—though admittedly less clear on this front—also indicate a strong focus on the equality of men. Indeed, Article IV of that document states:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, *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*.⁴⁴

The Clause above seems far ahead of its time. By intentionally using the words “the free inhabitants,” this Clause appears to have purposefully included African American freedmen in its resounding guarantee of equal treatment. Although some Northern states allowed free African Americans to vote at this time (an incredibly progressive fact in and of itself), granting such individuals “all of the privileges and immunities of free citizens” was a remarkably prescient and enlightened decision. Our analysis above shows that the “Privileges or Immunities Clauses” and the “Common Benefit Clauses” both use this language in an anti-feudal way, banning caste- or class-based legislation that unduly benefits one group based on their family pedigree or upbringing. By extension, the language here ought to be read as granting the same protections to African Americans, safeguarding all free people from laws that privilege groups based on their hereditary class. During the reign of the Articles of Confederation, then, none of the states could attempt to disadvantage or discriminate against out-of-state residents when they were within another state, including African Americans.

Like the Articles of Confederation, the American Constitution also contain a Privileges and Immunities Clause, which is nestled in Article IV, Section 2. It states that: “*The Citizens of each State* shall be entitled to all *Privileges and Immunities* of Citizens in the several States.”⁴⁵

⁴⁴ ARTICLES OF CONFEDERATION of 1771, art. IV, para. 1 (emphasis added).

⁴⁵ U.S. CONST. art. IV, § 2 (emphasis added).

Here, while the phrase “the citizens of each state” may seem to exclude African Americans, a fuller reading of the Constitution would indicate that free African Americans were once again included in this grant of equality. Indeed, this is because the term “citizens of each state” was defined, in the minds of the public, by referencing the collective understanding of citizenship at the time. Such a collective understanding would have been integrally built upon the Articles of Confederation, as it was a principal document in American history. Since Article IV of the Articles of Confederation clearly stated that the citizens of each state were “the free inhabitants of each of these States,” this could be taken as evidence that African Americans were granted expansive equality in the Constitution when it was written in 1787. Of course, the formal text of the Articles of Confederation and the American Constitution were often ignored and were certainly not followed perfectly in this regard—indeed, these equality-centric principles were seemingly discarded during the boom of enslavement following the invention of the Cotton Gin. Nonetheless, our two major founding texts—the Declaration of Independence and the Constitution, as read through the lens of Article 4 of the Articles of Confederation—are both clear on the question of equality. They are both committed to protecting the full and complete equality of all free inhabitants, at least in reference to the privileges and immunities of state citizenship at the time.

One possible objection to this line of argument could be that the Framers of the Constitution made a figurative “deal with the Devil,”⁴⁶ purposefully neglecting to outlaw slavery in order to incentivize Southern states to join the Union. In this regard, one might argue that the Framers’ silence could be taken as evidence that equality-centric values were not as important to the Framers as we suggest. However, even if the Framers did make such a devilish deal, they did not take any specific action that would revoke the entitlement that all free African American had—under both the Constitution and the Article of Confederation—to all of the privileges and immunities of state citizenship. This is crucially important because it means that free African American retained a substantial array of rights including some state voting rights, at least based on the

⁴⁶ Calabresi, *supra* note 23, at 889.

formal text of the Constitution. We want to emphasize, then, that while the Three-Fifths Compromise, the Fugitive Slave Clause, and the “allowance of importation of new slaves until 1868 were a great evil,” they did not, either implicitly or explicitly, hamper the state citizenship rights that free African Americans were granted in the Article of Confederation, and which Article IV, Section 2 of the Constitution upheld.

Our thinking on the slavery issue has been greatly shaped by a wonderful book: *Sons of Providence: The Brown Brothers, the Slave Trade, and the American Revolution*.⁴⁷ It recounts the life-long struggle between John Brown, the founder of Brown University, a warrior for American Independence, and an evil slave trader with his younger brother, Moses Brown, a passionate Quaker abolitionist.⁴⁸ Rappleye points out that in 1774, two years before Thomas Jefferson wrote the Declaration of Independence, “[t]he second article of the Continental Association,” said explicitly that: “We will neither import nor purchase, any slave imported after the first of December next; after which time we will wholly discontinue the slave trade, and will be neither concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it.”⁴⁹ As Professor Calabresi explains elsewhere,

This was an astonishing step [for the First Continental Congress to take] toward abolition [of slavery] by a “legislature” which lacked constitutional powers and even a country of its own at the time. (Evidently, some of those fighting for liberty from England in the 1770s appreciated that there was something incongruous in their enslaving others.) After the adoption

⁴⁷ See generally CHARLES RAPPLEYE, *SONS OF PROVIDENCE: THE BROWN BROTHERS, THE SLAVE TRADE, AND THE AMERICAN REVOLUTION* (Simon & Schuster, 2006).

⁴⁸ See *id.* at 1–3.

⁴⁹ *Id.* at 148.

of this resolution, the slavery issue would not resurface in government until after peace with England was achieved in the 1780s.⁵⁰

At this time, historical figures such as Moses Brown petitioned the Continental Government (which was the federal government under the Articles of Confederation) to prevent the spread of slavery or even to outlaw slavery in its entirety. The national government was far too weak—based on its lack of tax revenue and the comparative strength of state power over federal power at the time—to pass a full and complete slavery ban.⁵¹ However, the Continental Congress was able to act in a fairly expansive regard when it banned slavery in the Northwest Territory, which ultimately grew into the states of Illinois, Indiana, Michigan, Ohio, Wisconsin, and part of Minnesota.⁵² This ban on slavery in the North, known as the Northwest Ordinance, virtually guaranteed that a national government would forge itself in the North, the Midwest, and the West, eventually growing strong enough to abolish slavery in the South and clinch a decisive victory in the Civil War.⁵³ Benjamin Franklin and Alexander Hamilton contributed to the spread of this mindset, helping to shape the Northwest Ordinance by strengthening the widespread acceptance of abolitionist values like equality.⁵⁴ It is worth noting that the Northwest Ordinance paved the way for the Missouri Compromise, which banned slavery in the territories north of the Mason-Dixon Line, but permitted slavery south of it.⁵⁵ Later, in the *Dred Scott* case,⁵⁶ the Supreme Court invalidated the Missouri Compromise, which many scholars suggest led directly to the Civil War.⁵⁷

⁵⁰ MICHAEL STOKES PAULSEN, STEVENS G. CALABRESI, MICHAEL W. MCCONNELL, & SAMUEL L. BRAY, *THE CONSTITUTION OF THE UNITED STATES* 74 (2nd ed. 2013).

⁵¹ *Id.*

⁵² *Id.* at 75.

⁵³ *Id.* at 74–75.

⁵⁴ *Id.* at 75–76.

⁵⁵ *Id.* at 769–70.

⁵⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 528–29 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

⁵⁷ *Id.* See also PAULSEN, *supra* note 50, at 770–71. See generally Dr. Roberta Alexander, *Dred Scott: The Decision that Sparked a Civil War*, 34 N. KY. L. REV. 643 (2007).

Following the passage of the Constitution, Moses Brown once again called for the federal government to ban slavery, asking the House of Representatives in 1790 to take decisive action.⁵⁸ James Madison agreed that something must be done, contending that certain federal powers such as the commerce power could be wielded as a weapon to discourage immoral or unethical abuses of the people.⁵⁹ As Professor Calabresi has written elsewhere, Moses Brown's leadership and James Madison's craftiness led to the passage of a bill in 1794 that was called: "An Act to Forbid the Carrying on of the Slave Trade from the United States to any Foreign Place or Country." Notably, the Act was more than just symbolic, because it carried substantial enforcement penalties.⁶⁰ Ultimately, President George Washington chose to sign the bill into federal law.⁶¹ After a delay, in 1807, the Thomas Jefferson and his administration successfully abolished the slave trade in the United States once and for all, delivering a heavy blow to the international slave trade and emphasizing, once again, our nation's commitment to Lockean ideals of equality.⁶²

The Framers clearly did not have a spotless record when it comes to the issue of slavery and when it comes to their handling of the rights of free African Americans. Yet still, the Framers made serious advances and left hooks in the Constitution so that, over time, a national government could rise up and become sufficiently powerful and motivated on the subject, eventually abolishing slavery from the United States altogether. We think it is important to recognize the contribution of the Founders in this regard, because their contribution to the abolitionist effort is currently under-appreciated in academia. This contribution even spills into the modern day. In the case of same-sex marriage, we now see the American people emphasizing the importance of Lockean ideals of equality in a new realm. Throughout time, the American constitutional tradition has valued

⁵⁸ PAULSEN, *supra* note 50, at 75.

⁵⁹ *Id.* at 75–76. See also RAPPLEYE, *supra* note 47, at 295 (“[C]ongress have no authority to interfere with the emancipation of slaves, or in the treatment of them.”).

⁶⁰ Act To Prohibit the Importation of Slaves into Any Port or Place Within the Jurisdiction of the United States, ch. 22, § 2 Stat. 426 (1807).

⁶¹ PAULSEN, *supra* note 50.

⁶² Act To Prohibit the Importation of Slaves into Any Port or Place Within the Jurisdiction of the United States, ch. 22, § 2 Stat. 426 (1807).

equal treatment under the law, which fundamentally bars the creation of caste- and class-based laws.

