Originalism & 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. It seeks first to ascertain the original public meaning of Section One of the Fourteenth Amendment. The Article finds that Section One may serve as a prohibition on systems of caste and class legislation or alternatively as a ban on partial or special class legislation that singles out a group for a particular benefit or burden. As to the former, it explores the scientific research on the psychobiological roots of homosexuality, the historical treatment of homosexuals under American law, and present areas of legal inequality of homosexual relative to married heterosexual couples. It 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 latter, if the original public meaning of the Amendment is to constitutionalize the antebellum practice of prohibiting laws which single a group out for a special burden, it 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

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question, but rather to illustrate how an originalist could legitimately find denying same-sex marriage to be unconstitutional. At the least, the Article demonstrates that same-sex marriage demands of originalism deep consideration and is not the easy question Justice Scalia believes.

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, 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

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

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Richard D. Kahlenberg, The Arguments for Gay Marriage Undermine Affirmative Action, SLATE (Dec. 13, 2012 3:02 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/supreme_court_2012_howl_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.”)).

3 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, 575 (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 Caleb Kenney, Scalia Defends Opposition to Gay Rights in Response to Question at Princeton, DAILY PRINCETONIAN, Dec. 10, 2012, http://www.dailyprincetonian.com/2012/12/10/32135/; see also 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.
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 . . . it didn’t mean that [at the time of ratification] . . . it doesn’t mean that today.5

Whether it is laws prohibiting intimate acts between same-sex couples or same-sex marriage, Justice Scalia contends that these are 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 it will demonstrate how an originalist might find denying same-sex marriage 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 Lawrence Solum, originalism, “as a matter of lexicography . . . is a family resemblance term—with several overlapping senses.”7 While, the broad term originalism is ambiguous,8 the tie that binds these various senses is a desire to constrain the latitude of judicial

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6 Id.; see also Antonin Scalia Says Abortion, Gay Rights Are Easy Cases, supra note 4.


8 Id. at 6; see also Thomas Colby, The Sacrifice of New Originalism, 99 GEO. L.J. 713, 718 (2011); (remarking that, “[i]t 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.”).
discretion on constitutional matters, or more forcefully, judicial activism. It is how a particular brand of originalism defines fidelity that has prompted divergence.

For the purposes of this paper I will put to the side the more restrictive forms of originalism: original intent and original understanding originalism, and focus on the brand of originalism practiced by Justice Scalia, which has been referred to by some as the “New Originalism,” but more often and more descriptively identified as “original public meaning originalism.” Original public meaning originalism marked a shift from intent-focused forms of originalism. 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.

On the whole, New Originalists agree that where the text lays out a straightforward rule—for instance that the President must be at least thirty-five—courts should simply apply that rule.

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9 Solum, 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 713 (“Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its raison d’etre”); James E. Fleming, The Balkinization of Original Meaning, 2012 U. Ill. L. Rev. 669 (2012) (observing that “there are numerous varieties of originalism, and that 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 (“the theoretical moves from the Old to the New Originalism: (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.”). 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 generally, Keith Whittington, The New Originalism, 2 GEO. J. L. & PUB. POL’Y 599 (2004); 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.”).

12 Solum, supra note 7, at 16.

13 Colby, supra note 8, at 721, 724; see also Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 NW U. L. Rev. 923, 928 (2009).

14 Id.; Lawrence B. Solum, The Interpretation-Construction Distinction, 27 CONST. COMMENT. 95, 116 (2010) (noting that “the linguistic meaning of the constitution is fixed by linguistic facts at the time that each constitutional provision is framed and ratified . . . ”).

Many further contend that when the text lays out a broad standard or principle the objective meaning of the principal or standard controls interpretation. Some New Originalists also argue that though the meaning of a principle or standard is 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.

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 of the Article, 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, in this part I 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) that a hereditary characteristic is implicated; (2) that legislation and regulation creates class stratification based on that characteristic; and (3) that such stratification leads to the exclusive

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16 See Colby, supra note 8, at 722-724 (discussing the transition of originalism’s focus on subjective to objective original meaning); Vasan Kesavan & Michael Stokes 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); Steven Calabresi & Livia Fine, Two Cheers for Professor Balkin’s Originalism, 103 NW. U. L. REV. 663, 668 (2009); 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.”); 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; these originalists continue to search for the actual understandings of the actual ratifiers or public.”); John O. McGinnis & Michael Rappaport, The Abstract Meaning Fallacy, 2012 IL. L. REV. 737, 742 (criticizing drawing inferences from abstract language in the constitutional text).
allocation of rights to one group at the expense of another. To these features I apply scientific research on sexual orientation to support the argument that homosexuality is at least in part hereditary; that there is a history of legislation and regulation which distinguished homosexuals from heterosexuals, thus stratifying American society based on sexual orientation; and that there remain today significant areas where rights are exclusively allocated to heterosexuals at the expense of homosexuals, 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 same-sex marriage 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.

18 The discussion of historical legal treatment and scientific research in Part III is largely focused on homosexual men. This is not a choice to set aside other members of the 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. JOEY L. MOGUL, ANDREA RITCHIE, & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 19 (2011).

19 Solum, supra note 7, at 15.

20 For contrasting examples of this tension see, e.g., Gary Lawson, The Constitutional Case Against Precedent, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (arguing that “the practice of following precedent is . . . affirmatively inconsistent with the federal Constitution.”). But see, e.g., Henry P. Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 748 (1988) (recognizing that “to 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] at this point in our history,
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 Justice Scalia,24 have sought "to put [o]riginalism on a stronger theoretical footing" in two key ways: by recognizing that (1) where the text is vague the Constitution requires both semantic interpretation as well as construction, and (2) that the Constitution contains both clear rules and purposefully broad principles and standards.25

New Originalist Scholars such as Randy Barnett and Keith Whittington explain that to

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.”)

