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Originalism and Level of Generality

Peter J. Smith

George Washington University Law School, pjsmith@law.gwu.edu

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ORIGINALISM AND LEVEL OF GENERALITY

*Peter J. Smith**

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* Professor, George Washington University Law School. The author is grateful for thoughtful comments from Tom Colby and Orin Kerr.

I. INTRODUCTION

In concluding that the Fourteenth Amendment guarantees a right of same-sex couples to marry, Justice Kennedy's opinion for the Court in *Obergefell v. Hodges* was avowedly non-originalist in its promotion of the idea that changing societal norms can lead to the evolution of constitutional meaning.¹ But if the original meaning of the Fourteenth Amendment had been the Court's guide, would it have concluded that state bans on same-sex marriage are unconstitutional? To Justice Scalia, the answer was clear: "When the Fourteenth Amendment was ratified in 1868," he reasoned, "every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases."²

But asking how the framers of the Amendment would have answered the specific question about same-sex marriage, had it been put to them, is not the only plausible way to address the question of the Amendment's original meaning. We could instead ask whether the framers understood the Amendment to protect a fundamental right to marry, abstracting out the particular status or identity of the two people who seek to exercise the right. Or we could ask whether the Amendment would objectively have been understood to incorporate a principle prohibiting all "caste-like" discrimination,³ which in turn would necessitate consideration of whether discrimination against gays and lesbians is such a form of discrimination (which we might answer either in light of or in spite of the framers' intuitions about that question). Or we could ask whether the Amendment's original objective meaning was to mandate "equality," an objectively capacious concept that might forbid discrimination on the basis of sexual orientation today, even if it would not have in 1868.⁴

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.").

² *Id.* at 2628 (Scalia, J., dissenting).

³ See *infra* notes 169–182 and accompanying text.

⁴ See *infra* notes 172–177 and accompanying text.

Whether originalism requires the conclusion that bans on same-sex marriage violate the Fourteenth Amendment depends on which of these questions we ask. (And these questions, it turns out, are just a few of the many plausible ways to frame the inquiry.) The lower the level of generality at which we ask the question—for example, did the framers of the Fourteenth Amendment believe (or intend or expect) that the Amendment would prohibit bans on same-sex marriage—the more likely it is that the answer will be that bans on same-sex marriage are consistent with the original meaning. And the higher the level of generality at which we ask the question—for example, did the Fourteenth Amendment incorporate an “anti-caste” principle, or did the Fourteenth Amendment require “equality” more generally—the more likely it is that the answer will be that bans on same-sex marriage are inconsistent with the original meaning.

The same is true for other contested questions of constitutional law. Did the framers of the Fourteenth Amendment understand it to prohibit laws interfering with a woman’s right to use birth control or to obtain an abortion? Almost certainly not. But would a hypothetical, reasonable, well-informed person in 1868 have understood the Fourteenth Amendment to offer protection for personal autonomy in matters of family and child rearing? Likely so. And that broadly (and vaguely) defined right, when applied to specific circumstances in a modern context, might embrace (and therefore protect) the decision about whether to use contraception or to obtain an abortion. The selection of the level of generality at which we ask the question essentially foreordains the answer.⁵ We could go through this exercise for the permissibility of race-based affirmative action by state institutions;⁶ the constitutionality of restrictions on corporate expenditures designed

⁵ See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992) (“Movements in the level of constitutional generality may be used to justify almost any outcome.”).

⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“[T]he Equal Protection Clause does not prohibit the law school’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).

to influence the outcomes of elections;⁷ and countless other controversial questions of constitutional law.

It is, of course, not universally accepted that the appropriate inquiry, in determining constitutional meaning, is to seek the document's original meaning.⁸ But even if there were broad agreement that the proper way to interpret the Constitution is to seek its original meaning, constitutional questions would be heavily contested because we would have to decide whether to seek that meaning at a high level of specificity or, conversely, at a high level of generality.

Yet the Constitution does not give any clear guidance about how to decide the correct level of generality at which to read its provisions.⁹ Instead, originalists must have a theory about how to select the correct level of generality for ascertaining constitutional meaning.

The "old originalism"—that is, the original-intent originalism of Edwin Meese, Raoul Berger, and (originally) Robert Bork—tended to have such a theory, even if its proponents did not always apply it with perfect consistency.¹⁰ Notwithstanding the broad terms in which many of the Constitution's rights-granting provisions are framed, the old originalism generally sought constitutional meaning at a low level of generality.¹¹ Proponents of the old originalism contended that it was simply implausible to believe that the framers intended to authorize unelected judges to find, in the Constitution's vague and open-ended provisions, specific rights

⁷ See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 365 (2010) ("No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations.").

⁸ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) ("[O]riginalism is not, and had perhaps never been, the sole method of constitutional exegesis.").

⁹ See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices.").

¹⁰ See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (noting the prominence of the old originalism in the 1960s through the 1980s).

¹¹ See Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 352–53 (1988) (criticizing as illegitimate any effort to "read general words in disregard of the specific intention[s]"); *id.* at 351.

not explicitly mentioned in the text.¹² This approach usually resolved claims of constitutional rights against the existence of the right;¹³ if the question, after all, is whether the framers of the Fourteenth Amendment (or the Fifth Amendment) specifically intended the Constitution to protect the right of a woman to use contraception or to obtain an abortion, for example, the question pretty much answers itself.

The old originalism “was as much a normative theory of the proper judicial role as it was a semantic theory of textual interpretation.”¹⁴ Its primary professed commitment was to judicial constraint—preventing judges from imposing their personal policy preferences under the guise of interpretation—and judicial restraint—requiring judges, in most cases, to defer to legislative majorities.¹⁵ The old originalism tended to advance these goals, at least in theory, by limiting the circumstances under which judges could displace the decisions of democratically accountable actors.¹⁶ If constitutional rights are defined more narrowly, then there is less opportunity for judges to invalidate government action in the name of individual rights. And the old originalism, which erred strongly on the side of declining to find specific rights in the Constitution’s broadly worded rights-granting provisions, not surprisingly would have resulted in a more narrow range of protected rights.¹⁷

But as an approach for ascertaining constitutional meaning, the old originalism suffered from serious problems, both theoretical and practical. Given the number of potential “framers” (itself an

¹² See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 116–31 (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 180–85 (1990).

¹³ See Whittington, *supra* note 10, at 601 (“Above all, originalism was a way of explaining what the Court had done wrong, and what it had done in this context was primarily to strike down government actions in the name of individual rights.”).

¹⁴ See Whittington, *New Originalism*, *supra* note 10, at 602; Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 *CORNELL L. REV.* 101, 156–59 (2015).

¹⁵ See Colby & Smith, *supra* note 14, at 584–85 (noting old originalism’s commitment to judicial restraint and judicial deference to the legislature); Whittington, *supra* note 10, at 602 (describing old originalism’s focus on limiting judicial discretion and promoting judicial deference to the legislature).

¹⁶ See Whittington, *supra* note 10, at 602 (explaining that old originalists were “primarily concerned with empowering popular majorities”).

¹⁷ See *infra* notes 11–13 and accompanying text.

uncertain category), it is perhaps impossible to ascertain one single, collective intent, particularly when one seeks the subjective intentions of the framers;¹⁸ and, in any event, given the framers' views about interpretation, original-intent originalism likely was self-defeating.¹⁹ The old originalism was also susceptible to the charge that, by almost religiously adhering to the specific preferences of men who lived long ago, it was simply a device to impose substantively conservative values under the guise of neutral interpretation. In addition, if original intent, defined at a low level of generality, was the benchmark for constitutional meaning, then the approach not only did a poor job of explaining existing doctrine,²⁰ but also would have led, if faithfully followed, to untenable results—such as the conclusion that *Brown v. Board of Education*²¹ was incorrectly decided.²²

The “new originalism,”²³ which ostensibly is the dominant approach among originalists today, arose as a response to criticism of the old originalism. Although it is difficult to generalize, given the range of current originalist theories,²⁴ the new originalism generally eschews the subjective intent of the framers and instead seeks the original, objective meaning of the constitutional text.

¹⁸ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–22 (1980) (discussing the difficulty of pinpointing the specific intent to adopters); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 720 (2011) (“[C]ritics charged that it is often impossible to uncover a single collective intent of the Framers as a whole, insofar as different Framers were often motivated by different intentions.” (internal quotation marks omitted)).

¹⁹ See Colby, *supra* note 18, at 720 (“Critics also argued that original intent is a self-defeating philosophy. The historical evidence shows that the Framers intended for future generations *not* to interpret the Constitution according to the intent of the Framers; as such, in order to follow the intent of the Framers, one must *not* follow the intent of the Framers.”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1984) (“It is commonly assumed that the ‘interpretive intention’ of the Constitution’s framers was that the Constitution would be construed in accordance with what future interpreters could gather of the framers’ own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect.”).

²⁰ See Brest, *supra* note 18, at 223 (“Strict originalism cannot accommodate most modern decisions under the Bill of Rights of fourteenth amendment.”).

²¹ 347 U.S. 483 (1954).

²² See *infra* notes 41–63 and accompanying text.

²³ See Whittington, *supra* note 10, at 607–08 (examining new originalist theory).

²⁴ See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 256–62 (2009) (discussing the range of originalist theories).

The new originalism is based in significant part on the premise that to interpret text is, by definition, to seek the original meaning of the text.²⁵ It thus is as much a semantic theory of interpretation as it is a normative theory of the judicial role.²⁶ As such, the new originalism is not single-mindedly driven, as was the old originalism, by a commitment to judicial restraint. As Keith Whittington has explained, “[t]he new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”²⁷ In contrast to the old originalism, the “primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”²⁸ As a consequence, many new originalists have abandoned the old originalism’s refusal to acknowledge the possibility that the Constitution ought to be read at a high level of abstraction. After all, if fidelity to the original meaning of the text, rather than judicial restraint, is the operative principle, then we might have to interpret provisions that are written in objectively broad terms to have a broad sweep and application. Accordingly, new originalists do not insist that we should always seek constitutional meaning at the lowest possible level of generality, by reference to the specific expectations of the framers.

But in accepting that not every question of constitutional law can be resolved by seeking the specific understanding of the framers at the lowest possible level of generality, the new originalism creates a significant problem: once the new originalist

²⁵ See, e.g., Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1825–26 (1997) (“[T]he presumptive meaning of a [document] is its original public meaning.”).

²⁶ See, e.g., Lawrence B. Solum, *Semantic Originalism*, Ill. Pub. L. & Legal Theory Research Paper Series No. 07-24, Nov. 2008, at 30 (“What words mean is one thing; what we should do about their meaning is another.”).

²⁷ Whittington, *supra* note 10, at 609.

²⁸ *Id.* See also *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Scalia, J.) (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table,” and “it is . . . the role of th[e] Court” to enforce those rights, as originally understood, against modern legislative interference); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1562 (2012) (arguing that true originalism does “not worry about judicial restraint”).

departs from the lowest level of generality, how does she decide at which level of generality to seek constitutional meaning?

Most of the new originalists who have addressed the question have concluded that the appropriate inquiry is to seek the level of generality at which the text of a constitutional provision would have been objectively understood by the reasonable, hypothetical observer at the time that the provision was adopted.²⁹ Because many of the most contested provisions of the Constitution—including the central rights-granting clauses—are framed in broad, abstract terms, this approach inevitably should lead the originalist to seek the original meaning of those provisions at a high level of generality.³⁰ And because the original meaning at a high level of generality cannot, by itself, resolve most contested questions of constitutional law today, many new originalists have contended that we must instead engage in the process of “construction”—the creation of rules of decision that are “consistent with” the original meaning, “but not deducible from it.”³¹ On most accounts, construction necessarily requires judicial creativity to apply the Constitution’s broad commands to concrete circumstances, as it is a process that, by definition, is “outside the

²⁹ See, e.g., Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 488 (2007) (“But if what matters to us is the original meaning of the text, then the principles underlying the constitutional text should be as general as the text itself.”); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 644 (1999) (“[D]etermining original meanings entails determining the level of generality with which a particular term was used.”); Randy E. Barnett, *Scalia’s Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7, 23 (2006) (“[O]riginal public meaning originalism attempts to identify the level of generality in which the Constitution is objectively expressed.”); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1280 (1997) (“A genuine commitment to the semantic intentions of the Framers requires the interpreter to seek the level of generality at which the particular language was understood by the its Framers.”).

³⁰ See McConnell, *supra* note 29, at 1281 (“It is perfectly possible that . . . the interpreter would discover that some provisions of the Constitution were understood at a high level of generality . . .”); Whittington, *supra* note 10, at 611 (noting that the founders may have intended abstract principles that left discretion to future decision makers).

³¹ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 121 (2004) [hereinafter BARNETT, RESTORING]; see also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 265 (2005) [hereinafter Barnett, *Trumping Precedent*].

domain of originalism as a theory of constitutional interpretation.”³²

The new originalism addresses many of the theoretical flaws of the old originalism, but only by creating the very problem that the old originalism was designed to address. The old originalism purported to prevent the unconstrained judicial creativity that can follow from seeking the original meaning of the Constitution’s provisions at a high level of generality. But because many new originalists recognize that many of the Constitution’s most important provisions should be understood at a high level of generality, and approve of the process of judicial construction to apply those general, abstract principles to concrete cases, there is significant room for instrumental decision making.³³ In addition, if we faithfully apply this approach—ascertaining the broad principles that underlie the constitutional text and then seeking to apply them to problems today, often in ways that the framers

³² Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 967 (2009); see BARNETT, RESTORING, *supra* note 31, at 121 (“[C]onstitutional construction can be constrained by original meaning while not entirely determined by it”); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013) [hereinafter Solum, *Construction*] (discussing the difference between interpretation and construction); *infra* notes 248–254 and accompanying text. Though most new originalists seem to acknowledge the need for construction, not all originalists writing today agree with this modification to the old originalism. See generally John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737 [hereinafter McGinnis & Rappaport, *Abstract Meaning*] (criticizing those who conclude that possibly abstract language has an abstract meaning without sufficiently considering the alternative possibilities); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) (advocating a theory of constitutional interpretation based on the interpretive principles of the framers). See also Larry Alexander, *Simple-Minded Originalism* (UNIV. OF SAN DIEGO SCH. OF L. LEGAL STUDIES RESEARCH PAPER SERIES, Paper No. 08-0671 (2008) (“[G]iven what we accept as legally authoritative, the proper way to interpret the Constitution . . . is to seek its authors’ intended meanings. . . .”); Steven D. Smith, *That Old-Time Originalism*, in THE CHALLENGE OF ORIGINALISM 223 (2011) (Grant Hushcraft & Bradley W. Miller eds.) (attempting a defense of old originalism). In addition, although Keith Whittington acknowledges the need for construction, he argues that it should not be conceived as a task for the judiciary. See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 204–06 (1999).

³³ See Colby, *supra* note 18, at 752–64 (arguing that new originalism does not constrain judicial decision making); Colby & Smith, *supra* note 24, at 305 (“[O]riginalists’ claims that originalism is likely to be overwhelmingly better than its alternatives at constraining judicial discretion are substantially overblown.”).

could not have anticipated—then there is no obvious distinction between originalism and non-originalism.³⁴

Perhaps more important, it is fair to wonder whether this approach has been consistently and conscientiously followed; originalists often seem to vary the level of generality at which they seek constitutional meaning in a way that cannot be explained simply by reference to the level of generality at which the constitutional text is expressed. Indeed, in practice the decision appears ad hoc, largely unconstrained, and thus susceptible to the same kind of results-oriented decision-making that originalists have long decried. The choice of the level of generality at which to seek constitutional meaning—by academic originalists and, perhaps more troubling, by judges purporting to follow an originalist approach—varies from issue to issue and case to case, often with no neutral principle to explain the choice. The problem of the level of generality, in other words, has in practice undermined the core originalist claim that it is a neutral approach that effectively constrains the interpreter.

To be fair, this is not a problem that is unique to originalists; non-originalists have also long grappled with the problem of selecting a level of generality and the risk that doing so will simply be a guise to produce desired results.³⁵ The problem of the level of generality in textual interpretation will be with us for as long as we use words to capture complex ideas, with the hope that they will apply to new and unforeseen circumstances. But it might pose a particular problem for proponents of the new originalism, who

³⁴ See Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 707 (2011).

³⁵ See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131–49 (1977) (discussing the varying approaches to interpreting vague constitutional provisions); Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 318 (1992) (noting that the Court is eager to interpret the power-granting provisions of the Constitution at a high level of abstraction while interpreting rights-granting provisions narrowly); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091 (1981) (arguing that Bork's adoption of a principle in interpreting the Equal Protection Clause demands an arbitrary choice among levels of abstraction); Brest, *supra* note 18, at 217 (“The extent to which a clause may be properly interpreted to reach outcomes different from those actually contemplated by the adopters depends on the relationship between a general principle and its exemplary applications.”); Tribe & Dorf, *supra* note 9, at 1058 (“The selection of a level of generality necessarily involves value choices.”).

maintain, as did proponents of the old originalism, that their approach is the only genuinely objective and neutral approach to constitutional interpretation.³⁶ To the extent that both the appeal and the normative justification for originalism lies in such claims, the new originalism's willingness to permit judges to seek the original meaning at a high level of generality risks significantly undermining both the appeal and the justification for the approach.

The problem of the level of generality is central to the challenge that faces the new originalism, and central to understanding why originalism cannot fulfill its promise to provide a genuinely neutral approach to constitutional interpretation that largely avoids the pitfalls of judicial subjectivity that are thought to infect non-originalist approaches to interpretation.³⁷ My objective in this Essay is to demonstrate just how intractable the problem is. The problem is not simply theoretical; it is practical, as the choice of level of generality is an essential predicate to any effort to assign meaning to the constitutional text. Accordingly, in this Essay, I demonstrate the practical problem by providing examples of efforts by originalists—both new, old, and in-between—to select the level of generality when seeking to answer concrete questions of constitutional law.

