

ORIGINALISM AND SAME-SEX MARRIAGE

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Supreme Court Justice Antonin Scalia has repeatedly asserted that same-sex marriage is an easy question for originalism; it is clearly not within the Constitution's purview. The purpose of this Article is to challenge that claim by illustrating how an originalist could find that denying same-sex marriage contravenes the original public meaning of the Fourteenth Amendment. This Article finds that the original public meaning of Section One of the Fourteenth Amendment may serve (1) as a prohibition on systems of caste and class legislation, or (2) as a ban on partial or special class legislation that singles out a group for a particular benefit or burden. As to the first suggested meaning, this Article explores the scientific research on the psychobiological roots of sexual orientation, particularly of gay men; the historical treatment of gay men under American law; and areas of current legal inequality of same-sex couples, as compared to married different-sex couples. It also seeks to establish that a system of caste likely does exist, and that an originalist may find denying same-sex marriage to be an unconstitutional perpetuation of that system. As to the second suggested meaning, if the original public meaning of the Amendment is to constitutionalize the antebellum practice of prohibiting laws which single out a group for a special burden, this Article argues that an originalist may find denying same-sex marriage to be an unconstitutionally targeted burden. The aim of this Article is not to impose upon originalism a definitive answer to the same-sex marriage question, but rather to illustrate how an originalist could legitimately find denying same-sex marriage to be unconstitutional. At the least, it demonstrates that same-sex marriage demands of originalism deep consideration, and is not the easy question Justice Scalia believes.

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INTRODUCTION

On December 7th, 2012, the United States Supreme Court granted certiorari to two controversial cases relating to same-sex marriage: the first from the Ninth Circuit on California's Proposition Eight, and the second from the Second Circuit on the Federal Defense of Marriage Act (DOMA).¹ Predictably, the announcement has been met with much speculation about how the nine Justices will cast their votes.²

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¹ Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), cert. granted, sub nom. Hollingsworth v. Perry, 133 S. Ct 786 (Dec. 7, 2012) (No. 12-144); Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), cert. granted, 133 S. Ct 786 (Dec. 7, 2012) (No. 12-307); see also Adam Liptak, *Justices To Hear Two Challenges On Gay Marriage*, N.Y. TIMES (Dec. 8, 2012).

² See, e.g., Jess Bravin, *High Court Will Rule on Gay Marriage*, WALL ST. J., Dec. 8-9, 2012, at A9 ("The Supreme Court's liberal wing—Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan—is likely to treat the Defense of Marriage Act with skepticism. Conservative Justice Antonin Scalia is expected to be more deferential to the law, probably joined by Justice Clarence Thomas. Justice Samuel Alito also typically takes conservative positions on social issues."); Richard D. Kahlenberg, *The Arguments for Gay Marriage Undermine Affirmative Action*, SLATE, Dec. 13, 2012, http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/supreme_court_2012_how_justice_kennedy_could_vote_to_recognize_gay_marriage.html ("Kennedy is likely to be the swing vote in these cases, and many are predicting he will side with . . . liberals to support gay marriage."); Adam Winkler, *Will the Supreme Court Uphold Gay Marriage Ban?*, HUFFINGTON POST, Dec. 7, 2012, http://huffingtonpost.com/adam-winkler/will-the-supreme-court-up_b_2259342.html.

Justice Antonin Scalia, for one, has not been shy about his views on gay rights issues.³ Recently, discussing an array of controversial topics he asserted, “[t]he death penalty? Give me a break. It’s easy. Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion. Homosexual sodomy? Come on. For 200 years, it was criminal in every state.”⁴ Striking a similar chord in a 2009 interview, Justice Scalia remarked:

I do not propose or suggest that originalism is perfect. And provides easy answers for everything. But that’s not my burden. My burden is just to show that it’s better than anything else. And the originalist has *easy answers* for many things. Especially the most controversial things in modern times. Whether . . . the equal protection clause requires that the states permit same sex marriage. I mean you know *that’s not a hard question* for an originalist. Nobody ever thought that’s what the equal protection clause meant. . . . [I]t didn’t mean that [at the time of ratification] . . . [and] it doesn’t mean that today.⁵

Whether the issue is laws prohibiting intimate acts between same-sex couples or same-sex marriage, Justice Scalia contends that it is an easy questions for an originalist; the Constitution on its face does not prohibit laws from proscribing, nor would anyone at the time of ratification have expected the equal protection clause to protect, such conduct.⁶

Contrary to Justice Scalia’s assertion, this Article will show that same-sex marriage may not be the easy question for originalism he believes it to be. To support this claim, the Article will demonstrate how an originalist might find denying marriage to same-sex couples to be unconstitutional. The aim is not to ascertain a definitive answer to the same-sex marriage question, but rather to establish that this is a difficult question for originalism that demands thorough consideration.

As described by Professor Larry Solum, originalism, “as a matter of lexicography . . . is a family resemblance term—with several overlapping senses.”⁷ While the broad term

³ See, e.g., Elizabeth Chuck, *Gay Student Asks Justice Scalia to Defend his ‘Bestiality’ Comments*, NBC NEWS, Dec. 11, 2012, http://usnews.nbcnews.com/_news/2012/12/11/15841049-gay-student-asks-justice-scalia-to-defend-his-bestiality-comments?lite (reporting how just a few days after the Court announced it would hear the same-sex marriage cases, Justice Scalia came under fire for his response to a gay student’s question while speaking at Princeton University in defense of his controversial dissent in *Lawrence v. Texas*. In *Lawrence*, refuting the majority’s overruling of *Bowers v. Hardwick*, 478 U. S. 186 (1986), Justice Scalia wrote that “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers’* validation of laws based on moral choices.” 539 U.S. 558, 590 (2003) (Scalia, J., dissenting). Scalia explained that by equating laws banning “homosexual sodomy” to those banning bestiality and murder he aimed to prompt the question, “if we cannot have moral feelings against or objections to homosexuality, can we have it against anything?”); see also Caleb Kennedy, *Scalia Defends Gay Rights Position*, DAILY PRINCETONIAN, Dec. 11, 2012, <http://dailyprincetonian.com/2012/12/10/32135/>.

⁴ Mark Sherman, *Scalia Says Abortion, Gay Rights are Easy Cases*, ASSOC. PRESS, Oct. 5, 2012, <http://news.yahoo.com/scalia-says-abortion-gay-rights-easy-cases-073501926.html>.

⁵ Interview by Peter Robinson with Antonin Scalia, Supreme Court Justice (Feb. 23, 2009), available at http://media.hoover.org/sites/default/files/documents/uk_scalia_transcript.pdf (emphasis added); see also Common Knowledge, *Law and Justice with Antonin Scalia*, YOUTUBE, Mar. 16, 2009, http://youtu.be/zE9biZT_z1k.

⁶ Interview by Peter Robinson, *supra* note 5 (“Nobody ever thought that’s what the equal protection clause meant [that states are required to permit same-sex marriage].”); see also Sherman, *supra* note 4.

⁷ Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*

“originalism” is ambiguous,⁸ the tie that binds these various senses is a desire to constrain the latitude of judicial discretion on constitutional matters, or more forcefully, to constrain judicial activism.⁹ It is how a particular brand of originalism defines fidelity that has prompted divergence.

For the purposes of this Article I will put to the side the more restrictive forms of originalism—original intent and original understanding originalism¹⁰—and focus on the brand of originalism practiced by Justice Scalia, which has been referred to by some as the “New Originalism,”¹¹ but more often and more descriptively has been identified as “original public meaning” originalism.¹² Original public meaning originalism marked a shift from intent-focused forms of originalism.¹³ Rather than center its analysis on the subjective intentions of the framers or ratifiers, most originalists today accept that the meaning of the Constitution is the objective meaning that the words were given at the time of that particular article’s or amendment’s ratification.¹⁴

5 (Georgetown Univ. L. Ctr., Working Paper, 2011), available at <http://ssrn.com/abstract=1825543> [hereinafter Solum, *What is Originalism?*].

⁸ *Id.* at 6; see also Thomas Colby, *The Sacrifice of New Originalism*, 99 GEO. L.J. 713, 718 (2011) (“It would be a mistake to view either the Old or the New Originalism as a distinct and coherent constitutional theory; ‘originalism’ is a label that has been, and continues to be, affixed to a remarkably diverse array of interpretive theories that in fact share surprisingly little in common.”).

⁹ See Solum, *What is Originalism?*, *supra* note 7, at 41 (“‘Originalism’ is an ambiguous term. The family of contemporary originalist constitutional theories contains substantial diversity, and there may be no single thesis upon which all self-described originalists agree.”); see also Colby, *supra* note 8, at 714 (“Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its *raison d’être*.”); James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 670 (2012) (“[T]here are numerous varieties of originalism, and . . . the only thing they agree upon is their rejection of moral readings.”).

¹⁰ Colby identifies these forms of Originalism, which focused predominantly on the intentions of the framers or the subjective understandings of the ratifiers, as “Old Originalism.” Colby, *supra* note 8, at 719-720. Colby explains,

the theoretical moves from the Old to the New Originalism [include]: (a) the move from original intent to original meaning; (b) the move from subjective meaning to objective meaning; (c) the move from actual to hypothetical understanding; (d) the embrace of standards and general principles; (e) the embrace of broad levels of generality; (f) the move from original expected application to original objective principles; (g) the distinction between interpretation and construction; and (h) the distinction between normative and semantic originalism.

Id. I put these brands of originalism aside because it is almost certain that Old Originalism, which has been criticized for being irreconcilable with integrated schools, interracial marriage, and gender equality, could not sanction same-sex marriage. To attempt to prove otherwise is not a useful endeavor, especially considering that the most relevant jurist to this piece, Justice Scalia, does not embrace those methods.

¹¹ See, e.g., Colby, *supra* note 8, at 714 (“The advocates of this new and improved originalism have self-consciously adopted a new label—‘the New Originalism’—to distinguish their theory from its failed forerunner.”). See generally Keith Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599 (2004).

¹² Solum, *What is Originalism?*, *supra* note 7, at 16.

¹³ Colby, *supra* note 8, at 721-24; see also Lawrence Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 928 (2009) [hereinafter Solum, *Heller and Originalism*].

¹⁴ Solum, *Heller and Originalism*, *supra* note 13, at 928, 933; see also Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 116 (2010) [hereinafter Solum, *Interpretation-Construction*] (“[T]he linguistic meaning of the constitution is fixed by linguistic facts at the time that each constitutional

On the whole, New Originalists agree that where the text lays out a straightforward rule—for instance, the President must be at least thirty-five years old—courts should simply apply that rule.¹⁵ Many further contend that when the text lays out a broad standard or principle, the objective meaning of the principle or standard controls interpretation.¹⁶ Some New Originalists also argue that though the meaning of a principle or standard was set at the time of ratification, when applying that principle or standard to a modern set of facts, modern interpreters need not adhere to how it would have been expected to apply by the public living at the time of ratification.¹⁷

Applying an original public meaning originalist interpretation, one may determine that the objective original meaning of the Fourteenth Amendment is to serve as a broad prohibition on systems of caste and class legislation. If sexual orientation qualifies as such a caste-like feature, then legislation and regulation based on that feature may be unconstitutional.

In Part I, I define the version of original meaning originalism I employ, explain how it is distinct from original expected applications, and discuss how original meaning originalism functions. In Part II, I address the original meaning of the Fourteenth Amendment. Consistent with the work of originalist scholars who have examined the issue, I will argue that the original meaning of the Fourteenth Amendment is to establish a prohibition on systems of caste and/or class legislation. In Part III, I identify three interrelated features of a system of caste: (1) a hereditary characteristic is implicated; (2) legislation and regulation creates class stratification based on that characteristic; and (3) such stratification leads to the exclusive allocation of rights to one group at the expense of another. To these features I apply scientific research on sexual

provision is framed and ratified.”).

¹⁵ U.S. CONST. art. II, § 1, cl. 5; David Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1164 (2012) (“Rules are ‘determinate’; the examples are that a President must be thirty-five years old and that there are two houses of Congress.”).

¹⁶ See Colby, *supra* note 8, at 722-24 (discussing the transition of originalism’s focus on subjective to objective original meaning); Vasan Kesavan & Michael Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (explaining that original meaning should be found by identifying what an objective, reasonably well-informed reader at the time of ratification “within the political and linguistic community in which they were adopted” would have understood the text to mean).

¹⁷ See Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT 427, 449 (2007) [hereinafter Balkin, *Constitutional Redemption*] (“Fidelity to original meaning did not require following what the framing generation thought the consequences of adopting the words would be. That is especially so when the text employs abstract principles.”); Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 622 (1999) (“While some originalists still search for how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases, original meaning originalists need not concern themselves with this, except as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener.”); Stephen Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 669 (2009) (“What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law. . . . Ordinary citizens could not have been expected to know what these original expected applications [of constitutional text] were, and they could not have responded to them even if they had.”); see also, Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998). *But see* Colby, *supra* note 8, at 772 (identifying that some of those who have endorsed original meaning and rejected original intent have not “bought into the notion that the proper search is for the objective understandings of a hypothetical observer” and some originalists “continue to search for the actual understandings of the actual ratifiers or public”); John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 742 (2012) (criticizing drawing inferences from abstract language in the constitutional text).

orientation to support the argument that same-sex attraction, particularly for men, is at least in part hereditary. There is a history of legislation and regulation which distinguished gay men and lesbian women from heterosexual persons, thus stratifying American society based on sexual orientation, and there remain today significant areas where rights are exclusively allocated to opposite-sex couples at the expense of same-sex couples, particularly among the bundle of rights associated with marriage.¹⁸ Finally in Part IV, I explain how if sexual orientation is a caste-like feature, then denying marriage to same-sex couples violates the original meaning of the Fourteenth Amendment. Alternatively, I address how the same result is achieved if the original meaning is to serve as a prohibition on class legislation that singles out a group for a special benefit or burden.

I. ORIGINAL MEANING ORIGINALISM AND ITS INTERPRETATIVE METHODS

In this part, I explain how original meaning originalism operates as a method of constitutional interpretation. The methodology illustrated here will supply the framework for the analysis conducted in subsequent sections. As explained above, original meaning originalism is the idea that the true meaning of the Constitution, to which we owe our fidelity, is the original public meaning of the constitutional text.¹⁹ One challenge originalism continues to face is that any mode of constitutional interpretation that cannot encompass certain precedents,²⁰ notably *Brown v. Board of Education*,²¹ is unacceptable to modern majorities.²² Faced with an original meaning that is irreconcilable with modern societal norms, even Justice Scalia famously admitted he himself might prove merely a “faint-hearted originalist.”²³ Many New Originalists, though not

¹⁸ The discussion of historical legal treatment and scientific research in Part III is largely focused on gay men. This is not a choice to set aside other members of the broader LGBT community, but rather the consequence of where the attention of history and science has predominantly focused. The history of the LGBT community in the United States, especially its legal history, is multi-faceted and complex. Such a history requires examination through a number of lenses (e.g., race, gender, economic status) to develop a complete understanding. Much of the true history of LGBT individuals in the United States will never be known. See JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 19 (2011).

¹⁹ Solum, *What is Originalism?*, *supra* note 7, at 16.

²⁰ The role of precedent has often presented a unique source of tension for originalism. Compare Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (“[T]he practice of following precedent is . . . affirmatively inconsistent with the federal Constitution.”), with Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 772 (1988) (“[T]o accord status to stare decisis requires an acknowledgement that originalism plays a purely instrumental role by contributing to the establishment of legitimate government, which in turn promotes stability and continuity . . . [but] [a]t this point in our history, when adherence to stare decisis promotes the underlying values of stability and continuity better than does adherence to the original understanding, the latter cannot prevail.”).

²¹ 347 U.S. 483 (1954).

²² Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1192 (2012); see also, e.g., Strauss, *supra* note 15, at 1162 (citing *Brown* as the prime example of what he coins the “originalist [plausibility] dilemma”); Randy Barnett, *Originalism and Brown*, THE VOLOKH CONSPIRACY (May 12, 2005, 2:05 PM), http://volokh.com/archives/archive_2005_05_08-2005_05_14.shtml#1115921115.

²³ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself . . . upholding a statute that imposes the punishment of flogging.”).