23 Antonin Scalia, Originalism: The Lesser Evil, 57 U. Chi. L. Rev. 849, 863-864 (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.”)
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. Justice Scalia recently expressly rejected construction in his book Reading Law, which he co-authored with Southern Methodist University Law School Professor Bryan Garner. ANTONIN SCALIA AND 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 A.M.), http://originalismblog.typepad.com/ the-originalism-blog/2012/12/scalia-garner-on-interpretation-and-constructionmichael-ramsey.html. 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 (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. at 752. They conclude that they can “find no support for constitutional construction.” Id.
25 Balkin, supra note, 17 at 448; see also Greenberg & Litman, supra note 17, at 86; Solum, supra note 13, at 928 (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 Strauss, supra note 15, at 1164.
"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, that the Constitution is "objectively open-ended in many instances" is an "inescapable fact"—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 "marking the difference between linguistic meaning and legal effect."\(^{29}\) He recognizes "the fact of constitutional under-determinacy"—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

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\(^{27}\) Solum, *supra* note 7, at 16; Randy E. Barnett, *Interpretation and Construction*, 34 HARY. 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." Vague text, that interpretative methods fail to define, indicates that the framers intended to leave “some decisions of application to the judgment of future actors.”).


\(^{29}\) See Solum, *supra* note 14, at 95.

\(^{30}\) Solum, *supra* note 7, at 16.

\(^{31}\) Solum, *supra* note 14, at 106.

\(^{32}\) Professor Balkin predicts in his book *LIVING ORIGINALISM* 118 (2011) and reiterates in his article *The Distribution of Political Faith*, 71 MD. L. REV. 1144, 1158 (2012), 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
creating socially progressive, non-originalist precedent. For Balkin, "if 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." Where the text sets out a general principle (like “equal protection”), his version of original meaning originalism requires discerning underlying principles, "aids or heuristics that help us flesh out the textual commitment to moral or legal principle that we find in the text." Underlying principles, “underlie the text because they both support the text and explain the point of the text.” These underlying principles enable us to understand the principal stated in the text. We can engage in construction by applying that principle to a novel set of facts, precipitating different “legal effects.”

The semantic meaning of the text is fixed at the time each provision of the Constitution was framed. When the text sets out a clear rule, application is straightforward; when the text sets out

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34 Colby, supra note 8, at 726.

35 Balkin, supra note 17, at 493.

36 Id.

37 Solum, supra note 7, at 16; see also Calabresi & Fine, supra note 17, at 665-675 (discussing points of agreement with Balkin, and noting that “Professor Balkin is certainly right that the Constitution contains Clauses like the Necessary and Proper Clause or the Section Five power that employ standards and not rules.”). In Constitutional Redemption, Balkin softens on the degree to which a principle is fixed. He explains that, “[i]n 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, 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, 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 when deriving principles from e.g. 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, supra note 7, at 29 (explaining the fixation thesis argues that meaning was fixed at ratification).
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 on whether objective meaning implicates original expected applications. As explained above, original meaning requires “fidelity solely to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text.”

The objective meaning does not change with shifts in how “language assigns concepts to words.” 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.” To apply a later developing definition of the words would alter the meaning 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.”

In contrast, adhering to original expected applications 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 the

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39 Balkin, supra note, 17 at 429; Balkin, Abortion and Original Meaning, supra note 33, at 295. For a criticism of Balkin’s approach see Richard Kay, Original Intention and Public Meaning in Constitutional Interpretation, 103 NW U. L. REV. 702, 723-725 (2009). Kay discusses the lack of constraint and room for “imagination” in Balkin’s approach. He states that “relying on an artificial concept instead of on an actual historical event inevitably enlarges the field of . . . imaginative reconstructions.”

40 Balkin, supra note 17, at 430.

41 Id. at 431.

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 in 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.
Those who focus on original expected applications “ask how people living at the time the text was adopted would have expected [the Constitution] would be applied using language in its ordinary sense (along with any legal term of art).” A plain example would be that even if society were 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 expected the constitutional text not to prohibit capital punishment.

Originalists like Professors Balkin and Steven Calabresi embrace the idea that when interpreting the Constitution we should not be restrained by the way the public would have applied principles established at the time of that particular article or amendment’s ratification. Conflating non-binding expected application and binding original meaning is considered by some to be problematic and by others to be in fact “less faithful to the constitution” by entrenching a set of

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44 Balkin, supra note 33, at 296.
45 Id.
46 Calabresi & 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 (Feb. 1, 2012) (Nw. Pub. L. Research Paper No. 12-06) at 6, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2020371##.
47 Balkin, supra note 33, at 292-293. Balkin argues that the “the linguistic meaning of a text is one thing,” and “expectations about the application of that meaning to future cases” are another. 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.” Originalists who focus on the Original Expected Applications regard these achievement as interpretive mistakes, and though “maintaining 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. But see Balkin, supra note 17, at 435-436 (recognizing that Original Meaning Originalism does not always guarantee “happy endings”).
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 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 derive principles that are as general as the text—thus insight gained from expectation about what equal protection means would not necessarily embrace or exclude homosexuals (especially considering homosexuality was not even a concept at that time)50. In the least, the difficulty of ascertaining the degree to which expectation influences the definition of a principle supports 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, wherein allowing later generations to take and apply the principle

48 Fleming, supra note 9, at 674. 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.”

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

50 See infra Part III(C).

51 Solum, supra note 7, at 16.

52 Solum, supra note 7, at 17; see also 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.”)
to present-day circumstances.\textsuperscript{53} While the text itself cannot be changed (absent an Article V amendment),\textsuperscript{54} application of the general principle it sets out can shift with how our understanding of facts changes with time.\textsuperscript{55} Essentially, “[w]hat words mean is one thing; what we should do about their meaning is another.”\textsuperscript{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 the principle.\textsuperscript{57} Thus, “[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.”\textsuperscript{58} This process illustrates 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.\textsuperscript{59} Green explains, that a proper name (word, sign, sign combination, expression) expresses its “sense”

\textsuperscript{53} See generally, Balkin, supra note 17 (expanding on Abortion and Original Meaning, Balkin explains the functionality of his approach, asserting that fidelity to the Constitution requires adhering to both precise rules and underlying principles).

\textsuperscript{55} Balkin, supra note 33, at 293, 295. Balkin in its initial inception 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. Where “the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command.” Id. 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. at 305. Balkin contends that under 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 Balkin expands on the latitude one has when deriving principles. See also generally Balkin, supra note 17.

\textsuperscript{56} Colby, supra note 8, at 736; see also Gary Lawson, On Reading Recipes . . . and Constitutions, 85 GEO. L.J. 1823, 1823 (1997) (distinguishing between interpretation and adjudication).