I do not seek to provide a comprehensive survey of the role that the level of generality plays in the use and treatment of originalism by judges and scholars. Such an effort would be daunting; originalism has played a more prominent role in Supreme Court decision making in recent years, largely because of the influence of Justice Scalia, and there has been an explosion in scholarship about originalism and scholarship seeking to apply

³⁶ See Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY* (2005)) (arguing that “in principle” originalism “supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance,” whereas “constitutional interpretation based on the judge’s own assessment of worthy purposes and propitious consequences lacks that objectivity”); accord Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y 283, 286 (1996) (“Originalists tend to ground their arguments primarily on a foundation of legitimacy.”).

³⁷ See David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1163 (2012) (“If we are allowed to change the level of generality at which we characterize the original understandings, then originalism can justify anything.”).

originalist methods to specific questions of constitutional law. My goal is more modest: to provide enough examples, from judges and scholars professing to engage in an originalist inquiry, to make clear that the selection of the level of generality is essential to constitutional interpretation, yet largely unguided by any coherent and neutral theory of selection. As it turns out, it doesn't require very many examples to make the case.

II. THE PROBLEM OF *BROWN*

I start with a doozy—originalists' treatment of the Court's decision in *Brown v. Board of Education*.³⁸ I begin with *Brown* not because it is a typical case (far from it), but rather because it frames perfectly the conundrum that originalists face in selecting the appropriate level of generality at which to seek constitutional meaning. The conventional view among legal historians has long been that *Brown* cannot be reconciled with the original understanding of the Fourteenth Amendment. The evidence for the conventional view is extensive, but for present purposes it suffices to note the broad strokes of the argument.

Before it issued its decision, the Court in *Brown* requested reargument on "the circumstances surrounding the adoption of the Fourteenth Amendment in 1868," including "consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment."³⁹ Notwithstanding the Court's conclusion that these sources were at best "inconclusive,"⁴⁰ most of the prominent legal historians—both those who self-identify as originalists⁴¹ and those who do not⁴²—who have considered the

³⁸ 347 U.S. 483 (1954).

³⁹ *Id.* at 489.

⁴⁰ *Id.*

⁴¹ See, e.g., BERGER, *supra* note 12, at 119–30 (arguing that the framers did not intend to prohibit desegregated schools); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 113 (1990) hereinafter MALTZ, CIVIL RIGHTS] ("[T]here is no evidence that the framers of the Fourteenth Amendment intended to address the problem of segregation."); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 223 (1996) [hereinafter Maltz, *Originalism*] (arguing that *Brown* cannot be justified on originalist grounds).

question have disagreed.⁴³ As did the Court in *Brown*, they have relied on the context in which the Fourteenth Amendment was drafted and ratified.

First, because the Fourteenth Amendment was proposed in part to address doubts about Congress's authority to enact the Civil Rights Act of 1866, historians have focused on the meaning of that Act to shed light on the meaning of the Amendment. An early draft of the statute included a provision prohibiting "discrimination in civil rights or immunities . . . on account of race, color, or previous condition of servitude."⁴⁴ Many members of the House and Senate objected, expressing concern that this language might be construed to require integrated schools.⁴⁵ Proponents of the civil rights provision responded by insisting that the provision would not prohibit segregation in public education. For example, Representative James Wilson, who managed the bill in the House, declared that the civil rights provision did not "mean that all citizens shall sit on the juries, or that their children shall attend

⁴² See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 360–61, 366 (1986); LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 12–13 (1991) (discussing *Brown*); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881–83 (1995) (arguing that *Brown* is not defensible on originalist grounds); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1919 (1991) ("For if Congress did not manifest an intent to outlaw segregation, where could the Court find its authority to hold segregation unconstitutional?" (internal quotation marks omitted)); see also Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) ("The history of the adoption of the fourteenth amendment, to which reargument in these [segregation] cases had been largely addressed . . . was . . . inclusive at best." (internal quotation marks omitted)).

⁴³ See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 258 n.26 (1992) (surveying the literature and concluding that "the 'original understanding' on the issue of school segregation is not genuinely in doubt"); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 951 (1995) ("Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful[.]"). McConnell nevertheless argued that *Brown* is reconcilable with the original meaning, but most historians have disagreed with his account. See *infra* notes 75–92 and accompanying text.

⁴⁴ Ronald Turner, *Was "Separate but Equal" Constitutional?: Borkian Originalism and Brown*, 4 TEMP. POL. & CIV. RTS. L. REV. 229, 238–39, 239 n.61 (1995).

⁴⁵ See Bickel, *supra* note 42, at 18–20 (quoting statements by members of Congress who objected to the Civil Rights bill).

the same schools.”⁴⁶ Such assurances, however, did not satisfy the skeptics, and Representative John Bingham responded by supporting a motion to strike the civil rights provision from the bill.⁴⁷ He explained that striking the provision would make the bill “less oppressive, and therefore less objectionable,” particularly in light of the fact that “[t]here is scarcely a State in this Union which does not, by its constitution or by its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights.”⁴⁸ There thus is ample evidence that the Civil Rights Act of 1866 did not prohibit segregated public schools—or at least that the Members of Congress who voted on the bill, both in support or in opposition, did not understand it to prohibit segregation.

Second, historians have noted that congressional proponents of the Fourteenth Amendment argued that it was designed effectively to constitutionalize the provisions of the Civil Rights Act of 1866. Indeed, Bingham, who played a central role in eliminating the civil rights provision from the Act of 1866, drafted the Fourteenth Amendment and served as its primary sponsor in the House.⁴⁹ As Alexander Bickel noted, the rights-granting Section One of the Fourteenth Amendment “became the subject of a stock generalization: it was dismissed as embodying and, in one sense for the Republicans, in another for the Democrats and Conservatives, ‘constitutionalizing’ the Civil Rights Act.”⁵⁰ Because the Act had been amended in significant part for the purpose of clarifying that it would not require integrated schools, there is strong reason to conclude that the Fourteenth Amendment likewise would have been understood to permit segregation.⁵¹

Third, at the time of the ratification of the Fourteenth Amendment, segregated schools were common, either as a matter

⁴⁶ *Id.* at 16.

⁴⁷ *See id.* at 22 (describing John Bingham’s efforts to revise the bill).

⁴⁸ *Id.* at 22–23 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1271–72 (1865)).

⁴⁹ *See id.* at 29–30, 42–43 (noting that Bingham drafted the privilege or immunities, due process, and equal protection language that appears in the Fourth Amendment).

⁵⁰ *Id.* at 58.

⁵¹ *See id.* (“The obvious conclusion . . . is that section I of the fourteenth amendment, like section I of the Civil Rights Act of 1866 . . . as originally understood, was [not] meant to apply . . . to . . . segregation.”).

of practice or legal requirement, in many Northern and Midwestern states.⁵² As Earl Maltz has noted, Republican proponents of ratification repeatedly assured voters in these states, particularly the swing states closer to the border of the old Confederacy, that Section 1 of the Fourteenth Amendment would have only a minimal impact on their states' laws.⁵³ (Indeed, this state of affairs helps to explain why even Republicans favored eliminating the civil rights provision from the Act of 1866.) It is difficult to believe that the legislatures in these states would have ratified the Amendment if it prohibited such a common (and popular) practice. As Michael Klarman has explained, the "political and social context in which the Fourteenth Amendment was drafted and ratified" makes it "inconceivable that most—indeed even very many—Americans in 1866–68 would have endorsed a constitutional amendment to forbid public school segregation."⁵⁴

Finally, most historians to have considered the question have noted that most Republicans in the 39th Congress—the same Congress that passed the Fourteenth Amendment—continued to support segregated schools in the District of Columbia.⁵⁵ Before 1862, there was no publicly supported schooling for black children in the District.⁵⁶ In that year, Congress enacted laws "initiating a system of education of colored children,"⁵⁷ financed by a special tax on property "owned by persons of color."⁵⁸ In 1864, Congress changed the funding mechanism for the schools for black children

⁵² See Klarman, *supra* note 42, at 1885–90 (demonstrating how little support for desegregation existed in the United States at that time); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991) (noting that "twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools").

⁵³ Maltz, *Originalism*, *supra* note 41, at 228–29 (noting that in order to appeal to swing state voters, Republicans assured voters that Section 1 would only minimally impact Northern states).

⁵⁴ Klarman, *supra* note 42, at 1884.

⁵⁵ See, e.g., Maltz, *Originalism*, *supra* note 41, at 229 ("[C]ontemporaneously with the Fourteenth Amendment, the same Republicans continued to support the segregated school system in the District of Columbia.").

⁵⁶ McConnell, *supra* note 43, at 977.

⁵⁷ Act of May 20, 1862, ch. 77, § 35, 12 Stat. 394, 402.

⁵⁸ Act of May 21, 1862, ch. 83, § 1, 12 Stat. 407.

but apparently kept intact the structure of separate schools.⁵⁹ In 1866, the same year that Congress approved the Fourteenth Amendment, Congress appropriated money for the two separate school systems, without questioning whether the system of segregated schooling was problematic.⁶⁰ In addition, in 1871 and 1872, Congress debated bills that would have ended the practice of segregated schools in the District, but they all failed.⁶¹ (Anyone watching the Senate's deliberation on these bills would have sat, as Raoul Berger has noted, in a segregated gallery.)⁶²

Of course, because the Fourteenth Amendment directly constrained only state, and not congressional, power, Congress's apparent contemporaneous support for segregated schools in the District does not dispositively reveal Congress's understanding of the "perceived dictates" of the Equal Protection Clause.⁶³ But it nevertheless is powerful evidence that the same Members of Congress who passed the Fourteenth Amendment—and used it as a virtual campaign platform in 1866⁶⁴—did not view integrated schools as essential to the vision of civil rights that they sought to instantiate by passage of the Amendment.

As a consequence, the conventional view has long been that *Brown* cannot be justified on originalist grounds.⁶⁵ The Court itself did not seem to believe that the original understanding of how the Fourteenth Amendment would apply to the question of racially segregated schools was, or ought to be, dispositive.⁶⁶ The

⁵⁹ See McConnell, *supra* note 43, at 977–78 (noting that in 1864 Congress abolished the special tax while assuming that the schools would remain segregated).

⁶⁰ See Act of July 28, 1866, ch. 296, 14 Stat. 310, 316 (appropriating funds for various civil expenses, including schools); Act of July 28, 1866, ch. 308, 14 Stat. 343 (granting land for colored schools within the district). Congress did not seriously debate either bill.

⁶¹ See McConnell, *supra* note 43, at 978–80 (discussing the various failed efforts to desegregate the school systems).

⁶² See BERGER, *supra* note 12, at 125.

⁶³ McConnell, *supra* note 43, at 980.

⁶⁴ See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 58 (1988) (discussing the passage of the Fourteenth Amendment).

⁶⁵ See McConnell, *supra* note 43, at 952 (“In the fractured discipline of constitutional law, there is something very close to a consensus that *Brown* was inconsistent with the original understanding of the Fourteenth Amendment, except perhaps at an extremely high and indeterminate level of abstraction.”).

⁶⁶ *Brown v. Board of Education*, 347 U.S. 483, 492 (1954) (“In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . .”).

Court declared that, in approaching the problem, “we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”⁶⁷ And even scholars, such as Alexander Bickel, who strongly supported the outcome in *Brown* struggled to justify the decision’s rather obvious departure from the original understanding of the Fourteenth Amendment.⁶⁸ Indeed, an entire generation of constitutional law theorists came of age seeking to justify *Brown*—and the Court’s willingness to invalidate the policies at issue in the case—*notwithstanding the fact* that the decision could not seek refuge in the original meaning of the Constitution.⁶⁹

Raoul Berger, one of the founding fathers of the modern originalist movement, agreed that the result in *Brown* was inconsistent with the original intent of the Fourteenth Amendment, and as a consequence he argued that the Court’s decision—*notwithstanding the moral and normative appeal of the outcome*—was incorrect and illegitimate.⁷⁰ Berger relied on much of the same evidence described above,⁷¹ and he concluded that “the framers had no intention of striking down segregation.”⁷² Berger’s approach was characteristic of the old originalism: it focused on the subjective intent of the framers (in this case, the framers of the Fourteenth Amendment), and it paid special attention to how the framers would have expected the text to apply to the particular

⁶⁷ *Id.* at 492. See also McConnell, *supra* note 43, at 949 (stating that the opinion in *Brown* was an “explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution’s text, history, and interpretive tradition—not on considerations of modern social policy”).

⁶⁸ See Bickel, *supra* note 42, at 4, 65 (noting the “embarrassment of going counter to . . . the original understanding”).

⁶⁹ See, e.g., Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1537 (2004) (“Most law professors agree that any serious normative theory of constitutional interpretation must be consistent with *Brown v. Board of Education* and show why the case was correctly decided.” (internal footnotes omitted)); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26 (1959) (describing the desegregation decisions as posing “the hardest test of my belief in principled adjudication”). See generally Colby & Smith, *supra* note 14 (discussing liberals’ attempts to justify *Brown*).

⁷⁰ BERGER, *supra* note 12, at 117–33, 241–45.

⁷¹ *Id.* at 117–33 (detailing the history of the Civil Rights Act and its connection to the Equal Protection Clause).

⁷² *Id.* at 125.

question at issue. For Berger, the question was not whether the result in *Brown* was desirable; it was, instead, whether the result was consistent with the original intent.⁷³ Because it was not, Berger concluded, *Brown* was wrong.⁷⁴

But this view, though consistent with the form of original-intent originalism for which Berger advocated, was a tough sell. By the late 1970s and early 1980s, when the modern originalist movement was gaining steam, *Brown* was deeply entrenched in our legal, political, and cultural norms. Advancing an approach to constitutional interpretation that maintained that *Brown* was wrong was not a particularly effective recipe for attracting new adherents to the cause. As Michael McConnell observed, “[s]uch is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”⁷⁵ Indeed, “what once was seen as a weakness” in the decision—the fact that it cannot be squared with the original understanding of the Fourteenth Amendment—had become “a mighty weapon against the proposition that the Constitution should be interpreted as it was understood by the people who framed and ratified it.”⁷⁶

McConnell, who Keith Whittington referred to as “undoubtedly the most prominent new originalist,”⁷⁷ thus sought to construct an originalist argument in favor of *Brown*.⁷⁸ He acknowledged there have been “remarkably few exceptions” to the historical consensus

⁷³ See *id.* at 133 (noting that whether a law achieves a moral or public good is not the same as whether the law is constitutional).

⁷⁴ See *id.* at 245 (“[Chief Justice Warren] did not merely ‘shape’ the law, he upended it . . .”).

⁷⁵ McConnell, *supra* note 43, at 952; accord Balkin, *supra* note 69, at 1537 (“[A]lmost every serious constitutional theory is already consistent with [*Brown*].”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998) (“Our notions of what is canonical tell us that we have to justify *Brown* . . .”); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (“[A]ll legitimate constitutional decisions must be consistent with *Brown*’s rightness, and all credible theories of constitutional interpretation must accommodate the decision.”); BORK, *supra* note 12, at 77 (“It is not surprising that academic lawyers were unwilling to give [*Brown*] up, it had to be right. Thus, *Brown* has become the high ground of constitutional theory.”).

⁷⁶ McConnell, *supra* note 43, at 952–53.

⁷⁷ Whittington, *supra* note 10, at 608.

⁷⁸ See generally McConnell, *supra* note 43 (developing an originalist argument in favor of *Brown*).

that *Brown* was inconsistent with the original meaning.⁷⁹ But he attempted to defend *Brown* on originalist grounds by relying not on the evidence described above from 1866–1868, but instead on the views expressed during legislative debates on Senator Charles Sumner’s proposed Civil Rights Bill in the mid-1870s.⁸⁰ McConnell put dispositive weight on the fact that during those debates—which ultimately produced a law that banned racial discrimination in inns, theaters, common carriers, and other forms of public accommodation, but not in public schools—between one-half and two-thirds of both houses of Congress voted, at one point or another, in favor of school desegregation.⁸¹

McConnell acknowledged that evidence from the debates over the Civil Rights Act of 1875 “might be inferior in principle to information directly bearing on the opinions and expectations of the framers and ratifiers during deliberations over the Amendment itself,” but in his view there was substantially less evidence “concerning the latter.”⁸² His interpretive methodology thus was similar to Berger’s: he sought to ascertain “the original understanding of the meaning of the [Fourteenth] Amendment as it bears on the issue of school segregation”⁸³ and “the specific intentions and understandings of the framing generation regarding the issue of public school segregation.”⁸⁴ But in light of the ultimate failure of the legislative effort in the 1870s to ban segregation in schools—obviously a problem for the argument that the debates over the bill establish that the Fourteenth Amendment was widely understood to prohibit segregated schools⁸⁵—McConnell proposed a second “perspective” on the

⁷⁹ *Id.* at 950.

⁸⁰ *See id.* at 984–85.

⁸¹ *See id.* at 953, 985 (describing the Civil Rights Act of 1875 and noting the large number of votes in which members of Congress voiced opposition to segregated schools).

⁸² *Id.* at 984.

⁸³ *Id.*

⁸⁴ *Id.* at 1093.

⁸⁵ McConnell’s argument operated on a more subtle level, as well. He argued that even though the bills failed, they indicated that many members of Congress understood themselves to have power under Section 5 of the Fourteenth Amendment to address these matters, a power they could enjoy only if Section 1 of the Amendment reached segregation in public schools. *Id.* at 990–91. But this argument suffers from at least two problems. First, it is not clear that the members of the Reconstruction Congress had as narrow a view

question of original meaning: an inquiry that considered the “understanding” of the participants in the debates in the 1870s “of the relevant constitutional issues—the permissibility of segregation and the status of education as a civil right.”⁸⁶

McConnell then adjusted the level of generality at which he conducted this second inquiry. In a sign of the evolution of originalist theory, McConnell declared that “[i]t is widely agreed among originalists that the intentions or understandings of the framers regarding a specific issue, while informative, are not ultimately authoritative, for it is their understanding of the constitutional principles embodied in the constitutional provision—not their analysis of a particular legal phenomenon—that is controlling.”⁸⁷ Accordingly, he also sought to determine the views of the participants in the congressional debates in the 1870s on whether “separation by race [is] inconsistent with the requirement of equality,” and whether “the equality requirement of the Fourteenth Amendment [applies] to public education.”⁸⁸ Although “the collective judgment of the Congress in 1875 seemed to be ‘yes’ to the first question and ‘no’ to the second,”⁸⁹ McConnell suggested that by the mid-twentieth century, education’s status as a civil right was sufficiently well settled to bring education within the reach of the principle that the Amendment’s framers had enacted.⁹⁰

Even this inquiry was addressed to determining the views of the framers of the Fourteenth Amendment on the particular question of whether the Fourteenth Amendment prohibited racially segregated schools. Although McConnell concluded that the result in *Brown* was consistent with the Amendment’s original understanding, he was swimming strongly against the historical

of the Section 5 power as modern doctrine suggests. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 527–28 (1997) (rejecting the view that Congress has power under Section 5 to “enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment”). Second, the fact that the legislative efforts in the 1870s to prohibit racial segregation in schools failed undermines the claim that there was a broad consensus in favor of the view that Section 1 prohibited such segregation.