Justice Scalia,²⁴ have sought “to put originalism on a stronger theoretical footing” in two key ways: by recognizing that (1) where the text is vague, the Constitution requires both semantic interpretation and construction, and (2) the Constitution contains clear rules, as well as purposefully broad principles and standards.²⁵

New Originalist scholars such as Randy Barnett and Keith Whittington explain that to “interpret” the Constitution means to ascertain its semantic meaning, whereas construction entails “the application of . . . meaning . . . to particular circumstances.”²⁶ They have shifted away from the sort of original public meaning originalism practiced by Justice Scalia that strictly focuses on the “enterprise of discerning the semantic content of the Constitution” and toward a method of constitutional construction that strictly applies the objective original public meaning of the text when semantically clear, but allows for “judicial specification of constitutional doctrine when the text is vague.”²⁷ Barnett explains it is an “inescapable fact” that the Constitution is “objectively

²⁴ Neither Justice Scalia nor Justice Thomas has embraced the steps taken by Barnett and Balkin. In general, though “Justice Scalia . . . championed the move from original intent to original meaning, [he] has not said much about most of the other New Originalist moves. Justice Thomas is even further behind; he has not even consistently or explicitly acknowledged that the proper search is for the original public meaning rather than the original intent of the Framers.” Colby, *supra* note 8, at 772. Recently, Justice Scalia expressly rejected construction in his book *Reading Law*, which he co-authored with Southern Methodist University Law School Professor Bryan Garner. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13-15 (2012). See also Michael Ramsey, *Scalia & Garner on Interpretation and Construction*, THE ORIGINALISM BLOG (Dec. 31, 2012, 7:00 A.M.), <http://originalismblog.typepad.com/the-originalism-blog/2012/12/scalia-garner-on-interpretation-and-constructionmichael-ramsey.html> (quoting from *Reading Law* where Antonin Scalia rejects construction). In addition to Garner, other academic originalists, notably Professors John McGinnis and Michael Rappaport, have rejected construction. See 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, 752 (2009). McGinnis and Rappaport assert that the “original methods approach” they propose “stands in sharp contrast to the theories of constitutional construction” embraced by “new originalism.” *Id.* They conclude that they can “find no support for constitutional construction.” *Id.*

²⁵ Balkin, *Constitutional Redemption*, *supra* note 17, at 448; Strauss, *supra* note 15, at 1164 (describing Balkin’s distinction between “interpretation” and “construction”); see also Greenberg & Litman, *supra* note 17, at 617-19 (concluding that scholars must interpret the Constitution while also rejecting some of these original practices); Solum, Heller and Originalism, *supra* note 13, at 928-29 (summarizing Paul Brest’s criticisms of intent based originalism in his text *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980): “Brest’s article advanced a variety of criticisms of original intentions originalism, including: (1) the difficulty of ascertaining the institutional intention of a multimember body in general; (2) the particular problems associated with identifying the intention of the members of Philadelphia Convention and the various state ratifying conventions in the case of the original Constitution and of Congress and the various state legislatures in the case of amendments; (3) the problem of determining the level of generality or specificity of the Framers’ and ratifiers’ intentions; (4) the problem of inferring intentions from constitutional structure; (5) the difficulty of translating the Framers’ and ratifiers’ beliefs and values given changes in circumstances over time; (6) the problem of the democratic legitimacy—i.e., that the Constitution of 1789 was drafted and ratified without the participation of women and slaves; and (7) the problem of instability, in that an inflexible constitutional order cannot adapt to changing circumstances.”).

²⁶ Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 631 (2009) [hereinafter Barnett, *Misconceived Assumption*].

²⁷ Solum, *What is Originalism?*, *supra* note 7, at 16; see also Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 67, 70 (2011) (“Where the semantic meaning of the text provides enough information to resolve a particular issue about constitutionality . . . construction will look indistinguishable in practice from interpretation. . . . But . . . there is not always enough information to resolve a particular issue without something more. . . . A constitution with a degree of vagueness delegates some decisions of application to the judgment of future actors . . .”).

open-ended in many instances”; to deny that reality and the need for construction is “in fact to defy the original meaning of the Constitution.”²⁸

In a similar vein, Professor Lawrence Solum distinguishes between interpretation and construction as “mark[ing] the difference between linguistic meaning and legal effect.”²⁹ He recognizes “the fact of constitutional underdeterminacy,” or that “the original meaning of the text does not fully determine constitutional doctrine or its application to particular cases.”³⁰ Where the text fails to dictate how it should be applied to a particular case, construction is needed.³¹

Professor Jack Balkin has also embraced this notion of constitutional construction.³² He uses it as a means to reconcile original public meaning originalism with Supreme Court decisions creating socially progressive, non-originalist precedent.³³ For Balkin, “[i]f the text states a determinate rule, we must apply the rule in today’s circumstances. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.”³⁴ Where the text sets out a general principle (like “equal protection”), his version of original meaning originalism requires discerning underlying principles, which he defines as “aids or heuristics that help us flesh out the textual commitment to [the] moral or legal principle that we find in the text.”³⁵ Underlying principles, “underlie the text because they both support the text and explain the point of the text.”³⁶ These underlying principles enable us to understand the principle stated in the text itself. We can engage in construction by applying that principle to a novel set of facts, precipitating different “legal effects.”³⁷

²⁸ Colby, *supra* note 8, at 725-26 (citing Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 11-13 (2006)).

²⁹ Solum, *Interpretation-Construction*, *supra* note 14, at 95.

³⁰ Solum, *What is Originalism?*, *supra* note 7, at 16.

³¹ Solum, *Interpretation-Construction*, *supra* note 14, at 106-107.

³² Professor Balkin predicts in his book *LIVING ORIGINALISM* 118 (2011), and reiterates in his article *The Distribution of Political Faith*, that “it [is] only a matter of time before some very clever conservative originalist tried to show that the original meaning of the Fourteenth Amendment protects homosexuals as well as blacks and women. If gay rights ever become as taken for granted as racial and sexual equality, then conservative originalists will have to show why the Constitution’s original meaning, rightly understood, has always implicitly protected the rights of homosexuals (at least when one controls for changes in factual context).” 71 MD. L. REV. 1144, 1158 (2012). Without claiming myself to be all that clever, I endeavor to meet Professor Balkin’s predictions in this piece.

³³ See generally, e.g., Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Original Meaning*] (arguing that anti-abortion laws violated the original public meaning of the Fourteenth Amendment’s prohibitions against class legislation and its principle of equal citizenship); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (situating laws banning sex discrimination as applications of the original public meaning of the Fourteenth Amendment’s ban on caste systems).

³⁴ Colby, *supra* note 8, at 726 (citing Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 553 (2009)).

³⁵ Balkin, *Constitutional Redemption*, *supra* note 17, at 493.

³⁶ *Id.*

³⁷ Solum, *What is Originalism?*, *supra* note 7, at 16; see also Calabresi & Fine, *supra* note 17, at 665-75 (noting that “Professor Balkin is certainly right that the Constitution contains clauses like the Necessary and Proper or the Section Five power that employ standards and not rules” and discussing more general points of agreement with Balkin). In *Constitutional Redemption*, Balkin softens on the degree to which a principle is fixed. He explains,

[in] *Abortion and Original Meaning* I spent considerable time trying to show that the particular principles I relied on . . . had a strong pedigree in the history of the Fourteenth Amendment . . . But,

The semantic meaning of the text is fixed at the time each provision of the Constitution was framed.³⁸ When the text sets out a clear rule, application is straightforward; when the text sets out a vague principle, construction is often required. Either way, modern issues are placed beneath the lens of a fixed, objective meaning.

A. *Distinguishing Objective Original Meaning and Expected Applications*

One area where original public meaning originalists diverge is whether objective meaning implicates original expected applications. As explained above, original meaning requires “fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text.”³⁹ The objective meaning does not change with shifts in how “language assigns concepts to words.”⁴⁰ For example, as Professor Balkin explains, the language “against domestic violence” in Article IV Section 4, means “riots or disturbances within a state” and not “assaults and batteries by intimates or by persons living in the same household.”⁴¹ To apply a later developing definition of the words would alter the meanings and underlying principles of the constitutional text, which is impermissible. The meanings of the words and underlying principles were solidified at ratification and, “we are bound by the value judgments that appear [in] the text’s original public meaning.”⁴²

In contrast, adhering to original expected applications⁴³ is the idea that fidelity to “original meaning means not only adhering to original meaning of the constitutional text and the meanings of the words at the time they were adopted,” but also that “the concepts and principles underlying [the] words must be *applied* in the same way that they would have been applied when

as I shall now argue, neither living constitutionalism nor original meaning originalism requires that all constitutional principles must have been specifically intended by some group of framers or ratifiers.

Balkin, *Constitutional Redemption*, *supra* note 17, at 487. Where one could infer from Calabresi’s methodology in *Originalism and Sex Discrimination* that a principle is fixed as far as it was understood and endorsed by the public at the time of ratification, Balkin contends that “original meaning originalism [does not] require that all constitutional principles must have been specifically intended by some group of framers or ratifiers” and that we look to history “to derive underlying principles, even (and perhaps especially) principles that nobody in particular intended.” *Id.* Balkin explains that historical evidence helps us construct principles, but cautions that when deriving principles from statements of various framers and ratifiers, we must be wary of their expected applications of the text. *Id.* at 493. In the least, it appears that Balkin still embraces the notion that the principles must be present at the time of ratification.

³⁸ Solum, *What is Originalism?*, *supra* note 7, at 29 (explaining the “fixation thesis” and arguing that meaning was fixed at ratification).

³⁹ Balkin, *Original Meaning*, *supra* note 33, at 295; *see also* Balkin, *Constitutional Redemption*, *supra* note 17, at 429. *But see* Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW U. L. REV. 702, 723-25 (2009) (arguing that “relying on an artificial concept instead of on an actual historical event inevitably enlarges the field of . . . imaginative reconstructions” and criticizing Balkin’s approach for a lack of constraint and room for imagination).

⁴⁰ Balkin, *Constitutional Redemption*, *supra* note 17, at 430.

⁴¹ *Id.* at 430.

⁴² Jack Balkin, *Originalism and Sex Discrimination, or, How Thick is Original Public Meaning?* BALKINIZATION (Dec. 8, 2011, 5:55 PM), <http://balkin.blogspot.com/2011/12/originalism-and-sex-discrimination-or.html> (“[W]e are bound by the value judgments that appear [sic] the text’s original public meaning—which includes the ban on caste and class legislation—but we are not bound by their factual mistakes today.”).

⁴³ Fleming, *supra* note 9, at 671.

[the constitutional text was] adopted.”⁴⁴ Those who focus on original expected applications “ask[] how people living at the time the text was adopted would have expected [that the Constitution] would be applied using language in its ordinary sense (along with any legal terms of art).”⁴⁵ For example, were society to find capital punishment ethically and scientifically beyond justification, original expected applications would nonetheless require finding the practice constitutional because the public at the time the Eighth Amendment was ratified would have interpreted and *expected* the constitutional text not to prohibit capital punishment.

Originalists like Professors Balkin and Calabresi embrace the idea that when interpreting the Constitution we should not be constrained by the way the public would have applied principles established at the time of that particular article or amendment’s ratification.⁴⁶ Conflating non-binding expected application with binding original meaning is considered by some to be problematic,⁴⁷ and by others to be in fact “less faithful to the constitution” by entrenching a set of historical rules.⁴⁸ This Article will largely follow the lead of those who refuse to treat expected applications as binding.

Yet, expectations are often indicative of meaning.⁴⁹ It may very well be that even if we are not expressly bound by the expected applications of the past, the past’s expectations heavily influence our interpretation. Thus, the relationship between expected application and meaning

⁴⁴ Balkin, *Original Meaning*, *supra* note 33, at 296.

⁴⁵ *Id.*

⁴⁶ Calabresi and Matthews provide a useful example of this distinction:

Suppose Congress passed a statute that said the colors of the American flag were to be red, white, and blue, but that many statements in the congressional record indicate that important Members of Congress understood the word “blue” to mean “green.” Suppose further that the public understood the word “blue” to mean “blue” in accordance with its commonly accepted public meaning. The color of the flag in this case would be red, white, and blue notwithstanding Congress’s intent that ‘blue’ actually means “green.” We are governed by the formal legal texts that Congress enacts into law and not by the un-enacted intentions of the Members of Congress who wrote those texts. For the same reason, we are governed by the laws our ancestors made during Reconstruction and not by their un-enacted intentions or expectations when they made those laws.

Steven Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 B.Y.U. L. REV. 1393, 1397 (2012).

⁴⁷ Balkin argues that the linguistic meaning of a text and the “expectations about the application of that meaning to future cases” are quite separate things. Balkin, *Original Meaning*, *supra* note 33, at 292-93. In his view, an approach focused on original expected applications is difficult to reconcile with important “genuine achievements of American constitutionalism” such as “equal rights for women” or “greater freedom of speech.” *Id.* at 299-300. Originalists who focus on the Original Expected Applications regard these achievements as interpretive mistakes, and though “maintain them out of grudging acceptance,” are aggravated by what they deem to be “deviations . . . that sacrifice legitimacy and legality.” *Id.* Consequently, Balkin contends that an interpretative method that cannot embrace those achievements is untenable and that original meaning is not so limited. *Id.* But see Balkin, *Constitutional Redemption*, *supra* note 17, at 435-36 (recognizing that Original Meaning Originalism does not always guarantee “happy endings”).

⁴⁸ Comparing Balkin’s method of text and principle with an original expected applications approach, Fleming contends “[t]he upshot of his analysis is that original-expected-applications originalism is inherently revisionist. Because of its substantive (conservative), institutional (restraint), and jurisprudential (rule of law as a law of rules) commitments, original expected applications originalism revises the Constitution from our charter of abstract aspirational principles into a code of concrete historical rules – rather than being faithful to it.” Fleming, *supra* note 9, at 674.

⁴⁹ Balkin, *Original Meaning*, *supra* note 33, at 303 (“[O]riginal expected application . . . helps us understand the original meaning of the text and the general principles that animated the text.”).

could nonetheless make it difficult to find sexual orientation a caste-like feature protected by the Fourteenth Amendment. If the public could not have expected “equal protection” to extend to individuals sexually oriented toward those of their same gender, how can one derive a meaning that authorizes same-sex marriage? One response would be that we identify principles that are as general as the text itself. Insight gained from expectations about what equal protection means would not necessarily embrace or exclude gay men and lesbian women (especially considering the concept of same-sex attraction did not even exist at that time).⁵⁰ In the least, the difficulty of ascertaining the degree to which expectation influences the definition of a principle supports the reality that this is not an “easy question” for originalism.

B. *Why Original Meaning Originalism?*

The brand of original meaning originalism embraced by New Originalists like Balkin, Calabresi, and Solum appears to accept constitutional underdeterminacy.⁵¹ For them, interpretation involves deriving principles and applying them to novel factual scenarios.⁵² Where the text is “general, abstract, or offers a standard,” a decision was made by the adopters to voice a principle rather than a rigid rule, therein allowing later generations to take and apply the principle to present-day circumstances.⁵³ While the text itself cannot be changed (absent an Article V amendment),⁵⁴ application of the general principle it establishes can shift with how our understanding of facts changes with time.⁵⁵ Essentially, “[w]hat words mean is one thing; what we should do about their meaning is another.”⁵⁶

To flesh out principles from ambiguous text we can look to external resources, such as newspapers or statements by the framers or adopters, to reverse-engineer that principle.⁵⁷ Thus,

⁵⁰ See *infra* Part III(C).

⁵¹ Solum, *What is Originalism?*, *supra* note 7, at 16.

⁵² *Id.* at 17; see also Balkin, *Original Meaning*, *supra* note 33, at 293 (“The task of interpretation is to look to original meaning and underlying principles to determine how best to apply them in the current circumstance.”)

⁵³ Balkin, *Original Meaning*, *supra* note 33, at 305. See generally Balkin, *Constitutional Redemption*, *supra* note 17 (further explaining the functionality of his approach and asserting that fidelity to the Constitution requires adhering to both precise rules and underlying principles).

⁵⁴ U.S. CONST. art. V.

⁵⁵ Balkin, *Original Meaning*, *supra* note 33, at 293, 295. In its initial inception, Balkin dubbed his approach the model of “text and principle.” *Id.* In his method we look first to the original meaning of the words—the public meaning of words of the text at the time of enactment. *Id.* at 293. Where “the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command.” *Id.* at 305. When the text is not obviously clear, “where [it is] abstract, general or offers a standard, we must look to the principles that underlie the text to make sense of and apply it.” *Id.* Balkin contends that the model of text and principle enables “each generation of Americans [to] seek to persuade each other about how the text and its underlying principles should apply to their circumstances, their problems, and their grievances.” *Id.* at 301. In *Constitutional Redemption*, *supra* note 17, Balkin expands on the latitude one has when deriving principles.

⁵⁶ Colby, *supra* note 8, at 736 (quoting Lawrence B. Solum, *Semantic Originalism* 30 (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244); see also Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997) (distinguishing between interpretation and adjudication).

⁵⁷ Balkin, *Original Meaning*, *supra* note 33, at 303; Solum, *What is Originalism?*, *supra* note 7, at 19; see also, Calabresi & Matthews, *supra* note 46, at 3 (“Originalists believe the constitutional text should be

“[t]he inquiry is still a historical one, but one that is designed to uncover the level of generality at which the constitutional terms would have been objectively understood by reasonable observers at the time of the framing.”⁵⁸ This process demonstrates how original expected applications can influence what we ascertain to be the original meaning.

Calling on the philosophy of language, Christopher Green illustrates a similar division.⁵⁹ Green explains that any word, sign, or expression is a “proper name” that “expresses its sense” and “refers to or designates its referent.”⁶⁰ The sense of a word gives the word its cognitive value.⁶¹ A sense is strictly conveyed and expressed by language alone, and consequently is fixed.⁶² In contrast, the referent, the thing in the world the word picks out, can change based on a different individual’s application of the sense of the word.⁶³ A word’s sense determines its reference.⁶⁴ Green explains that while the “sense of the constitutional language [is] . . . fixed, the reference of that language depends on particular facts.”⁶⁵ The framers solidified the sense of the words, expressions, and principles in the constitutional text.⁶⁶ This is a function into which we as a society insert facts to derive a referent for our time.⁶⁷ We are thus not bound to how the framers would have understood facts when our modern knowledge of those facts dictates a different outcome.⁶⁸ Green also recognizes the value in original expected applications (what he calls original reference) as useful means of reverse engineering from an out-of-date application the sense of the constitutional language.⁶⁹

Original meaning originalism is an evolving interpretive method. Construction enables its adherents to preserve fidelity to the Constitution, but also to extend principles found where the objective meaning of the text fails to provide a clear rule of decision that is capable of resolving some modern dispute. Allowing individuals in a same-sex relationship to marry would have been unthinkable at the time of ratification. Yet, if the Fourteenth Amendment sets out a principle, the objective original meaning of which is to serve as a ban on caste and/or class legislation, then by

interpreted according to the original meaning of the words used as the meaning would have been unveiled in contemporary dictionaries, grammar books, and other indicia of objective public meaning.”); Greenberg & Litman, *supra* note 17, at 617 (“[O]nce we are committed to interpreting the grand, general clauses of the Constitution as standing for abstract principles, original practices will have an important role as evidence of the principles . . .”).