\textsuperscript{57} Solum, supra note 7, at 19; Balkin, supra note 33, at 303; see also, Calabresi & Matthews, supra note 46, at 3 (“Originalists believe the constitutional text should be 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 (“once 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 . . .”).

\textsuperscript{58} Colby, supra note 8, at 727.

\textsuperscript{59} Christopher Green, Originalism and the Sense-Reference Distinction, 50 ST. LOUIS U. L.J. 555 (2006). Green looks to philosophy of language to deal with the question of whether constitutional interpretation should be able to change with time. In addition to Gottlob Frege’s sense-reference distinction, Green also looks at similar, though not synonymous, theories of philosophy of language: John Stuart Mill’s distinction between connotation and denotation and Rudolph Carnap’s distinction between intentions and extensions. Id. at 260-261. At risk of
and refers to or designates its “referent.” The sense of a word gives the word its cognitive value. A sense is strictly conveyed and expressed by language alone, and consequently is fixed. 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. A word’s sense determines its reference. Green explains that while the “sense of the constitutional language [is] . . . fixed, the reference of that language depends on facts.” The framers solidified the sense of the words, expressions, and principles in the constitutional text. This is a function into which we as a society plug facts to derive a referent for our time. We are not bound to how the framers would have understood facts when our modern knowledge of those facts dictates a different outcome. 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 to derive the sense of the constitutional language.

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 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.

oversimplifying these philosophies, they all 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. at 560.
62 Id. at 585.
63 Id. at 595.
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.\(^6^4\) 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.\(^6^5\)

The language of Section One is both abstract and broad.\(^6^6\) 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.”\(^6^7\) The language also does not limit the class of protected citizens—all “citizen[s] of the United States” are protected. 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.

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\(^6^4\) See Balkin, supra note 33 at 316; Calabresi & Rickert, supra note 33, at 17; Steven Calabresi, Does the Fourteenth Amendment Guarantee Equal Justice for All?, 34 HARV. J. L. & PUB. POL’Y 149 (2011) (“I agree with John Harrison that the Amendment bans all forms of caste like discrimination.”); 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. As well, he 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 1458-1459.

But see e.g., Bret Boyce, Originalism and the Fourteenth Amendment, 33 WAKE FOREST L. REV. 909, 1020 (1998). Boyce remarks that, “any 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 . . . [t]he 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 “from the historical evidence, it is not at all clear that the [] 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.

\(^6^5\) U.S. CONST. amend XIV, §1 (emphasis added).

\(^6^6\) Calabresi & Rickert, supra note 33, at 15.

\(^6^7\) Id.
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 provided benefits or special burdens; (3) legislation that "created or maintained a disfavored caste or subordinate a group through law," and (4) legislation that selectively restricted or abridged basic rights of citizenship and therefore treated people as second-class citizens.68 Likewise, Calabresi and Julia Rickert identify the original meaning of Section One as "a rule against class legislation and systems of caste."69 They find that the "framers themselves are 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."70 Calabresi and Rickert argue that what matters is (1) that the Framers 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 amendments to mandate equality under the law by forbidding caste.71

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68 Balkin, supra note 33, at 316 n.59.
69 Calabresi & Rickert, supra note 33, at 17 ("Section One . . . was understood originally as enacting a rule against class legislation and systems of Caste.")
70 Id. at 20. Calabresi and Rickert do not attempt to define the proper textual source for the ban on caste and class legislation. Rather, they find that the framers are silent on the independent operation of the sections of the Fourteenth Amendment does not negate the notion that the Fourteenth Amendment on the whole prohibits caste and class legislation. 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. 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, 101 YALE L. J. 1385 (1992), 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," id. at 1385, whereas the equal protection clause "requires that the law, whatever it is, be the same for all citizens was crafted to provide protection equally." Id. at 1388. 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.71 Calabresi & Rickert, supra note 33, at 23; see also Green, supra note 58, at 602-603. Green comments that a resurrected Privileges and Immunities clause may be the proper source of a “no-caste” principle, citing as evidence to post-Slaughterhouse cases like the opinion in Strauder v. West Virginia, 100 U.S. 303 (1880), the
However, given the historical context surrounding ratification some have suggested that Section One applies only to race. The Civil Rights Act of 1866 was adopted in response to growing predominance of “Black Codes” in the Southern states. It sought to re-impose on freed blacks the restrictions on civil rights that existed prior to emancipation. 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.” The Framers, responding to this system and concerned about the rights of the newly freed, sought to craft an Amendment that would reject race discrimination as a forbidden caste system. 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,” it likely extends further than race. The holding of which is rooted in the Equal Protection Clause but bases much of its rhetoric and reasoning on the privileges of citizenship.

See Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 457 (1977) (“historical records all but incontrovertibly establish that the framers of the 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 64 (“the 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 Jonathan G. O'Neill’s essay Raoul Berger and the Restoration of Originalism, 96 NW. U. L. Rev. 253 (2001-2002), 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 265. Alternatively, for a discussion of 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. Public Law and Legal Theory Research Paper No. 10-06, 2011).

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

Steven Calabresi, supra note 64, at 150.

Calabresi & Rickert, supra note 33, at 13.

Calabresi & Matthews, supra note 46, at 17 (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).
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.\textsuperscript{78}

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 “desire to protect freed slaves.”\textsuperscript{79} 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.\textsuperscript{80}

While not dispositive evidence of original meaning, key framers like Jacob Howard, who explained that the Amendment embraced a ban on feudal caste,\textsuperscript{81} or Charles Sumner, who asserted the same for a Hindu-style caste system in his lecture \textit{The Question of Caste}, suggest an original meaning broader than race.\textsuperscript{82} Howard stated that, “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.”\textsuperscript{83} As Calabresi points out, “[f]ramers and contemporary commentators frequently compared race discrimination to other forms of arbitrary,

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\textsuperscript{77} Calabresi & Rickert, \textit{supra} note 33, at 19; see also, e.g., Garret Epps, \textit{Interpreting the Fourteenth Amendment: Two Don’ts and Three Dos}, 16 WM. & MARY BILL OF RTS. J. 433, 443-444 (2007) (discussing how the framers of the Fourteenth Amendment employed broad language to provide protection for immigrants, “because some of them were immigrants themselves,” as well as to Southern Unionists and Northerners moving into the South after the war.)
\textsuperscript{78} Calabresi, \textit{supra} note 64, at 150.
\textsuperscript{79} Calabresi & Rickert, \textit{supra} note 33, at 31 (recognizing that the rafters aimed to protect white unionist).
\textsuperscript{80} See generally \textit{id.} at 31-35.
\textsuperscript{81} \textit{id.} at 33 n.152.
\textsuperscript{82} \textsc{Charles Sumner, The Question of Caste,} at 17 (1869). Sumner in his discussion and rejection of caste recognizes the need for a broad prohibition. He states:

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.