During the Jacksonian period, much later in American history, a movement grew in the United States to prevent special interest groups or special hereditary classes from enjoying immunities or privileges not granted to all. Specifically, the common man was empowered to demand equal treatment from his government. Professor Calabresi has written extensively about this with co-authors in *Monopolies and the Constitution: A History of Crony Capitalism* and in *Religions and the Equal Protection Clause: Why the Constitution Requires School Vouchers*.⁶³ This complaint was at the very heart of President Andrew Jackson's campaign to kill the Bank of the United States, which he did kill, and which stayed dead, until 1913, when Woodrow Wilson created the Federal Reserve Board.⁶⁴ The killing of the Bank of the United States on the ground that it was class-based legislation, which set up a monopoly, is yet another instance in American history of the triumph of the equal protection idea.

Over time—during the Jacksonian period, and throughout the Civil War and Reconstruction Era—abolitionists as a group came to equate slavery and servitude with class- and caste-based legislation that unduly benefits one group based on their family pedigree or upbringing, granting privileges to some individuals over others on highly suspect moral grounds.⁶⁵ Slave owners did not compensate their slaves, did not treat them with respect or dignity, and did not afford them freedom or fair treatment. In this sense, slavery became objectionable precisely because it created divisions between groups of people that constitute caste- or class-based forms of discrimination.⁶⁶ The debates on the ratification of the Fourteenth Amendment feature some great quotes to this effect. Consider, for example, the words of Massachusetts Senator Charles Sumner:

⁶³ Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. PUB. POL'Y 983, 1068–073 (2013); Calabresi & Salander, *supra* note 15, at 945–45.

⁶⁴ Federal Reserve Act, ch. 6, 38 Stat. 251, 251–253 (1913).

⁶⁵ Calabresi & Leibowitz, *supra* note 63.

⁶⁶ Calabresi & Salander, *supra* note 15, at 946–51.

[T]here shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with special powers and privileges, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States or the jurisdiction thereof; but all persons therein shall be equal before the law.⁶⁷

Senator Sumner elaborated saying:

A Caste cannot exist except in defiance of the first principles of Christianity and the first principles of a Republic. It is Heathenism in religion and tyranny in government. The Brahmins and the Sudra in India, from generation to generation, have been separated, as the two races are now separated in these States. If a Sudra presumed to sit on a Brahmin's carpet he was punished with banishment. But our recent rebels undertake to play the part of the Brahmins, and exclude citizens, . . . on the ground of Caste, which according to its Portuguese origin, *casta* is only another term for race.⁶⁸

Finally, consider this remarkable statement from Senator Sumner:

The Rebellion began in two assumptions . . . first, the sovereignty of the States with the pretended right of secession; and, secondly, the superiority of the white race, with the pretended right of Caste, Oligarchy, and Monopoly on account of color . . . The second showed itself at the beginning, when South Carolina alone, among the thirteen States, allowed her Constitution to be degraded by an exclusion on account of color . . .⁶⁹

⁶⁷ CONG. GLOBE, 39th Cong., 1st Sess. 674 (1867).

⁶⁸ *Id.* at 683.

⁶⁹ *Id.* at 686.

During the 1860s, other members of the legislature made similar comments, echoing the sentiment of Senator Sumner. For example, Representative John F. Farnsworth said:

As a moral being, as a man, I hate slavery in the States of this Union as I hate serfdom in Russia—which, by the way, is about to be abolished in that Empire, while we quarrel over the extension of slavery in this—just as I hate caste in India; just as I hate oppression everywhere.⁷⁰

Representative Norton Townshend, a Democrat from Ohio, said:

I protest against all these interpolations into the Democratic creed, and against any interpretation of Democracy as makes it the ally of slavery and oppression. Democracy and slavery are directly antagonistic. Democracy is opposed to caste, slavery creates it; Democracy is opposed to special interest groups; slavery is but the privilege specially enjoyed by one class—to use another as brute beasts and take their labor without wages; Democracy is for elevating the laboring masses to the dignity of perfect manhood; slavery grinds the laborer into the very dust . . . [S]lavery is but the extreme of class legislation . . . [S]lavery is nothing more than the privilege some have of living out of others . . .⁷¹

Together, we take these historical excerpts as illustrations of the Founding Era's focus on equality, as well as its condemnation of class- and caste-based legislation. We think it is clear that the Founders disliked hereditary privileges and immunities, and we think they came to be strongly opposed preferential treatment for certain groups over others based on arbitrary reasons, like family background. These equality-centric ideals came to a head in the Reconstruction Era and in the three great constitutional amendments that followed: The Thirteenth Amendment, which abolished slavery;

⁷⁰ CONG. GLOBE, 36th Cong., 2d Sess. app. 119, 120 (1861).

⁷¹ CONG. GLOBE, 32d Cong., 1st Sess. app. 712, 713 (1852).

the Fourteenth Amendment, which abolished all caste systems, including racial discrimination in the Southern states; and the Fifteenth Amendment, which ensured that the voting rights of African Americans would be defended against infringement. While these were great victories for those who hold Lockean equality dear, we recognize that these reforms were woefully slow and that they were also cut short by discriminatory laws like the Jim Crow laws and the Grandfather Clauses validated in *Giles v. Harris*, 189 U.S. 475 (1903). Fortunately, with the Second Reconstruction in the 1960s, the three great amendments finally gained full force in protecting all people from class- and caste-based discrimination. Finally the Reconstruction Amendments were given the strength that they deserved.

In a prior law review article with Sarah Agudo, Professor Calabresi found that in 1868—which is the year when the Fourteenth Amendment was ratified and became part of our fundamental law—twenty-four of the thirty-seven state constitutions existing at that time (nearly a two-thirds majority) contained provisions guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type.⁷² Thus, in 1868, approximately eighty-eight percent of all Americans resided in states that constitutionally protected unenumerated individual liberty rights.⁷³ Throughout this article, we use the term “Lockean Natural Rights Guarantees” (or “the Guarantees”) to refer to these unenumerated individual liberty rights guarantees. The Lockean Natural Rights Guarantees almost all essentially followed the Virginia, Pennsylvania, and Massachusetts clauses from the founding which had proclaimed that: “All men are born free and equal and have certain natural and inalienable rights

⁷² 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, 88 (2008). However, as this article explained, the Connecticut, Rhode Island, and Texas Guarantees were so atypical that it is not fully accurate to group them with the twenty-four true Lockean Natural Rights Guarantees.

⁷³ See Calabresi & Agudo, *supra* note 72. The sixty-seven percent reflects the population that resided in the 24 States with true Lockean Natural Rights Guarantees as of the 1870 census. This percentage was calculated from data available from the United States Census Bureau. United States Region and Division State, *Population: 1790 to 1990*, CENSUS.GOV. (Aug. 26, 1993) <http://www.census.gov/population/www/censusdata/files/table-16.pdf>.

among which are the right to enjoy life and liberty and to acquire, possess, and defend property.”⁷⁴ We cannot stress strongly enough the significance of the fact that sixty-seven percent of all Americans living in 1868, when the Fourteenth Amendment was ratified, lived in jurisdictions that emphasized that all men are born free and equal. If there is any right that is deeply rooted in American history and tradition, then, it is the right of all people to be free and equal at the time of their birth. It must be noted that the right of individuals to be free and equal at the time of their birth bars the creation of caste or class-based legislation.

Moreover, the central claim of the Second Reconstruction made by the Reverend Martin Luther King was that:

When the architects of our Republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note, insofar as her citizens of color are concerned. ***

I say to you today my friends. And so even though we face the difficulties of today and tomorrow I, still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: “We hold these truths to be self-evident, that all men are created equal.”⁷⁵

Martin Luther King was right, and Americans knew he was right in arguing that Americans of every race and color were created equal. This is indeed at the heart of the American creed.

⁷⁴ MASS. CONST., *supra* note 38, at art. I.

⁷⁵ Dr. Martin Luther King, I have a Dream, Delivered at Lincoln Memorial, Washington, D.C., (Aug. 28, 1963), <http://www.americanrhetoric.com/speeches/mlkihaveadream.htm>. See also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Just as the Caste system of European feudalism spurred the inclusion of equality guarantees in the Declaration of Independence, and just as slavery and the Black Codes gave rise to the Reconstruction Amendment's guarantees of equality, the existence of gender roles in which women lacked basic civil and political rights enjoyed by men led to another great step toward equality, when women got the political right to vote in all federal and state elections in 1920, with the passage of the Nineteenth Amendment.

The inspiration and need for the Nineteenth Amendment to the U.S. Constitution is best expressed in the Seneca Falls Declaration of 1848,⁷⁶ which is worth quoting in full:

The Declaration of Sentiments

When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long

⁷⁶ 1 ELIZABETH CADY STANTON, *A HISTORY OF WOMAN SUFFRAGE* 70–71 (Fowler and Wells, 1889).

established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer. [W]hile evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled. The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny[sic] over her. To prove this, let facts be submitted to a candid world.

He has never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had no voice.

He has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners.

Having deprived her of this first right of a citizen[sic], the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

He has made her, if married, in the eye of the law, civilly dead.