⁵⁸ Colby, *supra* note 8, at 727.

⁵⁹ See generally Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006) (Analyzing whether the philosophy of language can change overtime). In addition to Gottlob Frege’s sense-reference distinction, Green also looks at similar, though not synonymous, theories of philosophy of language, including John Stuart Mill’s distinction between connotation and denotation and Rudolph Carnap’s distinction between intentions and extensions. At risk of oversimplifying these philosophies, all essentially distinguish how the meaning of a word can be fixed while the facts known in a particular historical moment can change the outcome of the meaning’s application.

⁶⁰ *Id.* at 563.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 560.

⁶⁶ *Id.*

⁶⁷ *Id.* at 585.

⁶⁸ *Id.* at 594.

⁶⁹ *Id.* at 595.

engaging in construction it may be possible to extend the Amendment's protection to prohibit class legislation or a system of caste that is focused on sexual orientation.

II. THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT AS A BAN ON SYSTEMS OF CASTE AND CLASS LEGISLATION

This part explores the original meaning of Section One of the Fourteenth Amendment and finds it to be a ban on class legislation and systems of caste.⁷⁰ I lean, in part, on the work of Professors Balkin and Calabresi who have previously explored the original meaning of the Fourteenth Amendment in great detail.

The text of Section One reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce *any* law which shall abridge the privileges or immunities of *citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the law.⁷¹

The language of Section One is both abstract and broad.⁷² It appears to reserve “equality before the law”—an ambiguous concept, and one that is “no less ambiguous . . . [than] phrases [like] privileges or immunities, [and] due process.”⁷³ The language also does not limit the class

⁷⁰ See Balkin, *Original Meaning*, *supra* note 33, at 315-16; Calabresi & Rickert, *supra* note 33, at 17; see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1413 (1992). Harrison recognizes that the purpose of the Fourteenth Amendment was to put an end to such laws, to “abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another.” *Id.* (internal citations omitted) (citing Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)); see also Stephen Calabresi, *Does the Fourteenth Amendment Guarantee Equal Justice for All?*, 34 HARV. J. L. & PUB. POL’Y 149, 149 (2011) (“I agree with John Harrison that the Amendment bans all forms of caste-like discrimination.”). Additionally, Harrison finds that the Fourteenth Amendment extends beyond just race to include “ad hoc castes or castes-in-context—criteria that are not commonly employed but that nevertheless represent a division of the citizenry into classes for reasons unrelated to the content of fundamental rights.” *Id.* at 1459.

But see, e.g., Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 1020 (1998). Boyce remarks,

[a]ny attempt to ground modern Fourteenth Amendment doctrine in original understanding inevitably confronts two intractable obstacles. First, the historical record is too sparse to permit confident conclusions about any of the most difficult and contentious questions of Fourteenth Amendment jurisprudence. . . . The original understanding can hardly account for the school desegregation decisions of the 1950s, let alone the voting rights, gender discrimination, and privacy decisions that were to follow in subsequent decades.

Id. He goes on to find that “[f]rom the historical evidence, it is not at all clear that the Fourteenth Amendment was originally understood to embody a general prohibition of racial discrimination . . . let alone a prohibition general enough to encompass discrimination based on sex or alienage.” *Id.* at 1024.

⁷¹ U.S. CONST. amend. XIV, §1 (emphasis added).

⁷² Calabresi & Rickert, *supra* note 33, at 15.

⁷³ *Id.*

of protected citizens—all “citizen[s] of the United States” are protected.⁷⁴ The abstractness of the language may indicate that Section One does not state a clear rule, but instead voices a principle that one must flesh out from indicators beyond the constitutional text.

According to Balkin, Section One guarantees equal protection from various, often interrelated, kinds of unequal treatment: (1) “legislation that made arbitrary and unreasonable distinctions between citizens or persons,” (2) “‘special’ or ‘partial’ legislation that picked out a group for special benefits or special burdens,” (3) “legislation that created or maintained a disfavored caste or subordinated a group through law,” and (4) “legislation that selectively restricted or abridged basic rights of citizenship and that therefore treated people as second-class citizens.”⁷⁵ Likewise, Calabresi and Julia Rickert identify the original meaning of Section One as “a rule against class legislation and systems of caste.”⁷⁶ They find that the “framers themselves were vexingly silent on the independent operation of Section One’s clause,” and instead, “tended to explain that Section One [on the whole] would guarantee equality and ban caste without getting more specific.”⁷⁷ Calabresi and Rickert argue

What matters is (1) that the Framers of the Fourteenth Amendment drafted an amendment to forbid legislation that prohibits all systems of caste and of class-based laws that were not justly prescribed for the general good of the whole people; (2) that they used language broad enough to carry out their intention; and (3) that contemporary readers generally understood the amendment to mandate equality under the law by forbidding caste.⁷⁸

However, given the historical context surrounding ratification, some have suggested that Section One applies only to race.⁷⁹ The Civil Rights Act of 1866 was adopted in response to

⁷⁴ U.S. CONST. amend. XIV, §1.

⁷⁵ Balkin, *Original Meaning*, *supra* note 33, at 315-16.

⁷⁶ Calabresi & Rickert, *supra* note 33, at 17.

⁷⁷ Calabresi and Rickert do not attempt to define the proper textual source for the ban on caste and class legislation. *Id.* at 19-20. Rather, they find that the framers’ silence on the independent operation of the different sections of the Fourteenth Amendment does not negate the notion that the Fourteenth Amendment on the whole prohibits caste and class legislation. *Id.* Thus, as a practical matter, it is unnecessary to delve into the debate over whether the Fourteenth Amendment’s Equal Protection or Privileges and Immunities Clauses controls.

To briefly explain that debate, the Fourteenth Amendment Privileges and Immunities Clause was mutilated by the Supreme Court’s decision in the *Slaughterhouse Cases*. 83 U.S. 36 (1873). It is argued that the *Slaughterhouse Cases* had the effect of jumbling the rights and powers set out in the Fourteenth Amendment. In his widely cited piece, *Reconstructing the Privileges or Immunities Clause*, John Harrison contends that the Privileges and Immunities Clause was crafted to “require that every state give the same privileges and immunities of state citizenship—the same positive law rights of property, contract, and so forth—to all of its citizens.” Harrison, *supra* note 70, at 1388. The Equal Protection Clause, on the other hand, “requires that the law, whatever it is, be the same for all citizens.” *Id.* The debate centers on whether the Court should overrule the *Slaughterhouse Cases* and resurrect the Privilege and Immunities Clause with an eye toward this original function.

⁷⁸ Calabresi & Rickert, *supra* note 33, at 23; *see also* Green, *supra* note 59, at 602-03. Green comments that a resurrected Privileges and Immunities Clause may be the proper source of a “no-caste” principle, citing as evidence post-*Slaughterhouse* cases like *Strauder v. West Virginia*, 100 U.S. 303 (1880), which rooted its holding in the Equal Protection Clause but based much of its rhetoric and reasoning on the privileges of citizenship.

⁷⁹ *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 407 (1977) (“[H]istorical records all but incontrovertibly establish that the framers of the

growing predominance of “Black Codes” in the Southern states, which sought to re-impose on freed blacks the restrictions on civil rights that existed prior to emancipation.⁸⁰ The “evil of [the codes] was that they abridged, shortened or lessened the fundamental rights of a class of people . . . creating a racial caste system of the South.”⁸¹ Responding to this system and concerned about the rights of the newly freed, the Framers sought to craft an Amendment that would prevent a race-based caste system.⁸² Therefore, one might argue that the Fourteenth Amendment simply constitutionalized the Civil Rights Act of 1866 and thus only protects from race-based caste systems.

Though at a bare minimum the Fourteenth Amendment must be understood as constitutionalizing the Civil Rights Act of 1866,⁸³ it likely extends further than race.⁸⁴ The ambiguous language of the Amendment on its face may indicate that the meaning is not limited to race, and the ratification history seems to support a finding that it accounts for more than only the racial caste system established by the Black Codes.⁸⁵

One piece of evidence that supports this argument is the Amendment’s drafting history, particularly changes in language between successive drafts. Calabresi and Rickert assert that from the beginning, the Committee of Fifteen on Reconstruction had a motive broader than a

Fourteenth Amendment excluded both suffrage and segregation from its reach: they confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody, white or black.”); *id.* at 46 (“[T]he purpose of the framers was to protect blacks from discrimination with respect to specified ‘fundamental rights,’ enumerated in the Civil Rights Act.”).

Berger is emblematic of an intent focused originalist. In his essay *Raoul Berger and the Restoration of Originalism*, 96 NW. U. L. REV. 253 (2001-2002), Jonathan G. O’Neill explains that Berger “understood ‘original intent’ as ‘shorthand for the meaning attached by the framers to the words they employed in the Constitution and its amendments.’” *Id.* at 265. Berger “dissected the debates in the 39th Congress and argued that the Fourteenth Amendment was intended by its drafters and supporters to constitutionalize only the basic rights contained in the [Civil Rights Act of 1866].” *Id.* at 264. Berger sought to rebut the liberal view that the amendment was “intended to incorporate the natural rights theories of antebellum abolitionists, thereby empowering the Court to fashion an open-ended, ‘living Constitution’ from its terms.” *Id.* at 266.

Alternatively, for a discussion of the contribution of abolitionist constitutionalism to the original public meaning of Section One, see Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, (Geo. Pub. L. & Legal Theory Research Paper No. 10-06, 2011).

⁸⁰ Jennifer M. McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 573 n.54 (2012) (“The ‘Black Codes’ were passed by each state of the former confederacy and sought to reimpose many of the legal restrictions that had applied to slaves prior to emancipation, particularly in relation to the exercise of contractual and civil rights.”).

⁸¹ Calabresi, *supra* note 70, at 150.

⁸² Calabresi & Rickert, *supra* note 33, at 13.

⁸³ Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 958 (1995) (recognizing that the Fourteenth Amendment “required an equality in certain specified rights. If a state provided these rights to its ‘white citizens,’ it had to provide the ‘same right’ to *all citizens*.”) (emphasis added).

⁸⁴ Calabresi & Rickert, *supra* note 33, at 19; *see also, e.g.*, Garret Epps, *Interpreting the Fourteenth Amendment: Two Don’ts and Three Dos*, 16 WM. & MARY BILL OF RTS. J. 433, 443-44 (2007) (discussing how the framers of the Fourteenth Amendment employed broad language to provide protection to immigrants, “because some of them were immigrants themselves,” in addition to Southern Unionists and Northerners moving into the South after the war).

⁸⁵ Calabresi, *supra* note 70, at 150.

“desire to protect freed slaves.”⁸⁶ Though early drafts came closer to merely constitutionalizing the Civil Rights Act of 1866, as revisions were made, specific references to race and color were removed.⁸⁷ While not dispositive evidence of original meaning, key framers, like Jacob Howard, who explained that the Amendment embraced a ban on feudal caste,⁸⁸ or Charles Sumner, who asserted the same for a Hindu-style caste system in his lecture *The Question of Caste*,⁸⁹ suggest an original meaning broader than race. Howard stated, the purpose of the Fourteenth Amendment was . . . to abolish all class legislation in the States and do away with the injustice of subjecting one caste of persons to a code not applicable to another.⁹⁰ Moreover, as Calabresi and Rickert point out,

the Amendment’s Framers and contemporary commentators frequently compared race discrimination to other forms of arbitrary, caste-creating discrimination to illustrate the evil caused by the Black Codes and to explain . . . [a]ny law that discriminates or abridges civil rights to set up a hereditary caste system violates the command of Section One of the Fourteenth Amendment.⁹¹

Beyond concerns voiced on the floor of Congress, state governors during ratification emphasized a need to protect white Unionists in the South after the Civil War—another indication that the Amendment was understood to go further than protecting just the rights of freed black men.⁹² The press, often a strong indicator of public meaning, also called for something more: one *Chicago Tribune* editorial in 1866 made a “forceful appeal for a constitutional amendment . . . that would level the evil of caste in one blow.”⁹³ Even those in society who opposed such a broad

⁸⁶ Calabresi & Rickert, *supra* note 33, at 31.

⁸⁷ See generally *id.* at 31-35 (highlighting the discussions of the original framers during the framing of our constitution.).

⁸⁸ *Id.* at 33 n.152.

⁸⁹ Charles Sumner, in his discussion and rejection of caste, recognizes the need for a broad prohibition:

Whatever the judgment on the unity of origin, where, from the nature of the case, there can be no final human testimony, it is a source of infinite consolation, that we can anchor to that their Unity, found in a common organization, a common nature, and a common destiny, being at once physical, moral and prophetic. This is the true Unity of the Human Family. In all essentials constituting Humanity, in all that makes Man, all varieties of the human species are one and the same. There is no real difference between them. The variance, [w]hether of complexion, configuration or language, is external and superficial only, like the dress we wear. Here all knowledge and every science concur.

CHARLES SUMNER, *THE QUESTION OF CASTE* 17 (1869).

⁹⁰ Harrison, *supra* note 70, at 1413 (citing Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)) (internal alterations omitted).

⁹¹ Calabresi & Rickert, *supra* note 33, at 6.

⁹² *Id.* at 36-41. The authors discuss the views of those within the states, citing predominantly comments from governors at the time of the ratification conventions as to the meaning of the Fourteenth Amendment. They assert that, “there is little doubt that most understood the Amendment to guarantee equal rights,” and to “be more than simply a ban on racially discriminatory legislation.” *Id.* at 40-41.

⁹³ *Id.* at 29-30 (citing Editorial, *Class Legislation*, CHI. TRIB., Jan. 12, 1866, at 2).

amendment acknowledged that Congress would go beyond the abolition of slavery in its repeal of that one type of caste.⁹⁴

It may very well be that the Fourteenth Amendment had an original public meaning that went beyond ameliorating slavery or negating the Black Codes. It protected not only against “arbitrary and capricious executive and judicial action and from the failure of State executives and judges to provide the equal protection of those laws already on the books,” but also defended against systems of caste and class legislation going forward.⁹⁵ Though after the fact, Justice Harlan’s dissent in *Plessey v. Ferguson*⁹⁶ is often cited to support the idea that the Amendment was to serve as an “anti-caste command.”⁹⁷

If we accept that the original meaning of the Amendment is to prohibit caste and class legislation, then the next step is to define what those terms meant to the public at the time of ratification. In defining “caste,” dictionaries at the time included both the historic Indian derivation—namely “a tribe or class of the same profession, as the case of Bramins [sic]”—as well as the more broad definition of “a distinct rank or order of society.”⁹⁸ The 1857 edition of *Webster’s Dictionary* provided both meanings: “[(1)] [a] distinct, hereditary order or class of people among the Hindoos [sic] the members of which are of the same rank, profession, or occupation; [(2)] an order or class.”⁹⁹ Similarly, an 1856 article in the *London Journal and Weekly Record of Literature, Science, and Art* described caste as “a term used to designate the social distinction and hereditary occupations . . . known to exist among the Egyptians and other nations of antiquity.”¹⁰⁰ *Webster’s* defines “class” as “a rank or order of persons or things; a division; a set of pupils or students of the same form, rank, or degree; a general or primary division.”¹⁰¹ Thus, the comparison in public discourse at the time of ratification of “race discrimination to feudalism and the Indian caste system,” and the determination “that all were the same type of hereditary, class-based discrimination,” support the notion that hereditariness is a factor to be considered when ascertaining the existence of a caste system.¹⁰²

While “class legislation” does not appear in dictionaries, the term was widely understood to “encompass laws that grant monopolies or otherwise benefit a favored few.”¹⁰³ It may be that, for all intents and purposes, “class legislation” and “caste” had synonymous meanings during the ratification period. It is easy to see how the terms could be viewed interchangeably, as both

⁹⁴ *Id.* at 30 (citing DAILY NAT’L INTELLIGENCER, Jan 5, 1866 col. 1).

⁹⁵ Calabresi & Matthews, *supra* note 46, at 21-22; Calabresi & Rickert, *supra* note 33, at 19; Green, *supra* note 59, at 601 (“An intermediate ‘no-caste’ principle fits well with Sumner’s invocation of the equality of the rights of citizens, based on the text of the Fourteenth Amendment.”).

⁹⁶ 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

⁹⁷ Calabresi & Rickert, *supra* note 33, at 45.

⁹⁸ *Id.* at 17 n. 72 (citing CHAUCEY A. GOODRICH, A PRONOUNCING AND DEFINING DICTIONARY OF THE ENGLISH LANGUAGE 64, 75 (1856)).

⁹⁹ *Id.* (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 152 (1857)).

¹⁰⁰ F. Phillott, *Origin of Cast*, LONDON J. & WKLY. REC. LITERATURE, SCI., & ART, Dec. 5, 1857, at 216 (emphasis in original).

¹⁰¹ Calabresi & Rickert, *supra* note 33, at 17 n. 72 (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 152 (1857)).

¹⁰² *Id.* at 13.

¹⁰³ *Id.* at 18 n.73.

achieve the goal of segmenting the population based on identifiable characteristics that are often hereditary or definite and relegate a particular group to a “rank or order” lower than that of another.