\textsuperscript{83} See John Harrison, \textit{supra} note 64, at 1413.
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caste-creating discrimination to illustrate the evil caused by the Black Codes...to explain [that] the Amendment would prohibit...[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.\textsuperscript{84}

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.\textsuperscript{85} The press, often a strong indicator of public meaning, also called for something more: one Chicago Tribune editorial in 1866 made a “strong appeal...for a Constitutional amendment that would level the evil of caste in one blow.”\textsuperscript{86} Even those [in society] who opposed [such a broad amendment] acknowledged that Congress would go beyond the abolition of slavery” in its repeal of that one type of caste.\textsuperscript{87}

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 or failure of State executives and judges to provide equal protection [under] those laws already on the books,” but also defended against systems of caste and class legislation going forward.\textsuperscript{88} Though after-the-fact, Justice Harlan’s dissent in Plessey v. Ferguson\textsuperscript{89} is often cited to support the idea that the was to Amendment serve as an “anti-caste command.”\textsuperscript{90}

\textsuperscript{84} Calabresi & Rickert, supra note 33, at 6.
\textsuperscript{85} Id. at 36–40. The authors discuss the views of those within the states, citing predominantly comments from Governors at the time of the ratification conventions, as to what 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.
\textsuperscript{86} Id. at 29 (citing Editorial, Class Legislation, Chi. Trib., Jan. 12, 1866, at 2.)
\textsuperscript{87} Id. (Citing Daily Nat’l Intelligencer, Jan 5, 1866 col. 1)
\textsuperscript{88} Calabresi & Matthews, supra note 46, at 22; Calabresi & Rickert, supra note 33, at 19; Green, supra note 58, 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.”).
\textsuperscript{89} 163 U.S. 537 (1896)
\textsuperscript{90} Calabresi & Rickert, supra note 33, at 45.
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. 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." 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." Webster defines “class” as a, “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.”

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.”

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” supports the notion that hereditariness is a factor to be considered when ascertaining the existence of a caste system.

The term "class legislation does not appear in dictionaries but was widely understood to "encompass laws that grant monopolies or otherwise benefit a favor few." 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 synonymously as both 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.

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91 Id. at 18 (citing CHAUCY A. GOODRICH, A PRONOUNCING AND DEFINING DICTIONARY OF THE ENGLISH LANGUAGE 64, 75 (1856)).
92 Id. at 18 (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 152 (1857)).
94 Calabresi & Rickert, supra note 33, at 13.
95 Id. at 18 n.72.
96 Id.
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, that a hereditary characteristic is implicated; second, that class legislation and regulation creates stratification based on that characteristic; and third that such stratification leads to the exclusive allocation of rights to one group at the expense of another. These facets are not definitive, but 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.\(^7\)

Section One may alternatively be viewed as a prohibition on class legislation alone. Professor Melissa Saunders contends in her piece *Equal Protection, Class Legislation, and Colorblindness*, that the Section 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.”\(^8\) State courts of the antebellum era found these laws offensive because: “[f]irst … such laws represented a perversion of the state’s proper role in society” as a “neutral umpire providing equal protection to the rights of all,” and “[s]econd, the state courts believed such laws threatened true republican government and with it, personal liberty.”

Saunders, though focusing on the original understanding rather than original public meaning, provides substantial evidence from the antebellum and ratification periods that the term

\(^7\) Harrison, *supra* note 64, at 1458-1459. 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]). Harrison finds that the Fourteenth Amendment is not necessarily limited to systems that segment based on “immutable, hereditary characteristics,” *id.* at 1457, but also extends to “ad hoc castes.” *Id.* at 1458.

\(^8\) Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 247-248 (1997). Saunders explains that, “in the first half of the nineteenth century, state courts across America developed hostility to laws that singled out certain persons or classes of persons for special benefits or burdens. *Id.* at 252 (citing e.g., Reed v. Wright, 2 Green 15, 27-38 (Iowa 1849); Lewis v. Webb, 3 Me. 326(1825); Wally’s Heirs v. Kentucky 10 Tenn. (2 Yer.) 554, 556-57); Ward v. Barnard, 1 Aik. 121 (Vt. 1825)).
“class legislation” was understood to mean such partial or special laws. 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. In his 1868 Treatise on the Constitutional Limitations, Cooley discusses such unequal and partial legislation. He asserted that, “equality 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 always obnoxious, and discriminations against persons or classes are still more so . . . .” By the time of the Civil War, a disposition against partial or special laws was embraced in nearly every state. 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 measure as the logical application of [the] principle . . . that government should not use its power to create favored or disfavored classes of citizens, but should confine itself to the equal

99 Id. at 252 n.29.

100 Id. at 259; See also, William Kent, Memoirs and Letters of James Kent, LL.D 163 (1898) available at https://play.google.com/books/reader?id=XSPAAtr1yl0C&printsec=frontcover&output=reader&authuser=0&hl=en&pg=GBS.PA163. Kent wrote that, “[t]he 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).

101 Thomas M. Cooley, Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States in the American Union 389-97 (3d ed. 1874). Cooley remarks that “laws public in their object may be general or local in their application; they may embrace many subjects or one . . . may extend to all 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 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 390-392.

102 Id. at 393. Interestingly, Cooley’s ideas bear a close relationship to present-day Supreme Court Equal Protection Jurisprudence, which “built upon cornerstones” laid by Cooley, Justice Stephen Field, and Justice Joseph Bradley. Saunders, supra note 98, at 302. 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 292 (citing Cooley, supra note 101, at 397).