⁸⁶ McConnell, *supra* note 43, at 1093.

⁸⁷ *Id.* at 1101.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See id.* at 1103–04 (explaining that by 1954, public education had become a civil right).

tide, and in particular the powerful evidence, described above, that most of the participants in the actual debate over the adoption and ratification of the Fourteenth Amendment—and, perhaps more important, most of the people of the time—appeared to have understood the Amendment to permit racially segregated schools.⁹¹ Indeed, the weight of opinion about McConnell’s article is that it was an impressive and sincere effort that nevertheless fell short of demonstrating that the original meaning of the Fourteenth Amendment prohibited racial segregation in public schools.⁹²

Justifying *Brown* on originalist grounds thus would take more than a careful historical effort to uncover the specific views of the framers of the Amendment. As McConnell seemed to understand, to justify *Brown* we must consider the original meaning at a higher level of generality. Consider the views of Robert Bork, one of the founding fathers of the modern originalist movement. Bork did not ignore the historical evidence described above of views about segregation’s status under the Fourteenth Amendment; to the contrary, he acknowledged that “[t]he inescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life.”⁹³ Bork thus accepted that the framers of the Amendment “assumed that equality and state-compelled separation of the races were consistent.”⁹⁴

But Bork nevertheless contended that the result in *Brown* was consistent with the “original understanding of the equal protection clause.”⁹⁵ In his view, although “[t]he ratifiers probably assumed that segregation was consistent with equality,” they “were not

⁹¹ See Klarman, *supra* note 42, at 1891 (explaining that integrated schools were the exception, not the rule, in the early postbellum period).

⁹² See, e.g., *id.* at 1882–83 (praising McConnell’s contributions but critiquing his originalist defense of *Brown*); Maltz, *Originalism*, *supra* note 41, at 223 (“[McConnell] adds greatly to our understanding of the doctrinal arguments that surrounded the desegregation issue in the 1870s, [but] . . . fails in his attempt to demonstrate that the decision in *Brown* is consistent with the original understanding.”); Jordan Steiker, *American Icon: Does it Matter What the Court Said in Brown?*, 81 TEX. L. REV. 305, 322 (2002) (book review) (“In the end, McConnell’s opinion is unpersuasive . . .”).

⁹³ BORK, *supra* note 12, at 75–76.

⁹⁴ *Id.* at 81.

⁹⁵ *Id.*

addressing segregation,” because the “text itself demonstrates that the equality under law was the primary goal.”⁹⁶ By 1954, however, “it had been apparent for some time that segregation rarely if ever produced equality.”⁹⁷ Bork thus concluded that the result (though not the reasoning) in *Brown* was correct as an originalist matter, because the “purpose that brought the fourteenth amendment into being” was “equality,” and “equality and segregation were mutually inconsistent,” even “though the ratifiers did not understand that.”⁹⁸

In other words, Bork argued that although the Fourteenth Amendment originally was understood to *permit* segregated schools, *Brown* nevertheless reached the correct result because we should seek the original meaning of the Fourteenth Amendment at a higher level of generality. On this view, the relevant inquiry is not to determine what the framers or ratifiers of the constitutional text thought about what it meant or how it would apply, but instead to seek the objective original meaning of the text by discerning the broad animating principle behind the text and then to apply it to concrete (and modern) circumstances.⁹⁹

⁹⁶ *Id.* at 82.

⁹⁷ *Id.*

⁹⁸ *Id.*; accord Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971) (“[The Fourteenth Amendment] was intended to enforce a core idea of black equality against governmental discrimination.”).

⁹⁹ Steven Calabresi (with Michael Perl) has advanced a more carefully researched version of this form of originalist argument in defense of *Brown*. See generally Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 3 MICH. ST. L. REV. 429 (2014) (providing originalist defense for *Brown*); see also Steven G. Calabresi, *Does the Fourteenth Amendment Guarantee Equal Justice For All?*, 34 HARV. J.L. & PUB. POL’Y 149, 150–51 (2010) [hereinafter Calabresi, *Equal Justice*] (same). Rather than arguing simply that the Fourteenth Amendment requires “equality,” as did Bork, Calabresi asserts that the Fourteenth Amendment “bans all forms of caste-like discrimination,” including the “racial caste system” that the Court invalidated in *Brown*. *Id.* at 149–50; see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388–89 (1992) (“Thus, an amendment that forbade the states from abridging privileges or immunities would ban caste legislation . . .”). Because “[a]t the time the Fourteenth Amendment was enacted, thirty-six of the thirty-seven states required in their state constitutions that public schools be provided,” Calabresi concludes that the “right to a public school education was, for all practical purposes, a privilege or immunity of state citizenship.” Calabresi, *Equal Justice*, *supra*, at 150. Segregation in schools, Calabresi argues, impermissibly abridged that right for African Americans, rendering policies of segregation impermissible forms of caste-like discrimination. As Bork had argued, Calabresi asserted that “[t]he fact that such

I will return shortly to Bork's approach to *Brown*, and what it suggests both about his approach to originalism and the dilemma of the level of generality more broadly. For now, it is sufficient to note that, whatever one thinks of Bork's approach,¹⁰⁰ it opened the floodgates for originalist claims (albeit usually stated conclusorily) that the result in *Brown* is defensible on originalist grounds. Indeed, it is virtually impossible today to find an originalist who even entertains the possibility that the result in *Brown* was inconsistent with the original meaning.¹⁰¹

III. BEYOND *BROWN*

Consider two immediate implications of Bork's approach to *Brown*. First, it helps to immunize originalism from claims that it

segregation had been practiced in 1868 and had been around for a very long time did not change the fact that it was and always had been unconstitutional." *Id.* at 151.

¹⁰⁰ For critiques of Bork's position, see Brest, *supra* note 35, at 1091–92 (“The fact is that all adjudication requires making choices among the levels of generality . . . and all such choices are inherently non-neutral. No form of constitutional decision-making can be salvaged if its legitimacy depends on satisfying Bork's requirements that principles be neutrally derived, defined, and applied.” (internal quotations omitted)); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1375–76 (1990) (calling Bork's position unconvincing and inconsistent); Raoul Berger, *Robert Bork's Contribution To Original Intention*, 84 NW. U. L. REV. 1167, 1176–83 (1990) (book review) (criticizing Bork's view of *Brown*); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1379–82 (1990) (book review) (asserting that Bork's originalist defense of *Brown* is ineffective).

¹⁰¹ See, e.g., *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 773–780 (2007) (Thomas, J., concurring) (“[M]y view was the rallying cry for the lawyers who litigated *Brown*.”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 88 (2012) (asserting that the text of the Equal Protection Clause “can reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally”); Calabresi, *Equal Justice*, *supra* note 99, at 151 (“The fact that such segregation had been practiced in 1868 and had been around for a very long time did not change the fact that it was and always had been unconstitutional. For this reason, the Supreme Court was on solid originalist ground when it struck down segregation in public schools.”); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1763 (2010) (“We believe that *Brown*'s holding extending the equality guarantee beyond private contract to public schooling can be defended on originalist grounds. . . .”); Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1194 (2008) (“*Brown* is a marvelous decision, a wonderful restoration of a lost original understanding of the meaning of Section 1 of the Fourteenth Amendment and a repudiation of a socially invented limitation on that meaning by the Jim Crow era.”).

cannot account for some of the most widely accepted, and normatively desirable, judicially created doctrines of constitutional law from the twentieth century: the Court's invalidation of bans on interracial marriage in *Loving v. Virginia*¹⁰² and the Court's application of heightened scrutiny to laws that discriminate on the basis of sex.¹⁰³ Failure to accommodate these decisions, like a failure to justify *Brown*, would be not only a significant embarrassment for originalism, but also likely fatal for the claim that originalism is the only legitimate means of assigning constitutional meaning. Second, it creates the possibility of an originalist justification for constitutional prohibitions on previously unrecognized bases for discrimination—such as sexual orientation—and constitutional protection for rights that have conventionally been thought to be untethered to the original meaning of the Constitution.

A. EQUAL PROTECTION

Consider how Bork's approach would apply to prohibitions on interracial marriage. In *Loving*, the Court invalidated Virginia's ban on most interracial marriages.¹⁰⁴ As with *Brown*, the conventional view is that *Loving* cannot be reconciled with the original meaning of the Fourteenth Amendment.¹⁰⁵ Indeed, Virginia's brief in the Supreme Court relied heavily on the original

¹⁰² 388 U.S. 1 (1967).

¹⁰³ See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

¹⁰⁴ 388 U.S. at 11–12.

¹⁰⁵ See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 228 (2011) (“If we follow . . . original-meaning originalism. . . . *Loving v. Virginia* is wrong. . . .”); RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 252 (2003) (“The historical record strongly indicates that the politicians who framed the Fourteenth Amendment did *not* intend for it to render illegal statutes prohibiting interracial marriage.”); RICHARD A. POSNER, *OVERCOMING LAW* 247 (1995) (arguing that *Loving* cannot be justified on originalist grounds); Cass Sunstein, *Debate on Radicals in Robes*, in *ORIGINALISM: A QUARTER CENTURY OF DEBATE* 293 (Steven G. Calabresi ed., 2007) (contending that an originalist view of the Constitution cannot justify the invalidation of bans on interracial marriage); Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 *WAKE FOREST L. REV.* 909, 996 (1998) (criticizing John Harrison's originalist defense of *Loving*); Klarman, *Response, supra* note 42, at 1919–20 (noting that even if one accepts McConnell's originalist defense of *Brown*, it would not justify the result in *Loving*).

understanding of the Fourteenth Amendment.¹⁰⁶ Although the Court in *Loving* reiterated its claim from *Brown* that evidence of the intent of the framers of the Fourteenth Amendment with respect to the question of interracial marriage bans was “at best . . . inconclusive,”¹⁰⁷ the evidence is in fact quite strong that the framers did not understand the Amendment to prohibit bans on interracial marriage. Laws banning interracial marriage were commonplace at the time of the adoption of the Fourteenth Amendment. In addition, when opponents of the Civil Rights Act of 1866, the Fourteenth Amendment, and the civil rights bills in the 1870s regularly (and perhaps demagogically) opposed those provisions in part on the ground that they would invalidate state bans on interracial marriage, Republican supporters repeatedly stressed that they would not disturb those bans.¹⁰⁸ Presumably for this reason, the Supreme Court itself has suggested that the decision in *Loving* was not rooted in the original meaning of the Fourteenth Amendment.¹⁰⁹

Accordingly, early accounts of *Loving* concluded that it was indefensible on originalist grounds. The year before the Court decided *Loving*, Alfred Avins contended, after a survey of the debates over the Fourteenth Amendment and related legislation,

¹⁰⁶ See Brief and Appendix on Behalf of Appellee, in 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 794, 798 (Philip B. Kurland & Gerhard Casper eds., 1975).

¹⁰⁷ 388 U.S. at 9 (quoting *Brown v. Board of Education*, 347 U.S. 483, 489 (1954)).

¹⁰⁸ See Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1253 (1966) (“No Republican member of Congress advocated miscegenation, [yet] . . . [t]he Democrats injected the cry of amalgamation into every conceivable debate, no matter how irrelevant it actually was.”).

¹⁰⁹ See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (stating that “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847–48 (1992) (resisting the “tempting” view that the Fourteenth Amendment should be interpreted consistent with its original understanding, because “[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause”). David Upham has contested the view that interracial marriage was, in practice, illegal in most states after the ratification of the Fourteenth Amendment, arguing that bans often were not enforced. See David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 259–80 (2015).

that no one in the Congress that drafted and adopted the Fourteenth Amendment “seriously thought” that state laws banning interracial marriage “were within the pale of the amendment’s prohibitions.”¹¹⁰ Similarly, Raoul Berger, after reviewing the congressional debates over the adoption of the Fourteenth Amendment, asserted that “[f]ew of the most ardent abolitionists would have dared argue for intermarriage at this time, because it would have wrecked their hope of securing the indispensable ‘fundamental rights’ to blacks.”¹¹¹ He acknowledged that the Civil Rights Act of 1866, which the Fourteenth Amendment effectively constitutionalized, protected the right of African Americans to make and enforce contracts; but in light of the statements by the framers about interracial marriage, “[t]o attribute to the framers an intention by the word ‘contract’ to authorize intermarriage runs counter to all intendments.”¹¹² Accordingly, he concluded that the framers “did *not* mean to prevent exclusion from . . . miscegenation laws.”¹¹³ Unlike the case of segregated schools, moreover, there is no evidence, even in the decade that followed the adoption of the Fourteenth Amendment, that a majority (let alone a super-majority) of members of Congress believed that the Amendment prohibited state laws banning interracial marriage.¹¹⁴

¹¹⁰ Avins, *Anti-Miscegenation Laws*, *supra* note 108, at 1253. Avins’s account was self-consciously originalist in nature, even if that term had not yet been coined to describe his approach. *See id.* at 1225 (“I believe that once the original understanding and intent of the framers is ascertained, the inquiry should be at an end.”).

¹¹¹ BERGER, *supra* note 12, at 161.

¹¹² *Id.* at 161–62.

¹¹³ *Id.* at 241.

¹¹⁴ Presumably for this reason, Michael McConnell, in the course of endeavoring to demonstrate that the result in *Brown* was consistent with the original meaning of the Fourteenth Amendment, did not offer a similarly robust defense of *Loving*. To be sure, McConnell asserted that “it is striking that not a single supporter of the 1875 Act attempted to deny that under their interpretation, anti-miscegenation laws were unconstitutional.” McConnell, *Desegregation Decisions*, *supra* note 43, at 1018. But he also concluded that the “effect of the Fourteenth Amendment was not to alter the boundary between civil and social rights, but to make race an unreasonable basis for discrimination within the civil sphere.” *Id.* at 1022–23. As Michael Klarman has noted, because “McConnell accepts the conventional view that the Framers of the Fourteenth Amendment distinguished civil from political and social rights, and barred racial discrimination only with regard to the former,” and because “interracial marriage” was plainly a “social” right, McConnell’s approach cannot justify *Loving*. Klarman, *supra* note 42, at 1919–20. *But see* Upham, *supra* note

But what if we seek the Amendment's original meaning at a higher level of generality? According to Steven Calabresi and Andrea Matthews, when one asks the correct question, it becomes "very easy" to see why *Loving* is correct as an originalist matter.¹¹⁵ Calabresi and Matthews do not dispute the traditional view that the framers of the Fourteenth Amendment did not understand the Amendment to invalidate bans on interracial marriage.¹¹⁶ But they contend that the original-intent originalism exemplified by Raoul Berger's work was "wrong," and that the original public meaning of the Fourteenth Amendment trumps the framers' subjective understandings and expectations about how it would apply.¹¹⁷ On their account, which they support principally by citing to a series of nineteenth century dictionaries, the Fourteenth Amendment's Privileges or Immunities Clause protected "positive law entitlements" in state common, statutory, and constitutional law "conferring civil rights on state citizens"; the rights that the Civil Rights Act of 1866 protected, including the right "to make and enforce contracts"; and other "fundamental rights."¹¹⁸ They then reason that in 1868, the right to marry—which, at bottom, is just a contractual relationship—clearly was both a privilege and immunity of state citizenship, a privilege or immunity of national citizenship, and a fundamental right.¹¹⁹ Accordingly, they argue, laws banning racial intermarriage "obviously" "abridge or shorten or lessen the literal right of African Americans and white Americans 'to make and enforce contracts.'"¹²⁰ They assert, in an echo of Bork's argument about

109, at 259–80 (arguing that after ratification of the Fourteenth Amendment, Republican judges and officials routinely declined to enforce bans on interracial marriage, based upon a belief that such bans violated the Fourteenth Amendment).

¹¹⁵ Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1398.

¹¹⁶ See *id.* (describing as a "fact" the assertion that "the Reconstruction Framers expected their laws to be consistent with . . . bans on racial intermarriage").

¹¹⁷ *Id.* at 1475.

¹¹⁸ *Id.* at 1413–20.

¹¹⁹ See *id.* at 1419–20 (describing the right to marry as both a privilege or immunity of state citizenship and a fundamental right).

¹²⁰ *Id.* at 1422 (internal quotation marks omitted); see also Calabresi, *Equal Justice*, *supra* note 99, at 151 (arguing that *Loving* was correctly decided "because the Fourteenth Amendment had constitutionalized the Civil Rights Act of 1866, which said that African Americans had the 'same' right to make contracts as was enjoyed by a white citizen");

Brown, that after the ratification of the Fourteenth Amendment, a state “clearly” could not constitutionally restrict the right to marry with racially discriminatory laws, “even though almost no-one realized it at the time.”¹²¹

To be sure, there is nothing particularly novel—even in originalist circles these days—about Calabresi and Matthews’s suggestion that we should ignore the framers’ original intent, subjective understandings, or expectations about how the constitutional text would apply. For years now, most originalists have moved, at least as a formal matter, towards the conclusion that the appropriate object in constitutional interpretation is the original objective meaning of the text, not the framers’ subjective intent, understanding, or expectations.¹²² Their approach to the question of interracial marriage—like Bork’s approach to the validity of racial segregation under the Equal Protection Clause—is simply a move in that direction.