Ultimately, there appear to be three features that were characteristically associated with the idea of a system of caste at the time of ratification. First, a hereditary characteristic is implicated; second, class legislation and regulation create stratification based on that characteristic; and third, such stratification leads to the exclusive allocation of rights to one group at the expense of another. These facets are not definitive, but they provide a useful framework for the analysis in the next section. As John Harrison explains, the Fourteenth Amendment may also protect “caste or castes-in-context” where, for example, hereditariness would not be an essential feature.¹⁰⁴

Section One may alternatively be viewed as a prohibition on class legislation alone. Professor Melissa Saunders contends that it was originally understood as constitutionalizing a well-established state court “doctrine against ‘partial’ or ‘special’ laws, which forbade the state to single out any person or group of persons for special benefits or burdens without adequate ‘public purpose’ justification.”¹⁰⁵ State courts of the antebellum era found these laws offensive because they (1) “represented a perversion of the state’s proper role in society . . . as a ‘neutral umpire’ providing equal protection to the rights of all,” and (2) “threatened true republican government and with it, personal liberty.”¹⁰⁶

Though Saunders focuses on original understanding rather than original public meaning, she provides substantial evidence from the antebellum and ratification periods that the term “class legislation” was understood to refer to such partial or special laws.¹⁰⁷ A prohibition on “class legislation,” so defined, very well may be the original public meaning of Section One. As previously stated, the work of scholars, legislators, and newspapers of the period can provide tremendous insight as to the original public meaning of the constitutional text. For example, the commentary of pre-Civil War scholars like Thomas Cooley and Chancellor William Kent recognize a widespread aversion to partial or special laws.¹⁰⁸ In his 1868 *Treatise on the Constitutional Limitations*, Cooley discusses such unequal and partial legislation.¹⁰⁹ He asserted,

¹⁰⁴ Harrison, *supra* note 70, at 1459. Harrison offers the example that, “[i]f individuals who drive foreign cars became the subject of widespread resentment, a law forbidding them from purchasing gasoline, that was motivated by a desire to retaliate against them, would be inconsistent with [the Fourteenth Amendment].” *Id.* at 1457-58. Harrison finds that the Fourteenth Amendment is not necessarily limited to systems that segment based on “immutable, hereditary characteristics,” but also extends to “ad hoc castes.” *Id.*

¹⁰⁵ Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247-48 (1997). Saunders explains that, “[i]n the first half of the nineteenth century, state courts across America developed a decided hostility to laws that singled out certain persons or classes of persons for special benefits or burdens.” *Id.* at 252; *see also, e.g.*, *Reed v. Wright*, 2 Greene 15, 27-28 (Iowa 1849); *Lewis v. Webb*, 3 Me. 326 (1825); *Wally’s Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554, 556-57 (1831); *Ward v. Barnard*, 1 Aik. 121, 121 (Vt. 1825).

¹⁰⁶ *Id.* at 253-54.

¹⁰⁷ *Id.* at 252-53 n.29.

¹⁰⁸ *Id.* at 259-60; *see also* WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT 163 (1898) (“The bill extends this oath to attorneys-at-law, before they can be permitted to practice; but it is not extended to candidates for the other learned professions, though the same reason would seem to apply, and though the admission of physicians and surgeons is equally the subject of legislative regulation. The bill, therefore, is not impartial in the imposition which it creates. *If the principle be just, it ought to have a general and equal application.*”) (emphasis added).

¹⁰⁹ THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 389-97 (3d ed. 1874). Cooley remarks, “[I]aws public

[e]quality of rights, privileges, and capacities unquestionably should be the aim of the law . . . The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are obnoxious, and discriminations against persons or classes are still more so¹¹⁰

By the time of the Civil War, a disposition against partial or special laws was embraced in nearly every state.¹¹¹ This concept was the common thread of the compromise between moderate Republicans and Democrats during the drafting process, who supported the Fourteenth Amendment “because they saw the measures as logical applications of a broader principle . . . that government should not use its power to create favored or disfavored classes of citizens, but should confine itself to the ‘equal protection’ of all.”¹¹² The general public likewise may have understood the meaning of Section One to embrace this idea. In 1866, an article in the *Cincinnati Commercial*, an influential periodical of the time, remarked that “Section [O]ne was . . . designed to enforce ‘the great Democratic principle of equality before the law’ and to invalidate all ‘legislation hostile to any class.’”¹¹³

Following my discussion of caste, I will explore how laws denying same-sex marriage could also violate the Fourteenth Amendment if its original public meaning is alternatively understood to be a prohibition on partial or special class legislation.

in their objects may be general or local in their application; they may embrace many subjects or one, and they may extend to all the citizens or be confined to particular classes . . .” *Id.* at 390. When applying to a particular class, the laws must be “general in their application to the class.” *Id.* These are “*general laws* in the constitutional sense.” *Id.* However, “every one [sic] has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government.” *Id.* at 391-92.

¹¹⁰ *Id.* at 393. Interestingly, Cooley’s ideas bear a close relationship to present-day Supreme Court Equal Protection jurisprudence, which was “built upon . . . cornerstones” laid by Cooley, Justice Stephen Fields, and Justice Joseph Bradley. Saunders, *supra* note 105, at 301. In fact, in the first edition of Cooley’s treatise published after ratification, he wrote, “the Fourteenth Amendment was adopted . . . [to settle that] the same securities which one citizen may demand, all others are entitled to.” *Id.* at 294 (citing COOLEY, *supra* note 109, at 397).

¹¹¹ Saunders, *supra* note 105, at 258.

¹¹² *Id.* at 268. Saunders explains,

the clause represented a carefully forged compromise between the abolitionists in the Republican Party’s radical wing, who would have liked to prevent the states from ever taking race into consideration in governing, and the former Democrats in its moderate wing, who were not prepared to concede that race should be completely excised from governmental decisionmaking but were firmly committed to the idea that the states should not be allowed to single out certain groups for special benefits or burdens without adequate justification.

Id. at 292. For a wide array of evidence from the Congressional Record during the drafting period to support that a prohibition of “class legislation” was the understood meaning of Section One, see generally *id.* at 268-93.

¹¹³ *Id.* at 288. The *Commercial* stated,

With this section engrafted upon the Constitution it will be impossible for any Legislature to enact special codes for one class of its citizens, as several of the reconstructed States have done, *subjecting them to penalties from which citizens of another class are excepted* if convicted of the same grade of offense, *or confer privileges upon one class that it denies to another.*

Id. (emphasis added).

III. THE FOURTEENTH AMENDMENT AS A PROHIBITION OF CASTE BASED ON SEXUAL ORIENTATION

A. *Method of Analysis and Application of the Original Meaning of the Fourteenth Amendment to Sexual Orientation*

If the arguments surveyed in Part II above reflect the view that the Fourteenth Amendment establishes a principle prohibiting systems of caste and class legislation, then by engaging in construction and applying that principle to a modern understanding of the facts about sexual orientation, a modern interpreter could find that laws stratifying based on that feature violate the Fourteenth Amendment. I now seek to demonstrate how, as a matter of history and science, those individuals sexually oriented toward persons of the same gender—focusing predominantly on gay men—could be determined to have been living under just such a system. A system of caste based on same-sex attraction exists if (1) sexual orientation is at least in part hereditary; (2) there is a history of stratification based on sexual orientation; and (3) there is an exclusive allocation of rights to heterosexual persons to the exclusion of gay men and lesbian, therein perpetuating a second-class status.

Briefly, it is important to understand that the gay community is not a small part of the American population. Though the oft-cited statistic from 1948 Kinsey Reports suggests that one in ten individuals are gay,¹¹⁴ this has long been rejected by recent data, and genetic researcher Simon LeVay indicates that about 3.1% of men and 0.9% of women reported having a same-sex orientation—a statistically significant minority.¹¹⁵ These statistics were recently affirmed by a poll released on October 18, 2012, by Gallup and the Williams Institute, reporting that 3.4% of all Americans identify as lesbian, gay, bisexual, or transgender.¹¹⁶

B. *Same-Sex Attraction as a Hereditary Feature*¹¹⁷

As indicated above, the original meaning of the Fourteenth Amendment was understood

¹¹⁴ *Homosexuality*, KINSEY INST., <http://kinseyinstitute.org/research/ak-data.html#homosexuality> (last visited Mar. 31, 2013).

¹¹⁵ SIMON LEVAY, *GAY, STRAIGHT, AND THE REASONS WHY: THE SCIENCE OF SEXUAL ORIENTATION* 14 (2011). At least one other recent study has found these percentages to be greater. CTR. FOR SEXUAL HEALTH PROMOTION, IND. UNIV. BLOOMINGTON, *NATIONAL SURVEY OF SEXUAL HEALTH AND BEHAVIOR*, <http://nationalsexstudy.indiana.edu/> (last visited Mar. 31, 2013) (“[A]bout 7% of adult women and 8% of men identify as gay, lesbian or bisexual . . .”).

¹¹⁶ Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, GALLUP, Oct. 18, 2012, <http://gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx>. This survey of 120,000 Americans is the largest single study of the distribution of LGBT population in the United States on record.

¹¹⁷ I explore scientific findings regarding the possible innate or hereditary nature of same-sex attraction en route to my broader explanation of how an originalist *could* find that laws prohibiting same-sex marriage violate the constitution. Determinations will have to be made about which of these points are relevant and which will be accepted as legislative fact. See generally John Monahan & Laurens Walker, *A Judges' Guide to Using Social Science*, 43 CT. REV. 156 (2007) (discussing how judges determine legislative facts in litigation); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942) (discussing how and whether rules of evidence apply in administrative adjudications). This also raises the further question of whether these determinations are properly made in the courthouse or in the legislature.

in part to prohibit caste and class legislation derived from hereditary characteristics.¹¹⁸ *Webster's 1861 Dictionary* defines “hereditary” as a characteristic “that is or may be transmitted from a parent to a child; as, *hereditary* pride; *hereditary* bravery; *hereditary* disease.”¹¹⁹ *Webster's* also defines “inherit” as “[t]o receive by nature from progenitor. The son *inherits* the virtues of his father; the daughter *inherits* the temper of her mother, and children often *inherit* the constitutional infirmities of their parents.”¹²⁰ It appears that at the time of ratification, for a trait or tendency to be inherited or “hereditary” meant that it was innate. Traits that we know today not to be inherited in a genetic sense were modified in common parlance using the adjective “hereditary,” such as being patriotic,¹²¹ cultured,¹²² and even being prone toward extreme accidents.¹²³ Other traits like insanity, criminality, morality, and even genius were believed to be hereditary.¹²⁴ Thus, it was believed that tendencies or orientations were as hereditary as parental “virtues” like a “strong constitution.”¹²⁵ If the Fourteenth Amendment prohibited caste systems segmenting society based on hereditary characteristics—which could be outwardly signaled by skin color, or be as arbitrary and as unapparent as the Indian Caste system, which employed names and certificates as identifiers—it is logical to conclude that it would have been as indefensible to

¹¹⁸ See McConnell, *supra* note 83, at 1011 n.303 (1995) (“defin[ing] the term ‘caste’ as ‘any separate and fixed order of society,’ where one group ‘claims hereditary rank and privilege,’ while another is ‘doomed to hereditary degradation and disability.’”) (citing Senator Charles Sumner, *On the Question of Caste*, in 13 WORKS OF CHARLES SUMNER 133, 143 (1880)).

¹¹⁹ NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 548 (Chauncey A. Goodrich ed., 1861), available at http://openlibrary.org/books/OL25326244M/An_American_dictionary_of_the_English_language. This definition was consistent throughout the 1800s. See ARTFL PROJECT: WEBSTER'S UNABRIDGED DICTIONARY, 1828 ED., <http://machaut.uchicago.edu/?resource=Webster%27s> (unlick “Use 1913 Edition”; then search “hereditary”) (last visited Mar. 31, 2013).

¹²⁰ WEBSTER, *supra* note 119, at 605. It is also worth noting that *Webster's* defined “inheritable” in 1861 as that which “may be transmitted from the parent to the child; as, *inheritable* qualities or infirmities.” *Id.* See also ARTFL PROJECT: WEBSTER'S UNABRIDGED DICTIONARY, 1828 ED., <http://machaut.uchicago.edu/?resource=Webster%27s> (unlick “Use 1913 Edition”; then search “inherit”) (last visited Mar. 31, 2013).

¹²¹ C.W.F., Letter to the Editor, *Hereditary Patriotism*, N.Y. TIMES, July 20, 1861, at 3.

¹²² President Eliot, *High Education is Hereditary*, CHRISTIAN RECORDER, Feb. 24, 1876 (stating that “[c]ulture is much surer to descend to children than wealth, because the nature forces of hereditary transmission are on its side.”).

¹²³ *Hereditary Accidents*, N.Y. TIMES, Feb. 14, 1873, at 6.

¹²⁴ See, e.g., *A Mad Family*, N.Y. TIMES, May 1, 1871, at 4 (“Hereditary insanity excites no surprise, although . . . hereditary genius may.”); Aug. Woodbury, *Crime and its Causes: An Analysis of its Several Causes With Suggestions*, N.Y. TIMES, Sept. 21, 1874, at 3 (classifying one type of criminal as those who have “a transmitted or inherited defect of character or evil trait”); FRANCIS GALTON, HEREDITARY GENIUS: AN INQUIRY INTO LAWS AND CONSEQUENCES, at v (1869) (explaining how he set out to “examin[e] . . . the kindred of about four hundred illustrious men of all periods of history . . . to establish the theory that genius was hereditary”); John Crockford, *Mind and Matter, illustrated by Considerations on Hereditary Insanity and the Influence of Temperament in the Development of the Passions*, CRITIC, June 12, 1847, at 474 (“Moral qualities are likewise transmitted such as thieving, lying, and even worse crimes.”).

¹²⁵ See WEBSTER, *supra* note 120, at 695; see also, ARTFL PROJECT: WEBSTER'S UNABRIDGED DICTIONARY, 1913 ED., <http://machaut.uchicago.edu/?resource=Webster%27s> (unlick “Use 1828 Edition”; then search “inherit”) (last visited May. 8, 2013) (defining inherit, in part, as “to receive or take by birth; to have by nature; to derive or acquire from ancestors, as mental or physical qualities; as, he inherits a strong constitution, a tendency to disease, etc.”).

create a system that segmented the population based on an innate orientation, for example those who were predisposed toward being more or less patriotic. Extending that idea, if sexual orientation is physically inherited in the biological sense and is also perceived as an innate inclination, then stratifying based on that characteristic would contravene the Amendment's original public meaning.

While there is no definitive scientific consensus as to why an individual develops a particular sexual orientation, and it may be a combination of "nature and nurture . . . play[ing] complex roles; [the consensus appears to be that] most people experience little or no sense of choice about their sexual orientation."¹²⁶ Psychobiological research on genetics and prenatal hormones indicate that sexual orientation is at least in part hereditary or innate.¹²⁷ This research supports the assertion that being gay is likely not a "fickle choice subject to correction,"¹²⁸ but a feature biologically rooted in a particular individual. This part seeks to support the assertion that same-sex attraction is, at least in part, a hereditary characteristic.

1. Genetics

Do genes influence sexual orientation and other aspects of gender?¹²⁹ A sizeable portion of genetic research on sexual orientation has focused on the search for a "gay gene."¹³⁰ While it

¹²⁶ AM. PSYCHOLOGICAL ASS'N, *Sexual Orientation and Homosexuality*, <http://apa.org/helpcenter/sexual-orientation.aspx> (last visited Apr. 4, 2013); see also LEVAY, *supra* note 115, at 41 ("In the mid 1990s, researchers at the RAND Institute analyzed the response of gay men and lesbians to a questionnaire in *The Advocate* . . . [which found] 90% of the gay men and 50% of the lesbians [surveyed] said that they felt they were 'born gay.'") (citing J. Lever, *Sexual Revelations: The 1994 Advocate Survey of Sexuality and Relationships: The Men*, THE ADVOCATE 17-24 (August 23, 1994) and J. Lever, *Lesbian Sex Survey*, THE ADVOCATE 21-30 (August 22 1995)).

¹²⁷ See GLENN WILSON & QAZI RAHMAN, BORN GAY: THE PSYCHOBIOLOGY OF SEX ORIENTATION 9 (2005) ("Throughout history there have been many conflicting theories [about why an individual has a same-sex preference], including 'perverse choice',[sic] seduction by older gays, being raised by smothering mothers and absent or aloof fathers, chance conditioning, traumatic early heterosexual experiences . . ."). The common theme among these explanations is that same-sex attraction is not something natural and innate, but rather the product of degeneration, often presumed psychological, of humanity. *Id.* at 30-31. These beliefs are in part the byproduct of flawed, and largely rejected, Freudian psychoanalytics that attributed the roots of same-sex attraction to an individual's failure to properly proceed through Freud's stages of human psychological development. *Id.* One Freudian theory found that a sexual "inversion" occurs when a boy is unable to detach from the maternal obsession, turned instead toward those "who represent himself" as sexual partners. *Id.* Other psychological and psychoanalytical theories proposed regression (or failure to outgrow) the anal phase or toddler-age "homosexual phase," a repressed early emotional trauma, and even a fear of the female genitalia as the embodiment of fear of castration. *Id.* As to lesbianism, psychoanalytical theory proposed as its root the notion of "penis envy" and an impulse to rebel against the female role in favor of a masculine role. *Id.* at 32.

¹²⁸ *Id.* at 9.

¹²⁹ LEVAY, *supra* note 115, at 43.

¹³⁰ The search for a "gay gene" is a charged issue within the LGBT community. Critics within the community express concern with the idea that "greater acceptance and fair treatment" of LGBT persons is predicated on whether sexual orientation is biologically "hardwired." Joe Sartelle, *Rejecting the Gay Brain (and choosing homosexuality)*, BAD SUBJECTS, May 1994, <http://bad.eserver.org/issues/1994/14/sartelle.html>. Critics further contend,

the problem with the "no choice" position on homosexuality is that in order to be effective. . . [one must] forget about the important distinction between desire and behavior. . . [For] even if research conclusively proves that homosexual feelings are biological in origin and thus not something an

is unlikely that such a singular gene exists, research nonetheless suggests there is a genetic root for sexual orientation.