103 Saunders, supra note 98, at 258.
protection of all.” 104 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.’” 105

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

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 Homosexuals.

If, as the arguments surveyed in Part II above reflecting 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 violates the Fourteenth Amendment. I seek now to demonstrate how as a matter of history and science those individuals sexually oriented toward those 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 homosexuality exists if (1) sexual orientation is at least in part hereditary;

104 Saunders, supra note 98, at 268. Saunders explains that, “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 exercised from governmental decision-making 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 268-293.

105 Saunders, supra note 98, at 288. The Commercial stated that:

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. (emphasis added).
(2) there is a history of stratification based on sexual orientation; and (3) there is an exclusive allocation of rights to heterosexuals to the exclusion of homosexuals 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 that one in ten individuals are gay has long since been rejected, genetic researcher Simon LeVay indicates that about 3.1% of men and .9% of women reported having a same-sex orientation—a statistically significant minority. These statistics were recently affirmed by a poll released on October 18, 2012 by Gallup and the Williams Institute that 3.4% of all Americans identify as lesbian, gay, bisexual, or transgender.

B. Homosexuality as a Hereditary Feature

As indicated above, the original meaning of the Fourteenth Amendment was understood in part to prohibit caste and class legislation derived from hereditary characteristics. Webster’s 1861 Dictionary defines “hereditary” as a characteristic “that is or may be transmitted from a parent

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107 SIMON LEVAY, GAY, STRAIGHT, AND THE REASONS WHY: THE SCIENCE OF SEXUAL ORIENTATION 15 (2010). At least one other recent study has found these percentages to be greater. CTR. FOR SEXUAL HEALTH PROMOTION, SCH. OF HEALTH, PHYSICAL EDUC., & RECREATION, IND. UNIV. BLOOMINGTON, NATIONAL SURVEY OF SEXUAL HEALTH AND BEHAVIOR, available at http://www.nationalsexstudy.indiana.edu/ (last visited Feb. 10, 2013) (finding that “out 7% of adult women and 8% of men identify as gay, lesbian or bisexual”);
108 Gary J. Gates and Frank Newport, Special Report: 3.4% of U.S. Adults Identify as LGBT, GALLUP (Oct. 18, 2012), http://www.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 U.S. on record.
109 I explore scientific findings regarding the possible innate or hereditary nature of homosexuality in 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); see also Kenneth C. Davis, An Approach to Problems of Evidence in the Administrative Process, 55 HARV. L. REV. 364 (1942). This also raises the further looming question over whether these determinations are properly made in the courthouse or in the legislature.
110 See Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 1011 n.303 (1995) (citing Sumner’s “On the Question of Caste,” published in 13 WORKS OF CHARLES SUMNER 133 (Boston, Lee & Shepard 1880), “in which he defined the term ‘caste’ as ‘any separate and fixed order of society,’ where one group ‘claim[s] hereditary rank and privilege’ while another is ‘doomed to hereditary degradation and disability.’”
to a child; as, hereditary pride; hereditary bravery; hereditary disease.”

Webster’s also defines “inherit” as “to receive by nature form 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.” It appears that at the time of ratification that for a trait or tendency to be inherited, to be “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, cultured, and even being prone toward extreme accidents. Other traits like insanity, criminality, morality, and even genius were believed to be hereditary. Thus, it was believed that tendencies or orientations were as “hereditary” as “a strong constitution.” If the Fourteenth Amendment prohibited caste systems segmenting society based on hereditary characteristics—which could be outwardly signaled by skin color or as arbitrary and as unapparent


112 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 695 (Chaucey a. Goodrich ed. 1861), available at http://openlibrary.org/books/OL25326244M/An_American_dictionary_of_the_English_language. 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.” See also, Inherit Definition, ARTFL PROJECT: WEBSTER’S UNABR. DICTIONARY 1828 ED., http://machaut.uchicago.edu/?action=search&word=inherit&resource=Webster%27s&quicksearch=on (last visited on Nov. 28, 2012) (“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.”).


114 President Elliot, High Education is Hereditary, THE CHRISTIAN RECORDER, Feb. 24, 1876, available at http://www.accessible.com/accessible/docButton?AAWhat=doc&AAWhere=1&AABeanName=toc1&AAPageSize=printFullDocFromXML.jsp&AACheck=2.22.1.0.1 (stating “Culture is much suer to descend to children than wealth, because the nature forces hereditary transmission are on its side.”)


116 See e.g. A Mad Family, N.Y. TIMES, May 1, 1871, at 4, available at http://search.proquest.com/docview/93112987?accountid=14707 (“hereditary insanity excited no surprise . . . although hereditary genius may”); Crime and its Causes, N.Y. TIMES, Sept. 21, 1873, at 3, available at http://search.proquest.com/docview/93405963?accountid=14707 (classifying one type of criminal as those who have “a transmitted or inherited defect of moral character.”); FRANCIS GALT, HEREDITARY GENIUS at v (1869) (Galton explains 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, available at http://search.proquest.com/docview/48457427?accountid=14707 (“moral qualities are likewise transmitted such as stealing, lying, and even worse crimes”).
as the Indian Caste system which employed names and certificates as an identifier—it is logical to conclude that it would have been as indefensible to create a system that segmented the population based on innate orientation, for example on 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 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.” Psychobiological research on genetics and prenatal hormones indicate that homosexuality is at least in part hereditary or innate. This research supports the assertion that being gay is likely not a “fickle choice subject to correction,” but a feature biologically rooted in a particular individual. This part seeks to support the assertion that homosexuality is, at least in part, a hereditary characteristic.

i. Genetics

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“[T]hroughout history there have been many conflicting theories [about why an individual has a homosexual preference], including ‘perverse choice,’ seduction by older gays, being raised by smothering mothers and absent or aloof fathers, chance conditioning, traumatic early heterosexual experience.” Id. The common theme being that homosexuality is not something natural and innate, but rather the product of degeneration, often presumed psychological, of humanity. These beliefs are in part, the byproduct of flawed, and largely rejected Freudian psychoanalytics that attributed the roots of homosexuality to an individual’s failure to properly proceed through Freud’s stages of human psychological development. Id. at 31. 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. Other psychological and psychoanalytical theories proposed regression (or failure to outgrow) the anal phase or toddler-age homosexuality 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. LeVay, supra note 107, at 29.
Do genes influence sexual orientation and other aspects of gender? A sizeable portion of genetic research on sexual orientation has focused on the search for a "gay gene." While it is unlikely that such a singular gene exists, research nonetheless indicates sexual orientation suggests a genetic root.