He has taken from her all right in property, even to the wages she earns.

He has made her, morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.

He has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be given, as to be wholly regardless[sic] of the happiness of women—the law, in all cases, going upon a flase[sic] supposition of the supremacy of man, and giving all power into his hands.

After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.

He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration. He closes against her all the avenues to wealth and distinction which he considers most honorable[sic] to himself. As a teacher of theology[sic], medicine, or law, she is not known.

He has denied her the facilities for obtaining a thorough education, all colleges being closed against her.

He allows her in church, as well as state, but a subordinate[sic] position, claiming apostolic authority for

her exclusion from the ministry, and, with some exceptions, from any public participation in the affairs of the church.

He has created a false public sentiment by giving to the world a different code of morals for men and women, by which moral delinquencies which exclude women from society, are not only tolerated, but deemed of little account in man.

He has usurped the prerogative of Jehovah himself, claiming it as his right to assign for her a sphere of action, when that belongs to her conscience and to her God.

He has endeavored, in every way that he could, to destroy her confidence[*sic*] in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.

Now, in view of this entire disfranchisement of one-half the people of this country, their social and religious degradation—in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.⁷⁷

After decades of struggle, and in light of the Seneca Falls Declaration of Sentiments, We the People of the United States adopted the Nineteenth Amendment to the Constitution giving women equal political voting rights with men. Shortly after that momentous and transformative constitutional amendment, the U.S. Supreme Court said, in *Adkins v. Children's Hospital*⁷⁸ that “[in] view of the great—not to say revolutionary—changes which have taken place . . . in the contractual, political, and civil status of women, culminating in the

⁷⁷ *Id.*

⁷⁸ *Adkins v. Children's Hosp.*, 261 U.S. 525, 553 (1923).

Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.”⁷⁹ Justice Oliver Wendell Holmes dissented in this case, arguing that our country “will need more than the Nineteenth Amendment to convince [him] that there are no differences between men and women, or that legislation cannot take those differences into account.”⁸⁰ This is the same Justice Holmes who, in the eugenics case of *Buck v. Bell*, said that:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles is enough.⁸¹

In 1937, the New Deal Supreme Court overruled *Adkins v. Children's Hospital* in *West Coast Hotel v. Parrish*, a case which, in effect, held that gender classifications are reviewed under rational basis scrutiny and not the skeptical scrutiny used in *Adkins v. Children's Hospital*, which had been decided shortly after the Nineteenth Amendment was ratified and which reflected the national mood at that time.⁸² The New Deal Supreme Court then announced (in a footnote to a case upholding an economic classification as to filled milk) that it would give rational basis scrutiny to all state social and economic legislation unless it: 1) intruded on rights secured by the federal Bill of Rights against the federal government; 2)

⁷⁹ *Id.*

⁸⁰ *Id.* at 579–60 (Holmes, J., dissenting).

⁸¹ *Buck v. Bell*, 274 U.S. 200, 207 (1927) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

⁸² *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1936).

closed off the political processes of change; or 3) discriminated against a discrete and insular minority.⁸³ Since women were not a discrete and insular minority in 1938 and nor are they now, *Carolene Products* made clear at the time that sex discrimination would be upheld if there was a rational basis for it.

In *Goesaert v. Cleary*, Justice Felix Frankfurter wrote for a six-justice majority of New Dealers, upholding as constitutional a Michigan law, which forbade women from being bartenders unless they were the wives or daughters of a bartender.⁸⁴ Justice Frankfurter upheld this law using rational basis scrutiny, which was all the scrutiny that he thought was called for.⁸⁵

In 1964, the Congress of the United States disagreed with Justice Frankfurter and forbade sex discrimination in employment in its landmark civil rights bill enacted later that year.⁸⁶ This evidently made an impression on the Supreme Court, which in a unanimous opinion by Chief Justice Warren Burger in *Reed v. Reed*, ruled that sex discrimination in a state inheritance law violated the rational basis test.⁸⁷ The Justices came close to giving sex classifications strict scrutiny in *Frontiero v. Richardson*,⁸⁸ but they settled for something called middle level scrutiny instead in *Craig v. Boren*.⁸⁹

Throughout this period of time, U.S. Supreme Court Justice William H. Rehnquist campaigned tirelessly for a rule of strict scrutiny for racial classifications and rational basis scrutiny of everything else.⁹⁰ Justice Rehnquist used the New Deal Supreme Court decision in *Carolene Products*—the filled milk case—as his lodestar. Justice Rehnquist also notably cited to *Williamson v. Lee Optical Co.*,⁹¹ a radical rational basis test opinion, in his dissent in *Roe v. Wade*.⁹² Justice Rehnquist's embrace of New Deal constitutionalism did not have anything to do with the original meaning of the Fourteenth or Nineteenth Amendments. He did not in fact care about originalism

⁸³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁸⁴ *Goesaert v. Cleary*, 335 U.S. 464 (1948).

⁸⁵ *Id.* at 466–67.

⁸⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

⁸⁷ *Reed v. Reed*, 404 U.S. 71 (1971).

⁸⁸ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁸⁹ *Craig v. Boren*, 429 U.S. 190 (1976).

⁹⁰ *See Davis*, *supra* note 4, at 293, 297. *See also* Rehnquist, *supra* note 4.

⁹¹ *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

⁹² *Roe v. Wade*, 410 U.S. 113, 173 (Rehnquist, J., dissenting).

or constitutionally limited government at all.⁹³ Justice Rehnquist argued for the rational basis test because he thought the Supreme Court was behaving in a judicially restrained manner when it upheld laws as being constitutional.⁹⁴ It should be mentioned in this regard that Justice Rehnquist, as a law clerk to Supreme Court Justice Robert Jackson, wrote a memo arguing against *Brown v. Board of Education* and in favor of *Plessy v. Ferguson* on judicial restraint grounds.⁹⁵ After all, in *Plessy*, no State law was struck down so the Court was arguably judicially restrained.⁹⁶ Justice Rehnquist did say at his confirmation hearings that he had been asked by Justice Jackson to lay out the legal case for the losing side in *Brown* and that the views in his memo to his boss were not his own.⁹⁷

In *United States v. Virginia*, the Supreme Court revisited the law of sex discrimination and held that sex discriminatory laws must have an “exceedingly persuasive justification” that survives “skeptical scrutiny.”⁹⁸ This brought the Supreme Court back to the view it expressed in *Adkins v. Children’s Hospital*, where the Court had said that after the adoption of the Nineteenth Amendment differences in legal rights between men and women were practically at the “vanishing point.”⁹⁹ Professor Calabresi has defended this conclusion in a law review article with Julia Rickert entitled: *Originalism and Sex Discrimination*.¹⁰⁰ We honestly and sincerely believe that sex discrimination violates the Fourteenth Amendment’s equality guarantee, and that our view is more faithful to the original meaning of that document than is Justice Rehnquist’s test of strict scrutiny for race and rational basis review for everything else. The Rehnquist

⁹³ Davis, *supra* note 4, at 294–95.

⁹⁴ *Id.*

⁹⁵ Memorandum from William H. Rehnquist to Justice Robert H. Jackson, A Random Thought on the Segregation Cases (circa December 1952) (on file as part of Robert Houghwout Jackson Papers, Library of Congress, Manuscript Division, Box 184, Folder 5).

⁹⁶ *Plessy v. Ferguson*, 163 U.S. 567 (1896).

⁹⁷ *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 135 (1986).

⁹⁸ *United States v. Virginia*, 518 U.S. 515, 531 (1996).

⁹⁹ *Adkins v. Children’s Hospital*, 261 U.S. 525, 553 (1923).

¹⁰⁰ Calabresi & Rickert, *supra* note 17, at 93.

view reads the word “race” into the text of the Fourteenth Amendment when it is not there, even though the exact same word appears in the Fifteenth Amendment.

Tellingly, an early draft of the Fourteenth Amendment originally did limit the scope of the Amendment to race and race-based discrimination. Later, these draft versions of the Fourteenth Amendment were scraped in favor of a broader phrasing that included guarantees for the rights of *all persons*, regardless of race. One original draft version of the Fourteenth Amendment read:

Sec. 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.

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

Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.¹⁰¹

Ultimately, the ratified version of the Fourteenth Amendment did not contain such race-based limitations.¹⁰² Largely, this is because the original draft version of the Amendment was rejected by members of Congress on both the right and the left, since both parties wanted the Fourteenth Amendment to protect against a wider array of rights violations. Congress members on the left “wanted to prohibit all forms of caste” and members on the right “wanted to

¹⁰¹ BENJ. B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 83–84 (Columbia Univ. 1914).

¹⁰² U.S. CONST. amend. XIV.

protect the rights of white Unionists in the South.”¹⁰³ In this sense, the Fourteenth Amendment was certainly intended to protect the rights of more than just black Americans.

Indeed, as the final version of Section One of the Fourteenth Amendment was introduced in Congress on May 23, 1866, Senator Howard explained that the words *race* and *color* were dropped from the Fourteenth Amendment because:

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.¹⁰⁴

On an earlier date, Senator Eliot explained the meaning of Section One of the Fourteenth Amendment using similar justifications:

I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit[] State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.¹⁰⁵

This understanding of Section One as banning all caste- and class-based legislation was discussed at length in Congress,¹⁰⁶ but it

¹⁰³ See Calabresi & Rickert, *supra* note 17, at 32.