The first major support for a genetic basis of sexual orientation emerged from research finding a higher incidence of male same-sex attraction within families. These studies also suggested a maternal genetic linkage. The most well-known study was performed by Dean Hamer in 1993, who found that 13.5% of gay men had a gay brother, 7% had a gay uncle, and another 7% had one or more gay cousins.¹³¹ Gay uncles and cousins were found to be predominantly on the maternal side.¹³² Hamer concluded that the “the site for the ‘gay genes’ might be on the X chromosome.”¹³³ A subsequent study in 1998 of 182 families with two or more gay brothers also found [indicators of] maternal transmission.¹³⁴ Later tests have called into question the X chromosome hypothesis, and it appears more likely that a gene or a group of genes on the X chromosome contributes to sexual orientation but is not the sole determining factor.¹³⁵ Though suggestive of a genetic link, results have been too inconsistent to determine with certainty that the link is maternal.

Twin studies have been another important source of genetic research. Analyzing twins is an ideal way to “separate the effects of genes from the effects of the environment.”¹³⁶ Such research entails comparing identical, monozygotic, twins that develop from a single egg and fraternal, dizygotic, twins, which develop from separate eggs.¹³⁷ The functionality of this comparison arises from the fact that monozygotic twins share 100% of their genetic make-up, whereas fraternal twins share only 50% (the same as ordinary siblings).¹³⁸ Both sets of twins are

individual has any control over, this does not necessarily carry with it the right to act upon those feelings.

Id.

¹³¹ WILSON & RAHMAN, *supra* note 127, at 50.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 50-51.

¹³⁵ *Id.* at 51. In further research of the X-chromosome theory, Dean Hamer “conducted an analysis of the DNA of a selected group of 40 pairs of gay brothers and examined 22 DNA markers on the X chromosome.” *Id.* at 52. He found that 82% of the gay brothers shared a region of the X chromosome referred to as Xq28. *Id.* Testing those results against 32 new pairs of gay brothers, 36 pairs of lesbian sisters, and the heterosexual brothers of the initial gay pairs revealed that 67% of gay brothers shared Xq28, where none of the lesbian sisters did. *Id.* The heterosexual brothers had a 22% chance of carrying the Xq28 marker. *Id.* Hamer concluded that the genes in Xq28 may influence sexual orientation of men, but not women. *Id.* In the 1998 study, the Xq28 marker was shared by 66% of the gay brothers. *Id.* A subsequent study by researchers at the University of Western Ontario failed to replicate those findings. *Id.* See also Ingrid Wickelgren, *Discovery of ‘Gay Gene’ Questioned*, 284 SCIENCE 571, Apr. 23, 1999, <http://sciencemag.org/content/284/5414/571.summary>; *Doubt cast on ‘gay gene’*, BBC NEWS, Apr. 23, 1999, <http://news.bbc.co.uk/2/hi/science/nature/325979.stm>.

¹³⁶ WILSON & RAHMAN, *supra* note 127, at 45.

¹³⁷ *Id.*

¹³⁸ *Id.* One criticism of twin studies is that they “include small sample sizes and assumptions that identical and fraternal twins both have the same family environments; if identical twins are treated more similarly by their parents than fraternal twins, for example, this could be mistaken for a genetic influence.” Michael Balter, *Gay Is Not All in the Genes*, SCIENCE NOW, June 30, 2008, <http://news.sciencemag.org/sciencenow/2008/06/30-01.html>. Furthermore, given that the actual proportion of the population identifying as gay is so small, it is difficult to find a large enough sample size of twins that could yield conclusive results about this population. WILSON & RAHMAN, *supra* note 127, at 48.

often raised in similar environments. A higher level of concordance in a trait in monozygotic relative to dizygotic twins can be an indication of a “greater role for genetics in that trait, because the genetic contribution between these two sets of twins differs markedly while their environment is held constant.”¹³⁹ Statistically speaking, it is estimated that personality trait variations are 50% genetic, and 50% environmental.¹⁴⁰ “One landmark study in 1991 looked at gay men’s brothers and found that 52% of identical twin brothers were also gay, in contrast with only 22% of non-identical twin brothers and 11% of adoptive, genetically unrelated brothers.”¹⁴¹ Accounting for volunteer bias, a subsequent twin study found the actual heritability of same-sex attraction to be closer to 31% for men and about 50% for women.¹⁴² One study conducted in 2000 found “non-heterosexual orientation” among identical twins to be 30%, relative to 8% for fraternal twins.¹⁴³ Notably, “identical twins concordant for sexual orientation [did not] report greater similarity in their childhood experiences than identical twins that were non-concordant. In fact . . . male concordant identical pairs reported having *less* similar childhoods.”¹⁴⁴ As doctors Glen Wilson and Qazi Rahman assert in their book, *Born Gay*, while “genetic factors are [clearly] involved in the origins of sexual orientation,” environmental factors likely play an important role as well.¹⁴⁵

Other possible genetic sources for sexual orientation have also been suggested. One highly controversial study reinforced the likelihood of a genetic connection on the basis of what has been dubbed the “fertile female hypothesis.”¹⁴⁶ The study submits that gay men are often found in larger families because such families carry a gene that promotes a heightened sexual attraction to males inciting “greater fecundity of female relatives.”¹⁴⁷ Another speculative study suggests that mitochondrial DNA acts “selfishly” in favor of a female species by targeting the fetus’s sexual orientation.¹⁴⁸ Despite the breadth of theories, geneticists ultimately recognize that it is unlikely a single switch determines or controls sexual orientation. What is more likely is that sexual orientation is determined by a polygenic collection.¹⁴⁹ Nevertheless, genetics appear to

¹³⁹ WILSON & RAHMAN, *supra* note 127, at 45.

¹⁴⁰ *Id.* at 45–46.

¹⁴¹ Frank Bruni, *Genetic or Not, Gay Won’t Go Away*, N.Y. TIMES, Jan. 28, 2012, <http://nytimes.com/2012/01/29/opinion/sunday/bruni-gay-wont-go-away-genetic-or-not.html>.

¹⁴² See K.M. Kirk *et al.*, *Measurement Models for Sexual Orientation in a Community Twin Sample*, 30 BEHAVIOR GENETICS 345, 355 (2000).

¹⁴³ WILSON & RAHMAN, *supra* note 127, at 49.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ LEVAY, *supra* note 115, at 185.

¹⁴⁷ *Id.* at 185–86 (discussing Andrea Camperio-Ciani, *et al.*, *Evidence For Maternally Inherited Factors Favouring Male Homosexuality And Promoting Female Fecundity*, 271 (1554) PROCEEDINGS: BIOLOGICAL SCIENCES 2217–21 (Nov. 7, 2004)); see also Michael Balter, “Gay Genes” May Be Good for Women, June 18, 2008, <http://news.sciencemag.org/sciencenow/2008/06/18-01.html> (discussing research finding that same-sex attraction survives in the population because genes influencing sexual orientation “may increase fertility in women.”).

¹⁴⁸ LEVAY, *supra* note 115, at 172; see also Daniel Honan, *The Gay Gene: New Evidence Supports an Old Hypothesis*, BIG THINK, June 16, 2012, <http://bigthink.com/think-tank/the-gay-gene-new-evidence-supports-an-old-hypothesis> (quoting Bryan Sykes, the author of the 2011 book *DNA USA*, who asserts that male same-sex attraction may be “explain[ed] by the way that mitochondria are inherited down the female line . . . getting rid of male embryos and making sure that they’re propagated at the expense of males.”).

¹⁴⁹ WILSON & RAHMAN, *supra* note 127, at 53; see also, Howy Jacobs, *Don’t ask, don’t tell, don’t publish*, EMBO REPORTS, May 1, 2012, <http://nature.com/embor/journal/v13/n5/full/embor201248a.html>

have a heavy hand in an individual's sexual orientation, even if the role and scope of its influence have not yet been completely defined.¹⁵⁰

2. Hormones and Brain Structure

More recently, research has focused on the role of prenatal hormones in defining sexual orientation. A fetus, though genetically of a particular gender, does not fully develop distinguishing genitalia until the third trimester.¹⁵¹ During that period, the "Y chromosome . . . kicks off the cascade of hormonal events that produces a recognizable male."¹⁵² A key role in this process is played by the Androgen Receptor protein, which directs the actions of sex hormones and allows testosterone to enter into and bind to cells.¹⁵³ This hormonal process has a large impact on the way the brain and body develop.¹⁵⁴

The "prenatal androgen theory," or prenatal hormone theory, is based on the idea that sexual orientation is determined by a *decreased* level of prenatal testosterone in *gay men* (or an increased level of prenatal testosterone in lesbian women), precipitating under-masculinization (or over-masculinization).¹⁵⁵ Whether caused by testosterone or a lack thereof, due to an absence of sufficient "aromatase to convert testosterone to estrogen within the male brain," prenatal hormones appear to impact the brain and behavior.¹⁵⁶ This occurs through (1) "organizational effects, which mold brain and behaviour early in the womb and are irreversible," and (2) "activational [sic] effects, which are transient effects of hormones circulating in the blood upon brain and behavior in adulthood."¹⁵⁷ Activational effects, in contrast with organizational effects, "turn on" functional systems whose basic structure has developed much earlier in life . . . and are generally not permanent."¹⁵⁸

Data indicates that "the levels of *sex hormones* circulating during fetal life direct the development of the brain and influence gendered traits," including sexual orientation.¹⁵⁹ While some gendered characteristics result from human environmental factors, others are innate to males and females across the animal kingdom, particularly among mammals. To support this contention, genetics researcher Simon LeVay offers three primary observations:

(comparing the polygenic nature of prostate cancer and the likely polygenic nature of same-sex attraction, as well as the paucity of research on the genetics of same-sex orientation); LEVAY, *supra* note 115, at 173.

¹⁵⁰ Balter, *supra* note 147 ("Studies suggest that homosexuality is at least partly genetic. And although homosexuals have far fewer children than heterosexuals, so-called gay genes apparently survive in the population."); see also Simon LeVay, *The Paradox of Gay Genes*, HUFFINGTON POST, Oct. 1, 2012, http://huffingtonpost.com/simon-levay/the-paradox-of-gay-genes_b_1929641.html ("The key to understanding how gay genes survive is the realization that such genes exist, not only in gay people themselves, but also in some of their non-gay relatives.").

¹⁵¹ WILSON & RAHMAN, *supra* note 127, at 69.

¹⁵² *Id.*

¹⁵³ *Id.* at 69-70

¹⁵⁴ *Id.* at 70.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 71 (explaining the aromatization hypothesis).

¹⁵⁷ *Id.*

¹⁵⁸ LEVAY, *supra* note 115, at 54.

¹⁵⁹ *Id.* at 43.

First, . . . experiments conducted using nonhuman animals . . . indicate that testosterone levels during a “critical period” before and around the time of birth influence an animal’s preference for male or female sex partners after puberty . . . [A] similar developmental mechanism might operate in ourselves as in other animals. The critical period . . . in humans would probably be entirely before birth, given that humans are born at a much later stage of brain maturation than most laboratory animals. Second, . . . gendered traits . . . are indeed influenced by prenatal hormones. . . . Third, the fact that homosexuality is linked to a variety of gendered-atypical traits in childhood and adulthood . . . suggests . . . a “gender package” that has common developmental roots.¹⁶⁰

LeVay’s research also identifies physical manifestations of the hormonal influence on brain structure and gendered traits. He has extensively studied the hypothalamus and identified a sexually dimorphic (“differing in structure between male and females”) cell group named INAH-3.¹⁶¹ The grouping is found to be “two to three times larger in men than women.”¹⁶² In an autopsy study where the deceased’s sexual orientation was known, it was found that INAH-3 was smaller for gay men than straight men, comparable in size to that of straight women.¹⁶³ However, at least one subsequent study of 34 straight men, 34 straight women, and 14 gay men called into question the statistical validity of LeVay’s results.¹⁶⁴

Yet LeVay also found a similar correlation between same-sex orientated conduct and a parallel cell grouping in other mammals called the sexually dimorphic nucleus of the preoptic area, or SDN-POA. Lowering or blocking testosterone during critical periods of development in laboratory mammals caused that cell grouping to shrink. These male animals also exhibited atypical sexual conduct—males became less likely to mount partners and acquiesced to being mounted. LeVay contends that testosterone’s organizational and activational effects precipitated the change in the size of SDN-POA and directed the animal’s shift in sexual orientation.¹⁶⁵

Other studies found a correlation between sexual orientation and differences in brain

¹⁶⁰ *Id.* at 132.

¹⁶¹ *Id.* at 47.

¹⁶² *Id.*

¹⁶³ Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 (5023) SCIENCE 1034-35 (Aug. 30, 1991); see also Simon LeVay, *The “Gay Brain” Revisited*, NERVE, Sept. 5, 2000, <http://nerve.com/love-sex/the-science-of-sex-the-gay-brain-revisited>.

¹⁶⁴ William Byne et al., *The Interstitial Nuclei of the Human Anterior Hypothalamus: An Investigation of Variation with Sex, Sexual Orientation, and HIV Status*, 40(2) HORMONES AND BEHAVIOR 86-92 (2001) (finding the size difference in INAH3 between gay and straight males less statistically significant). Though the Byne et al. study confirmed that INAH-3 was larger in straight men than in straight women, the trend towards a smaller INAH-3 grouping in gay men was found not to be statistically reliable. WILSON & RAHMAN, *supra* note 127, at 112.

¹⁶⁵ LeVay, *supra* note 115, at 47-55. Prenatal exposure to higher levels of testosterone in female guinea pigs leads them to “mount” other animals in adulthood, rather than “display lordosis” (acquiescence to being mounted). *Id.* at 55. Conversely, males deprived of testosterone were “less likely to mount other animals and more likely to display lordosis.” *Id.* In addition, “[s]exual dimorphisms in similar nuclei have been found in other mammals [in addition to rats] such as guinea pigs, ferrets, sheep and some primates. The main cause of this sex difference appears to be the differing exposure of males and females to testosterone in the womb.” WILSON & RAHMAN, *supra* note 127, at 109. Wilson and Rahman also discuss research by Roger Groski at UCLA in 1978 that demonstrated that differing androgen levels affected the size of the SDN-POA. *Id.*

structure and cognitive function. One recent study concluded that, “the size of the two symmetrical halves of the brains of gay men more closely resembled those of straight women than they did straight men.”¹⁶⁶ Cognitive studies have also found indications of a “gender shift” among gay men and gay women regarding “male-favoring visuospatial traits such as mental rotation, targeting, and navigation, as well as female-favoring tasks such as verbal fluency”¹⁶⁷ Ultimately, biology appears to contribute to sexual orientation, even if the “correlation between form and function” remains unclear.¹⁶⁸

3. Summarizing the Scientific Research on the Hereditary Nature of Sexual Orientation

It appears that sexual orientation likely results from a combination of factors—genetic, hormonal, and environmental. Because sexual orientation is likely “inherited,” either genetically or on the basis of prenatal hormones (whose function may also be determined by our genetic code), that fact is likely sufficient to identify this characteristic as “hereditary” as it would be understood at the time of the Fourteenth Amendment’s ratification (an inherited, innate behavioral characteristic). That sexual orientation is, at least in part, the product of biology serves to strengthen its hereditary quality.

C. A History of Laws and Regulations Stratifying Society on Sexual Orientation and its Related Conduct

If male same-sex attraction is in fact hereditary, for the Fourteenth Amendment to be implicated, there must additionally be a system of caste or class legislation that stratifies society based on that feature. In this section, I will show that there exist long-standing legal and administrative practices that relegate gay men to second-class status: first, the indirect prohibition of conduct today commonly associated with male same-sex orientation; and second, upon the coalescence of an identifiable gay community during the 1920s, the direct efforts of legislatures, courts, and bureaucratic agencies to criminalize male same-sex attraction, suppress same-sex association, and stifle the development of a gay sub-culture.

1. The Criminality of Same-Sex Conduct from the Colonial Period to World War I

Early laws did not “define individuals as homosexuals *per se*,”¹⁶⁹ nor would individuals have understood themselves to be “homosexual” prior to the rise of psychoanalytics in the 1880s. Rather, laws criminalized conduct such as sodomy and oral sex, generally without mentioning particular participants’ sexual orientation.¹⁷⁰ In essence, American sodomy laws sought to

¹⁶⁶ Alice Park, *What the Gay Brain Looks Like*, TIME, June 17, 2008, <http://time.com/time/health/article/0,8599,1815538,00.html>; see also, LEVAY, *supra* note 115, at 274 (noting gay men are gender-shifted in their brain chemistry and composition).

¹⁶⁷ LEVAY, *supra* note 115, at 274.

¹⁶⁸ *Id.* at 217.

¹⁶⁹ MOGUL ET AL., *supra* note 18, at 19.

¹⁷⁰ *Lawrence v. Texas*, 539 U.S. 566, 568 (2003). In England the “first civil English sodomy law was enacted in 1533, prohibiting the ‘detestable and abominable Vice of Buggery committed with mankind or beast’ and imposing punishment by death and forfeiture of all property belonging to [the offender].” MOGUL ET AL., *supra* note 18, at 12-13. During this period, cross-dressing and sexual interactions between women were severely punished

prohibit non-procreative sexual activity.¹⁷¹ Thus, the country has “no longstanding history. . . of laws directed at homosexual conduct as a distinct matter.”¹⁷² Nevertheless, in this first part I will show how criminal prohibitions of the sort of intimate conduct currently associated with male same-sex conduct produced an environment inclined toward the sort of direct legislation that developed near the turn of the twentieth century.