The first major support for a genetic basis for sexual orientation emerged from research finding a higher incidence of homosexuality within families. These studies also suggested a maternal genetic linkage. The most well known study was performed by Dean Hamer in 1993: he found that 13.5% of gay men also had a gay brother, that 7% had a gay uncle and another 7% had gay cousins. Gay uncles and cousins were found to be predominantly on the maternal side. Hamer concluded that the "the site for the gay gene might be on the X Chromosome. A subsequent study in 1998 of 182 families with two or more gay brothers also found [indicators of] maternal transmission." Latter 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 contribute to sexual orientation but are not the sole determining factors. Though suggestive of a genetic linkage, results have been too inconsistent to determine with certainty that the link is maternal.

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119 LeVay, supra note 107, at 43.
120 The search for a “gay gene” is a charged issue within the LGBT community. Critics within the community of “gay gene” and similar scientific research express concern with the idea that “greater acceptance and fair treatment” is predicated on whether sexual orientation is biologically “hardwired.” Critics contend that 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 orientation is of a biological origin this does not necessarily carry with it the right to act upon those feelings.” Joe Sartelle, Rejecting the Gay Brain (and choosing homosexuality), BAD SUBJECTS (May 1994) http://bad.eserver.org/issues/1994/14/sartelle.html.
121 Wilson & Rahman, supra note 118, at 50.
122 Id.
123 Id. at 51. In further research of the X-chromosome theory, Dean Hamer “conducted an analysis of the DNA of a selected group of forty pairs of gay brothers and examined twenty two DNA markers on the X-chromosome.” He found that 82% of the gay brothers shared a region of the X chromosome referred to as Xq28. Testing those results with thirty-two new pairs of gay brothers and thirty-six pairs of lesbian sisters and the heterosexual brothers of the gay pairs revealed that 67% of gay brothers shared Xq28, where none of the lesbian sisters did. The heterosexual brothers had a 22% chance of carrying the Xq28 marker. Hamer concluded that the genes in Xq28 may influence sexual orientation of men, but not women. In the 1998 study Xq28 marker was shared by 66% of the gay brothers. Id. at 52. A subsequent study by researchers at the University of Western Ontario failed to replicate those findings. Ingrid Wickelgren, Discovery of 'Gay Gene' Questioned, 284 SCIENCE 571 (Apr.
Another important source of genetic research has been twin studies. Analyzing twins is an ideal way to "separate the effects of genes from the effect of the environment." Such research entails comparing identical, monozygotic, twins that develop from a single egg and fraternal, dizygotic, twins, which develop from separate eggs. The functionality of this comparison derives from the fact that monozygotic twins share one hundred percent of their genetic make-up, where fraternal twins share only fifty percent (the same as ordinary siblings). Both sets of twins are 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 because "the genetic contribution between these two sets of twins differs markedly while their environment is held constant." Statistically speaking, it is estimated that personality traits are 50% genetic, 50% environmental. 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. Accounting for volunteer bias, actual hereditability of homosexuality in men was determined to be closer to 31% for men and about 50% for women. One 2000 study found that "non-heterosexual orientation" among identical twins to be 30%, relative to 8% for fraternal twins. Notably, in both studies "identical twins concordant for sexual orientation did not report greater similarity in childhood experiences than identical twins that were non-concordant . . . in fact male concordant identical pairs reported having less similar

124 Wilson & Rahman, supra note 118, at 45.
125 Id. One criticism of twin studies is that they include small sample sizes and operate on assumptions that identical and fraternal twins both have the equivalent 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 (June 30, 2008, 12:00 AM), http://news.sciencemag.org/sciencenow/2008/06/30-01.html. As well, given the actual portion of the population (about 3.1%) that identify as gay it is difficult to find a large enough sample size of twins that could yield conclusive results. Wilson & Rahman, supra note 118, at 48.
126 Id. at 45.
127 Id. at 49.
childhoods.”129 As doctors Glen Wilson and Qazi Rahman assert in their book, Born Gay, “genetic factors are [clearly] involved in the origins of sexual orientation” but likely environmental factors play an important role as well.130

Other possible genetic sources for sexual orientation have been suggested. One speculative study suggests that mitochondrial DNA acts “selfishly” in favor of a female species by targeting the fetus’s sexual orientation in order to mitigate the eventual person’s likelihood to reproduce.131 Another highly controversial study reinforced the likelihood of a genetic connection on the basis of what has been dubbed the “fertile female hypothesis.” The study surmised 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.”132 Ultimately, geneticists recognize that it is unlikely that a single switch controls sexual orientation. What is more likely is that sexual orientation is determined by a polygenic collection.133 Nevertheless, genetics appears to have a heavy hand in an individual’s sexual orientation, even if that role has not yet been completely defined.134

129 Wilson & Rahman, supra note 118, at 49.
130 Id.
131 LeVay, supra note 107, 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 Brian Sykes, founder of Oxford Genetics, who asserts that male homosexuality 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.”)
132 LeVay, supra note 107, at 186 (discussing Andrea Camperio-Ciani, et al., Evidence For Maternally Inherited Factors Favouring Male Homosexuality And Promoting Female Fecundity, 271 (1554) PROCEEDINGS: BIOLOGICAL SCIENCES 2217-2221 (Nov. 7, 2004)); see also Balter, supra note 124 (discussing research finding that homosexuality survives in the population because genes influencing sexual orientation “may increase fertility in women.”).
133 Wilson & Rahman, supra note 118, at 53; see also, Howy Jacobs, Don’t Ask, Don’t Tell, Don’t Publish, EMBO REPORTS (Dec. 12, 2012) http://www.nature.com/embor/journal/v13/n5/full/embor201248a.html (comparing the polygenic nature of prostate cancer and the likely polygenic nature of homosexuality, as well as a paucity of research on the genetics of homosexuality); LeVay, supra note 107, at 173.
134 Michael Balter, “Gay Genes” May Be Good for Women, (June 18, 2008), http://news.sciencemag.org/science/2008/06/18-01.html (“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://www.huffingtonpost.com/simon-levay/the-paradox-of-gay-genes_b_1929641.html (asserting that, “[t]he 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.”)
ii. **Hormones and Brain Structure**

More recent research has focused on the role of prenatal hormones as an explanation for sexual orientation. A fetus, though genetically of a particular gender, does not fully develop distinguishing genitalia until the third trimester. During that period the “Y chromosome . . . kick[s] off a cascade of hormonal events that produces a recognizable male.” 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. This process has a large impact on the way the brain and body develop.