¹⁰⁴ CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

¹⁰⁵ *Id.* at 2511.

¹⁰⁶ Melissa Saunders quotes Representative Hotchkiss of New York as saying that the Fourteenth Amendment was “designed to forbid a state to ‘discriminate between its citizens and give one class of citizens greater rights than it confers upon another.’” Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 284 (1997). She quotes Senator Jacob

was not contested.¹⁰⁷ On the other hand, suggestions that Section One only protected black people were explicitly rejected.¹⁰⁸ Indeed, those who opposed the Amendment did not dispute the idea that it prohibited caste- and class-based legislation. Instead, they expressed views that were unabashedly in favor of class legislation.¹⁰⁹ In this

Howard as saying that the Equal Protection Clause of the Amendment would “abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.” *Id.* at 286 (alterations in original). She quotes Senator Timothy Howe as saying the Amendment would “give the federal government ‘the power to protect classes against class legislation.’” *Id.* at 287.

¹⁰⁷ Senator Dixon, debating the content of Section One, stated:

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

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

¹⁰⁸ Senator Bingham, during the congressional debate, clarified that Section One applied to whites as well as blacks:

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

Mr. BINGHAM. It is due to the committee that I should say that it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment.

Id. at 1065.

¹⁰⁹ A statement made by Representative Nicholson during congressional debates exemplifies sentiment favorable to class legislation:

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

Id. at 2081.

sense, it is clear that the Framers of the Fourteenth Amendment intended for the Amendment to ban caste- and class-based legislation.

Around this time, Senator Charles Sumner helped to popularize the view that the Fourteenth Amendment ought to bar the creation of caste systems across the board, and his view was widely supported by other Senators, as illuminated by a discussion between Senators Howard and Clark.¹¹⁰ Indeed, Senator Charles Sumner argued that the voting-rights provision of the Fourteenth Amendment represented a national “recognition of a caste and the disenfranchisement of a race.”¹¹¹ Senator Jacob Howard agreed, contending that the Fourteenth Amendment must apply “not to color or to race at all, but simply to the fact of individual exclusion” from crucial political and civil rights.¹¹²

In the end, this view became so widespread that even the Republican National Party posted bulletins explaining that the Fourteenth Amendment was meant to bar caste- and class-based discrimination.¹¹³ Published in August of 1866, the bulletin read:

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

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

The Republicans in Congress tried to the extent of their powers to *abolish throughout the bounds of the republic the evils of caste*, as second only to those of slavery. How much did the Democrats do toward that object?¹¹⁴

¹¹⁰ See Calabresi & Rickert, *supra* note 17, at 32–33.

¹¹¹ CONG. GLOBE, 39th Cong., 1st Sess. 1281 (1866).

¹¹² CONG. GLOBE, 39th Cong., 1st Sess. 2767 (1866).

¹¹³ *Who Did It?*, PHILA. N. AM. & U.S. GAZETTE, Aug. 13, 1866, at 2.

¹¹⁴ *Id.* (emphasis added).

Undeniably, then, the Framers of the Fourteenth Amendment gave state legislators ample notice that they understood the Amendment to prohibit caste of systems of special-interest and class-based lawmaking. This view was articulated clearly and was readily available to all who sought clarification about the Fourteenth Amendment and its meaning.

At the same time, the legislative history of the Fourteenth Amendment reveals that opposition to the Black Codes was “not because they discriminated on the basis of race,” but rather “because they singled out a certain class of individuals for unique disadvantage.”¹¹⁵ For example, Senator Lyman Trumbull—the co-sponsor of the Civil Rights Act of 1866—disliked the Black Codes because they “deprive[d] [some] citizen[s] of civil rights which are secured to other citizens,” thereby violating Blackstone’s maxim that “the restraints introduced by the law should be equal to all.”¹¹⁶ In a similar line of argument, Senator William Pitt Fessenden described the Black Codes as being an unacceptable form of class legislation.¹¹⁷ Many others noted that the Black Codes had the effect of reducing freed black men to the position of being second-class citizens.¹¹⁸ At the same time, President Andrew Johnson opposed the Black Codes because, “there is no room for favored classes or monopolies,” since the most basic “principle of our Government is that of equal laws,” which must always “accord[] ‘equal and exact justice to all men,’ [and] special privileges to none.”¹¹⁹

This is relevant given the fact that some scholars who object to our interpretation of the original public meaning of the Fourteenth Amendment contend that it was merely—or at least primarily—passed as a means of undermining the Black Codes.¹²⁰ Insofar as the predominate objections to the Black Codes were objections to caste- and class-based legislation, it seems unlikely that the Fourteenth

¹¹⁵ See Calabresi & Salander, *supra* note 15, at 952.

¹¹⁶ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

¹¹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866).

¹¹⁸ See Saunders, *supra* note 106, at 271–72 n.112 (citing a series of statements by members of the Thirty-ninth Congress).

¹¹⁹ Andrew Johnson, *First Annual Message to the Senate and House of Representatives*, Dec. 4, 1865, in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, 361–362 (James D. Richardson, ed., 1897).

¹²⁰ See, e.g., Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 679 & n.42, 681–685 (2003).

Amendment was understood solely as banning discrimination of a racial nature. Coupled together, the fact that most Senators opposed to the Black Codes were appalled by its status as a piece of class legislation and the fact that the final draft of the Fourteenth Amendment was “carefully drafted” to make “no specific mention of race” means that the Fourteenth Amendment ought to be understood as “banning all systems of class and caste, and not just discrimination on the basis of race.”¹²¹

Furthermore, this view is supported by the writings of former Justice Scalia, a well-known originalist who emphasized the importance of the original meaning of the constitution and of constitutional amendments.¹²² In his dissenting opinion in *Rutan v. Republican Party of Illinois*,¹²³ former Justice Scalia “gave a glimpse into his view of the Equal Protection Clause.”¹²⁴ He wrote that “the Thirteenth Amendment’s abolition of the institution of black slavery[] leaves no room for doubt that laws treating people differently because of their race are invalid.”¹²⁵ In this sense, former Justice Scalia correctly seemed to suppose that the Thirteenth Amendment banned more than just black slavery, which it does because it bans slavery altogether (just as the Fourteenth Amendment bans caste altogether), and those two Amendments do not just ban African American slavery or discrimination against only African Americans. The Fourteenth Amendment protects all persons and “was meant to apply broadly.”¹²⁶

It is important to be clear that this view of the Fourteenth Amendment was shared not only by the Framers of the Fourteenth Amendment, but also by the individuals who completed its ratification. Professor Calabresi has argued elsewhere that “[t]he Framers of the Fourteenth Amendment and those who contemplated its ratification said repeatedly and publicly that it forbids the imposition of caste systems and caste-based lawmaking,” and “[t]hose who heard

¹²¹ See Calabresi & Salander, *supra* note 15, at 952.

¹²² Scalia, *supra* note 6, at 16–18.

¹²³ *Rutan v. Republican Party of Il.*, 497 U.S. 62, 92–115 (1990).

¹²⁴ See Calabresi & Rickert, *supra* note 17, at 24.

¹²⁵ *Rutan*, 497 U.S. at 95 n.1.

¹²⁶ See Calabresi & Rickert, *supra* note 17, at 25.

[that] concurred in that understanding.”¹²⁷ Indeed, “the Amendment’s Framers and contemporary commentators frequently compared race discrimination to other forms of arbitrary, caste-creating forms of discrimination,” like the imposition of a European feudal system or an Indian caste system, “to explain what the Amendment would prohibit.”¹²⁸

The original public meaning of the Amendment is thus that it bars all systems of caste- and class-based laws. For example, as the Fourteenth Amendment was being considered in Congress, some members of the public began demanding a constitutional amendment that would end “all forms of class legislation whatsoever for good.”¹²⁹ The *Chicago Tribune* published an editorial in January of 1866 representing one such appeal.¹³⁰ The editorial argues that the Black Codes create a class-based system resembling European aristocracy, and ought to be banned on the basis that they allow for oppression by creating a hereditary ruling class:

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

¹²⁷ *Id.* at 6.

¹²⁸ *Id.*

¹²⁹ *See id.* at 29.

¹³⁰ Editorial, *Class Legislation*, CHI TRIB., Jan. 12, 1866, at 2.

legislation, as between whites and blacks, except when forbidden by counter-legislation by Congress, they can also create class distinctions in the future between native and adopted citizens, between rich and poor, or between any other divisions of society.

The most effectual way to reach the root of this matter, is to amend the Constitution so as to forbid class legislation entirely by prohibiting the enactment of laws creating or recognizing any political distinctions because of class, race or color between the inhabitants of any State or Territory, and providing that all classes shall possess the same civil rights and immunities, and be liable to the same penalties, and giving Congress the power to carry the clause into effect . . . [W]e believe that we might as well level the evil of caste at one blow, as to fight it by dribbles and sections, through another long course of years.¹³¹

The *Tribune's* desire to create a constitutional amendment prohibiting caste-discrimination was "not echoed by all," but even those who opposed the Amendment recognized that eliminating caste-discrimination was a major component of Section One of the Fourteenth Amendment.¹³² Indeed, one such commentator wrote in the *Daily National Intelligencer* in January 1866, expressing fear that Congress would overstep the boundaries of abolishing slavery and "repeal God's law of caste."¹³³ Additionally, the *Philadelphia North American Gazette* published in February 1866 that a constitutional amendment was under discussion in Congress that would "secure for the citizens of any one State the same rights as are enjoyed by the citizens of other States, thus terminating the discriminations made against sections and classes and races."¹³⁴ This view of the Fourteenth Amendment, then, seems quite widespread.