But this approach, in conjunction with an inquiry that seeks the original meaning at a higher level of generality, can unsettle conventional understandings of the Constitution’s original meaning in other contexts, as well. Consider the question of the constitutional status of official discrimination on the basis of sex. At the time of the ratification of the Fourteenth Amendment, the states routinely excluded women from the benefits of equal citizenship. The text of the Amendment itself, in Section 2,¹²³ by

Harrison, *supra* note 99, at 1459–60 (stating that both the Civil Rights Act and the Fourteenth Amendment prohibited bans on interracial marriage).

¹²¹ Calabresi & Matthews, *supra* note 115, at 1419–20; *see also id.* at 1421 (“Obviously, many of the framers of the Fourteenth Amendment thought that the government had a compelling interest in preventing interracial marriage, but it is just as obvious that it was a ban on racial intermarriage which lay at the bottom of the very racial caste system that the Fourteenth Amendment was written to extirpate.”); Calabresi, *Equal Justice*, *supra* note 99, at 151–52 (“[T]he fact the Framers of the Amendment did not understand [that the Fourteenth Amendment gave African Americans the right to marry white citizens] means nothing. Members of Congress rarely read much less understand the laws they make, but that does not make those laws any less binding on all of us.”).

¹²² *See* Colby & Smith, *supra* note 24, at 250–55 (describing the shift from original intent to original objective meaning); Colby, *supra* note 18, at 720–30 (discussing how new originalists reject a search for subjective intent and instead seek objective meaning).

¹²³ U.S. CONST. amend. XIV, § 2 (“[W]hen the right to vote at any election . . . is denied to any of the male inhabitants of [a] State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime,

implication tolerates the denial to women of the right to vote.¹²⁴ Indeed, during the debate over the adoption of the Fourteenth Amendment, Elizabeth Cady Stanton, Susan B. Anthony, and other women's rights advocates publicly campaigned to remove gender as a measure of suffrage.¹²⁵ They also petitioned Congress for a constitutional amendment to "prohibit the several States from disfranchising any of their citizens on the ground of sex."¹²⁶ Representative Thaddeus Stevens introduced the petition into the Congressional Record, and two years later other Senators proposed language that would have incorporated a universal suffrage provision into the Fifteenth Amendment, but the efforts failed.¹²⁷

Women's rights advocates then began a campaign to convince the courts that Section 1 of the Fourteenth Amendment, and in particular the Privileges or Immunities Clause, protected women against discrimination in the grant of the franchise and in the exercise of other rights.¹²⁸ Just a few years after the ratification of the Fourteenth Amendment, however, the Court made clear its view that the exclusion of women from the practice of law did not offend the Amendment.¹²⁹ Several years later, in the course of interpreting the Equal Protection Clause to prohibit the exclusion of African Americans from service on juries, the Court reasoned that the state "may confine the selection to males," because it did

the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

¹²⁴ See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 13 (2010) ("Section 2 of the Fourteenth Amendment . . . actually enshrines sex discrimination, by assuming that the electorate will consist only of men."); Michael C. Dorf, *Tainted Law*, 80 U. CIN. L. REV. 923, 933 (2012) ("At the very least, the inclusion of the word 'male' in Section 2 tells us that the framers and ratifiers of the Fourteenth Amendment did not intend or expect it to extend the franchise to women.").

¹²⁵ See Ellen Carol Dubois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, 74 J. AM. HIS. 836, 847 (1987).

¹²⁶ *Petition for Universal Suffrage*, THE ELIZABETH CADY STANTON & SUSAN B. ANTHONY PAPERS PROJECT, <http://ecssba.rutgers.edu/docs/rutuniv.html> (last updated Aug. 2010).

¹²⁷ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 969–70 & n.59 (2002) (describing proposals by Senators Pomeroy and Fowler).

¹²⁸ *Id.* at 972.

¹²⁹ See *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.").

“not believe the Fourteenth Amendment was ever intended to prohibit [that].”¹³⁰

Indeed, women did not gain the right to vote until the adoption of the Nineteenth Amendment in 1919,¹³¹ and the Court did not conclude that discrimination by the government on the basis of sex triggered meaningful concerns under the Equal Protection Clause until the early 1970s, when the drive to adopt the Equal Rights Amendment—to correct the Constitution’s failure to protect women against discrimination—was in full steam.¹³² When the Court finally concluded, in 1976, that classifications on the basis of gender triggered heightened scrutiny, it did not even purport to suggest that this approach was required by the original meaning of the Fourteenth Amendment, stating instead (rather dubiously) only that “previous cases” established the proper test.¹³³

As a consequence, at least until recently, the widely accepted view has been that the original meaning of the Fourteenth Amendment did not prohibit the states from classifying on the basis of sex. For example, shortly after the Supreme Court held that official sex discrimination triggers heightened scrutiny, future Justice Ruth Bader Ginsburg argued that “[b]oldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment’s equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities.”¹³⁴

This view was not confined to those who are skeptical of originalism as a means for ascertaining constitutional meaning. Lino Graglia, who was a prominent academic defender of originalism in the 1980s and 1990s, summarized the conventional

¹³⁰ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

¹³¹ U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

¹³² See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary, legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . .”); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion) (stating that classifications based on sex are “inherently suspect”).

¹³³ *Craig v. Boren*, 429 U.S. 190 (1976).

¹³⁴ Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161.

view about the original meaning of the Fourteenth Amendment when he declared that

there is no real doubt that the purpose of the equal protection clause was to prohibit certain discriminations by states on the basis of race. This provision, given our history, is an important protection, but one that has absolutely nothing to do with the power of the states to make distinctions on many other grounds, such as on the basis of sex¹³⁵

As a consequence, Graglia argued, “Supreme Court decisions denying popularly elected state representatives the authority to make such distinctions are not legitimate constitutional decisions.”¹³⁶ Similarly, Robert Bork, who proposed reading the Equal Protection Clause at a high level of generality to justify the Court’s decision in *Brown*, criticized the Court’s cases applying heightened scrutiny to laws classifying on the basis of sex, principally on the ground that the “ratifiers of the fourteenth amendment did not intend to treat women as a special class deserving protection as they did intend with respect to blacks.”¹³⁷ He concluded that “the equal protection clause should be restricted to race and ethnicity because to go further would plunge the courts into making law without guidance from anything the ratifiers understood themselves to be doing.”¹³⁸

This view, moreover, is not confined to old originalists writing in the 1970s and 1980s. In 2011, Calvin Massey interviewed Justice Scalia for a magazine article. Massey noted that “[i]n

¹³⁵ Lino A. Graglia, “Constitutional Theory”: *The Attempted Justification for the Supreme Court’s Liberal Political Program*, 65 TEX. L. REV. 789, 795 (1987).

¹³⁶ *Id.*; see also Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767, 776 (1998) (“In short, all talk of the Supreme Court ‘interpreting’ the Constitution in reaching its controversial rulings of unconstitutionality is purely conventional and entirely misleading.”).

¹³⁷ BORK, *supra* note 12, at 326. Bork also reasoned that, because “our society feels very strongly that relevant differences exist [between men and women] and should be respected by government,” a “court that applies the fourteenth amendment to women as a special group, rather than as part of the human race, must make cultural and political choices that it need not make when applying the amendment to racial groups.” *Id.* at 329.

¹³⁸ *Id.* at 330.

1868, when the 39th Congress was debating and ultimately proposing the [Fourteenth] Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination." He then asked Justice Scalia whether the Court had "gone off in error by applying the [Fourteenth] Amendment" to it.¹³⁹ Justice Scalia responded:

Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box.¹⁴⁰

It appears, moreover, that reformulating the question as McConnell did for the question of segregated schools would not change this result. Ward Farnsworth examined not only the debates from 1866 to 1868 on the adoption of the Fourteenth Amendment in Congress, but also "congressional debates between 1871 and 1875 over bills to enforce the Fourteenth Amendment," to determine "what the Reconstruction Congresses understood themselves to have accomplished."¹⁴¹ He acknowledged that much of the congressional debate about the effect of the Amendment on

¹³⁹ *The Originalist: Interview with Justice Antonin Scalia*, CAL. LAWYER (Jan. 2011), <http://www.callawyer.com/clstory.cfm?pubdt=Nan&eid=913358&evid=1>.

¹⁴⁰ *Id.*; see also *Legally Speaking: Antonin Scalia*, UCTV (Mar. 21, 2011), <http://www.uctv.tv/search-details.aspx?showID=20773> (recording of University of California Television broadcast). Justice Scalia also declared, in an interview at Hastings Law School, that the Fourteenth Amendment does not ban sex discrimination because "[n]obody thought it was directed against sex discrimination." Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME (Sept. 22, 2010), <http://www.time.com/time/nation/article/0,8599,2020667,00.html>; cf. *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (suggesting that courts should apply rational-basis review to sex-based classifications because "[i]t is hard to consider women a 'discrete and insular minorit[y]'" (alteration in original)).

¹⁴¹ Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1231 (2000).

women was “indirect,” in that it took place in the course of more heated debates about the Amendment’s effect on matters of race.¹⁴² But in so doing, the “congressmen frequently appear to [have drawn] on widely shared beliefs about women and the regime of laws affecting them,” often “appeal[ing] to settled understandings about the legal position of women to challenge their adversaries in arguments about other issues, usually involving race, that [were] more controversial.”¹⁴³ Even as they disagreed over the Amendment’s application to matters of race, therefore, there was “evidence of much common ground among them regarding the Amendment’s implications for women.”¹⁴⁴ In light of this evidence, Farnsworth concluded that “[t]he Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.”¹⁴⁵ Accordingly, the “type of originalism that Professor McConnell uses to show that *Brown* was correctly decided . . . leads to the conclusion that nineteenth-century laws imposing serious legal disabilities on women were constitutional.”¹⁴⁶

To reach the conclusion that the original meaning of the Constitution presumptively prohibits the states from discriminating on the basis of sex, in other words, requires a significantly more creative approach, and at a minimum one that does not rely simply on the subjective intentions and expectations of the framers of the constitutional text.¹⁴⁷ Such an approach is also crucial for the viability of originalism, as it has become untenable to maintain that the Constitution tolerates official discrimination on the basis of sex, just as no respectable theory of constitutional interpretation today can lead to the conclusion that *Brown* was wrong.¹⁴⁸

¹⁴² *Id.* at 1230.

¹⁴³ *Id.* at 1233.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1230.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., Dorf, *supra* note 124, at 934 (contending that if the expectations of the framers control, modern sex discrimination jurisprudence is indefensible).

¹⁴⁸ See *id.* at 935 (“[I]t would simply be unthinkable that in 2012 the Equal Protection Clause could be interpreted to permit most forms of official sex discrimination.”).

And, in fact, Steven Calabresi has recently contended that originalism requires the conclusion that the Constitution forbids discrimination on the basis of gender.¹⁴⁹ The argument requires us both to consider the original meaning of the Fourteenth Amendment at a higher level of generality than is used in the conventional account, described above, and to understand the Amendment through the lens of the Nineteenth Amendment, which was adopted a half-century later.¹⁵⁰ First, Calabresi reasoned that the broad principle animating the Fourteenth Amendment is a ban on “all forms of caste-like discrimination.”¹⁵¹ Second, he noted that “the Constitution explicitly addresses the subject of sex discrimination in the Nineteenth Amendment,” which “gave women the right to vote.”¹⁵² That right, in turn, “is a political right, unlike the civil rights addressed by the Fourteenth Amendment.”¹⁵³ Third, Calabresi observed that the framers of the Fourteenth Amendment “distinguished between civil rights, which were possessed by all citizens, including women and children, and political rights, which were exercised only by the male subset of

¹⁴⁹ See Calabresi, *Equal Justice*, *supra* note 99, at 152 (arguing that the Nineteenth Amendment requires the conclusion that the Fourteenth Amendment bans sex discrimination with respect to civil rights).

¹⁵⁰ Reva Siegel has similarly argued that we should understand the Constitution’s treatment of sex discrimination in light of the interaction between the Fourteenth and Nineteenth Amendments. See Siegel, *supra* note 127, at 1039–44 (advocating for an interpretation of sex discrimination doctrine grounded in a reading of the Fourteenth and Nineteenth Amendments as well as the history of the Women’s Suffrage Movement). Her approach, however, consciously eschewed the form of originalism on which Calabresi relies. See *id.* at 1032 (“[T]he actions of past generations of Americans who made or lived under the Constitution do not bind us in any simple sense.”). Siegel argued the Nineteenth Amendment, which was the “product of a wide-ranging, multigenerational debate over the terms of women’s citizenship in a democratic constitutional order,” is effectively “part of the post-ratification history of the Fourteenth Amendment,” *id.* at 1034, and that “an additional foundation for sex discrimination doctrine” can emerge from “a synthetic reading of the Fourteenth and Nineteenth Amendments that is grounded in the history of the woman suffrage campaign,” *id.* at 949.

¹⁵¹ Calabresi, *Equal Justice*, *supra* note 99, at 149; see also Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 17 (2011) (“Section One . . . enact[ed] a rule against class legislation and systems of caste.”); Harrison, *supra* note 99, at 1413 (noting that the purpose of the Fourteenth Amendment was to do away with “caste” legislation).

¹⁵² Calabresi, *Equal Justice*, *supra* note 99, at 152.

¹⁵³ *Id.*

the population.”¹⁵⁴ Fifth, he reasoned that, “[o]nce the Constitution had been amended to bar sex discrimination as to political rights it became utterly implausible that the no-caste command of the Fourteenth Amendment did not also ban most, if not all, sex discrimination as to civil rights” because “[p]olitical rights are rarer and more jealously guarded than civil rights.”¹⁵⁵

To reach these conclusions, Calabresi had to make a move similar to the one that Bork had made years earlier about *Brown*.¹⁵⁶ In an article developing the argument in greater detail, Calabresi and Julia Rickert conceded that the “Framers and ratifiers of the Fourteenth Amendment” did not “understand sex discrimination to be a form of caste or of special-interest class legislation,” but argued that “the Framers’ original expected applications of the constitutional text . . . are not the last word on the Fourteenth Amendment’s reach.”¹⁵⁷ The framers of the Fourteenth Amendment, they explained, were “mistaken in their belief that laws discriminating on the basis of sex are not relevantly similar to laws that discriminate on the basis of race.”¹⁵⁸ Those framers “conceded that if women had been fitted by nature for the privileges and responsibilities afforded to men, then the fears of some and the hopes of others that the Fourteenth Amendment would threaten the sexual social order would be well founded.”¹⁵⁹ But “[w]e now know more about women’s capabilities than the Fourteenth Amendment’s Framers knew.”¹⁶⁰ And because, “as Robert Bork has explained, we are governed by the constitutional law that the Framers of the Fourteenth Amendment wrote and not by the unenacted opinions that its members held,” it “follows that we also are not bound by their unenacted factual beliefs about the capabilities of women.”¹⁶¹ Moreover, they argue, unlike the evolving understandings about the harms of

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *supra* notes 93–98 and accompanying text.

¹⁵⁷ Calabresi & Rickert, *supra* note 151, at 7.

¹⁵⁸ *Id.* at 9.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

segregation, the “change in our understanding of women’s abilities has been constitutionalized” by a subsequent amendment.¹⁶²

On Calabresi’s and Rickert’s account, the “definition of caste”—a term that does not appear in the Fourteenth Amendment—“had not changed; rather, the capabilities of women and the truth of their status in society had come to be better understood and that new understanding was memorialized in the text of the Constitution.”¹⁶³ Accordingly, even though the framers of the Fourteenth Amendment “inject[ed] their assumptions about women’s competence and proper sphere into the text of [Section 2 of] the Fourteenth Amendment,” making it “very difficult to read the original 1868 version of the Fourteenth Amendment as a bar to sex discrimination,” the Nineteenth Amendment nevertheless made it “implausible to read the no-caste rule of the Fourteenth Amendment as allowing discrimination on the basis of sex with respect to civil rights.”¹⁶⁴ Applying an approach similar to the one that Bork advocated for in *Brown*, in other words, creates the possibility of an originalist justification for the Court’s cases subjecting gender discrimination to heightened scrutiny.

If we are willing to follow this approach to the Fourteenth Amendment, then there is no obvious reason why we would have to stop with discrimination on the basis of race and gender. Applying Bork’s approach to *Brown* also creates the possibility of an originalist justification for constitutional condemnation of discrimination on the basis of sexual orientation and constitutional protection for rights—including the fundamental right of gay people to marry the same-sex partners of their choice—that, when viewed at a high level of specificity, do not find clear support in our historical traditions.

The question whether the Fourteenth Amendment, as an original matter, presumptively prohibits discrimination on the basis of sexual orientation does not seem very difficult to most people. Given the relatively recent vintage of societal condemnation of discrimination against gays and lesbians—and the continuing debate over whether it even ought to be

¹⁶² *Id.*

¹⁶³ *Id.* at 10.

¹⁶⁴ *Id.* at 66–67.

prohibited—there is little doubt that the framers of the Fourteenth Amendment did not believe that the Amendment would prohibit such discrimination in the same way that it prohibits (at least some forms of) official discrimination on the basis of race. To decide that the Amendment nevertheless presumptively prohibits discrimination on this basis, therefore, requires one to conclude that the meaning of the Amendment has changed, a conclusion generally inconsistent with originalist interpretation.¹⁶⁵ This, at least, was the thrust of Justice Scalia’s questions at oral arguments in *Hollingsworth v. Perry*,¹⁶⁶ which involved a challenge (based at least in part on the Equal Protection Clause) to California’s ban on same-sex marriage. He stated, “We don’t prescribe law for the future. [We] decide what the law is. I’m curious, when [did] it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted?”¹⁶⁷ When Ted Olson, the counsel for the respondents, responded that it became unconstitutional when “we . . . as a culture determined that sexual orientation is a characteristic of individuals that they cannot control,” Justice Scalia pressed him to provide the date when the Constitution “change[d].”¹⁶⁸

Seeking the meaning of the Fourteenth Amendment by asking how the framers of the Amendment expected it to apply, in other words, cannot plausibly yield the conclusion that official discrimination on the basis of sexual orientation is unconstitutional. And even if one is willing to depart from the specific expectations of the framers, one cannot rely, as did Calabresi and Matthews in addressing official discrimination on the basis of gender, on the adoption of a subsequent constitutional amendment—in that case, the Nineteenth Amendment—that touches on the question. For this reason, Calabresi declared in 2010 that the Fourteenth Amendment, properly understood as an

¹⁶⁵ See *supra* note 29 and accompanying text.