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 homosexual men, and increased level of prenatal testosterone in homosexual women, precipitating under-masculinization and over-masculinization. Whether caused by testosterone or the lack thereof due to an absence of sufficient “aromatase to convert testosterone to estrogen within the male brain,” prenatal hormones seem to impact the brain and behavior. This occurs through “organizational effects, which mold brain and behavior early in the womb and are irreversible . . . and activational [sic] effects . . . transient effects of hormones circulating in the blood [that impact] brain and behavior upon adulthood.” 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.”

“[E]vidence suggests that the levels of sex hormones circulating during fetal life direct the development of the brain and influences gendered traits, including sexual orientation.”

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136 *Id.*
137 *Id.*
138 *Id.* This is known as the aromatization hypothesis.
139 *Id.*
140 LeVay, *supra* note 107, at 54
141 *Id.* at 64
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 researcher Simon LeVay offers three primary observations:

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 likely be] before birth, given that humans are born at a much later stage of brain maturation than most laboratory animals. Second, [research shows other] gendered traits are indeed influenced by prenatal hormones . . . [and] Third, [the idea that] homosexuality is linked to a variety of gendered-atypical traits in childhood and adulthood . . . suggests [a] . . . gender package" that has common developmental roots.142

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-3.143 The grouping is found to be two to three times larger in men than women. In an autopsy study where the deceased's sexual orientation was known, it was found that INAH-3 was in fact smaller for gay men than straight men, comparable in size to that of straight women.144 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.145

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 be smaller. These animals also exhibited atypical

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142 Id.
143 Id.
145 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 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. Id.; Wilson & Rahman, supra note 118, at 112.
sexual conduct—males became less likely to mount a partner and actually acquiesced to being mounted. LeVay contends that testosterone’s organizational and activational effects precipitated the change in size of SDN-POA and directed the animal’s shift in sexual orientation.146

Other studies have found a correlation between sexual orientation and differences in brain structure and cognitive function. One recent study found that “the size of the two symmetrical halves of the brain of gay men more closely resembled those of straight women than they did straight men.147 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 traits such as verbal fluency.”148 Ultimately, there appears to be a biological cause to sexually orientation, even if the “correlation between form and function” remains unclear.149

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

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

146 LeVay, supra note 107, at 55. Prenatal exposure to higher levels of testosterone in female guinea pigs lead them to “mount” other animals in adulthood, rather than “display lordosis” (acquiescence to being mounted). Conversely, males deprived of testosterone were “less likely to mount other animals and more likely to display lordosis.” “Sexual 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 and Rahman, supra note 118, 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.

147 Alice Park, What the Gay Brain Looks Like, TIME (June 17, 2008), http://www.time.com/time/health/article/0,8599,1815538,00.html; see also, LeVay, supra note 107, at 274

148 LeVay, supra note 107, at 274.

149 Id. at 217.
C. A History of Laws and Regulations Stratifying Society on Sexual Orientation and Related Conduct

If homosexuality is in fact hereditary, for the Fourteenth Amendment to be implicated there must be a system of caste or class legislation that stratifies society based on that feature. In this section, I will show that there exists a long-standing legal and administrative practice of relegateing homosexuals to second-class status: first, indirectly by prohibiting conduct today commonly associated with same-sex orientation, and then upon the coalescence of a identifiable gay community during the 1920s, through the direct effort of the legislatures, courts, and bureaucratic agencies to criminalize homosexuality, suppress homosexual association, and stifle the development of a gay sub-culture.

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

Early laws did not “define individuals as homosexuals per se,” 150 nor would individuals have understood themselves to be homosexual prior to the rise of psychoanalytics in the 1880s. Rather, laws criminalized conduct like sodomy and oral sex generally without mention of the sexual orientation of particular participants. 151 In essence, American sodomy laws sought to generally prohibit non-procreative sexual activity. 152 Thus, “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.” 153 Nonetheless, in this first part I will show how criminal prohibitions on the sort of intimate conduct associated today with homosexuality produced an environment inclined toward the sort of direct legislation that developed near the turn of the twentieth century.

150 Mogul et al., supra note 18, at 19.
151 Lawrence v. Texas, 539 U.S. 566, 568 (2003). In England the “first sodomy law was enacted in 1533, prohibiting the “Vice of Buggery” committed with mankind or beast” and imposing punishment by death and forfeiture of all property belonging to [the offender].” Mogul, supra note 18, at 13. During this period, cross-dressing and sexual interactions between women were severely punished throughout Europe—part of a civilization-wide emphasis on enforcing gender roles. 151 The terms buggery and sodomy “were sometimes . . . used interchangeably as both terms proscribed non-procreative sexual acts, though it seems that sexual interactions with an animal were prosecuted as buggery.” Id. at 13
152 Id. at 569.
153 Id. at 568.
The criminalization of conduct associated today with same-sex orientation extends as far back as the pre-colonial period in North America. 154 Spanish and Portuguese colonizers enforced gender hierarchies on indigenous populations—they corporally punished native males who engaged in sexual relations with other men and reviled at the sight of ‘indigenous ‘men’ who [took on] the appearance, mannerisms, duties, and roles of “women.” 155 On the other side of the continent, the British legal code ruling the thirteen colonies imported to the new world laws 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) 156 statutes that prohibited sodomy, buggery, and crimes-against-nature nonetheless threatened individuals engaging in this conduct with death as such acts were capital crimes “on par with murder, treason, and adultery.” 157

From American independence until the late 1800s the text and application of these laws changed little from the colonial versions. 158