¹³¹ *Id.*

¹³² See Calabresi & Rickert, *supra* note 17, at 30.

¹³³ Editorial, DAILY NAT'L INTELLIGENCER, Jan. 5, 1866 at 2, col. 1.

¹³⁴ Editorial, *Constitutional Amendments*, PHILA. N. AM. & U.S. GAZETTE, Feb. 15, 1866, at 2.

Indeed, “[p]opular accounts of the Fourteenth Amendment understood it to be far-reaching,” banning caste- and class-based legislation on the whole.¹³⁵ The *San Francisco Daily Evening Bulletin* characterized the Fourteenth Amendment as “an opportunity . . . for the masses to break down the domination of caste and aristocracy.”¹³⁶ The *Boston Daily Advertiser* described the Fourteenth Amendment’s purpose as “compel[ling] the states to . . . throw the same shield over the black man as over the white, over the humble as over the powerful.”¹³⁷ In the same vein, the *Cincinnati Commercial* penned that the Amendment gave the Constitution a dose of “the great Democratic principle of equality before the law” and thereby invalidated any and all “legislation hostile to any one class.”¹³⁸ In this sense, newspaper articles dispensed at the time of the Fourteenth Amendment’s ratification seemed to uniformly agree that the Amendment would bar caste- and class-based discrimination in the United States.

At the same time, there is widespread academic agreement—even amongst peers that disagree with our understanding of the Fourteenth Amendment—that the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866.¹³⁹ This is important, because newspaper editorials published while the Civil Rights Act was being considered in Congress uniformly agreed that the Act “conferr[ed] the same common law civil rights on all citizens without regard to race,” while also establishing that the Civil Rights Act barred caste- and class-based legislation.¹⁴⁰ Indeed, “[t]he earliest press coverage of the Civil Rights Bill . . . show that the public debate over the Civil Rights Act of 1866 began with a full realization of the fact that the

¹³⁵ See Calabresi & Leibowitz, *supra* note 63, at 1039.

¹³⁶ Editorial, *Southern Sentiment*, S.F. DAILY EVENING BULL., Nov. 9, 1866, at 2, col 2.

¹³⁷ Editorial, *Reconstruction*, BOS. DAILY ADVERTISER, May 24, 1866, at 1, col. 2.

¹³⁸ Editorial, *The Constitutional Amendment*, CINCINNATI COM., June 21, 1866, at 4.

¹³⁹ See Paul Finkelman, *supra* note 120, at 685–86; see also RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 23–33, 82–85 (2nd ed. 1997) (arguing that the Fourteenth Amendment protects only the rights listed in the Civil Rights Act of 1866 and not the right to a free, non-discriminatory public school education).

¹⁴⁰ See Calabresi & Matthews, *supra* note 21, at 1437.

law was an equalizing measure that sought the exact same rights for all citizens of the United States.”¹⁴¹ For example, the *North American and United States Gazette* wrote on February 12, 1866, that:

The Civil Rights bill, to which we alluded on its passage by the Senate, is properly connected with this Freedmen’s Bureau bill, and taken together they will undoubtedly work great changes in the rebellious States. They must render nugatory all efforts of the dominant rebel influence to re-impose a pernicious system of caste upon the south and to deprive the freedmen of their civil rights, or of the legal means of defence.¹⁴²

In this sense, newspapers regarded the Civil Rights Act of 1866 as a rejection of “the South’s effort to re-impose a caste system.”¹⁴³ This view of the Civil Rights Act of 1866 was also defended by the *Boston Daily Journal* on February 23, 1866. Therein, it was argued that “there is no substantive disagreement among loyal men respecting [African American] civil rights. We all agree that they must have the civil rights of any other class of citizens, the rights of person and property, to sue and to be sued – in short equality before the laws.”¹⁴⁴ The *Philadelphia Inquirer* printed the same article—on the same day—stating that “we all agree that [African Americans] must have the civil rights of all other class of citizens.”¹⁴⁵ Here, we see general agreement that the Civil Rights Act of 1866 barred caste- and class-based legislation. Given the fact that scholars see the Fourteenth Amendment as constitutionalizing the Civil Rights Act of 1866, such scholars must also admit that the Fourteenth Amendment bars the creation or enforcement of caste- and class-based legislation. Historical newspaper accounts indisputably support this interpretation of the Fourteenth Amendment, and of the Civil Rights Act of 1866.

¹⁴¹ *Id.* at 1437–38.

¹⁴² *The Practical Work of Reconstruction*, N. AM. & U.S. GAZETTE, Feb. 12, 1866, at 2.

¹⁴³ See Calabresi & Matthews, *supra* note 21, at 1442.

¹⁴⁴ *The Country in No Peril*, BOS. DAILY J., Feb. 23, 1866, at 4.

¹⁴⁵ *Views of David Dudley Field*, PHILA. INQUIRER, Feb. 23, 1866, at 8.

Furthermore, following the ratification of the Fourteenth Amendment, the Supreme Court doled out several decisions that clearly “understood that the Fourteenth Amendment had constitutionalized the antebellum doctrine against special or partial laws.”¹⁴⁶ In the *Slaughter-House Cases*, the Court “dealt with a classic piece of antebellum class legislation: a monopoly.”¹⁴⁷ Justice Bradley’s dissenting opinion “dutifully identified the state-granted slaughterhouse monopoly as class legislation and declared it unconstitutional under the Fourteenth Amendment’s equality guarantee.”¹⁴⁸ Specifically, Justice Bradley contended that “a law which prohibits a large class of citizens from adopting a lawful employment . . . deprives those citizens of the equal protection of the laws”¹⁴⁹ Eleven years later, in a follow-up case, Justice Bradley argued that the Fourteenth Amendment represents a “denial of the equal protection of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others”¹⁵⁰ In this sense, Justice Bradley has concurred with our understanding of the Fourteenth Amendment since the *Slaughter-House Cases*.

The Supreme Court upheld this view of the Fourteenth Amendment again in 1885 in *Barbier v. Connolly*.¹⁵¹ Therein, Justice Field explained that the Fourteenth Amendment prohibits “[c]lass legislation, discriminating against some and favoring others.”¹⁵² Crucially, the “purpose of the law cannot be to grant a special benefit to a particular individual or group” or to strip an individual or group of some particular benefits.¹⁵³ Instead, the purpose “must be to promote an important public” aim or goal.¹⁵⁴ As a result, the Fourteenth Amendment only allows for the existence of laws that discriminate when

¹⁴⁶ See Calabresi & Salander, *supra* note 15, at 957.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Slaughter-House Cases*, 83 U.S. 36, 122 (1873) (Bradley, J., dissenting).

¹⁵⁰ *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 766 (1884) (Bradley, J., concurring).

¹⁵¹ *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1885).

¹⁵² *Id.* at 32.

¹⁵³ See Calabresi & Leibowitz, *supra* note 63, at 1031.

¹⁵⁴ *Id.*

those laws “are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good.”¹⁵⁵ This view is also expressed in *Corfield v. Coryell*, where Justice Washington indicated that “fundamental rights could [only] be trumped by just laws enacted for the good of the whole people.”¹⁵⁶

Further, in *Gulf, C. & S.F. Ry. Co. v. Ellis*, the Supreme Court used the Fourteenth Amendment to strike down a state law that “awarded attorneys’ fees to plaintiffs injured by trains because the law subjected railroad companies to a peculiar burden not placed on other corporations or individuals.”¹⁵⁷ In the majority opinion, the Court rationalized that allowing state governments to subject “certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no matter restraining state action.”¹⁵⁸ The Court “took it for granted that the Fourteenth Amendment banned all forms of class legislation and actually cited antebellum state cases to explain its Fourteenth Amendment jurisprudence.”¹⁵⁹ On this point, “the court was unanimous.”¹⁶⁰

At the same time, the *Civil Rights Cases* also represent an instance of the Supreme Court unanimously agreeing that the Fourteenth Amendment bars caste- and class-based forms of discrimination. In the majority opinion, Justice Bradley contended that “class legislation” is “obnoxious to the prohibitions of the Fourteenth Amendment.”¹⁶¹ Justice Bradley defined class legislation as any law that “den[ies] to any person, or class of persons, the right to pursue any peaceful avocations allowed to others.”¹⁶² In the dissent, Justice Harlan wrote:

If the constitutional amendments be enforced, according to the intent with which, as I conceive, they

¹⁵⁵ *Barbier*, 113 U.S. at 31–32.

¹⁵⁶ See Calabresi & Leibowitz, *supra* note 63, at 1031 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (1823)).

¹⁵⁷ See Calabresi & Salander, *supra* note 15, at 958.

¹⁵⁸ *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897).