¹⁶⁶ 133 S. Ct. 2652 (2013). The Court in *Hollingsworth* did not resolve the question, concluding instead that the intervenors lacked standing to appeal the district court’s decision. See *id.* at 2656.

¹⁶⁷ Transcript of Oral Argument at 38, *Hollingsworth v. Perry*, 135 S. Ct. 2652 (2013) (no. 12-144)

¹⁶⁸ *Id.* at 39–40.

originalist matter, does not prohibit discrimination on the basis of sexual orientation.¹⁶⁹

Yet Calabresi and Matthews's argument about gender discrimination did not rely exclusively on the Nineteenth Amendment. Their argument followed from their premise that we should seek the original meaning of the Fourteenth Amendment at a high level of generality, reading it to prohibit caste-based discrimination rather than to prohibit only the certain limited forms of discrimination on the basis of race to which most of its framers would have understood it to apply.¹⁷⁰ That argument—on which Calabresi relied in defending *Brown* and *Loving* on originalist grounds, as well—is simply a variation of the argument that Bork advanced in defense of *Brown*.¹⁷¹ And if we follow that approach, then the originalist case for prohibiting discrimination on the basis of sexual orientation becomes more plausible.

For simplicity's sake, consider how Bork's approach to *Brown* applies to the case of discrimination on the basis of sexual orientation. Recall that Bork argued that *Brown* was correct as an original matter because the "purpose that brought the fourteenth amendment into being" was "equality," and "equality and segregation were mutually inconsistent," even "though the ratifiers did not understand that."¹⁷² It does not take very much creative lawyering to argue, in the case of same-sex marriage, that even though "the ratifiers probably assumed that" bans on same-sex marriage were "consistent with equality," they "were not addressing" that practice, because the "text itself demonstrates

¹⁶⁹ See Calabresi, *Equal Justice*, *supra* note 99, at 153 (concluding that "the Fourteenth Amendment's ban on castes" does not "bar all forms of sexual-orientation discrimination," because "[n]o constitutional amendment like the Nineteenth Amendment has been adopted that recognizes sexual orientation as being a suspect classification," and thus "[n]o Article V consensus . . . has been demonstrated").

¹⁷⁰ See Calabresi & Matthews, *supra* note 115, at 1412 n.65 ("[The Fourteenth Amendment] protects against laws that discriminate on the basis of class or caste . . .").

¹⁷¹ See BORK, *supra* note 12, at 82 ("The purpose that brought the fourteenth amendment into being was equality before the law . . ."); Calabresi, *Equal Justice*, *supra* note 99, at 151–52 (discussing *Brown* and *Loving*).

¹⁷² BORK, *supra* note 12, at 82; *accord* Bork, *supra* note 98, at 14–15 ("The Court must . . . choose a general principle of equality that applies to all cases.").

that the equality under the law was the primary goal.”¹⁷³ To be sure, once one is willing to extend the reach of the Equal Protection Clause beyond the practices that prompted its adoption, one must resolve the thorny question of “how far the protection of the clause may be extended”¹⁷⁴ But having already apparently accepted that the Clause can apply to forms of discrimination that the framers of the Fourteenth Amendment believed would be permissible, the choice to extend its reach to other bases for discrimination is simply an interpretive move of degree, not of kind.

And, in fact, some prominent originalists have begun tentatively to suggest that there is an originalist justification for the view that discrimination on the basis of sexual orientation violates the equality norms in the Fourteenth Amendment. In 2013, Michael Ramsey suggested that there is a “plausible,” even if not “conclusive,” originalist case “against sexual orientation discrimination.”¹⁷⁵ He reasoned that the original public meaning of the Equal Protection Clause prohibited “discrimination on the basis of characteristics such as race,” and that although “people at the time the clause was adopted didn’t think” that sexual orientation was a characteristic like race, the “facts underlying sexual orientation might . . . affect sexual orientation’s status under the fixed meaning of ‘equal.’”¹⁷⁶ Because “[o]ur understanding of sexual orientation today” is “factually very different from the nineteenth century understanding,” we “might conclude that sexual orientation discrimination violates ‘equal’ treatment in the sense that ‘equal’ was understood by the drafters and ratifiers of the Fourteenth Amendment.”¹⁷⁷

¹⁷³ BORK, *supra* note 12, at 82; *see id.* at 81 (arguing that “those who ratified” the Fourteenth Amendment “intended black equality, which they demonstrated by adopting the equal protection clause”).

¹⁷⁴ *Id.* at 330.

¹⁷⁵ Michael Ramsey, *Is There an Originalist Case for Same-Sex Marriage?*, THE ORIGINALISM BLOG (Mar. 25, 2013), <http://originalismblog.typepad.com/the-originalism-blog/2013/03/is-there-an-originalist-case-for-same-sex-marriagemichael-ramsey.html>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*; *see also* Grant Darwin, *Originalism and Same-Sex Marriage*, 16 U. PA. J. L. & SOC. CHANGE 237, 278–80 (2013) (arguing that a decision invalidating bans on same-sex marriage can be justified with an originalist approach).

More recently, Ilya Somin argued that bans on same-sex marriage are a form of impermissible discrimination on the basis of sex,¹⁷⁸ presumably because “[s]ame sex marriage laws allow a man to marry a woman but not another man.”¹⁷⁹ Although “most informed observers” in the nineteenth century “believed that all or nearly all sex-discriminatory laws of that era were constitutional,” that “conclusion was premised on factual understandings about women’s capabilities that have been superseded by later evidence. Similarly, nineteenth century (and later) support for laws restricting marriage on the basis of gender [was] also premised on factual assumptions that later evidence proves largely false.”¹⁸⁰ Somin asserts that these arguments are “distinctively originalist” because they “provide evidence that the ‘broad principle’”—forbidding caste-like discrimination—“was understood to be included in the text of the Fourteenth Amendment *at the time of enactment*.”¹⁸¹ Steven Calabresi, who had asserted just a few years earlier that the Fourteenth Amendment does not prohibit discrimination on the basis of sexual orientation or bans on same-sex marriage, now apparently agrees with this view.¹⁸² If we seek the original meaning of the Equal Protection Clause at a high level of generality and embrace a willingness to depart from the specific understanding and expectations of the framers, in other words, then the Clause in practice can have far-reaching application.

¹⁷⁸ See Ilya Somin, *William Eskridge on Originalism and Same-Sex Marriage*, THE VOLOKH CONSPIRACY (Jan. 23, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/23/william-eskridge-on-originalism-and-same-sex-marriage/> (“[L]aws forbidding same sex marriage . . . amount to unconstitutional sex discrimination.”).

¹⁷⁹ Steven G. Calabresi & Hannah Besley, *Gay Marriage and the Fourteenth Amendment*, at 24 (Northwestern Public Law Research Paper No. 14-51, October 13, 2014), <http://ssrn.com/abstract=2509443>.

¹⁸⁰ Somin, *supra* note 178.

¹⁸¹ Ilya Somin, *Originalism is Broad Enough to Include Arguments for a Constitutional Right to Same-Sex Marriage*, THE VOLOKH CONSPIRACY (Jan. 28, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/originalism-is-broad-enough-to-include-arguments-for-a-constitutional-right-to-same-sex-marriage/>.

¹⁸² See Calabresi & Besley, *supra* note 179, at 1 (providing an originalist argument that the Fourteenth Amendment protects same-sex marriage).

B. FUNDAMENTAL RIGHTS

The same-sex marriage cases involved not only a claim under the Equal Protection Clause, but also a claim that the state bans impermissibly interfered with the fundamental right to marry—a right that, as a matter of doctrine, is protected by the Due Process Clause of the Fourteenth Amendment.¹⁸³ Originalists traditionally have been quite skeptical of constitutional protection for unenumerated rights.¹⁸⁴ That skepticism has been based both on the normative claim that it is anti-democratic and inconsistent with the judicial role to invalidate popular legislation without a clear textual and historical warrant,¹⁸⁵ and the interpretive claim that fidelity to the Constitution forecloses the possibility of judicial protection for rights that are not specifically mentioned in the constitutional text or clearly within the contemplation of the framers.¹⁸⁶

Consider Robert Bork's approach to the Fourteenth Amendment's protection for unenumerated rights. In Bork's view, *Griswold v. Connecticut*¹⁸⁷ and *Roe v. Wade*¹⁸⁸—to take two prominent examples—were indefensible on originalist grounds because contraception is not “covered specifically or by obvious implication by any provision of the Constitution,” and “the right to abort, whatever one thinks of it, is not to be found in the Constitution.”¹⁸⁹ Bork, in other words, sought the original meaning at a very low level of generality when the question was

¹⁸³ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (“The Court now holds that same-sex couples may exercise the fundamental right to marry.”).

¹⁸⁴ See, e.g., Bork, *supra* note 98, at 9 (“When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims . . .”).

¹⁸⁵ See, e.g., OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE 4 (1987) (“[J]udicial review is legitimate only when courts adhere strictly to the text of the Constitution.”); Bork, *supra* note 98, at 10 (“Where the Constitution does not embody the moral or ethical choice, the judge has basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy.”).

¹⁸⁶ See, e.g., BERGER, *supra* note 12, at 117–19, 125, 133; BORK, *supra* note 12, at 185.

¹⁸⁷ 381 U.S. 479 (1965).

¹⁸⁸ 410 U.S. 113 (1973).

¹⁸⁹ BORK, *supra* note 12, at 112, 258; see also *id.* at 113–14.

whether the Constitution protected unenumerated rights.¹⁹⁰ For Bork, the case was even clearer because the Court's decisions in *Griswold* and *Roe*, like the incorporation cases that preceded them, anchored the rights in question in the Due Process Clause of the Fourteenth Amendment. Bork argued that the "transformation of the due process clause from a procedural to a substantive requirement was an obvious sham."¹⁹¹ He noted, as had John Hart Ely, that "'substantive due process' is a contradiction in terms. . . ."¹⁹²

Bork's view about substantive due process was long the conventional view among originalists. Raoul Berger asserted that the concept of due process plainly "did not comprehend judicial power to override legislation on substantive or policy grounds."¹⁹³ He called the doctrine of substantive due process (in what he obviously did not intend as a compliment) "largely a product of the post-1937 era," at least to the extent that its application was "libertarian" in nature, and thus unmoored from the historical understanding of the Fourteenth Amendment.¹⁹⁴ Justice Scalia similarly has repeatedly "reject[ed] the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty."¹⁹⁵ On this view, judicial protection for substantive rights under the Due Process Clause is self-evidently incorrect, and thus must be incorrect as an original matter, because the very concept of "substantive due process" is "oxymoronic."¹⁹⁶

¹⁹⁰ See Colby & Smith, *supra* note 14, at 586 ("Bork argued that judges should decline to find any specific rights in [the Privilege or Immunity Clause]'s capacious language.").

¹⁹¹ BORK, *supra* note 12, at 31.

¹⁹² *Id.* at 32.

¹⁹³ BERGER, *supra* note 12, at 194.

¹⁹⁴ *Id.* at 140; see also *id.* at 249–50 (criticizing substantive due process).

¹⁹⁵ *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring); *accord McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (noting his "misgivings" about substantive due process). Justice Scalia has declared that he was willing to make an exception in the case of incorporation of substantive rights specifically mentioned in the Bill of Rights, but only because the Court's practice of doing so "is both long established and narrowly limited." *Albright*, 510 U.S. at 275.

¹⁹⁶ Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. & PUB. POL'Y 73, 77 (2011).

At the core of the traditional originalist objection to judicial protection for unenumerated rights, however, is the concern that, without specific guidance from the constitutional text, judges would simply impose their own policy preferences under the guise of interpretation, a practice that most originalists find both lawless and anti-democratic.¹⁹⁷ This concern helps to explain why Bork and other originalists have maintained this view even in the face of substantial historical evidence that the framers of the Fourteenth Amendment understood the Privileges or Immunities Clause (even if not the Due Process Clause) to protect unenumerated fundamental rights. The historical record is far too rich for anything other than a cursory treatment here, but for present purposes it suffices to note that the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment repeatedly declared that those enactments would protect “[s]uch fundamental rights as belong to every free person.”¹⁹⁸ As Senator Jacob Howard, the principal sponsor of the Amendment in the Senate, explained, the Amendment would protect not only “the personal rights guarant[e]d and secured by the first eight amendments,” but also the “privileges and immunities spoken of in” Article IV, a category that was understood to refer to natural rights and thus that “cannot be fully defined in their entire extent and precise nature.”¹⁹⁹ The debates are filled with uncontradicted assertions that the Amendment would “give to a citizen of the United States the natural rights which necessarily pertain to citizenship.”²⁰⁰

Notwithstanding this evidence, Bork categorically rejected the position that the Privileges or Immunities Clause protects unenumerated rights, arguing instead that judges should decline to find any specific rights in that clause’s seemingly capacious

¹⁹⁷ See OFFICE OF LEGAL POLICY, *supra* note 185, at 4–5 (discussing the importance of strict adherence to the text of the Constitution).

¹⁹⁸ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

¹⁹⁹ CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

²⁰⁰ CONG. GLOBE, 39th Cong. 1st Sess. 1088 (1866) (statement of Rep. Woodbridge). See BARNETT, *supra* note 31, at 60–68 (discussing members of the 39th Congress’s view on the Privileges or Immunities Clause); JOHN HART ELY, DEMOCRACY AND DISTRUST 28 (1980) (noting that Senator Howard’s speech provides support for a broad interpretation of the Privileges or Immunities Clause). See generally MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986) (discussing incorporation); cf. BARNETT, *supra* note 31, at 54–60 (addressing historical understandings of the Ninth Amendment); ELY, *supra*, at 34–41 (same).

language.²⁰¹ The clause is phrased so broadly, he argued, as to make its meaning a complete “mystery.”²⁰² And a “provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it.”²⁰³ Bork’s approach was based both on the assumption that the framers could not possibly have intended to vest unelected judges with the power to determine and enforce unenumerated rights²⁰⁴ and the concern that judicial reliance on vague constitutional language to produce specific results inevitably would be simply a guise for judicial willfulness,²⁰⁵ the precise practice that gave rise to the need for originalism in the first place.²⁰⁶

Justice Scalia’s approach to unenumerated rights was similar, though he had very little to say about the Privileges or Immunities Clause and its original meaning. He has serious “misgivings . . . as an original matter” about judicial protection for unenumerated rights under the Fourteenth Amendment,²⁰⁷ but (presumably as a matter of *stare decisis*) he has not urged the wholesale overruling of the Court’s cases protecting substantive rights under the Due Process Clause. Instead, he has insisted that the Court can protect unenumerated rights only when a “relevant tradition,” defined at the “most specific level,” protecting the right “can be identified.”²⁰⁸ For Justice Scalia, then, judges interpreting the Fourteenth Amendment should seek the original meaning at the lowest possible level of generality. Under this approach, women do not enjoy a constitutional right to obtain an abortion,

²⁰¹ See *supra* note 190 and accompanying text.

²⁰² BORK, *supra* note 12, at 166.

²⁰³ *Id.*

²⁰⁴ See *id.* at 180–85.

²⁰⁵ Bork, *supra* note 98, at 8 (“Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other.”).

²⁰⁶ See BERGER, *supra* note 12, at 1 (“The Fourteenth Amendment is the case study par excellence of . . . the Supreme Court’s . . . continuing revision of the Constitution under the guise of interpretation.”); see also *id.* at 116–31 (rejecting the “‘Open-Ended’ Phraseology Theory” of constitutional interpretation).

²⁰⁷ *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring).

²⁰⁸ *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.7 (1989).

because “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”²⁰⁹ Similarly, on this view, the Constitution does not protect a fundamental right of same-sex couples to marry, because it is not plausible—indeed, it is, as Justice Scalia has stated, “absurd”—to suggest that the specific right of a person to marry a person of the same gender is “deeply rooted in this nation’s history and traditions.”²¹⁰ There is little doubt that the framers of the Fourteenth Amendment did not understand the Amendment to protect a right of women to obtain abortions²¹¹ or of same-sex couples to marry.²¹² This was, in essence, Justice Scalia’s approach in *Obergefell*.²¹³

But we might arrive at a very different set of conclusions both about the Constitution’s protection for unenumerated rights—including the right to marry, and the derivative right to marry a person of the same sex—if we follow the approach that Bork and others have used to justify *Brown* (and *Loving* and the Court’s sex-discrimination cases) on originalist grounds. That is, if originalism permits us to depart from the specific, subjective understandings and expectations of the framers and instead to seek the broad principle embodied in the text, and then to apply that principle to new circumstances not within the contemplation

²⁰⁹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

²¹⁰ *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

²¹¹ *See Roe v. Wade*, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting) (“There apparently was no question concerning the validity of [state bans on abortion] when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.”).

²¹² *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (“[I]t would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view [of marriage] for granted.”).