The criminalization of conduct today associated with same-sex orientation extends as far back as the early colonial North America.¹⁷³ Spanish and Portuguese colonizers enforced sexuality and gender hierarchies on indigenous populations; they corporally punished native males who engaged in sexual relations with other men and reviled at the sight of “[i]ndigenous ‘men’ who [took] on the appearance, mannerisms, duties, and roles of ‘women . . .’”¹⁷⁴ On the other side of the continent, the British imported laws to the thirteen colonies prohibiting sodomy and punishing deviation from western gender norms. Though often difficult to enforce (it was rare for authorities to catch consenting adults in the act),¹⁷⁵ statutes that prohibited sodomy, buggery, and “crimes-against-nature” nonetheless threatened individuals engaging in this conduct with death, as such acts were labeled capital crimes “on par with murder, treason, and adultery.”¹⁷⁶ From American independence until the late 1800s, the text and application of these laws changed little from the colonial versions.¹⁷⁷

After the Civil War, middle-class urban society became concerned with people who departed from increasingly rigid gender and sexuality roles.¹⁷⁸ Broadly crafted “morals codes” criminalized conducting oneself in a manner outside of expected gendered behavior.¹⁷⁹ By 1890, the emergence of psychoanalytics, and its designation of such behaviors as psychologically degenerate, spawned a societal anxiety about the “sexual inversion” of women who dressed as men, and men “who renounced the male gender role as they renounced the male sex role . . .”¹⁸⁰

throughout Europe—part of a civilization-wide emphasis on enforcing gender roles. The terms buggery and sodomy “were sometimes . . . used interchangeably . . . [as] both terms proscribed non-procreative sexual acts . . .” *Id.* at 13. Note, however, that sexual interactions with an animal were prosecuted as buggery.” *Id.*

¹⁷¹ *Lawrence*, 539 U.S. at 568.

¹⁷² *Id.*

¹⁷³ See generally MOGUL ET AL., *supra* note 18, at 2-5 (arguing that Europeans created gender hierarchies through sexually violent enforcement during the colonization period).

¹⁷⁴ *Id.* at 3. Biblically derived prohibitions on “the Sodomitic vice” emerged in Western Europe in the 1400s, around the period of the Spanish Inquisition. *Id.* at 2-4, 12. Spanish and Portuguese missionaries in the New World identified what they recognized as “intrinsic sexual deviance” as “reminiscent of the biblical tale of Sodom and Gomorrah.” *Id.* at 2-3. They took significant steps to suppress cross-gendered dress and impose Western-style masculinity. *Id.* at 2-4. Mogul, Ritchie, and Witlock contend that “suppression of gender fluidity” and imposition of “patriarchy” was a large part of the “formation of the U.S. nation state on Indigenous land.” *Id.* at 3.

¹⁷⁵ WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 19 (1999).

¹⁷⁶ MOGUL ET AL., *supra* note 18, at 13.

¹⁷⁷ ESKRIDGE, *supra* note 175, at 19 (noting that in 1880 only sixty-three persons were incarcerated for “crimes against nature” and pre-1881 prosecutions “overwhelmingly focused on male-female, adult-child, or man-animal relations rather than same-sex intimacy”).

¹⁷⁸ *Id.* at 20.

¹⁷⁹ *Id.* at 19 (identifying penal codes of New York and Chicago as being typical of moral codes of the mid to late 1800s).

¹⁸⁰ *Id.* at 20.

Rapidly, “[c]ategories of a disapproved people—the “sodomite, the sexual invert, the homosexual”—entered public discourse.¹⁸¹

The turn of the twentieth century marked two key shifts: first, these “disapproved people” began to develop their own subcultures and meeting places in American cities; and second, the clinical and medical classification of sexual inversion as sexual psychopathy¹⁸² led “inversion” to become associated with rape and child molestation.¹⁸³ The coalescence of “inverts,” and the identification of that group as morally degenerate, triggered the first legal reactions to gay culture. Groups like New York’s Comstock Society emerged to “suppress vice” and pressure police into enforcing moral and sodomy laws through raids of clubs and other venues frequented by the so-called “inverts.”¹⁸⁴

Between 1880 and 1921, sodomy laws expanded to include oral sex and used increasingly specific and clinical language to define prohibited conduct. States and municipalities also expanded public indecency prohibitions targeting gender fraud, gender deviance, and sexual deviance—these laws provided grounds for the entrapment and harassment of “gender-benders” and gay men.¹⁸⁵ In New York, for example, “the legislature added a new section 887(9) to the Criminal Procedure Code, expanding the definition of illegal ‘vagrant’ to include ‘every male person who . . . solicits for immoral purposes [in any public place].’”¹⁸⁶ The state employed this statute as a legal basis for police action against male “inverts”, especially in raids of clubs.¹⁸⁷ The conviction rate for these crimes was a staggering 83%.¹⁸⁸ During this time the federal government—also prompted by prevailing medical assumptions—empowered the Immigration Naturalization Service to deport or exclude “sexual perverts” and others who “because of . . . abnormal impulses are in repeated conflict with social customs and constituted authorities;” the War Department similarly instituted regulations to “discharge” existing and “screen out” potential “sodomites” and “inverts” from its ranks.¹⁸⁹

2. The Rise of Class Legislation and Regulation Directed Specifically at Gay Males and the Suppression of Gay Society from WWI to the 1960s

The twenties ushered in a period in which “sexual acts and desires became constitutive of identity.”¹⁹⁰ Yet, the sexual liberation for heterosexuals during this time also had the impact of marking same-sex attraction and gay men and lesbian women with the new taboo.¹⁹¹ From the 1920s onward, state and federal regulations, often claiming national security concerns, targeted gays and lesbians and sought to root them out of public employment and to suppress gay community development. On the criminal front, a mushrooming national hysteria over child

¹⁸¹ *Id.* at 18.

¹⁸² *Id.* at 22-24.

¹⁸³ *Id.* at 23.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 24-37.

¹⁸⁶ *Id.* at 29

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 30.

¹⁸⁹ *Id.* at 36-37.

¹⁹⁰ MOGUL ET AL., *supra* note 18, at 19.

¹⁹¹ ESKRIDGE, *supra* note 175, at 40.

molestation and the perceived threat of gay men to America's youth spurred harsher legal penalties for intimate actions between individuals of the same gender. These laws imposed a stigma of deviance, criminality, and otherness on gay men and lesbian women.

a. Regulatory Actions

As Professor William Eskridge put it bluntly, “[t]he modern regulatory state cut its teeth on gay people.”¹⁹² The first regulations targeting gay men were spurred by the mobilization of American forces in World War I and were born out of a growing concern over same-sex intimacy among soldiers.¹⁹³ The rise of the bureaucratic state produced an environment that excluded gay men from the workplace and sought to foil public association of a growing gay community.

With Herbert Hoover's FBI leading the charge, the federal government made it a priority to root out “homosexual and other sex perverts” for fear that “[t]he social stigma attached to sex perversion . . . [may make them] go to great lengths to conceal their perverted tendencies.”¹⁹⁴ In essence, Hoover feared gay men within the government were at risk for communist blackmail and coercion. Existing regulations were employed to serve that end, as “the Civil Service Commissions regulation barring from federal employment people who engage in ‘immoral conduct’ was read to include ‘homosexuality.’”¹⁹⁵ “[A]ntihomosexual witch-hunt[s]” at the federal level soon gave way to the same at the state level.¹⁹⁶ For example, the California State Bar disbarred lawyers for same-sex acts between consenting adults.¹⁹⁷ In Florida, legislative investigation committees engaged in a six-year campaign to purge state schools of gay staff and teachers.¹⁹⁸ That effort was fueled by concerns that gay men, incapable of procreation, needed to recruit new boys to preserve their numbers.¹⁹⁹

In addition to being rooted out of the workplace, gay social culture and community association also came under pressure. In a growing number of cities, from New York and Los Angeles to Pittsburgh and Providence, “police . . . observed gay hangouts, posed as decoys to attract solicitations, and raided gay bars, baths and other spaces.”²⁰⁰ After WWII the efforts of vice squads to “purge” gay men from their cities became even more overt and directed.²⁰¹ The

¹⁹² *Id.* at 43.

¹⁹³ *Id.* at 37.

¹⁹⁴ *Id.* at 68; see generally Douglas M. Charles, *From Subversion to Obscenity: The FBI's Investigations of the Early Homophile Movement in the United States, 1953-1958*, 19(2) J. OF THE HIST. OF SEXUALITY 262, 285 (May 2010) (highlighting the FBI's investigations into the beginnings of gay rights groups).

¹⁹⁵ Exec. Order No. 10,450, 18 Fed. Reg. 2491 (Apr. 29, 1953); ESKRIDGE, *supra* note 175, at 69 (identifying that in 1951 the U.S. State Department fired 119 employees for “homosexuality” and another 134 in 1952).

¹⁹⁶ ESKRIDGE, *supra* note 175, at 72.

¹⁹⁷ *Id.* at 73.

¹⁹⁸ *Id.*

¹⁹⁹ See Evelyn Schlatter & Robert Steinback, *10 Anti-Gay Myths Debunked*, INTELLIGENCE REP., no. 140, Winter 2010, <http://splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/10-myths>.

²⁰⁰ ESKRIDGE, *supra* note 175, at 44.

²⁰¹ *Id.* at 63-64. Eskridge provides some striking arrest statistics from America's major cities during this period: “sodomy or solicitation of sodomy generated almost sixty percent of the arrests by Philadelphia's morals squad in 1949;” that amounts to two hundred men brought to court each month. *Id.* at 63. After WWII, the Los Angeles police department's moral division arrested thousands of gay men annually, and Washington, D.C., armed with

means they employed also grew more extreme, with officers in some cases “spending hours perched above public toilets . . . and even following homosexuals and peering through doors into bedrooms.”²⁰² Police efforts from 1946 to 1965 are estimated to have led to the arrest of between two and five thousand individuals each year for sodomy, most of whom engaged in consensual sexual activity.²⁰³

While the police raided gay bars, state entities like California’s Alcoholic Regulatory Control Department and the New York State Liquor Authority were empowered to revoke licenses, and often closed bars if the premises were found to be “a resort for ‘sexual perverts.’”²⁰⁴ States and municipalities censored literature produced by groups like the Mattachine Society, and suppressed theater and film depicting or related to same-sex conduct and gay culture.²⁰⁵ Ultimately, by the mid-1960s, with the gay rights movement on the horizon, gay men faced, “police harassment, job discrimination, [and] state exclusions.”²⁰⁶

b. Criminal Law Actions

The 1924 trial of Nathan Leopold and Richard Loeb for the brutal murder of Bobby Franks hardened the association between male same-sex attraction, criminal depravity, and psychopathy. Highly publicized psychiatric expert testimony about the killers’ “(homo)sexually perverted desire,” including explicit details about their deviant “symbiotic sexualized relationship,” produced a media and public frenzy over the trial.²⁰⁷ Leopold and Loeb, and other similar criminal cases,²⁰⁸ spurred a “national hysteria” over child sexual molestation.²⁰⁹ Between the World Wars, public officials “increasingly . . . demonized [homosexuals] as threatening to

the Murray Act, “arrested hundreds of men for sodomy, indecent assault and lewdness . . . between 1948 and 1953.” *Id.* at 64.

²⁰² *Id.* at 64.

²⁰³ *Id.* at 66.

²⁰⁴ *Id.* at 79 (“In 1954 Miami adopted an ordinance making it unlawful for a bar to knowingly employ or sell alcohol to ‘a homosexual person, lesbian or pervert, as the same are commonly accepted and understood, or to knowingly allow two or more persons who are homosexuals, lesbians or perverts to congregate . . . in his place of business.’”).

²⁰⁵ *Id.* at 48, 75-77.

²⁰⁶ *Id.* at 92.

²⁰⁷ MOGUL et al., *supra* note 18, at 21 (“Early in the investigation, a teacher at Franks’ school, ‘an effeminate man, whom the police suspected of homosexual tendencies,’ was considered the prime suspect.”).

²⁰⁸ *Id.* at 27. In addition to their discussion of the Leopold and Loeb case, Mogul et al. explore a number of queer criminal archetypes. *Id.* at 26-27. For example, they identify Leopold and Loeb as emblemizing the “gleeful gay killer[.]” *Id.* at 27. The authors also explore the 1892 murder of Freda Ward by her lover, nineteen-year-old Alice Mitchell, specifically discussing the media’s obsession with Mitchell’s “purported insanity and [the] intrinsic violence of [her] gender nonconformity.” *Id.* at 27-28.

²⁰⁹ See ESKRIDGE, *supra* note 175, at 40-43 (“[S]ociety increasingly turned to control homosexuals. . . . Echoing the views of the popular press, [one] judge in 1922 described ‘sexual perverts’ as ‘wild ferocious animals’ who engaged in a ‘degenerate sexual commerce with little boys or little girls.’ . . . [Soon] [t]he state’s goals were to control and punish the psychopathic homosexual, to harass and drive underground homosexual communities and their expression, and to exclude homosexuals from citizenship—all in the name of protecting children from a dangerous force threatening their development into heterosexuals.”); *id.* (“American regulation of sexuality shifted after World War I from a focus on female corruption to a focus on male sexual aggression, reaching an apex after 1935 when child molestation became a national hysteria.”).

children whose sexual development was so easily derailed.”²¹⁰ State legislators adopted harsher sodomy laws that provided for incarceration or detainment in mental institutions of “moral degenerates and sexual perverts.”²¹¹ Under these laws, “[t]he most common . . . conviction [was] sodomy, including sodomy between consenting adults.”²¹² The District of Columbia’s 1948 “Miller Act,” a sodomy law that carried a heavy twenty-year prison sentence, is indicative of the severity of punishment under similar laws enacted nationwide.²¹³

3. The Gay Rights Movement, Erosion of Discriminatory Laws and Regulations, and the Persistence of Caste

The beginning of the gay rights movement, marked by the Stonewall Riots on June 27, 1969, initiated the erosion of laws that discriminated against gay men and lesbian women.²¹⁴ After Stonewall, the gay rights movement earned a significant number of legal victories in the realm of First Amendment rights.²¹⁵ By the middle of the 1970s, several cities and counties had added sexual orientation to their lists of non-discrimination statuses.²¹⁶ In addition, the “Civil Service Commission repealed its ban on homosexual employment in the Federal Civil Service.”²¹⁷ During that same period, a number of states decriminalized lesbian and gay intimacy by reforming or eliminating sodomy laws in conformance with changes to the Model Penal Code (MPC).²¹⁸

Despite legal gains, social stratification persisted. Organizations embraced the ballot initiative process to repeal pro-gay ordinances: the prime example is the use of the ballot initiative by Anita Bryant’s “Save Our Children” campaign in 1977 to repeal Dade County, Florida’s four-month-old gay rights ordinance.²¹⁹ This process was followed by cities in Minnesota, Kansas, Oregon, and California attempting to repeal their own gay rights ordinances.²²⁰ However, at a time when many states were removing prohibitions on private consensual sexual activity in line with the revised MPC, the 1970s also saw a reactionary shift among conservative states, which attempted to single out same-sex sexual activity for criminal prosecutions.²²¹ While only nine

²¹⁰ *Id.* at 40.

²¹¹ *Id.* at 42.

²¹² *Id.* at 61.

²¹³ *Id.* at 60.

²¹⁴ *Id.* at 99; see also Marty Rouse, *Remembering Stonewall: 43 Years Later*, HUM. RTS.

CAMPAIGN BLOG, June 28, 2012, <http://www.hrc.org/blog/entry/remembering-stonewall-43-years-later>; William Rubenstein, *The Stonewall Anniversary: 25 Years of Gay Rights*, 21 HUM. RTS. 18, 19 (1994).

²¹⁵ *Id.* at 111-23 (discussing the First Amendment litigation efforts of the gay rights movement).

²¹⁶ *Id.* at 130.

²¹⁷ Tina Fetner, *Working Anita Bryant: The Impact of Christian Anti-Gay Activism on Lesbian and Gay Movement Claims*, 48 SOCIAL PROBLEMS 411, 411 (2001).

²¹⁸ *Id.* at 414.

²¹⁹ Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 258 (1997).

²²⁰ *Id.*

²²¹ See *Lawrence*, 539 U.S. at 570 (2003). Many state legislatures modernized their entire system of criminal law when “[i]n 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for ‘criminal penalties for consensual sexual relations conducted in private.’” *Id.* at 572. However, several states’ legislatures “were so appalled to be without a prohibition on homosexual sodomy that they

states enforced such prohibitions—and by 2003 most of those states were not actively enforcing those prohibitions—it was not until the Supreme Court’s decision in *Lawrence* that a same-sex couple could engage in private consensual sexual relations without the threat of prosecution. Furthermore, the 1990s saw the passage of the Defense of Marriage Act (DOMA)²²² and of Don’t Ask, Don’t Tell²²³ by Congress, which together inhibited the ability of gay men and lesbian women, both individually and as couples, to enjoy freedoms and privileges equivalent to those enjoyed by heterosexual persons as a matter of federal law.²²⁴ Viewed along with predecessor legislation and regulation beginning in the 1920s, these more recent statutes evidence a continuing pattern of relegating gays and lesbians to a second-class legal status.