¹⁵⁹ See Calabresi & Salander, *supra* note 15, at 958.

¹⁶⁰ *Id.* at 959.

¹⁶¹ *Civil Rights Cases*, 109 U.S. 3, 24 (1883).

¹⁶² *Id.* at 23–24.

were adopted, there cannot be, in this republic, any class of humans being in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.¹⁶³

Further, *Skinner v. Oklahoma* stands out as another Supreme Court case defending our view of the Fourteenth Amendment as banning caste- and class-based legislation. Indeed, *Skinner v. Oklahoma* “stands as a nineteenth century class legislation case where a fundamental liberty – the right to procreate – was being denied to low class thieves but not to high class thieves.”¹⁶⁴ In this case, “the law in question discriminated among different classes of thieves, but it did not do so to promote the general interest but did so instead to support the interests of high class thieves.”¹⁶⁵ In the end, the court held that the law was unconstitutional, at least in part, on the grounds that it violated the low class thieves’ right to equality under the law.¹⁶⁶ In this sense, *Skinner* provides additional support for our argument that caste- and class-based legislation is prohibited by the Fourteenth Amendment of the United States Constitution.

Put together, all of these Supreme Court and lower court cases provide further support for our contention that American constitutional law upholds our interpretation of the Fourteenth Amendment.

Indeed, this view of the Fourteenth Amendment has continued into the modern day. The Supreme Court continues to base their opinions on the understanding that the Fourteenth Amendment bars caste- and class-based legislation. Indeed, “much of the Supreme Court’s use of the Fourteenth Amendment to strike down various impermissible classifications in the 1970s, 1980s, and 1990s is also quite consistent with our view that the Fourteenth Amendment enacts a general ban on class legislation and systems of caste.”¹⁶⁷ Laws

¹⁶³ *Id.* at 62 (Harlan, J., dissenting).

¹⁶⁴ See Calabresi & Salander, *supra* note 15, at 998 (citing *Skinner v. Oklahoma* ex rel. Williamson, 316 U.S. 535, 537–41 (1942)).

¹⁶⁵ *Id.*

¹⁶⁶ *Skinner*, 316 U.S. at 541–43.

¹⁶⁷ See Calabresi & Salander, *supra* note 15, at 1002.

that discriminate on the basis of national origin, gender,¹⁶⁸ illegitimacy,¹⁶⁹ and physical disability¹⁷⁰ “constitut[e] a caste system because these groups are defined in part by heredity or by immutable characteristics.”¹⁷¹ Sexual orientation is another immutable characteristic.¹⁷² As a result, laws that ban same-sex marriage thrust LGBTQ couples into a state of second-class citizenship, thereby undermining their Fourteenth Amendment right to be treated equally under the law.

In this sense, the Supreme Court has continuously—throughout American history—upheld the view that the Fourteenth Amendment bars caste- and class-based legislation, especially insofar as those laws explicitly or facially target certain groups.¹⁷³ Given the fact that laws banning same-sex marriage do explicitly single out LGBTQ individuals, and strip them of a privilege granted to heterosexual couples, this represents a fundamental violation of their right to equality, thereby violating the Fourteenth Amendment. Supreme Court precedent supports such a view. In the end, then, relevant case law upholds our interpretation of the Fourteenth Amendment as enacting a general ban on caste- and class-based legislation.

However, “we recognize that interpreting the Fourteenth Amendment to include a broad ban on all class legislation is to adopt an approach to the Amendment’s anti-discrimination clause that is

¹⁶⁸ *Craig v. Boren*, 429 U.S. 190, 210 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973). *See also* *United States v. Virginia*, 518 U.S. 515, 554–57 (1996).

¹⁶⁹ *Trimble v. Gordon*, 430 U.S. 762, 776 (1977); *Gomez v. Perez*, 409 U.S. 535, 537–38 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972).

¹⁷⁰ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985) (holding that denial of zoning permit to home for mentally retarded individuals failed rational basis test under the Equal Protection Clause). *But see id.* at 473 (Marshall, J., dissenting in part and concurring in the judgment in part) (arguing that mentally retarded individuals should be considered a suspect class due to history of discrimination and strict scrutiny analysis should apply).

¹⁷¹ *See Calabresi & Salander*, *supra* note 15, at 1002.

¹⁷² *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 320–26 (D. Conn. 2012).

¹⁷³ *See Calabresi & Salander*, *supra* note 15, at 1002. *See also Craig*, 429 U.S. at 210; *Frontiero*, 411 U.S. at 690–91; *Virginia*, 518 U.S. at 554–57; *Trimble*, 430 U.S. at 777; *Gomez*, 409 U.S. at 537–38; *Weber*, 406 U.S. at 175–76; *City of Cleburne*, 473 U.S. at 448, 450.

inconsistent with the legendary discussion in *Carolene Products* Footnote Four.”¹⁷⁴ Within that footnote, “the Supreme court indicated that the Fourteenth Amendment’s anti-discrimination command”¹⁷⁵ only protects “discrete and insular minorities.”¹⁷⁶ This “implies a narrow reading of the Fourteenth Amendment, under which the Amendment’s anti-discrimination command would not apply to women or other majority victims of class legislation.”¹⁷⁷ Notably, however, “the Supreme Court has rejected” this approach in recent years,¹⁷⁸ and “the Court has decided many recent Fourteenth Amendment cases without even citing the *Carolene Products*”¹⁷⁹ discrete and insular minorities test.¹⁸⁰ In this sense, recent precedent shows the Supreme Court moving away from this limited view of the Fourteenth Amendment.

At the same time, there is no reason to think that the decision in *Carolene Products* is inconsistent with the view that the Fourteenth Amendment acts as a general ban against class legislation and systems of caste. Professor Calabresi articulated this argument well in an earlier article, wherein he argued that:

[T]he holding in *Carolene Products* is consistent with the notion that the Fourteenth Amendment bans class legislation generally. In *Carolene Products*, Congress prohibited shipments of a certain kind of imitation milk which it found could be “injurious to the public health, and its sale constitutes a fraud on

¹⁷⁴ See Calabresi & Salander, *supra* note 15, at 1004.

¹⁷⁵ *Id.*

¹⁷⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

¹⁷⁷ See Calabresi & Salander, *supra* note 15, at 1004.

¹⁷⁸ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 592–93 (2009) (striking down discrimination against whites); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 747 (2007) (applying strict scrutiny to an affirmative action program and striking down the program); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (limiting an affirmative action program); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (striking down an affirmative action program).

¹⁷⁹ See Calabresi & Salander, *supra* note 15, at 1004.

¹⁸⁰ See, e.g., *Ricci*, 557 U.S. at 593; *Romer v. Evans*, 517 U.S. 620, 635 (1995); *Trimble*, 430 U.S. at 776; *Craig*, 29 U.S. at 208–09; *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

the public.” The law thus singled out sellers of imitation milk for a special burden, but it did so under a public purpose justification—public health concerns and protecting the public from fraud. Those are sufficient justifications for upholding the law; the Supreme Court was right in the *Carolene Products* case itself.¹⁸¹

In this vein, it seems that relevant Supreme Court precedent upholds our interpretation of the Fourteenth Amendment as instituting a general ban on class legislation and systems of caste in the United States.

Moreover, there is reason to believe that even if the Court was forced to apply the discrete and insular minorities test from Footnote Four of the *Carolene Products* decision, the Justices would still conclude that laws disproportionately targeting LGBTQ individuals ought to count as unconstitutional under “more exacting judicial scrutiny.”¹⁸² When determining whether or not a minority group counts as discrete and insular, one must assess whether or not the minority group is politically powerless or otherwise lacking in political power.¹⁸³ According to a judge on the Northern District Court of California, LGBTQ people “are a minority of the population in the United States” and represent a discrete and insular minority because “despite the modest successes in remediating existing discrimination, the record demonstrates that gay men and lesbians continue to suffer discrimination” that is “unlikely to be rectified by legislative means.”¹⁸⁴ As such, the Court found “that the unequivocal evidence demonstrates that, although not completely politically powerless, the gay and lesbian community lacks meaningful political power.”¹⁸⁵ As such, even if the Court were forced to utilize the discrete and insular minorities test, laws enacting bans on same-sex marriage would still count as unconstitutional because they dispro-

¹⁸¹ See Calabresi & Salander, *supra* note 15, at 1004–05 (internal citations omitted).

¹⁸² *Id.* at 1005. See also *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁸³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁸⁴ *Karen Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 988–89 (N.D. Cal. 2012).

¹⁸⁵ *Id.* at 989.

portionately discriminate against gays and lesbians, a group of people that seems to clearly represent a discrete and insular minority in the United States. Thus, Supreme Court precedent backs our interpretation of the Fourteenth Amendment as barring caste- and class-based legislation.

In addition to Supreme Court precedent, “opposition to class legislation and the need for generality in lawmaking were expressed in state court decisions throughout the country in the period from the 1820s to the 1860s.”¹⁸⁶ In 1824, the Maine Supreme Court stated, “it can never be within the bounds of legitimate legislation to enact a special law . . . granting a privilege and indulgence to one man” that is not granted “to all other persons.”¹⁸⁷ Rather, laws ought to be “prescribed for the benefit and regulation of the whole community,” given the fact that each and every individual has “an equal right” to his or her “protection” under the law.¹⁸⁸ In the same vein, the Pennsylvania Supreme Court argued in 1851 that “general laws are enacted, which bear . . . on the whole community,” and “if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal.”¹⁸⁹ In this sense, state courts have also upheld the notion that the Fourteenth Amendment bars caste- and class-based legislation.