²¹³ *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) (“When it comes to determining the meaning of a vague constitutional provision—such as ‘due process of law’ or ‘equal protection of the laws’—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.”); *see also id.* at 2614 (Roberts, C.J., dissenting) (“There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way.”).

of the framers, then we can construct a plausible originalist justification for the existence of a wide range of unenumerated rights.²¹⁴ The assertion that the framers could not have intended for unelected judges to give content to vague rights-granting provisions—“itself a contested twentieth-century projection rather than a supported and historically contextualized assertion”²¹⁵—would no longer be dispositive. Instead, the crucial fact would be that the Constitution seems fairly clearly to acknowledge (in the Ninth Amendment) the existence of unenumerated rights²¹⁶ and includes provisions such as the Privileges or Immunities Clause of the Fourteenth Amendment that, objectively speaking, are written at such a high level of generality as necessarily to include within their scope a variety of unspecified rights.²¹⁷

Nor would the faithful originalist need to confine that category of rights to rights with historical roots dating back to the framing of the Fourteenth Amendment, because (again) we no longer need to ascertain original meaning by seeking to determine how the framers would personally have answered the narrow question at issue. And, in fact, there is evidence that the framers of the Fourteenth Amendment drafted it “at a higher level of abstraction or generality—that of natural liberty rights—than any specific list of liberties and deliberately so,” precisely because the framers

²¹⁴ See Whittington, *supra* note 10, at 609 (“[N]ew originalism open[s] up space for originalists to reconsider the meaning of . . . rights-oriented aspects of the Constitution . . .”). Although no one would accuse Justice Kennedy of taking an originalist approach in his opinion for the Court in *Obergefell*, see 135 S. Ct. at 2598 (“The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”), his approach arguably was consistent with Bork’s approach to *Brown*, at least in its treatment of *Loving* and other cases that involved the right to marry, see *id.* at 2602 (“*Loving* did not ask about a ‘right to interracial marriage’; *Turner* did not ask about a ‘right of inmates to marry’; and *Zablocki* did not ask about a ‘right of fathers with unpaid child support duties to marry.’ Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”).

²¹⁵ Colby & Smith, *supra* note 14, at 166.

²¹⁶ See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

²¹⁷ See Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521), 2009 WL 4099504, at *8–21 (summarizing research about the scope of the Privileges or Immunities Clause).

understood that it would be impossible and unwise to list all of the fundamental rights with which the government might someday interfere.²¹⁸ Just as some originalists read the Fourteenth Amendment's anti-discrimination principle to prohibit forms of discrimination that the framers of the Amendment believed would be left untouched, originalists can read the Amendment's protection for fundamental rights to accommodate evolving conceptions of rights. On this view, there is an originalist justification for the Court's conclusion in *Obergefell* that the states cannot interfere with an individual's right to marry a person of the same sex.²¹⁹

And, indeed, some originalists have already begun the project of supplying originalist justifications for interpreting the Fourteenth Amendment (and the Ninth Amendment) to protect a wide range of rights beyond marriage. Randy Barnett, for example, has carefully developed and supported the argument that originalism requires judges to protect unenumerated rights, including economic rights such as the freedom of contract.²²⁰ Barnett's approach is based on the premise that the proper object in constitutional interpretation is to determine the "objective meaning that a reasonable listener would place on the words used" in the text, rather than "how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases."²²¹ In addition, because the rights-granting provisions of the Constitution are objectively framed at a high level of generality, Barnett argues that originalism properly understood requires us to seek the meaning of those provisions at that high level of generality, and then to endeavor to apply it to modern circumstances.²²² This is, in effect, the approach that Bork

²¹⁸ BARNETT, RESTORING, *supra* note 31, at 258.

²¹⁹ See *Obergefell*, 135 S. Ct. at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

²²⁰ See BARNETT, RESTORING, *supra* note 31, at 255–69 (providing an originalist justification for judicial protection of certain unenumerated rights); see also Colby & Smith, *supra* note 14, at 527 ("[Originalism] has now evolved to the point where it can plausibly accommodate claims that the Constitution protects economic liberty.").

²²¹ BARNETT, RESTORING, *supra* note 31, at 92–93.

²²² See *id.* at 119–20.

proposed to justify *Brown* on originalist grounds. Jack Balkin has followed a similar approach in offering an originalist justification for the right to an abortion.²²³

IV. ORIGINALISM AND LEVEL OF GENERALITY

What accounts for this staggering range of conclusions by originalists about how to choose a level of generality at which to seek the original meaning? Part of the answer lies in the evolution of originalist thought itself. As noted earlier, the old originalism sought principally to effectuate a limited vision of the judicial role, a goal best achieved by limiting the range of constitutional rights on which judges can rely to invalidate popular decision making. Accordingly, the old originalism sought the original intent at the most specific level of generality.²²⁴ But the limits of this approach—including its inability to justify foundational cases such as *Brown* and *Loving*—led originalists to modify their approach.²²⁵

Many new originalists—in particular, academic new originalists—have taken a different approach to selecting the level of generality at which to seek the original meaning. They have generally concluded that the “level of generality at which terms were defined is not an a priori theoretical question but a contextualized historical one.”²²⁶ Accordingly, as Randy Barnett has explained, “part of finding original meaning is determining the level of generality with which a particular term was used.”²²⁷ Consistent with the focus on objective original meaning, Barnett has argued that the originalist should “identify the level of

²²³ See BALKIN, *supra* note 105, at 214–19; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) (developing an originalist argument for a constitutional right to abortion).

²²⁴ See *supra* notes 10–15 and accompanying text; *see also*); Brest, *Misconceived Quest*, *supra* note 18, at 204–05 (distinguishing between “strict” and “moderate” originalism); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 312–13 (1996) (distinguishing between “hard” and “soft” originalism).

²²⁵ See *supra* notes 18–24 and accompanying text.

²²⁶ KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 187 (1999).

²²⁷ BARNETT, RESTORING, *supra* note 31, at 120.

generality in which the Constitution is objectively expressed.”²²⁸ The natural consequence of such an approach—which recognizes that “[t]he proper level of generality for the constitutional principles in the text is the one we find in the text itself”²²⁹—is that we should seek the meaning of most of the Constitution’s rights-granting provisions at a high level of generality. Indeed, because those provisions were “deliberately” framed at a high level of abstraction,²³⁰ their text might even “point to the possibility of new principles,” and thus new rights.²³¹

Professions of fidelity to this approach to determining the proper level of generality are not unique to a small cadre of new originalists intent on unsettling the conventional understanding of what originalism entails. Michael McConnell, for example, argued in 1997 that originalists should seek the original meaning at “the level of generality at which the particular language was understood by its Framers.”²³² And even Robert Bork, who at one time was in the vanguard of the old originalism, eventually came to the view that part of the originalist’s task in ascertaining the original meaning of the text is to find “its degree of generality, which is part of its meaning,” and then to “apply that text to a particular situation.”²³³ In seeking to interpret the “broadly stated” rights-granting provisions, Bork asserted, the “judge should state the principle at the level of generality that the text and historical evidence warrant.”²³⁴

²²⁸ Barnett, *Infidelity*, *supra* note 29, at 23; *see also* Easterbrook, *supra* note 5, at 359 (“Thus the question becomes the level of generality the ratifiers and other sophisticated political actors at the time would have imputed to the text.”).

²²⁹ BALKIN, *supra* note 105, at 263.

²³⁰ BARNETT, RESTORING, *supra* note 31, at 258.

²³¹ BALKIN, *supra* note 105, at 266.

²³² McConnell, *supra* note 29, at 1280.

²³³ BORK, *supra* note 12, at 149.

²³⁴ *Id.* Cf. Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 672–73 (2009) (noting that some provisions of the Constitution “employ standards and not rules,” and arguing that “[i]t is not an adequate answer in these situations to say, as Justice Scalia sometimes did, that originalist judges ought not to enforce Clauses of this kind because they do not lend themselves to principled judicial application”). *But see* McGinnis & Rappaport, *Abstract Meaning*, *supra* note 32, at 741 (criticizing new originalists for assuming that broad language should be understood at a high level of generality rather than pursuing other, equally plausible (and more narrow) ways of reading the language).

Given the examples discussed above, one can be forgiven for wondering whether this approach has been consistently and conscientiously followed in practice; it is far from clear that the variation in the level of generality at which originalists seek constitutional meaning can be explained solely by reference to the level of abstraction at which the constitutional text is expressed. I will have more to say about this problem shortly, but even assuming consistent adherence to this approach, it creates the very problem that the old originalism was designed to address.

The old originalism was concerned with both judicial *restraint* and judicial *constraint*.²³⁵ The “primary commitment” of the old originalism was to the former, in that “originalism was married to a requirement of judicial deference to legislative majorities.”²³⁶ As Lino Graglia argued, the old originalism was designed to “minimize the conflict between judicial review and democracy” by generally “permit[ting] the results of the democratic political process to stand.”²³⁷ If judges may invalidate democratic action only when required by the specific “principles actually laid down in the historic Constitution,” then there will be fewer occasions for the exercise of judicial review and correspondingly more space for the operation of ordinary majoritarian decision making.²³⁸

As noted above, the new originalism is self-consciously less concerned with restraint than was the old originalism. If “originalism is warranted as a theory of interpretation—that is, as

²³⁵ See Colby & Smith, *supra* note 14, at 583 (“[T]he old originalism was at its core deeply concerned with both judicial *constraint*—narrowing the discretion of judges—and judicial *restraint*—deferring to democratic majorities.”).

²³⁶ Whittington, *supra* note 10, at 602; see also Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 632 (1990) (“[T]he appeal to democratic theory only makes sense if originalism is combined with a general preference for judicial restraint.”).

²³⁷ Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 STAN. L. REV. 1019, 1026 (1992).

²³⁸ BORK, *supra* note 12, at 163; accord Bork, *supra* note 98, at 10–11 (stating that courts should adhere to legislative value choices); OFFICE OF LEGAL POLICY, *supra* note 185, at 4 (“[J]udicial review is legitimate only when courts adhere strictly to the text of the Constitution.”). The old originalism was primarily a response to the perceived excesses of the Warren Court. See Whittington, *supra* note 10, at 601 (stating that “originalism was largely developed as a model of criticism of” the actions of the Warren and Burger Courts). See generally Colby & Smith, *Lochner*, *supra* note 14 (discussing the evolution of legal movements).

a method of determining the meaning of the words written in the Constitution”²³⁹—then fidelity to the original meaning of the text, rather than judicial restraint, must be the operative principle. To the new originalist, “a commitment to originalism is distinct from a commitment to judicial deference,” and originalism “may often require the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding.”²⁴⁰ When those commitments are phrased at a high level of generality, fidelity to the text might require giving them a broad sweep and application, even if this results in a greater potential for displacing majoritarian decision making. To the new originalist, this is simply the price of fidelity to the Constitution, which (after all) would be largely unnecessary if we were convinced that majoritarian decision-making should always prevail.

But proponents of the old originalism were also concerned with judicial *constraint*—that is, with narrowing the discretion of judges to rely on subjective value judgments in deciding constitutional questions.²⁴¹ As Robert Bork argued, “The only way in which the Constitution can constrain judges is if the judges interpret the document’s words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments.”²⁴² On this view, originalism is constraining because it supplies a “historical criterion that is conceptually quite separate from the preferences of the judge himself.”²⁴³

Although the new originalism has more or less abandoned its predecessor’s devotion to judicial restraint, it has largely maintained its professed commitment to judicial constraint, albeit

²³⁹ Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 108 (2001).

²⁴⁰ Whittington, *supra* note 10, at 609.

²⁴¹ See *supra* note 235 and accompanying text.

²⁴² Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986).

²⁴³ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989); accord BERGER, *supra* note 12, at 284–86 (arguing that reliance on original intent forecloses judicial value choices); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 106 (1989) (“A central concern of originalism is that judges be constrained by the law rather than be left free to act according to their own [interests].”).

with less certainty than did proponents of the old originalism.²⁴⁴ The new originalists' claim is, essentially, that judges applying the approach are "constrained by their obligation to remain faithful to the original meaning,"²⁴⁵ which requires a historical inquiry rather than an unguided exploration of morality and social policy. At a minimum, then, new originalists contend that "although their theory does not completely eliminate judicial subjectivity and the potential for judicial mischief, it is still meaningfully constraining, at least in comparison to the alternatives."²⁴⁶

Tom Colby has demonstrated why new originalists' claims about constraint are unconvincing.²⁴⁷ As should be apparent from the examples discussed above, the new originalism's willingness to seek the original meaning at a high level of abstraction inevitably leaves considerable room for judicial creativity, and thus holds less promise for judicial constraint.

Indeed, many new originalists have conceded that originalism alone often is not sufficient to resolve constitutional cases involving provisions that are couched in abstract terms and that lack clear, rule-like commands. Once one acknowledges that the original meaning of abstractly phrased provisions should be ascertained at a correspondingly high level of abstraction, it becomes inevitable that the original meaning of some of those provisions will be "underdeterminate."²⁴⁸ In some cases, "the principle established by the text may be unclear;" in others, the text might "specify a principle that is itself identifiable," but the principle might be "indeterminate in its application to a particular situation."²⁴⁹ Either way, "[t]raditional tools of interpretive analysis can be exhausted without providing a constitutional

²⁴⁴ See Whittington, *supra* note 10, at 608–09 (noting that "there seems to be less emphasis on the capacity of originalism to limit the discretion of the judge," and that the "new originalist . . . is unlikely to argue that only originalist methodology can prevent judicial abuses or can eliminate the need for judicial judgment").

²⁴⁵ Colby, *supra* note 18, at 751.

²⁴⁶ *Id.*

²⁴⁷ See *id.* at 751–756 ("How can a theory that interprets the most contentious constitutional clauses at a very high level of abstraction claim to be any more constraining than other methods of constitutional interpretation?").

²⁴⁸ Barnett, *supra* note 239, at 108.

²⁴⁹ WHITTINGTON, *supra* note 32, at 8.

meaning that is sufficiently clear to guide government action.”²⁵⁰ In such cases, the act of interpretation—that is, of discerning “the communicative content (linguistic meaning) of the constitutional text”²⁵¹—“runs out,” and we must instead turn to the process of “construction” to formulate rules and standards to apply the abstract principles in the text to concrete cases.²⁵² Constitutional construction thus seeks to produce constitutional law that is “consistent with [the] original meaning but not deducible from it.”²⁵³ As should be clear from this account of the relationship between interpretation and construction, the new originalism leaves significant discretion to judges charged with deciding constitutional cases.²⁵⁴

We might ask, moreover, whether originalism has actually been constraining in practice, once the interpreter is willing to seek the original meaning at a level of generality higher than the level at which Raoul Berger would have sought it. The examples above suggest that the selection of the level of generality provides a substantial amount of room for an originalist to profess fidelity to the original meaning while ensuring desired outcomes. But the problem is not simply that some originalists are more willing than others to seek the original meaning at a higher level of generality. The problem is that many originalists seem to vary the level of generality at which they seek meaning, from constitutional provision to provision or issue to issue, in ways that cannot be explained by simple reference to the level of generality at which the text is expressed.

We have already seen that Robert Bork, a founding father of the modern originalist movement, sought the original meaning of the Equal Protection Clause at a much higher level of generality, in seeking to justify *Brown*, than he sought the original meaning of

²⁵⁰ *Id.*

²⁵¹ Solum, *Construction*, *supra* note 32, at 457.

²⁵² Solum, *supra* note 26, at 20.

²⁵³ BARNETT, RESTORING, *supra* note 31, at 121; *see also* Colby, *supra* note 18, at 734 (“There can be no originalist answer to the question of which construction to apply; by definition, construction supplements interpretation and cannot be dictated by it.”).

²⁵⁴ *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 151 (2013) (arguing that “[c]onstructionist originalism is likely to reach inconsistent and ad hoc results”).

the Privileges or Immunities Clause, a potential source of a range of individual rights, even though both are objectively expressed at a high level of generality.²⁵⁵ Bork was also sometimes willing to interpret the First Amendment at a relatively high level of generality, at least in determining its application to suits for libel. In *Ollman v. Evans*, an en banc case decided when Bork was a judge on the D.C. Circuit, Bork acknowledged that “[w]e know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment.”²⁵⁶ But, he continued, “we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of those clauses.”²⁵⁷ Accordingly, even though “the framers” might not have “envision[ed] libel actions as a major threat to that freedom,” judges should “adapt their doctrines” over time if the “libel action becomes a threat to the central meaning of the first amendment. . . .”²⁵⁸

Yet when the question was the scope of the Establishment Clause of the First Amendment, he sought the original meaning at a much lower level of generality. He asserted that “[a]s an original matter, the clause might have extended no further than a prohibition against the government’s recognition of an official church or the favoring of some religions over others.”²⁵⁹ He then relied on the expectations of the framers about how the clause would apply, reasoning that the first Congress, “many of whose members were also members of the Philadelphia convention or of the various state ratifying conventions, and hence aware of what the clause was intended to mean, adopted legislation that demonstrated that they did not think the ‘wall of separation between church and state . . . was as severe and complete as the Court has now made it.’”²⁶⁰ On this basis, he criticized most of the

²⁵⁵ See *supra* notes 93–99, 137–138 and accompanying text.

²⁵⁶ 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

²⁵⁷ *Id.*

²⁵⁸ *Id.* See generally Steven G. Calabresi & Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on Ollman v. Evans*, 80 U. CHI. L. REV. DIALOGUE 155 (2013) (discussing Bork’s concurrence in *Ollman*).

²⁵⁹ BORK, *supra* note 12, at 95.

²⁶⁰ *Id.*

Court's modern cases interpreting the Establishment Clause, and in particular, cases prohibiting prayer in schools.²⁶¹

Justice Scalia, another founding father of the modern originalist movement—and who ushered in the new originalism by leading the “campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”²⁶²—similarly varied the level of generality at which he sought the meaning of the constitutional text. Justice Scalia sometimes sought the original meaning at a high level of generality. As with many other originalists today, Justice Scalia suggested that *Brown* was consistent with the original meaning of the Equal Protection Clause. In a book with Bryan Garner, for example, he asserted that the text of the Equal Protection Clause “can reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally.”²⁶³ To be sure, as noted above *Brown* is an unusual (and fraught) example; but Justice Scalia was willing to seek the original meaning at a level of abstraction higher than that warranted by the specific understanding and expectations of the framers in other contexts, as well.

For example, in *Citizens United v. Federal Election Commission*,²⁶⁴ Justice Scalia wrote separately to take issue with Justice Stevens's account of the framers' view of corporate speech.²⁶⁵ Rather than focus on the framers' specific view of the

²⁶¹ See *id.* (“The Court has adopted a rigidly secularist view of the establishment clause . . .”).

²⁶² Antonin Scalia, *Address by Justice Antonin Scalia in Washington, D.C.* (June 14, 1986), in OFFICE OF LEGAL POLICY, *supra* note 185, at 6.