4. Does History Indicate a Stratification Created by Laws Based on a Hereditary Characteristic?

From the early criminal prohibitions on sodomy and the first steps by major cities to impose gender conformity and expel “sexual inverts,” the law has sent a clear message that such individuals are deviant, different, and less than “typical” heterosexual men and women.²²⁵ As a consequence of an innate feature of their identity, gay men and lesbian women found themselves unable to serve in the military if open about their sexuality; participate in the civil service without fear of persecution; teach in public schools; engage in consensual sexual activity with their preferred partners; openly socialize with like individuals in private venues; and distribute art and literature aimed a peer audience. It would appear that the denial to a group of such a wide array of privileges, freely available to their heterosexual peers, created a level of stratification that relegated gays and lesbians to second-class social status. From these facts, one could find that a caste system based on sexual orientation did in fact exist. Even if many of the more divisive discriminatory laws and regulations have eroded, a system of caste nonetheless persists, as I will show in the next section.

D. *Sexual Orientation and the Exclusive Allocation of Rights*

Building on the historical evidence provided above, this section will focus on some of the rights and privileges currently denied gay men and lesbian women that support the idea that a caste system not only existed, but also continues to exist. The exclusive allocation of these rights to a heterosexual majority continues to stratify American society based on sexual orientation, notably in the area of family law. Family law is interrelated with the legal institution of marriage,

added new laws [specifically] barring [it].” Rubenstein, *supra* note 214, at 19.

²²² Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat 2419 (1996).

²²³ Don’t Ask, Don’t Tell, Pub. L. No. 103-160, div. A, title V, § 571(a)(1), 107 Stat. 1547, 1670 (1993), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (2010).

²²⁴ See, e.g., *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 923 (C.D. Cal. 2010), *vacated by* *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011) (“[Don’t Ask, Don’t Tell] denies homosexuals serving in the Armed Forces the right to enjoy ‘intimate conduct’ in their personal relationships” and “the right to speak about their loved ones while serving their country in uniform; . . . it discharges them for including information in a personal communication from which an unauthorized reader might discern their homosexuality.”); see also, *Judge Rules “Don’t Ask, Don’t Tell” Policy Unconstitutional*, ABC NEWS, Sept. 10, 2010, <http://abcnews.go.com/blogs/politics/2010/09/judge-rules-dont-ask-dont-tell-policy-unconstitutional/>.

²²⁵ See ESKRIDGE, *supra* note 175, at 18.

which is in reality “a bundle of rights and obligations pertaining to how each member of the couple must treat each other and how outsiders must treat the couple.”²²⁶ Numerous rights accompany marriage at both the federal and state levels,²²⁷ but I will touch on just a few: taxes, inheritance and intestacy, testimonial privilege, and adoption.

1. Federal Taxes

Federal taxes are used to incentivize and shape marriage. Prominently, the joint tax return, “available also for state income taxes, treats married couples as one taxpaying unit.”²²⁸ DOMA defines marriage for the purposes of federal law as being between one man and one woman,²²⁹ and thus the IRS does not recognize same-sex marriages for federal income, gift, or estate tax purposes.²³⁰ For this reason, “gay and lesbian couples must file as single people on their federal tax returns.”²³¹ This distinct treatment creates significant problems for same-sex couples who live in states that recognize same-sex marriage and so must complete state tax forms as a married couple but federal tax forms as individuals.²³² Perhaps even more significantly, the federal tax code “forces [same-sex] parents that share a home, meals, and parenting responsibilities to break their family apart to file separate tax forms.”²³³

Federal tax law denies same-sex couples tax benefits in property transfers given to other married couples as “[f]ederal law uses marriage as a way to defer tax obligations when an affluent individual dies leaving a widowed spouse, who inherits [assets and property].”²³⁴ Where “[p]roperty transfers between spouses are not subject to gain-loss valuation,”²³⁵ federal estate tax

²²⁶ Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 5, 6 (2010) (“These rights and obligations usually include, inter alia, the right to receive a portion of a spouse’s estate if she dies intestate, the right to bring a wrongful death action, the right to access spousal health, disability and accident insurance plans, the right to assert evidentiary privileges, the right to hospital visitation and other incidents relevant to medical treatment of a family member, and the entitlements and responsibilities pertaining to spousal maintenance and marital property at separation.”).

²²⁷ See ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 366 (2004) (“More than one thousand rights and responsibilities are automatically accorded to couples based on marital status.”); Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 146 (2003) (describing how a search by the General Accounting Office identified 1,049 federal laws that condition rights on marital status).

²²⁸ Bernstein, *supra* note 227, at 146.

²²⁹ Defense of Marriage Act, 1 U.S.C. § 7 (2006).

²³⁰ See Keeva Terry, *Same-Sex Relationships, DOMA, and the Tax Code: Rethinking the Relevance of DOMA to Straight Couples*, 20 COLUM. J. GENDER & L. 384, 392-93 (2011) (“Individuals who are not married for federal income tax purposes are not permitted to file jointly. Married filing separately has a completely different and less beneficial rate structure than the filing categories for single persons who are not married for federal income tax purposes.”) (emphasis omitted).

²³¹ Frederick Hertz, *Tax Issues for Same-Sex Couples*, NOLO, <http://nolo.com/legal-encyclopedia/tax-issues-same-sex-gay-couples-32290.html> (last visited Dec. 22, 2012).

²³² *Id.*

²³³ Tara Siegel Bernard, *Some Tax Breaks Unavailable to Same-Sex Couples*, N.Y. TIMES, Apr. 16, 2012, <http://bucks.blogs.nytimes.com/2012/04/16/some-tax-breaks-unavailable-to-same-sex-couples> (quoting MOVEMENT ADVANCEMENT PROJECT, FAMILY EQUAL. COUNCIL & CTR. FOR AMERICAN PROGRESS, UNEQUAL TAXATION AND UNDUE BURDENS FOR LGBT FAMILIES 9 (Apr. 2012)).

²³⁴ Bernstein, *supra* note 227, at 146-47.

²³⁵ *Id.*

laws force “[s]ame-sex couples [to] face federal marginal tax rates of up to 45% on the bequest of assets to their surviving partner at death that exceed an excluded amount per estate”²³⁶ Thus, for an “equivalent transfer, married couples pay no taxes,” where same-sex couples must pay sizeable taxes.²³⁷

2. Inheritance and Intestacy

While an individual can bequeath his or her property at death to whomever he or she would like, same-sex couples find themselves disadvantaged when a partner dies intestate. When a married person dies holding assets, his or her spouse will almost certainly inherit at least a portion of those assets, unless the surviving spouse waived claims:

Many states forbid the disinheriting of spouses, and all of them establish wives and husbands as default beneficiaries when decedents die without a will. . . . Married decedents who die intestate may not have intended to leave money to their wives or husbands, but the state in effect chooses to write a will benefiting these widowed spouses.²³⁸

While some states have recognized same-sex couples as equivalent to married couples or have accepted out of state same-sex marriage licenses for the purposes of wills and inheritance,²³⁹ most have not. Consequently, in those states, “intestacy laws protect only the rights of lawfully married survivors, and in states that do not recognize same-sex marriages or civil unions, the estate will be distributed to distant relatives, or even escheat to the state, rather than benefit the surviving partner” to the same-sex marriage, union, or long-standing relationship.²⁴⁰

²³⁶ MICHAEL D. STEINBERGER, FEDERAL ESTATE TAX DISADVANTAGES FOR SAME-SEX COUPLES 1 (2009), available at <https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/PX1269.pdf>.

²³⁷ *Id.*

²³⁸ Bernstein, *supra* note 227, at 149.

²³⁹ See, e.g., Peter C. Valente & Susan P. Witkin, *Estate Planning Issues for Same-Sex Spouses*, N.Y. L.J., Jan. 4, 2011, at 3, available at <http://blankrome.com/index.cfm?contentID=37&itemID=2376> (citing Matter of Ranftle, 917 N.Y.S.2d 195 (N.Y. App. Div. 2011) for its holding “that a same-sex spouse is a ‘spouse’ for purposes of New York’s intestacy laws”); see also Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children’s Rights as Children*, 48 SANTA CLARA L. REV. 999, 1002 (2008) (citing Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (“[B]arring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”)).

²⁴⁰ Christine A. Hammerle, *Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union*, 104 MICH. L. REV. 1763, 1764 (2006). The author notes,

Although effective testamentary planning would obviate the need for recognition of same-sex intestacy rights, it has some possible shortcomings. Relying on wills to accurately reflect a decedent’s intent is problematic for three reasons: relatives of the decedent may successfully challenge a will leaving most or all of the estate to a same-sex partner, a home-drawn will may fail for defects in execution, or couples in a civil union or same-sex marriage may neglect to make wills at all, assuming that their union or marital status will protect them in the event one dies.

Id. at 1768.

3. Evidentiary Privileges in State and Federal Courts

In federal courts, “[u]ntil 1933, a married person was deemed incompetent to testify in favor of his spouse. . . .”²⁴¹ In the Federal Rules of Evidence, this common law notion

has been replaced by evidentiary rules that make being married a source of power for witnesses and parties to litigation. Two significant marital privileges have endured: the privilege to exclude adverse spousal testimony, and the confidential marital communications privilege. . . . [Such] communications are absolutely privileged from disclosure, and either spouse may invoke the privilege.²⁴²

However, “under the federal Defense of Marriage Act, federal statutes and regulations that provide special treatment to marriages or spouses apply only to opposite-sex marriages.”²⁴³ In the context of Federal Rule of Evidence 501, DOMA limits the ability of a federal judge to recognize marital privileges between same-sex spouses in cases arising under federal law.²⁴⁴ Where a federal court presides over a criminal case, a same-sex spouse (or partner under a civil union) who refuses to testify as a witness may be compelled to testify against his or her significant other or face being held in civil contempt or prosecuted for criminal contempt.²⁴⁵ Perhaps of greater concern, “if the prosecution successfully compels the testimony, the accused may be convicted and incarcerated based on evidence that arguably should have been excluded.”²⁴⁶

Presently, “[i]n thirteen states, a person can stop his or her spouse from testifying adversely. The broader confidential-communications privilege covers disclosure between husbands and wives in the confidence of the marital relationship.”²⁴⁷ Similar to the federal system, states have created significant barriers for same-sex spouses who try to assert evidentiary privileges intended to protect the marital institution by enacting both evidentiary laws that provide for spousal privilege and also their own versions of the Defense of Marriage Act (sometimes called “mini-DOMAs”).²⁴⁸

²⁴¹ Bernstein, *supra* note 227, at 148.

²⁴² *Id.*

²⁴³ Eugene Volokh, *Same-Sex Marriages, the Spousal Privilege Not To Testify, and Iowa vs. Federal Law*, THE VOLOKH CONSPIRACY (Oct. 29, 2009, 2:44 PM), <http://volokh.com/2009/10/29/same-sex-marriages-the-spousal-privilege-not-to-testify-and-iowa-vs-federal-law/>.

²⁴⁴ See John Bergstresser, Note, *When Evidentiary Rules Enforce Substantive Policies: Same-Sex Marital Privilege Under Federal Rule of Evidence 501 in Diversity Cases*, 46 NEW ENG. L. REV. 303 (2012) (“[O]ne of DOMA’s greatest consequences is that the evidentiary rights available to same-sex spouses under state law would be ignored when litigation proceeds in federal rather than state court.”).

²⁴⁵ See Maria A. La Vita, Note, *When the Honeymoon is Over: How a Federal Court’s Denial of the Spousal Privilege to a Legally Married Same-Sex Couple Can Result in the Incarceration of a Spouse Who Refuses to Adversely Testify*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 245 (2007).

²⁴⁶ *Id.*

²⁴⁷ Bernstein, *supra* note 227, at 152.

²⁴⁸ See Lisa Yurwit Bergstrom & W. James Denvil, *Availability of Spousal Privileges for Same-Sex Couples*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 224-26, 235 (2012) (“The law of evidence has recognized two distinct marital privileges, which are designed to protect marital unions. The first of these privileges, the

4. Adoption

Adoption is another area in which individual gays and lesbians and same-sex couples are legally disadvantaged relative to their heterosexual peers. A same-sex couple can become parents via two routes: the couple “may petition jointly to adopt a child who is not biologically related to either [partner]” or one partner can petition to adopt the child of his or her same-sex partner.²⁴⁹ The latter is referred to as a second-parent adoption, “a legal procedure that allows a same-sex parent to adopt his or her partner’s biological or adoptive child without terminating the legal rights of the first parent.”²⁵⁰ In this way, legislators and courts have continued to “expand the legal definition of the American family.”²⁵¹ This changing understanding of family has led to the erosion of legislation denying same-sex couples the ability to adopt.²⁵² For instance, Arkansas and Florida recently struck down laws categorically prohibiting lesbians and gay individuals from adopting children.²⁵³

Nonetheless, a significant disparity between same-sex and different-sex couples persists within state adoption law. Mississippi stands alone as the only state that continues to have a legal code that outright denies the ability of “couples of the same gender” to adopt.²⁵⁴ Yet other states continue to deny same-sex couples the right to adopt through less explicit means. Utah’s adoption law prevents adoption by a couple that “is not [in] a legally valid and binding marriage under [state law].”²⁵⁵ Thus, unless Utah chooses to allow for same-sex marriage, a same-sex couple

‘anti-marital facts privilege,’ which is available only in criminal cases in some jurisdictions, protects one spouse from being compelled to testify against the other during the marriage. The second, the ‘confidential communications privilege,’ protects spouses from having their confidential marital communications disclosed in legal proceedings. . . . One must be married, of course, to avail oneself of these evidentiary privileges. Therefore, [in many states and in federal court,] the privileges [are] not available to same-sex couples . . .”).

²⁴⁹ Ann K. Wooster, Annotation, *Adoption of Child by Same-Sex Partners*, 61 A.L.R. 6th 1 (2011). See also *Id.* § 9 (surveying case law of adoptions by lesbian and gay persons and couples).

²⁵⁰ NAT’L GAY & LESBIAN TASK FORCE, *SECOND-PARENT ADOPTION IN THE U.S.* (2008), available at <http://outfront.org/files/pg332/Secondparentadoption.pdf>; see also NAT’L CTR. FOR LESBIAN RIGHTS, *ADOPTION BY LESBIAN, GAY, AND BISEXUAL PARENTS: AN OVERVIEW OF CURRENT LAW* (2012), available at <http://www.nclrights.org/site/DocServer/adptn0204.pdf?docID=1221>.

²⁵¹ Rachel L. Swarns, *Male Couples Face Pressure to Fill Cradles*, N.Y. TIMES, Aug. 10, 2012, at A1.

²⁵² See Wooster, *supra* note 249, at §2 (“A . . . dwindling number of states have laws or policies prohibiting or restricting adoption by lesbian or gay people while increasing numbers of jurisdictions have enacted explicit provisions prohibiting discrimination on the basis of sexual orientation in adoption.”).

²⁵³ *Id.* §24; see also David Knowles, *Florida Gay Adoption Ban Overturned, but 3 States Still Restrict It*, AOL NEWS SURGE DESK, Sept. 22, 2010, <http://aolnews.com/2010/09/22/florida-gay-adoption-ban-overturned-but-3-states-still-restrict/>; Amanda Terkel, *Arkansas Supreme Court Strikes Down Ban On Gay Adoptions*, HUFFINGTON POST, June 7, 2011, http://huffingtonpost.com/2011/04/07/arkansas-supreme-court-ban-gay-adoption_n_846174.html.

²⁵⁴ MISS. CODE ANN. § 93-17-3 (2012) (“Adoption by couples of the same gender is prohibited.”).

²⁵⁵ UTAH CODE ANN. § 78B-6-117 (LexisNexis 2012). In relevant part, Utah’s minor adoption law states:

(1) A minor child may be adopted by an adult person, in accordance with the provisions and requirements of this section and this part.

(2) A child may be adopted by:

cannot adopt there. In addition, “[s]tate courts in Michigan have ruled that unmarried individuals may not jointly petition to adopt.”²⁵⁶ Second-parent adoptions have also faced significant challenges. Courts in Kentucky, Nebraska, North Carolina, and Ohio have ruled second-parent adoptions impermissible under current state law.²⁵⁷

Furthermore, where a state has not outright legislatively or judicially addressed the issue of same-sex adoption (either joint or second-parent), “prospective adoptive parents who are lesbian, gay, bisexual, or transgender . . . still encounter discrimination during the adoption process.”²⁵⁸ According to the Human Rights Campaign, only eighteen states and the District of Columbia explicitly allow same sex couples to adopt through joint adoption, and in Colorado and Minnesota, same-sex couples have been able to successfully petition to adopt in some jurisdictions.²⁵⁹ Only twenty-one states and the District of Columbia expressly provide for second-parent adoption or offer a stepparent alternative.²⁶⁰ In the remaining states, adoption statutes are often vague, providing significant room for judicial discretion. In allowing for such case-by-case analysis, same-sex couples are made victims to the subjective prejudices of the specific evaluator.²⁶¹

5. Present-day indicators of a caste system

The evidence provided above clearly indicates societal segmentation. These legal issues taken individually may be insufficient to establish a system of caste. However, when viewed collectively and in combination with the historical treatment of gay men and lesbian women under the law, one could determine that a system of caste has historically been present and continues to exist. Though the denial of certain tax benefits or greater difficulties in the adoption process may not be akin to having a police officer follow an individual home and peer into his or her bedroom, these disparities nonetheless support the assertion that gays and lesbians face a second-class status. Part IV addresses how denying same-sex marriage further perpetuates that system, and thus violates the original meaning of Section One.

(a) *adults who are legally married* to each other in accordance with the laws of this state, including adoption by a stepparent; or

(b) subject to Subsection (4), any single adult, except as provided in Subsection (3).

(3) A child *may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage* under the laws of this state.

Id. (emphasis added).