Similarly, the Tennessee Supreme Court also embraced this interpretation of the Fourteenth Amendment within its own state constitution. In 1844, the Tennessee Supreme Court “ruled that a law that allowed trustees of a particular trust to receive a donation made to an unincorporated association was void because of the constitutional requirement that legislators may not suspend a general law for the benefit of particular individuals.”¹⁹⁰ Its constitution said that:

the legislature shall have no power to pass any law, for the benefit of individuals, inconsistent with the general laws of the land, nor to pass any law granting

¹⁸⁶ See Calabresi & Leibowitz, *supra* note 63, at 1031.

¹⁸⁷ See Saunders, *supra* note 106, at 253 n.34 (discussing the protection of equal rights for all groups of citizens) (quoting *Lewis v. Webb*, 3 Me. 326, 335–36 (1825)).

¹⁸⁸ *Id.* at 253–54.

¹⁸⁹ *Id.* at 255 (quoting *Ervine’s Appeal*, 16 Pa. 256, 268 (1851)) (showing how general laws are used to safeguard people against oppression).

¹⁹⁰ See Calabresi & Leibowitz, *supra* note 63, at 1032.

to any individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of this law.¹⁹¹

This case, based on the underlying tenets of the Fourteenth Amendment, upholds the idea that laws ought not to target certain groups and strip them of privileges and benefits doled out to the rest of society. In this sense, the Tennessee Supreme Court upheld the view of the Fourteenth Amendment espoused within this piece.

Likewise, in an 1859 Ohio Supreme Court case, the dissent argued against a law that established “separate schools for colored children.”¹⁹² On the subject of caste-based legislation, the dissent argued that it is:

[T]he inveterate vice of absolute governments, and is inconsistent with the theory and spirit of a free and popular government like ours; asserting in its bill of rights the equality of all men. A free government like ours must be presumed, so far as practicable, to avoid class legislation; and rather to trust and favor the natural liberty and right of individuals to form and regulate their own social circles and classification according to their respective predilections and prejudices.¹⁹³

Ultimately, the judge concluded that “it seems to me alike unwise and wholly out of character with the progress, the general intelligence, and liberality of the age at this time—more than ten years after the repeal of the ‘black laws,’ . . . to give an extent and effect to those disabling statutes.”¹⁹⁴ Here, we see another example of judges at the state level upholding the concept that the laws ought to apply fairly to everyone and that they ought not strip certain groups of benefits that the rest of the community enjoys. In the end then,

¹⁹¹ *Id.*; TENN. CONST. art. XI, § 7.

¹⁹² ENOS Van Camp v. Bd. of Educ. of the Inc. Vill. of Logan, 9 Ohio St. 406, 416 (1859) (Sutliff, J., dissenting).

¹⁹³ *Id.* at 415.

¹⁹⁴ See Calabresi & Leibowitz, *supra* note 63, at 1033.

this view of the Fourteenth Amendment was widespread at the time of the passage of the Fourteenth Amendment, at both the state and national levels.

Finally, the Fourteenth Amendment not only guarantees all “persons” the equal protection of the laws, but it also guarantees all “persons” due process of the law. No one thinks that the word “person” in the Due Process Clause applies only to racial minorities and not to women, as well as to white men, so why would not the very same word—“person”—mean the same thing in the Equal Protection context? Nor would those of us who would resurrect the Privileges or Immunities Clause of the Fourteenth Amendment think that women, as well as men, are not citizens of the United States.¹⁹⁵

Once we examine the original meaning of the Fourteenth and Nineteenth Amendments in relation to each other, then we are led ineluctably to the conclusion that the Fourteenth Amendment bans not only the Black Codes, but also other similar systems of caste- or class-based legislation. When the Nineteenth Amendment was ratified in 1920, any logical synthesis of these two Amendments required that laws that discriminate on the basis of sex be seen as generally forbidden. The arc of American history has egalitarian roots that go back to seventeenth century England and New England, and the U.S. concern with improving its record as to equality has had a global reach.

II. SEXUAL ORIENTATION

The Supreme Court was right to hold in *Loving v. Virginia* that laws against interracial marriage violated the Fourteenth Amendment. Professor Calabresi has made this argument previously in a law review article co-authored with Andrea Matthews, the article entitled *Originalism and Loving v. Virginia*.¹⁹⁶ If a white person has a right to marry another white person, then under the Civil Rights Act of 1866 and the Fourteenth Amendment, citizens of every race and color have the same right. Laws that allow white people only to marry white people and African Americans only to marry African

¹⁹⁵ U.S. CONST. amend. XIV, § 1.

¹⁹⁶ See Calabresi & Matthews, *supra* note 21, at 1394 (arguing that *Loving* was “one of the great human rights triumphs of the last fifty years” and that it changed originalist thinking).

Americans discriminate on the basis of race by telling an individual of one race that he cannot marry an individual of another race.¹⁹⁷ This is, as a formal matter, race discrimination if we look at it—as we must—through the lens of an individual picking a spouse to marry.

State laws that ban same-sex marriage formally discriminate on the basis of sex in the same way that State laws that banned interracial marriage discriminated on the basis of race. Same-sex marriage laws allow a man to marry a woman, but not another man. This is, again as a formal matter, sex discrimination—plain and simple.

This argument was first made by Professor Andrew Koppelman in the *New York University Law Review*.¹⁹⁸ According to Professor Koppelman, the sex discrimination argument garnered new weight and was popularized following the Hawaiian Supreme Court decision in *Baehr v. Lewin*.¹⁹⁹ This case—decided in May of 1993—held that “a law restricting marriage to opposite-sex couples came within the scope of the prohibition on sex discrimination in the equal protection clause of the state constitution.”²⁰⁰ In other words, the Hawaiian Supreme Court was the first court to hold that prohibitions on same-sex marriage constitute a form of sex discrimination, because the laws bar an individual from marrying his or her partner on the basis of sex alone.

Professor Koppelman contends that “as a matter of definition, if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex.”²⁰¹ In other words, “if Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is

¹⁹⁷ *Id.* at 1404.

¹⁹⁸ Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 198–204 (1994) (arguing that lesbians and gay men “have suffered persecution and discrimination in much the same way blacks have” and that it is a form of oppression).

¹⁹⁹ *Id.* at 201 (discussing *Baehr v. Lewin*, 852 P.2d 44, 74 (Haw. 1993), which required a compelling state interest to avoid the abridgement of constitutional rights).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 208.

being discriminated against because of his sex.”²⁰² In this sense, it seems virtually incontrovertible that bans on same-sex marriage do not constitute a form of sex discrimination.

Sex discrimination is only permitted under *United States v. Virginia* or *Adkins v. Children’s Hospital* if the State can proffer an “exceedingly persuasive justification” for the discrimination in question, which must survive “skeptical scrutiny.”²⁰³ Given the historic roots of our national commitment to birth equality discussed in this article, State laws which ban same-sex marriage cannot meet this burden. In other words, the originalist justifications for protecting a right to same-sex marriage discussed above—namely, that anything less is a form of class or caste-based discrimination—weakens these arguments because they cannot overcome skeptical scrutiny in the face of such consistent historical opposition. In saying this, Professor Calabresi is not going to criticize the motives or the rationality of his many friends who are opposed in good faith to same-sex marriage or to a constitutional right to same-sex marriage. He understands and appreciates the arguments that some opponents of same-sex marriage have made, such as those made in the article, *What is Marriage?* authored by Sherif Girgis, Robert George, and Ryan Anderson.²⁰⁴

We approach this question after deeply studying the history of this country, the Declaration of Independence, the first state bill of rights, the Articles of Confederation, the U.S. Constitution of 1787, and, critically, the Fourteenth and Nineteenth Amendments. Professor Calabresi has had many friends, some of whom are deeply opposed to same-sex marriage and others of whom are gay and are married. Suffice it to say that we have yet to hear an exceedingly persuasive argument which will survive skeptical scrutiny as to why same-sex marriage is more threatening to heterosexual marriage

²⁰² *Id.*

²⁰³ *Id.* at 215. *See also* *United States v. Virginia*, 518 U.S. 515, 531 (1996) (noting today’s skeptical scrutiny of “action denying rights” to individuals based on their sex); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 544 (1923) (noting the exercise of judicial power involved in administering justice and discussing the rational basis test versus individual constitutional rights).

²⁰⁴ Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J. L. & PUB. POL’Y REV. 245, 250–51 (2011) (arguing that marriage is not “just a contract” and that the state has legitimate interests in recognizing only certain unions as legal marriages).

than it is to the current legal regime which allows for LGBTQ and heterosexual promiscuity, serial monogamy, polygamy, and easy, no-fault divorce. Serial monogamy, by the way, is the institution by which many Americans marry and divorce, and then they remarry, always remaining faithful at all times to those to whom they are then married. It goes without saying, we should think, that in some respects, serial monogamy is a lot like polygamy, which Professor Calabresi opposes because it arguably leads to sex discrimination.