²⁶³ SCALIA & GARNER, *supra* note 101, at 88. Justice Scalia has declared, however, that he would limit the reach of the equality mandate to laws that discriminate on the basis of race. See *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) (announcing that he will apply the “permissive *McCulloch* standard” for Congress's power under Section 5 of the Fourteenth Amendment only “to congressional measures designed to remedy racial discrimination by the States,” not other forms of discrimination). But he still argued that the Equal Protection Clause prohibited segregated schools even though the framers of the Fourteenth Amendment did not expect it to do so. See Transcript of Oral Argument, *supra* note 168, at 38 (responding to a lawyer who asked, “When did it become unconstitutional to assign children to separate schools?” by stating, “It's an easy question, I think, for that one. At the time that the Equal Protection Clause was adopted. That's absolutely true.”).

²⁶⁴ 558 U.S. 310 (2010).

²⁶⁵ See *id.* at 392–93 (Scalia, J., concurring).

right of corporations to engage in speech—or whether corporate speech was originally understood to count as “speech” within the meaning of the Amendment—Justice Scalia focused on the fact that the constitutional text “makes no distinction between types of speakers.”²⁶⁶ Because the “Amendment is written in terms of ‘speech,’ not speakers,” Justice Scalia reasoned that its “text offers no foothold for excluding any category of speaker,” including “incorporated associations of individuals.”²⁶⁷ Justice Scalia conceded that the framers’ views about corporations might be relevant “insofar as it can be thought to be reflected in the understood meaning of the text they enacted,” but he did not (unlike Justice Stevens) engage in any historical inquiry beyond focusing on the word “speech” to determine that “understood meaning.”²⁶⁸ In other words, Justice Scalia eschewed the framers’ specific understanding of and expectation about how corporate speech would be treated under the First Amendment, focusing instead on the broad sweep of the word “speech.”

Justice Scalia was also willing to apply the constitutional text to technologies and media that did not exist at the time of the adoption of the relevant provision. For example, Justice Scalia concluded that the Free Speech Clause of the First Amendment protects violent video games from content-based regulation,²⁶⁹ and that the Fourth Amendment limits the use of thermal-imaging technology outside of a home.²⁷⁰ This approach necessarily entails interpretation at something other than the lowest possible level of generality, because it presupposes that some broader principle that underlies the text—in the case of the Free Speech clause, that protected speech “communicate[s] ideas,”²⁷¹ and in the case of the

²⁶⁶ *Id.* at 386.

²⁶⁷ *Id.* at 392–93.

²⁶⁸ *Id.* at 386.

²⁶⁹ *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (Scalia, J.) (reasoning that “‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears”).

²⁷⁰ *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) (Scalia, J.) (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology To withdraw protection of this minimum expectation [of privacy in the home] would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.”).

²⁷¹ *Entm’t Merchs. Ass’n*, 564 U.S. at 790.

Fourth Amendment, that a search is government action that interferes with “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion”²⁷²—should be applied in ways that the framers of the text could not have anticipated or foreseen.

Justice Scalia sought the original meaning at an even higher level of generality when addressing the constitutionality of official race-conscious affirmative action programs.²⁷³ In concluding that such programs violate the Equal Protection Clause, Justice Scalia relied on the fact that the conventional justification for such programs—to remedy the effects of non-specific past societal discrimination—“is alien to the Constitution’s focus upon the individual,” a focus that Justice Scalia substantiated by invoking the Equal Protection Clause’s explicit protection for “person[s],” rather than groups.²⁷⁴ Justice Scalia reached this conclusion even though there is ample historical evidence that the framers of the Fourteenth Amendment did not understand it to prohibit race-conscious measures to address the effects of past discrimination.²⁷⁵

²⁷² *Kyllo*, 533 U.S. at 31.

²⁷³ See Easterbrook, *supra* note 5, at 356 (“In *City of Richmond v. J.A. Croson Co.*, Justice Scalia . . . treated the Equal Protection Clause as the source of a simple but exceedingly general rule . . .”).

²⁷⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia did not provide an originalist defense for why this principle—phrased as it is at a high level of generality—applies to race-conscious actions by the *federal* government. Indeed, if it is difficult to construct an originalist argument for *Brown v. Board of Education*, it is close to impossible to construct one for *Bolling v. Sharpe*. See 347 U.S. 497, 500 (1954) (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

²⁷⁵ For example, in 1866, the Thirty-Ninth Congress—the same Congress that drafted and passed the Fourteenth Amendment—passed a statute authorizing the Freedmen’s Bureau (which was created to help freed slaves) to provide special assistance to African Americans that would not be available to white citizens. CONG. GLOBE, 39th Cong., 1st Sess. 3842–50 (1866) (Senate vote); *id.* at 3850 (House vote). The following year, the Fortieth Congress—the same Congress that imposed Reconstruction to force the southern states to ratify the Fourteenth Amendment—enacted a statute providing money for “destitute colored persons” in Washington, D.C. Resolution of March 16, 1867, 15 Stat. 20. And in the years after the Civil War, Congress enacted many other appropriations for “colored” soldiers and sailors of the Union Army. All of these programs were open only to African Americans—even African Americans who had not been slaves—and were adopted over objections from opponents that such racially exclusive measures were unfair to poor whites and were thus racially

This refusal to be bound by the specific expectations of the framers is perhaps not surprising, given Justice Scalia's repeated assertion that the original meaning of the text, rather than the subjective intentions of the framers, should control. Indeed, Justice Scalia argued that the specific expectations of the framers about how the constitutional text would apply are not the appropriate interpretive object in the search for original meaning. In a colloquy with Ronald Dworkin about constitutional interpretation, Justice Scalia declared that he follows "what the text would reasonably be understood to mean," rather than the "concrete expectations of lawgivers."²⁷⁶

Of course, even taking Justice Scalia at his word, it is not at all clear that in practice there is a meaningful difference between original-meaning originalism, on the one hand, and original-intent or original-expected-application originalism, on the other, at least when one does not seek the former at a high level of generality. To be sure, many originalists have dedicated significant time and effort to the task of demonstrating that, as a matter of theory, we ought to seek the original meaning and not the original intent or the framers' subjective expectations about how the text would apply.²⁷⁷ But whatever one can say about the theoretical differences between the varying objects of originalist interpretation, in practice the inquiry to determine the objective original meaning inevitably will turn, at least in part, on the same types of evidence that are relevant to demonstrating the framers'

discriminatory. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (discussing "social welfare programs" during reconstruction).

²⁷⁶ ANTONIN SCALIA, A MATTER OF INTERPRETATION 144 (Amy Gutmann ed., 1997).

²⁷⁷ See Colby & Smith, *supra* note 24, at 249–55. These efforts arose, at least initially, in response to devastating critiques by Jeff Powell and Paul Brest, among others, to original-intent originalism. See *supra* notes 18–24 and accompanying text. Later, arguments in favor of original-meaning originalism over original-intent or original-expected-applications originalism became part of a more general project of justifying originalism as an interpretive, rather than a normative, theory. See, e.g., Lawson, *supra* note 25, at 1834 ("Interpretation must precede evaluation, rather than vice versa. The Constitution's merit as a constitution depends on its meaning, and one should not prejudice that question by allowing preconceptions about merit to affect the interpretative enterprise.").

original intentions or expectations about how the text should apply.²⁷⁸

Justice Scalia, for example, declared that he looks to *The Federalist* and writings by other participants in the framing “not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.”²⁷⁹ I am willing to take at face value Justice Scalia’s explanation for why he relied on such materials, but one cannot avoid noting that someone seeking the original intent or original expected application likely would rely on the very same materials. Evidence of original intent and original expected applications, in other words, is also (generally speaking) evidence of how the constitutional text would have been understood by the hypothetical reasonable person,²⁸⁰ and thus its objective original meaning.²⁸¹

But even assuming that there is a meaningful difference between an inquiry seeking the original objective public meaning (at a relatively specific level of generality) and one seeking the original expected application of the text, Justice Scalia did not consistently eschew the latter. I have already described Justice Scalia’s view that the Fourteenth Amendment does not guarantee a right of same-sex couples to marry, because in 1868 “no one

²⁷⁸ See, e.g., Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1686, 1689–1701 (2012) (noting that despite the rise of original-meaning originalism, the founders’ intentions continue to be relevant to modern constitutional theorists).

²⁷⁹ Scalia, *supra* note 276, at 38.

²⁸⁰ See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48–49 (2006) (“[T]he weight of originalist opinion today supports the view that the Constitution’s meaning is to be found in the hypothetical mind of the reasonable person . . .”).

²⁸¹ See, e.g., BARNETT, RESTORING, *supra* note 31, at 60–68 (relying heavily on statements of members of the Reconstruction Congress in seeking to ascertain the original public meaning of the Fourteenth Amendment); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1133 (2003) (examining the role of records from the Constitutional Convention in interpreting the Constitution, and concluding that they provide “rich insight into original linguistic meaning”); McConnell, *supra* note 43, at 957–1093 (relying on statements of members of Congress in the 1860s and 1870s to ascertain the original meaning of the Fourteenth Amendment).

doubted the constitutionality” of laws limiting marriage to opposite-sex couples;²⁸² and his view that discrimination on the basis of gender should not, as an original matter, give rise to any special concern under the Equal Protection Clause, because “nobody ever thought that that’s what it meant.”²⁸³ Justice Scalia also relied on the framers’ expectations in concluding that capital punishment does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.²⁸⁴ He acknowledged that the Amendment enacts “an abstract principle,” because (as in the case of the First and Fourth Amendments) it must be capable of application “to all sorts of torture quite unknown at the time the Eighth Amendment was adopted.”²⁸⁵ But he then asserted that the principle that it “abstracts” is the founding “society’s assessment of what is cruel,” and thus is “rooted in the moral perceptions of *the time*.”²⁸⁶ As such, “capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment.”²⁸⁷ For Justice Scalia, “provision for the death penalty [in the Fifth Amendment’s reference to “capital” crimes] in a Constitution that sets forth the moral principle of ‘no cruel punishments’ ” was “conclusive evidence that the death penalty is not (in the moral view of the Constitution) cruel.”²⁸⁸

In other words, because the framers of the Eighth Amendment did not believe that capital punishment was cruel and unusual punishment, it cannot (for constitutional purposes) be considered cruel and unusual today. Notwithstanding Justice Scalia’s ostensible rejection of the “concrete expectations of [the framers]” as the appropriate guide for the original meaning,²⁸⁹ he relied explicitly and dispositively on those expectations in assessing the constitutionality of capital punishment. This is in stark contrast to his apparent view that practices that the framers of the

²⁸² See *supra* note 2 and accompanying text.

²⁸³ See *supra* note 140 and accompanying text.

²⁸⁴ U.S. CONST. amend. VIII.

²⁸⁵ Scalia, *supra* note 276, at 145.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 146.

²⁸⁹ *Id.* at 144.

Fourteenth Amendment believed were permissible—such as segregated schools and race-conscious remedial legislation—are now unconstitutional because the abstract principle that animates the text applies differently now than it would have then.

Justice Scalia was not alone among the Justices in shifting the level of generality at which he sought constitutional meaning. Justice Thomas has also implicitly contended that *Brown* was consistent with—indeed, required by—the original meaning of the Fourteenth Amendment,²⁹⁰ and that race-conscious programs designed to benefit racial minorities are inconsistent with the Amendment’s original meaning.²⁹¹ Like Justice Scalia, Justice Thomas has apparently been willing to seek the original meaning for resolving those questions at a high level of generality, reasoning that the “Constitution enshrines principles independent of social theories.”²⁹² He has also taken a broad view of the First Amendment’s protection for commercial speech, concluding (notwithstanding the conventional view that the framers did not believe that the Amendment protected commercial speech)²⁹³ that he does “not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”²⁹⁴

²⁹⁰ Justice Thomas suggested in his concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* that the Fourteenth Amendment does not distinguish between “measures to keep the races together” and “measures to keep the races apart,” and that the “Constitution is not [so] malleable” as to permit the constitutionalization of “today’s faddish social theories that embrace that distinction.” 551 U.S. 701, 780 (2007) (Thomas, J. concurring). Justice Thomas then cited Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), to support the assertion that the “Constitution enshrines principles independent of social theories.” *Id.*

²⁹¹ See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2428 (2013) (Thomas, J., concurring) (“The Equal Protection Clause strips States of all authority to use race as a factor in providing education.”).

²⁹² *Parents Involved*, 551 U.S. at 780 (Thomas, J., concurring).

²⁹³ See, e.g., LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 248 (1963) (“[W]e do not know what the First Amendment’s freedom of speech-and-press clause meant to the men who drafted and ratified it at the time they do so. Moreover, they themselves . . . possessed no clear understanding either.”); Bork, *supra* note 98, at 22 (“The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.”).

²⁹⁴ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring). Justice Thomas somewhat tentatively noted that “some historical materials suggest”

But Justice Thomas has sought the original meaning of the First Amendment at a much lower level of generality in seeking to determine whether state regulation of the sale of violent video games to minors interferes with the freedom of speech. In *Brown v. Entertainment Merchants Ass'n*,²⁹⁵ he concluded that “[t]he practices and beliefs of the founding generation establish that ‘the freedom of speech,’ as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.”²⁹⁶ He relied on historical evidence that, in his view, demonstrated that “the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children.”²⁹⁷ Justice Thomas concluded that it “would be absurd to suggest that such a society understood ‘the freedom of speech’ to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors’ parents.”²⁹⁸ According to this reasoning, the First Amendment does not provide

commercial speech has the same status under the Amendment as other speech, and he cited three cases and a statement by Benjamin Franklin to support that position. *Id.*

Justice Thomas also tentatively suggested, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), that the Privileges or Immunities Clause of the Fourteenth Amendment might protect unenumerated rights. *See id.* at 854 (“The mere fact that the [Privileges or Immunities] Clause does not expressly list the rights it protects does not render it incapable of principled judicial application.”). Although he conceded that this possibility “may produce hard questions,” he noted that the “Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress’ power or is otherwise prohibited,” and he reasoned that “[w]hen the inquiry focuses on what the ratifying era understood the Privileges or Immunities Clause to mean, interpreting it should be no more ‘hazardous’ than interpreting these other constitutional provisions by using the same approach.” *Id.* It is not entirely clear from Justice Thomas’s opinion, but it seems likely that he was suggesting that an unenumerated right would have to have been specifically recognized at the time of the ratification of the Fourteenth Amendment as a fundamental right in order to be entitled to protection today under the Clause. *Cf. id.* at 858 (concluding that “the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public . . . deemed [the right to keep and bear arms] necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery”).

²⁹⁵ 131 S. Ct. 2729 (2011).

²⁹⁶ *Id.* at 2751 (Thomas, J., dissenting).

²⁹⁷ *Id.* at 2752.

²⁹⁸ *Id.*

protection today for activity that the “founding generation would not have considered [to be] an abridgment of ‘the freedom of speech.’”²⁹⁹

Justice Thomas took a similar approach to the constitutionality under the Due Process Clause of bans on same-sex marriage. He sought to answer the question by assigning a narrow meaning to the term “liberty” in the Due Process Clauses. He contended that “[s]ince well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits,” and that the “Framers created our Constitution to preserve that understanding of liberty.”³⁰⁰ In his view, the term “liberty” most likely referred “only to freedom from physical restraint,”³⁰¹ and at most meant “individual freedom from governmental action, not as a right to a particular governmental entitlement.”³⁰² Because a state’s refusal to acknowledge a marriage does not involve any restraint on private action, Justice Thomas reasoned, such action by the state does not impermissibly interfere with the liberty protected by the Due Process Clause.³⁰³

Similarly, Justice Thomas has sought the original meaning of the Commerce Clause at a low level of generality. In his concurring opinion in *United States v. Lopez*,³⁰⁴ he urged the Court to consider an approach “more faithful to the original understanding” of the Clause.³⁰⁵ He stressed that “at the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes,”³⁰⁶ and he warned that “interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems.”³⁰⁷ Because the “Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach

²⁹⁹ *Id.*

³⁰⁰ *Obergefell v. Hodges*, 135 S. Ct. at 2631 (Thomas, J., dissenting).

³⁰¹ *Id.* at 2633.

³⁰² *Id.* at 2634 (emphasis omitted).

³⁰³ *See id.* at 2635–37.

³⁰⁴ 514 U.S. 549 (1995).

³⁰⁵ *Id.* at 584 (Thomas, J., concurring).

³⁰⁶ *Id.* at 585.

³⁰⁷ *Id.* at 587.

of the Federal Government,”³⁰⁸ we should understand such matters to be outside of the reach of the commerce power today.³⁰⁹ When the question is the scope of Congress’s power under the Commerce Clause, in other words, Justice Thomas does not seek the principle that underlies the term “commerce” and then endeavor to apply it to modern circumstances; he seeks both the framers’ definition of the term and their understanding of how it would apply, notwithstanding changes that they could not have foreseen.

Other prominent originalists have also varied the level of generality at which they seek the original meaning in ways that cannot obviously be explained by the level of generality at which the constitutional text is expressed. For example, as discussed above, Steven Calabresi has sought the original meaning of the Fourteenth Amendment at a high level of generality when considering the Amendment’s treatment of discrimination on the basis of race, gender, and sexual orientation and the Amendment’s protection for the right to marry.³¹⁰ Indeed, he went so far as to describe as “faux originalists” those originalists who believe that the Fourteenth Amendment does not prohibit sex discrimination,³¹¹ presumably because they improperly read the Amendment at too narrow a level of generality. But when the question is the regulation of abortion—a matter on which he has confessed to holding very strong views³¹²—he seeks constitutional meaning at a much lower level of generality. Rather than ask, for example, whether the Fourteenth Amendment, through its protection for fundamental rights,³¹³ embraces a right to decide when or whether to start a family, Calabresi asks whether a right to “abortion on demand” is either “deeply rooted in history and

³⁰⁸ *Id.* at 590.

³⁰⁹ *See id.* at 593 (declaring that we must “respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce”).

³¹⁰ *See supra* notes 115–121, 147–164, 169 and accompanying text.

³¹¹ *See* Calabresi & Rickert, *supra* note 151, at 101.