²⁵⁶ HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: JOINT ADOPTION (Jan. 6, 2012), *available at* http://hrc.org/files/assets/resources/Joint_Adoption_parenting_Laws_April_2011.pdf [hereinafter HRC: JOINT PARENT ADOPTION].

²⁵⁷ *Id.*; NAT’L GAY & LESBIAN TASK FORCE, *supra* note 250 (citing *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002); *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998); and *Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994)); *see also* S.J.L.S. v. T.L.S., 265 S.W.3d 804 (Ky. Ct. App. 2008).

²⁵⁸ *Wooster*, *supra* note 249, at § 2, § 2 n. 8.

²⁵⁹ HRC: JOINT PARENT ADOPTION, *supra* note 256.

²⁶⁰ NAT’L CTR. FOR LESBIAN RIGHTS, *supra* note 250.

²⁶¹ *See* HRC: JOINT PARENT ADOPTION, *supra* note 256 (“In many states the status of parenting law for LGBT people is unclear. The determination of parenting rights is always made on a case-by-case basis and it is ultimately the decision of the judge whether to grant the adoption petition.”).

IV. DENYING SAME-SEX MARRIAGE MAY BE UNCONSTITUTIONAL AS A VIOLATION OF THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT

This final part explores the implications for originalism of finding the original meaning of Section One to be a prohibition on either caste or class legislation on the same-sex marriage question. I aim to support the proposition that an originalist could find that denying marriage to same-sex couples violates the Fourteenth Amendment, and therefore that laws prohibiting same-sex couples from entering into a legally binding marriage are unconstitutional.

A. Denying Same-Sex Marriage Under the Fourteenth Amendment as a Prohibition on Caste

As set out in Part II above, the original meaning of Section One of the Fourteenth Amendment may be a broad prohibition on systems of caste. A system of caste stratifies society on the basis of a hereditary characteristic, and exclusively allocates rights to one group while denying those same rights to another. Part III provides evidence to show that a caste system grounded on sexual orientation exists in the United States. Such a system exists if one is persuaded that (1) sexual orientation is at least partially hereditary; (2) the existence and impact of direct and indirect statutes and regulations based on sexual orientation indicate a history of class legislation which relegated gays and lesbians to second class citizenship; and (3) despite erosion of this caste system, there are still many areas today in which different-sex couples are allocated rights and privileges to the exclusion of same-sex couples. Therefore, an original meaning originalist may find first, that sexual orientation has been and continues to be the basis of a system of caste and class legislation; and second, that legislation predicated on that feature is unconstitutional. Extending this rationale, such an originalist could conclude that laws denying marriage (or an equivalent bundle of rights) to same-sex couples are counter to the original meaning of Section One and are therefore unconstitutional.

To maintain the present allocation of rights would seem to require an alternative justification for why these rights and privileges should be denied to same-sex couples.²⁶² One argument is that gay men and lesbian women are not being denied an equal, reciprocal right to marry. They have the right to marry someone of the opposite sex and enjoy all the rights that come with that union.

Such arguments are merely a modern twist on the “separate but equal” rationale that preserved anti-miscegenation laws in cases like *Pace v. Alabama*,²⁶³ and was rejected by the Supreme Court in *Loving v. Virginia*.²⁶⁴ In *Loving*, the state of Virginia argued,

the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to [the races, such that] members of each race are punished to the same degree . . . [and] because its

²⁶² In *Windsor v. United States*, the government argued that one reason why the Defense of Marriage Act should be preserved is “[f]iscal prudence” because expanding the group entitled to spousal government benefits would be an increased strain on the federal budget. 699 F.3d 169, 186 (2d Cir. 2012). The Second Circuit rejected this argument. *Id.* at 186-87. Nonetheless, perhaps a similar type of argument would not fall within the scope of the Fourteenth Amendments prohibition on systems of caste and class legislation.

²⁶³ 106 U.S. 583 (1883).

²⁶⁴ 388 U.S. 1, 10-12 (1967).

miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes . . . do not [violate this original meaning].²⁶⁵

The Warren Court rejected Virginia's argument on non-originalist grounds, and originalism has struggled to find anti-miscegenation within the scope of Section One.²⁶⁶ Professor Steven Calabresi has responded to critics of the non-originalist arguments in *Loving* by explaining how the outcome in *Loving* was nonetheless proper under an original meaning originalist approach.²⁶⁷ He argues that the Civil Rights Act of 1866 ensured that

citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . .²⁶⁸

If one accepts that marriage is a civil legal contract,²⁶⁹ then, as Calabresi asserts, “[i]f an African American man is told that he can legally enter into a marriage contract with only an African American woman and not a white woman . . . his ability to make marriage contracts has

²⁶⁵ *Id.* at 7-8.

²⁶⁶ From the standpoint of originalism, the process by which the Warren Court reached their conclusion in *Loving* is questionable. See, e.g. Jack Balkin, *Scalia's Biggest Problem isn't Brown, It's Bolling and Loving*, BALKINIZATION (Oct. 28, 2009, 7:35 AM), <http://balkin.blogspot.com/2009/10/scalias-biggest-problem-isnt-brown-its.html> (“[T]he Supreme Court overturned the rule of *Pace* in *Loving v. Virginia*, decided in 1967 during the high water mark of the Warren Court. The Court dodged the history . . . by claiming that it was inconclusive (which is not the case).”).

Others have noted the difficulty of explaining the holding in *Loving* through an originalist lens by focusing on the historical evidence indicating that prohibitions on interracial marriage were not intended by the drafters of the Equal Protection Clause. Kermit T. Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J. L. & PUB. POL'Y 99, 102 n.15 (2011) (“It is about as plain as such things can be, for instance, that the ratifiers of the Equal Protection Clause did not think it would immediately create a right to interracial marriage, which the colorblindness approach does.”). See also Josh Blackman, *Balkin's Right, Scalia's Wrong*, *Bolling v. Sharpe and Loving v. VA bigger Originalist Quandary* than Brown, JOSH BLACKMAN'S BLOG (Oct. 28, 2009), <http://joshblogs.wordpress.com/2009/10/28/balkins-right-scalias-wrong-bolling-v-sharpe-and-loving-v-va-bigger-originalist-quandry-than-brown/> (“How can the federal government possibly be mandated to enforce equal protection under an originalist jurisprudence. Further, how can [a] miscegenation ban . . . possibly be unconstitutional if it was a common at the time of Reconstruction.”).

²⁶⁷ Calabresi & Matthews, *supra* note 46, at 3-4.

²⁶⁸ Civil Rights Act of 1866, 42 U.S.C. § 1981 (2006) (emphasis added).

²⁶⁹ Calabresi & Matthews, *supra* note 46, at 60 n.91; see also 1 WILLIAM BLACKSTONE, COMMENTARIES 432-33 (1893) (“Our law considers marriage in no other light than as a civil contract. . . . [T]he law treats it as it does all other contracts . . .”). Furthermore, both a modern dictionary and one from the time of ratification recognize marriage as a civil contract agreement. BLACK'S LAW DICTIONARY 897 (9th ed. 2009); *Marriage Definition*, ARTFL PROJECT: WEBSTER'S UNABRIDGED DICTIONARY 1828, <http://machaut.uchicago.edu/?action=search&word=Marriage&resource=Webster%27s&quicksearch=on> (“Marriage is a contract both civil and religious . . .”) (last visited Dec. 21, 2012).

been abridged.”²⁷⁰ To impair the “liberty of contract” in such a way would be “blatantly unconstitutional.”²⁷¹ Extending this framework to sexual orientation and same-sex marriage, if we accept that the Fourteenth Amendment not only “at a bare minimum . . . constitutionalized the Civil Rights Act of 1866”²⁷² but also went beyond race, one could find that denying an individual the freedom to enter into a marriage contract (a legal agreement that includes a “bundle of rights”) with *whomever* he or she likes, purely on the basis of sexual orientation, is also unconstitutional.

B. Denying Same-Sex Marriage Under the Fourteenth Amendment as a Prohibition of Partial or Special Class Legislation

As addressed above, another possible original meaning of Section One is that it constitutionalized the state court practice of prohibiting “special” or “partial” legislation—laws that single out certain persons or groups for special burdens or benefits without adequate justification.²⁷³ It may be that either explicitly denying same-sex marriage in legislation, or affirming that only marriage between persons of different sexes will be entitled to legal recognition, violates this principle.

On the one hand, such legislation could be viewed as singling out same-sex couples to place on them the “special burden” of being unable to enter into a legally binding marital relationship with the person they love. Conversely, such laws could be understood as singling out different-sex couples for the special benefit of the privilege of entering into a legally binding marital relationship with the person they love. From either perspective, the law in this area is not “operat[ing] *equally* upon all persons.”²⁷⁴

For reasons discussed in the previous section, one could make the argument that by providing gay men and lesbian women the ability to enter into different-sex marital relationships, the law does not single out any group for a special disadvantage. Yet that ignores reality: whereas different-sex couples have the commitment to the person they love recognized by law, and are accorded rights and privileges as a result, same-sex couples are denied that opportunity. At a minimum, there is a “special burden” on same-sex couples to enter into legal arrangements (contracts, trusts, wills, etc.) to even try and approximate the benefits of a legally binding marriage between people of different sexes.

A caveat exists for partial legislation when an adequate justification is present, usually based on some general societal benefit: such legislation cannot be arbitrary. The state courts from which this principle was adopted “understood that the imposition of special benefits and burdens was often necessary to promote the general welfare, and . . . were willing to tolerate laws singling out certain persons . . . for special treatment when they could be justified on this ground.”²⁷⁵

However, arguments in favor of denying same-sex marriage as a matter of general welfare are often predicated on ignorance, such as a fear of gay or lesbian recruitment, or blanket assertions such as “[t]he decline of marriage over the past few decades has reduced the number of men who are helping women raise their children . . . [and] [s]ame-sex marriage likely will

²⁷⁰ Calabresi & Matthews, *supra* note 46, at 30.

²⁷¹ *Id.* at 40.

²⁷² *Id.* at 23.

²⁷³ Saunders, *supra* note 105, at 247–48.

²⁷⁴ *Id.* at 255 (emphasis added).

²⁷⁵ *Id.* at 260.

contribute to this decline, even among heterosexual men.”²⁷⁶ Another common argument is that “marriage is ordered toward the procreation of children” and so legal supports are given to marriage to protect these interests “because society must be concerned about its own preservation and continuity into the next generation.”²⁷⁷ Yet, the notion that same-sex marriage poses a threat to procreation seems to misunderstand the nature of same-sex relationships and their influence on the family. The American Psychological Association has resolved that “there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.”²⁷⁸ Even legally grounded arguments appear weak relative to the privilege being denied. For instance, one might argue that legalizing same-sex marriage necessitates significant revisions of the tax code or require expansion of school curriculums.²⁷⁹

There may very well be persuasive arguments against same-sex marriage. For instance, some might be convinced that preservation of tradition is a sufficient general welfare justification for restricting marriage as an institution exclusively to heterosexuals. Nevertheless, as a matter of application, whatever arguments are put forward must survive a complex inquiry to establish that the general welfare principal is satisfied. Essentially, this inquiry is comparable to the strict or heightened scrutiny analysis the Supreme Court has adopted under its existing Equal Protection precedents, and is therefore far from the “easy” case that Justice Scalia and others might assume. Absent an argument that supports complete denial of marriage to same-sex couples as a matter of general welfare, an originalist would be compelled to find such a law as a violation of the Fourteenth Amendment’s prohibition on partial or special legislation.

V. CONCLUSION

Justice Scalia has asserted that same-sex marriage is an easy case. The Constitution, in his view, could not possibly sanction same-sex conduct, much less same-sex unions. Yet, under the “new originalist” framework put forward in this piece, even if this is an easy question for Justice Scalia, it may not be so easy for originalism. As Randy Barnett explains, “[t]he intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact

²⁷⁶ Glenn Stanton & Dr. Bill Maier, *How Would “Marriage” Between Homosexuals Threaten My Heterosexual Marriage and Family?*, CORNERSTONE FAMILY COUNCIL, <http://cfcdaho.org/how-would-quotmarriagequot-between-homosexuals-threaten-my-heterosexual-marriage-and-family> (2011); see also Seth Forman, Editorial, *Five Arguments Against Gay Marriage: Society Must Brace for Corrosive Change*, N.Y. DAILY NEWS, June 23, 2011, <http://nydailynews.com/opinion/arguments-gay-marriage-society-brace-corrosive-change-article-1.131144#ixzz2JflnDfOL>. But see Eric Zorn, Editorial, *The Top Six Arguments Against Gay Marriage (and Why They All Fail)*, CHICAGO TRIB., May 19, 2012, http://blogs.chicagotribune.com/news_columnists_ezorn/2012/05/the-top-six-arguments-against-gay-marriage-and-why-they-all-fail.html.

²⁷⁷ Robert Sokolowski, *The Threat of Same-Sex Marriage*, AMERICA MAG., June 7, 2004, <http://americamagazine.org/issue/487/article/threat-same-sex-marriage>.

²⁷⁸ Ruth Ullmann Paige, AMERICAN PSYCHOLOGICAL ASS’N, *Proceedings of the American Psychological Association for the Legislative Year 2004: Minutes of the Meeting of the Council of Representatives (July 26 & 30, 2004)*, <http://apa.org/about/policy/parenting.aspx>.

²⁷⁹ For an overview of the arguments supporters of a ban on same-sex marriage may put forward in the upcoming cases before the Supreme Court, see Lyle Denniston, *Same-Sex Marriage III: The Arguments Against*, SCOTUSBLOG (Nov. 29, 2012, 12:05 AM), <http://scotusblog.com/2012/11/same-sex-marriage-iii-the-arguments-against/>.

that can be established by reference to historical materials.”²⁸⁰ From those historical materials, one may find that the original meaning of the Fourteenth Amendment is to serve as a prohibition on systems of caste and class legislation, with those terms being synonymous. Alternatively, one could find the original meaning to be a prohibition on class legislation defined as partial or special legislation.

If the Fourteenth Amendment establishes a prohibition on systems of caste, then laws stratifying society based on hereditary characteristics are constitutionally impermissible. If the scientific research presented above is correct, then the extensive history of laws directly and indirectly targeting gay men and lesbian women may establish such a system. Further, laws prohibiting marriage of same-sex couples (or limiting marriage and/or an equivalent bundle of rights to different-sex couples) could be an impermissible and unconstitutional perpetuation of that system, in violation of the Fourteenth Amendment. If the original meaning prohibits special or partial legislation that singles out a particular group for a unique burden or allocates a special privilege, such laws would likewise violate the Fourteenth Amendment.

Resolving the issue of same-sex marriage for originalism will require answering other complex questions. For instance, is there something fundamentally unique about marriage that renders it more than a normal legal agreement?²⁸¹ Does the anti-caste command extend to marriage? Does the Fourteenth Amendment guarantee a right to marriage at all? Is preserving tradition necessary to promote general welfare? There are certainly many arguments for and against what I propose here.²⁸² Nonetheless, a case can be made for how originalism may find

²⁸⁰ Barnett, *Misconceived Assumption*, *supra* note 26, at 660.

²⁸¹ *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888) (noting famously that marriage is “something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”); *see also* Linda C. McClain, “*God’s Created Order, Gender Complementarity, and the Federal Marriage Amendment*,” 20 *BYU J. PUB. L.* 313, 315, 322 (2006) (discussing proponents of the Federal Marriage Act who held the view that marriage as an institution is necessarily premised on “gender complementarity,” and “not like other close personal relationships between adults, because its main feature is ‘the attempt to bridge sex difference and the struggle with the generative power of opposite-sex’”). Marriage may also be unique because of its intimate connection with religious institutions. Michael Novak, *What Marriage Is*, 156 *PUB. INT.* 24, 26-27 (2004) (commenting that heterosexual marriage is a religiously “privileged union,” and that “the understanding of what marriage constitutes is largely outside the state’s purview”). Others argue that marriage is a unique relationship, and that to extend it beyond heterosexual union would be a slippery slope. Richard G. Wilkins, 16 *REGENT U. L. REV.* 121, 122 (2003) (“Recognition of a constitutional right to same-sex marriage . . . would open the door to legally mandated conferral of all legislative preferences now reserved for marriage upon any form of consensual sexual coupling, no matter how idiosyncratic.”).

²⁸² *See, e.g.*, Calabresi, *supra* note 70, at 152 (“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 population.”) (emphasis added). Regarding gender discrimination, the Fourteenth Amendment did not grant political rights, as “[p]olitical rights [were viewed as being] rarer and more jealously guarded.” *Id.* However, in his view, when the Nineteenth Amendment granted political rights to women (as the Fifteenth Amendment had done for Black men), this placed women on equal footing with male peers. *Id.* He argues that the Nineteenth Amendment should guide our reading of the Fourteenth Amendment—once complete political rights were granted, no less restrictive civil rights can justifiably be denied. *Id.*

Oddly, Calabresi argues that because there has not been a constitutional amendment akin to the Nineteenth or

that denying same-sex couples the right to marry is unconstitutional. Perhaps it is not such an easy question for originalism after all.

Fifteenth Amendments extending political rights explicitly to the gay community, the Fourteenth Amendment cannot be read to require complete equal allocation of civil rights to that group. *Id.* at 153. I contend that Calabresi is misguided—the circumstances simply are not analogous. The Fifteenth and Nineteenth Amendments were required to provide political rights where, first for blacks and then for women, *none had existed before*. However, individuals have never been outright denied political rights based on sexual orientation. Presumably, gay, white, property-owning men have always had full political rights. Therefore, following Calabresi's logic, if the LGBT community has full political rights today—which they do—then no amendment is required and to deny them any of the *less restricted civil rights* would violate the Fourteenth Amendment.