Even aside from the fact that sexual orientation discrimination is a form of sex discrimination, it is also itself a creature of caste, which is forbidden by the Fourteenth Amendment. As discussed above, any legislation that treats one group as inherently lesser or inferior to other groups is suspect under the Fourteenth Amendment, because the Fourteenth Amendment calls for equality between groups. We argue that discrimination against gay people, lesbians, and transgender people leads to members of these groups being treated as outcasts. For example, a mark of caste is limits on intermarriage, which is why the bans on same-sex marriage are suspect and unconstitutional.

Insofar as the Fourteenth Amendment bars the creation of caste- or class-based legislation, then it also bars the creation of anti-LGBTQ legislation that aims to limit the rights of gay and lesbian couples from marrying one another. Indeed, LGBTQ rights organizations often decry policies limiting gay and lesbian marriage, against the opposition of religious groups, on the basis that these policies create a form of “second-class citizenship.”²⁰⁵ Indeed, “these advocates for same-sex marriage also argue that lack of access to marriage constitutes unequal status as citizens, and that this denial of full citizenship is tantamount to denigration of gay, lesbian, and bisexual [and transgender] identity.”²⁰⁶

In our view, there are several reasons as to why denying LGBTQ couples the right to marry forces them into a state of second-rate citizenships, thereby violating the Fourteenth Amendment. This can

²⁰⁵ Kyle Luebke, *Gay Groups Make Religious Individuals Feel Like ‘Second Class Citizens,’* LGBTQ NATION (Aug. 28, 2011), <http://www.lgbtqnation.com/2011/08/gay-groups-make-religious-individuals-feel-like-second-class-citizens/>.

²⁰⁶ Jyi Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERS. ON POL. 269, 273 (2005).

be seen, first and most simply, in the practical benefits of marriage that are denied to LGBTQ people. First, and most simply, marriage extends to couples a considerable assortment of benefits. Married couples can file their taxes jointly and have a combined income, which can help reduce the couple's tax burden in any given fiscal year and makes the couple more appealing to lenders.²⁰⁷ Married couples also qualify for an estate tax marital deduction and a gift tax marital deduction, offering married couples significant financial savings year after year.²⁰⁸ On top of that, married couples can receive survivor's benefits from their deceased partner's pension plan, can receive spousal Social Security, Medicare, or disability benefits, and can receive veterans' and military benefits from their spouses, such as benefits for education or medical care.²⁰⁹ Moreover, one spouse can inherit a share of the other spouse's estate when he or she passes away, and he or she can receive an exemption from both estate taxes and gift taxes for all property that is left to the surviving spouse.²¹⁰ In this sense, there are a plethora of economic benefits that an individual garners when entering into a marriage.

There are also health benefits to marriage. Numerous psychological and sociological studies have proven that married couples tend to have better health outcomes, both mentally and physically, than their unmarried peers.²¹¹ Indeed, a "large body of research links marriage with a lower risk of developing cancer, having a heart attack and being diagnosed with dementia and various diseases."²¹² It seems, then, that marriage not only grants individuals significant economic benefits, but also is capable of improving their overall health—both emotionally and physically.

²⁰⁷ Kate Ashford, *11 Things You Never Thought Of When You Decided Not To Get Married* (Sep. 26, 2014), <http://www.forbes.com/sites/kateashford/2014/09/26/deciding-not-to-get-married/>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*; Lina Guillen, *Marriage Rights and Benefits*, NOLO LAW FOR ALL (2015), <http://www.nolo.com/legal-encyclopedia/marriage-rights-benefits-30190.html>.

²¹⁰ Ashford, *supra* note 207.

²¹¹ Shelley Emling, *A Happy Marriage Leads To Better Health, Study Finds*, THE HUFFINGTON POST (Feb. 20, 2013), http://www.huffingtonpost.com/2013/02/14/married-couples-healthier-than-singles-study_n_2686051.html.

²¹² *Id.*

Moreover, the institution of marriage affords married couples rights that are not extended to non-married couples. Namely, “[m]arriage establishes the right to a realm of privacy – a right not accorded to those who do not or may not marry.”²¹³ For instance, marriage “creates a right to private sexual relations” while also extending to married couples the right to keep their conversations private, even from the court of law.²¹⁴ Thus, laws banning same-sex marriage deny same-sex couples the privacy rights that are afforded to opposite-sex couples.

Denying these benefits to LGBTQ couples definitionally forces them into a form of second-class citizenship. As stated above, LGBTQ couples lose out on the economic benefits, health benefits, and legal benefits that straight couples can acquire, simply by virtue of the fact that they share the same sex. On face, it seems that excluding LGBTQ people from garnering these benefits shows that they are treated as lesser citizens than traditional heterosexual couples, inherently subjugating them into a lower class of citizenship. Indeed, “these harms create legal and social instability for sexual-minority families in nearly every aspect of daily living, and they are central reasons LGBT families seek the legal recognition of marriage.”²¹⁵ As such, we argue that laws barring LGBTQ couples from entering into marriage are unconstitutional, as they violate the Fourteenth Amendment by creating a form of caste.

Additionally, gay and lesbian couples often feel stigmatized and socially relegated to a lesser, second-class form of citizenship as a direct result of the bans against same-sex marriage.²¹⁶ Marriage can often be a transformative event in one’s life, and has been treated as a major and valuable life experience for humans throughout time. Children are often raised to perceive marriage as an important landmark in their life that they ought to look forward to. Not unlike their straight counterparts, LGBTQ couples often place value on the tradition of marriage, and these people likely grew up envisioning the moment in which they would walk down the aisle and marry the love of their life. Denying same-sex couples the right to engage in this culturally-valued tradition inherently treats them as lesser, and

²¹³ Josephson, *supra* note 206, at 270.

²¹⁴ *Id.*

²¹⁵ *Id.* at 273.

²¹⁶ See Luebke, *supra* note 205.

banishes them to a form of second-class citizenship. Here, bans on same-sex marriage not only violate the Fourteenth Amendment because they deny same-sex couples access to economic and health benefits, but they also deny same-sex couples access to an important, transformative life event. The quest for marriage rights, then, represents “an effort” on the part of LGBTQ activists “to secure the social conditions of human flourishing on equal terms with straight citizens.”²¹⁷

At the same time, laws banning same-sex marriage appear to “enlist” LGBTQ persons “in the enterprise” of relegating themselves to a form of second-class citizenship.²¹⁸ For example, Professor Dorf contends that:

Questions of marital status arise not only in interactions with the government but in social settings: registering children for school, bringing a partner to the hospital, at professional gatherings, and so forth. Every time the members of a same-sex couple that wish to be married but are denied that opportunity under state law answer “no” to the question of whether they are married, they participate in their own oppression. Even apart from the tangible consequences that may result, such denials must surely sting - all the worse so because the wounds will be experienced as partly self-inflicted.²¹⁹

In this sense, laws that ban same-sex marriage not only oppress LGBTQ individuals by forcing them into a form of second-class citizenship through the denial of benefits, but they also force LGBTQ persons to participate in their own oppression. Clearly, then, laws banning same-sex marriage violate the original public meaning of the Fourteenth Amendment.

Further, this view of the relationship between marriage and citizenship has been utilized in recent court decisions. For example, the

²¹⁷ Josephson, *supra* note 206, at 273.

²¹⁸ Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1308 (2011).

²¹⁹ *Id.* at 1308–09.

2003 majority opinion of the Massachusetts Supreme Court explicitly “made this connection between marriage and citizenship,”²²⁰ arguing that

[t]he Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens . . . [t]he dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous . . . It is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.²²¹

By extension, precedent supports the view that laws banning same-sex marriage violate the Fourteenth Amendment by forcing LGBTQ persons into a form of second-class citizenship.

In sum, the Fourteenth Amendment—when read in combination with the Nineteenth Amendment—bars the creation of caste- and class-based legislation and bars sex discrimination.

On both counts, an originalist reading of the Fourteenth Amendment would secure a right to same-sex marriage. This is because bans on same-sex marriage represent a form of sex discrimination, and bans on same-sex marriage banish LGBTQ individuals into a form of second-class citizenship, where these people are stripped of valuable benefits and are forced into a lower class of society. In this sense, an originalist reading of the Fourteenth Amendment would require the Supreme Court to defend a right to same-sex marriage. In this sense, *Obergefell* was rightly decided—though on admittedly weak originalist footing in the majority opinion—because laws that ban same-sex marriage inherently relegate same-sex couples to a lower class in society. Thus, same-sex couples deserve equal access to the right to marry, as seen within the rich history behind the Fourteenth Amendment and behind equality jurisprudence in the United States.

In the end, even aside from the equal protection doctrine, all of us are born free and equal, and with that freedom comes the right to

²²⁰ Josephson, *supra* note 206, at 270.

²²¹ *Id.* See also *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 948 (Mass. 2003).

marry any one person who we choose to marry, without regard to his or her race, sex, sexual orientation, or religion. This is the conclusion that history and the original meaning of the Fourteenth Amendment ineluctably lead to. In this sense, same-sex marriage is not merely grounded in the policy preferences of the Supreme Court or based upon other unfounded arguments. Instead, the history of the Equal Protection Clause mandates these conclusions.