³¹² *See* Steven G. Calabresi, *How To Reverse Government Imposition of Immorality: A Strategy for Eroding Roe v. Wade*, 31 HARV. J.L. & PUB. POL’Y 85, 85 (2008) (describing abortion as a “loathsome procedure” and stating that “*Roe v. Wade* was “not merely wrongly decided,” but “also profoundly immoral”).

³¹³ *See* Calabresi & Matthews, *supra* note 115, at 1413–20 (analyzing the meaning of the Fourteenth Amendment’s Privileges or Immunities Clause).

tradition” or supported by enough states today to constitute an “Article V consensus of three-quarters of the States.”³¹⁴ Similarly, whereas Randy Barnett seeks the original meaning of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment at a sufficiently high level of generality to authorize judges to “supplement” the text by recognizing rights entitled to protection³¹⁵— including the right of same-sex partners to engage in consensual sex at home³¹⁶ and the freedom of contract³¹⁷—he has, like Justice Thomas, sought the original meaning of the Commerce Clause at a much lower level of generality.³¹⁸

So much for the constraining power of originalism. We can produce radically different answers to questions of constitutional law simply by modifying the level of generality at which we ask the questions. If originalists continue to coalesce around the principles of the new originalism, then originalism’s capacity to constrain will continue to diminish—and, conversely, originalism’s capacity to generate a wide range of plausible answers to questions of constitutional law will continue to increase.³¹⁹

Perhaps more important, the growing tendency of originalists to seek the original meaning at a high level of generality is tending (presumably much to the chagrin of those who were in the vanguard of the old originalism in the 1970s and 1980s) to collapse the distinction between originalism and non-originalism. This is not necessarily a bad thing as a matter of theory, but it might have distorting effects for our constitutional culture.

Non-originalism obviously is not one cohesive theory, but rather a collection of theories that reject the assertion that we must

³¹⁴ Calabresi, *Equal Justice*, *supra* note 99, at 154.

³¹⁵ BARNETT, RESTORING, *supra* note 31, at 123.

³¹⁶ See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 495 (2004) (“By the theory of the police power presented here, *Lawrence v. Texas*, is . . . easy case.”).

³¹⁷ See BARNETT, RESTORING, *supra* note 31, at 211–19.

³¹⁸ See *id.* at 278–318; Barnett, *supra* note 239, at 146 (“The most persuasive evidence of original meaning . . . strongly supports . . . [a] narrow interpretation of Congress’ [Commerce Clause] power . . .”).

³¹⁹ See Colby & Smith, *supra* note 24, at 300 (“[T]he wide range of competing versions of originalism enables self-professed originalists to reach, while applying ostensibly originalist methodology, virtually any result that they wish to reach.”).

always be bound by the narrow original understanding of the constitutional text.³²⁰ But non-originalists—or living constitutionalists, as they used to be called—do not simply ignore text and history in assigning constitutional meaning. As I have noted elsewhere, for most non-originalists, the original meaning of the text provides the starting point for any act of constitutional interpretation.³²¹ Few non-originalists, for example, would contend that a twenty-five-year-old person is eligible to serve as President—or, conversely, that the Constitution should be read today to prevent anyone under the age of fifty from serving as President.³²² But because of the broad level of generality at which much of the constitutional text is expressed, the text alone rarely resolves constitutional questions.³²³ Non-originalists also generally do not feel constrained by the specific expectations of the framers in deciding how to apply the principle embodied in the text to modern circumstances.

Accordingly, when Justice Brennan gave a speech in 1986 to the Federalist Society criticizing originalism, he lamented those “who would restrict claims of right to the values of 1789 specifically articulated in the Constitution” and who “turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.”³²⁴ His approach, in contrast, accepted the framers’ “fundamental principles” but refused to be bound by the “precise, at times anachronistic, contours” of those principles.³²⁵ To Justice Brennan, recognizing that “the genius of the Constitution” lies in “the adaptability of its great principles to

³²⁰ See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24 (2009) (defining non-originalism as the “thesis that facts that occur after ratification or amendment can properly bear—constitutively, not just evidentially—on how courts should interpret the Constitution . . .”).

³²¹ See Smith, *supra* note 34, at 723 (noting that originalists use the original meaning as “the starting point” for interpretation).

³²² See U.S. CONST. art. II, § 1, cl. 5 (providing that no person shall “be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . .”).

³²³ See Smith, *supra* note 34, at 723 (“[O]riginal meaning . . . rarely alone provides the conclusion.”).

³²⁴ William J. Brennan, Jr., *Speech to the Text and Teaching Symposium at Georgetown University* (Oct. 12, 1985), reprinted in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55–57 (Steven G. Calabresi ed., 2007). I am indebted to my colleague Orin Kerr, who brought this speech to my attention.

³²⁵ *Id.* at 61.

cope with current problems and current needs” necessarily entailed the rejection of originalism.³²⁶

And yet this was, essentially, Bork’s approach to the question of racial segregation, to take the example with which we began our discussion. Bork criticized the Court for relying on a non-originalist rationale in *Brown*,³²⁷ reasoning that the Court’s self-conscious rejection in *Brown* of originalism³²⁸ not only was wrong, but also had a “calamitous effect upon the law” precisely because it purported to depart from the original meaning.³²⁹ But even if Bork was correct that the opinion in *Brown* would have gained legitimacy by being clearly “rooted in the original understanding,”³³⁰ it is far from clear that Bork’s approach—which, again, focused on the demands of “equality”—was meaningfully different from the Court’s actual approach, which ultimately concluded that, “in . . . light of [public education’s] full development and its present place in American life,” segregated schools were unconstitutional because “[s]eparate educational facilities are inherently unequal.”³³¹ Indeed, as we have seen, Bork’s approach would justify all sorts of open-ended interpretation in the name of “equality,” including many with which, it is safe to say, Bork would have expressed strong disagreement.³³²

Yet the examples discussed above suggest that Bork’s approach to *Brown* is no longer an outlier in originalist circles. If all originalism entails today is a commitment to the ideas that constitutional meaning was fixed at the time of ratification and

³²⁶ *Id.*

³²⁷ See BORK, *supra* note 12, at 77, 83 (stating that the Court in *Brown* issued “a ruling based on nothing in the historic Constitution,” which subsequently encouraged the Court “to embark on more adventures in policymaking, which is what it thought it had done in *Brown*”).

³²⁸ 347 U.S. 483, 492 (“[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”).

³²⁹ BORK, *supra* note 12, at 76.

³³⁰ *Id.* at 83.

³³¹ *Brown*, 347 U.S. at 492, 495.

³³² Cf. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 n.25 (1997) (“If achieving ‘equality’ is the relevant intention, it would be equally originalist to say that the Fourteenth Amendment enacted Marxism, on the theory that equality and capitalism were mutually inconsistent, though the ratifiers did not understand that.”).

that judges are bound by that meaning,³³³ with the recognition that in many cases the meaning was fixed only at a very high level of generality, then there is no longer anything particularly distinctive about originalism.³³⁴

In a provocative paper, for example, Will Baude argues that “originalism is our law”; but he can do so—and accommodate many Supreme Court decisions that an earlier generation of originalists either decried or regretfully concluded were indefensible on originalist grounds—only because his definition of what originalism entails is so capacious.³³⁵ Similarly, Jack Balkin has sought expressly to merge, under the banner of “Living Originalism,” what were once thought to be competing approaches to interpretation.³³⁶ But it turns out that this was not a particularly challenging move, given how much originalists have repudiated about the old form of originalism.

It is in this light that we should understand Elena Kagan’s comments about originalism during the hearings on her nomination to serve as Associate Justice. When asked about the framers, Kagan declared, “Sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they tried to do. In that way, we are all

³³³ See Solum, *Construction*, *supra* note 32, at 456 (describing the “Fixation Thesis” and the “Constraint Principle” as the “two core ideas” of originalist theories).

³³⁴ See Orin Kerr, *More on Originalism and Same-Sex Marriage*, VOLOKH CONSPIRACY (Jan. 29, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/29/more-on-originalism-and-same-sex-marriage/> (“If we accept the full range of what today’s theorists say, it no longer makes sense to ask whether there is an originalist argument for a position. There are now originalist arguments for everything.”); Orin Kerr, *Is There an Originalist Case for a Right to Same-Sex Marriage?*, VOLOKH CONSPIRACY (Jan. 28, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/is-there-an-originalist-case-for-a-right-to-same-sex-marriage/> (nothing that to make an originalist claim “identifiably different” from a non-originalist one, there would need to be evidence that “the level of generality actually identified and applied” was the same as that understood by the framers).

³³⁵ William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2403 (2015) (defining “inclusive originalism” as an approach under which “the original meaning of the Constitution is the ultimate criterion for constitutional law,” and under which “judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them”) (emphasis omitted).

³³⁶ See BALKIN, *supra* note 105, at 3–34.

originalists.”³³⁷ But Justice Kagan could make this assertion in good faith only because the version of originalism most often advanced by scholars is slowly becoming what most of us think of as non-originalism. Justice Kagan could just as easily have declared, it turns out, that we are all *non*-originalists now.

This is not to say that the old originalists had it right. Quite to the contrary, the old originalism suffered from very serious problems, including the fact that it could not justify some of our most deeply valued norms of constitutional law. But at least under the old originalism, we usually knew (more or less) where we stood. Under the old originalism, for example, *Roe* was wrong,³³⁸ but so was *Lochner*.³³⁹ Under the new originalism, perhaps both are still wrong;³⁴⁰ or perhaps *Roe* was right but *Lochner* was wrong;³⁴¹ or perhaps *Roe* was wrong but *Lochner* was

³³⁷ Kagan, *We Are All Originalists*, THE BLT: THE BLOG OF LEGAL TIMES (June 29, 2010), <http://legaltimes.typepad.com/blt/2010/06/Kagan-we-are-all-originalists.html>.

³³⁸ See OFFICE OF LEGAL POLICY, *supra* note 185, at 2 (“[T]he Supreme Court has . . . created out of whole cloth . . . a ‘right of privacy,’ a ‘right’ the Court used to invalidate . . . the abortion laws of all 50 states.”); see also William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (criticizing the view under which “nonelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so”).

³³⁹ See, e.g., BERGER, *supra* note 12, at 266 (“The logic that bars the one equally bars the other.”); BORK, *supra* note 12, at 43 (“[S]ubstantive due process, wherever it appears, is never more than a pretense that the judge’s views are in the Constitution.”); OFFICE OF LEGAL POLICY, *supra* note 185, at 59 (“To justify its promotion of a laissez-faire marketplace [in the *Lochner* era], the Court purported to rely on the due process clauses of the fifth and fourteenth amendments, but it never seriously attempted to justify its expansive interpretation of those clauses with their original meaning.”). This is not to say, however, that there was not a plausible defense of *Lochner* under the old originalism. See, e.g., Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453, 454, 492–97 (1985) (arguing that *Lochner* was consistent with the original meaning of the Fourteenth Amendment).

³⁴⁰ See, e.g., Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POLY 947, 952 (2008) (“The Supreme Court abandoned the *Lochner*-era doctrine of economic substantive due process in the face of a withering textualist and originalist critique”); *id.* at 957 (“Is it more important to the rule of law to maintain abortion rights or more important to get rid of the doctrine of substantive due process, which led to *Dred Scott v. Sandford* and to *Lochner v. New York*? In constitutional law, one ought to take the long view.”).

³⁴¹ See, e.g., Balkin, *supra* note 223, at 292 (offering “an argument for the right to abortion based on the *original meaning* of the constitutional text as opposed to its *original expected application*”); Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 679–80 (2005) (suggesting that although there is a

right;³⁴² or perhaps they were both right.³⁴³ All we have to do is alter the level of generality at which we seek the original meaning, and we can construct a plausible argument for any of those results—or, for that matter, for almost anything.

There is an irony in this state of affairs. Modern originalism arose in direct response to the broad rights-granting decisions of the Warren and Burger Courts.³⁴⁴ “Above all, originalism was a way of explaining what the Court had done wrong, and what it had done wrong in this context was primarily to strike down government actions in the name of individual rights”³⁴⁵—and in particular, individual rights that were not specifically mentioned in the text or specifically contemplated by the framers. But the new originalism’s embrace of the practice of seeking constitutional meaning at a high level of generality means that almost anything goes now, even for originalists.

Yet the problem goes beyond irony. The source of originalism’s appeal, particularly outside of the legal academy, has long been its claim to neutrality.³⁴⁶ On this view, because originalism “lash[es] judges to the solid mast of history,”³⁴⁷ it is “less likely to aggravate

plausible claim that *Lochner* was correct when it was decided, based on the intellectual assumptions of the time, our legal culture has changed enough that it is now wrong).

³⁴² See, e.g., Edward Whelan, *Rand Paul is Wrong: Judicial Restraint is Right*, NAT’L REV. (Jan. 15, 2015), <http://www.nationalreview.com/article/396480/rand-paul-wrong-judicial-restraint-right-ed-whelan> (“The core of judicial activism consists of the wrongful overriding by judges of democratic enactments or other policy choices made through the processes of representative government. *Roe v. Wade*, with its invention of a constitutional right to abortion, is a classic example.”); Ed Whelan, *Re: Does the Constitution Protect Unenumerated Rights?*, NAT’L REV. (Apr. 18, 2012) (stating that it is “quite plausible” that “the Privileges or Immunities Clause, properly construed, does protect some substantive, <http://www.nationalreview.com/bench-memos/296482/re-does-constitution-protect-unenumerated-rights-ed-whelan> (stating that it is “quite plausible” that “the Privileges or Immunities Clause, properly construed, does protect some substantive economic rights”).

³⁴³ See, e.g., BARNETT, RESTORING, *supra* note 31, at 259–66 (constructing an originalist argument for a constitutionally protected “presumption of liberty” against legislative interference); Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 411 (2007) (“I am sympathetic with [Balkin’s] conclusions about the unconstitutionality of prohibitions on abortion.”).

³⁴⁴ See Whittington, *supra* note 10, at 601 (“[O]riginalism was a reactive theory motivated by substantive disagreement with . . . the Warren and Burger Courts. . .”).

³⁴⁵ *Id.*

³⁴⁶ See McConnell, *supra* note 36, at 2415 (arguing that originalism is objective rather than ideological).

³⁴⁷ Whittington, *supra* note 10, at 602.

the most significant weakness of the system of judicial review,” which is the risk that “the judges will mistake their own predilections for the law.”³⁴⁸ Approaches to constitutional interpretation that do not tie judges to the historical meaning of the Constitution, in contrast, simply invite judges to impose their own policy preferences under the guise of interpretation.³⁴⁹ But originalists’ increasing willingness to seek constitutional meaning at a high level of generality largely frees judges from the constraint of history. And, as we have seen, the freedom to vary the level of generality while still claiming fidelity to originalism tends to make originalism seem significantly less neutral.³⁵⁰

More important, although academic originalists have gone a long way towards making originalism attractive even to those who were deeply skeptical of the old originalism, judges remain free to apply some version of the old originalism when they are so moved. As Tom Colby has explained, originalists can accept some of the new originalism’s modifications to the old originalism while rejecting—or “more often simply not acknowledging or engaging”—others; or worse, they can claim to accept those changes in theory, “but then turn around and not actually employ them in practice.”³⁵¹ The examples discussed above suggest that this happens regularly.

In addition, the popular conception of originalism remains something much more like the old originalism.³⁵² That conception is based on what Larry Alexander has self-deprecatingly described

³⁴⁸ Scalia, *supra* note 243, at 863.

³⁴⁹ See, e.g., BeVier, *supra* note 36, at 286 (“Integrity characterizes a judicial process based on originalism, and its lack is one of the chief deficiencies of its alternatives.”); *id.* at 288 (arguing that the “impersonality” of originalism’s decision-making criteria “invokes all the virtues of objectivity and by implication rejects subjective judging,” and criticizing the “often arbitrary, partisan, subjective criteria of nonoriginalists”).

³⁵⁰ See *supra* notes 244–254 and accompanying text.

³⁵¹ Colby, *supra* note 18, at 772; see also Dorf, *supra* note 124, at 937–38 (“[D]espite the shift in academic defenses of originalism, judges and others continue to invoke the older, more simple-minded expected-applications version of originalism.”).

³⁵² See Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2022–23 (2012) (reviewing both JACK M. BALKIN, *LIVING ORIGINALISM* (2011)); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)) (“The available evidence indicates that members of the public at large hold views about originalism, but they do not sharply distinguish among original intent, original expected application, and original semantic meaning.”).

as “simple-minded originalism,”³⁵³ and it derives much of its appeal from the idea that by adhering to the specific intent of the framers, judges can avoid “legislating from the bench.”³⁵⁴ To be sure, the claim that judges who follow this approach can effectively limit their role to that of “umpire”³⁵⁵ might be fanciful to most people who are engaged with constitutional law, but it is a metaphor with great resonance outside of our world.

Originalism acquires an additional veneer of respectability in the popular conception when the work of new originalists purporting to justify *Brown* and the Court’s decisions on sex discrimination and the right of privacy trickles in to the public discourse over the proper way to interpret the Constitution. But in practice—particularly in judicial practice, with respect to new questions that arise—judges are free to follow the more narrow, popular conception of originalism and seek the original meaning at a low level of generality.³⁵⁶ This enables originalists to continue to claim, in public debates over how to interpret the Constitution, that only their approach to constitutional interpretation is genuinely neutral, while avoiding the taint that assuredly would attach to their approach with the admission that it cannot, in fact, justify many of our most prized norms of constitutional law.

Sooner or later, originalists will have to choose.

³⁵³ See Alexander, *supra* note 32, at 1 (noting that “simple-minded originalism,” which seeks the “authors’ intended meaning,” is “considered heretical among most legal academics” but is “so orthodox among ordinary folks as to escape notice”).

³⁵⁴ Whittington, *supra* note 10, at 601 (internal quotation marks omitted); see JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 96 (2005) (quoting President Nixon, who insisted that it was “the job of the courts to interpret the law, not to make the law.” (internal quotation marks omitted)).

³⁵⁵ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States).

³⁵⁶ See Dorf, *supra* note 352, at 2014 (“Widespread acceptance of Balkin’s views would allow conservatives to say that even liberals now accept originalism but then turn around and defined originalism narrowly.” (footnotes omitted)).