After the Civil War, middle-class urban society became concerned with people who departed from increasingly rigid gender roles. 159 Broadly crafted “moral codes” criminalized conducting oneself in a manner outside of expected gendered behavior. 160 By 1890, the emergence of psychoanalytics, and its designation of such a behavior as psychologically degenerate, spawned a societal anxiety about the “sexual inversion” of women who dressed as men, and “fairies . . . who

154 See generally Mogul et al., supra note 18, at 3-5.
155 Id. at 4. Biblically derived prohibitions on “the Sodomitie vice” emerged in Western Europe in the 1400s, around the period of the Spanish Inquisition. Id. at 12. Spanish and Portuguese missionaries in the new world identified what the recognized as “intrinsic sexual deviance” as “reminiscent of the biblical tale of Sodom and Gomorrah.” They took significant steps to suppress cross-gender dress and impose Western-style masculinity. Id. 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.”
157 Mogul et al., supra note 18, at 13.
158 Eskridge, supra note 156, 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.)
159 Id. at 20.
160 Id. at 19 (identifying penal codes of New York and Chicago as being typical of moral codes of the mid to late 1800s).
renounced the male gender role as they renounced the male sex role.”\textsuperscript{161} Rapidly, “[c]ategories of a disapproved people – the sodomite, the sexual invert, the homosexual” entered public discourse.\textsuperscript{162}

The turn of the twentieth century marks 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 psychopathy\textsuperscript{163} led “inversion” to become associated with rape and child molestation.\textsuperscript{164} The coalescence of “inverts,” and 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 inverts.\textsuperscript{165}

Between 1880 and 1921 sodomy laws were expanded to include oral sex and the language of such statutes became increasingly specific and clinical in defining 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 homosexuals.\textsuperscript{166} In New York, “the legislature added a new section 887 (9) to the Criminal Procedure Code, expanding the definition of illegal “vagrant” to include “[e]very male person who . . . in any public place solicits for immoral purposes.” This statute was employed as a legal basis for police action against male inverts, especially in raids of clubs. The conviction rate for these crimes was a staggering 83 percent.\textsuperscript{167} During this time the Federal Government, also prompted by prevailing medical understandings, empowered the Immigration Naturalization Service to deport or exclude “sexual perverts” and others who “because of . . . abnormal impulse are in repeated conflict with social custom and constitute authorities,” and the War Department

\textsuperscript{161} Id. at 20.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 22-24.
\textsuperscript{164} Id. at 23.
\textsuperscript{165} See, id. at 20.
\textsuperscript{166} Id. at 27-37.
\textsuperscript{167} Id. at 29-30
similarly instituted regulations to “discharge” existing and “screen out” potential sodomites and inverts from its ranks.\textsuperscript{168}

\section*{ii. The rise of class legislation and regulation directed specifically at homosexuals and the suppression of homosexual society from WWI to the 1960s}

The twenties ushered in a period in which “sexual acts and desires became constitutive of identity.”\textsuperscript{169} Yet, the sexual liberation for heterosexuals during this time also had the impact of marking homosexuality and homosexuals with the new taboo.\textsuperscript{170} From the 1920s onward, state and federal regulations—often claiming national security concerns—targeted homosexuals and sought to root them out of public employ and to suppress gay community development. On the criminal front, a mushrooming national hysteria over child molestation and the perceived threat of homosexuals 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 homosexuals.

\subsection*{a) Regulatory Actions}

As Professor William Eskridge bluntly puts it “the modern regulatory state cut its teeth on gay people.”\textsuperscript{171} The first regulations targeting homosexuals were spurred by the mobilization of American Forces in World War I out of a growing concern over same-sex intimacy among the soldiers.\textsuperscript{172} The rise of the bureaucratic state produced an environment that excluded homosexuals 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 “the social stigma attached to sex

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\textsuperscript{168} Id. at 36.
\textsuperscript{169} Mogul et al., supra note 18, at 19.
\textsuperscript{170} Eskridge, supra note 156, at 40.
\textsuperscript{171} Id. at 43.
\textsuperscript{172} Id. at 37.
\end{flushright}
perversions . . . [may make them] go to great lengths to conceal their tendencies.”173 In essence, Hoover feared homosexuals in government were at risk for communist blackmail and coercion. “The Civil Service Commissions regulation barring from federal employment people who engage in “immoral conduct” was read to include “homosexuality,”174 Federal level homosexual witch-hunts gave way to state witch-hunts.175 The California State Bar, for one, disbarred lawyers for homosexual activities with consenting adults.176 In Florida, legislative investigation committees engaged in a six-year campaign to purge state schools of homosexual staff and teachers.177 That effort was fueled by the belief that homosexuals, incapable of procreation, needed to recruit new boys to preserve their numbers.178

In addition to being rooted out of the workplace, gay social culture and community association was also under-pressure. In a growing number of cities, from New York and Los Angeles to Pittsburgh and Providence, “police . . . vice teams . . . observed gay hangouts, posed as decoys to attract solicitations, and raided gay bars, baths and other spaces.”179 After WWII the efforts of vice squads to “purge” homosexuals from their cities became even more overt and directed.180 The means they employed also grew more extreme, with officers in some cases “spending hours perched above public toilets . . . and even following homosexuals home and peering through bedroom doors.”181 Police efforts from 1946 to 1965 are estimated to have led to

175 Id. at 72.
176 Id. at 73.
177 Id.
179 Eskridge, supra note 156, at 54.
180 Id. at 63. Eskridge provides some striking arrest statistics from America’s major cities during this period: “solicitation of sodomy or sodomy accounted for almost sixty percent of the arrests of Philadelphia’s moral squad in 1949; that amounts to two hundred homosexuals to court each month. Id. After WWII, the Los Angeles’s police department’s moral division arrested thousands of gay men annually, and Washington, D.C. armed with the Murray Act “arrested hundreds of men for sodomy, indecent assault and lewdness between 1948 and 1953.” Id.
181 Id. at 64.
the arrest of between two and five thousand individuals each year for sodomy, with likely more
than half being for consensual sexual activity.\textsuperscript{182}

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.”\textsuperscript{183} State and
municipal sensors suppressed literature produced by groups like the Mattachine Society, in
addition to theater and film depicting or related to homosexuality.\textsuperscript{184} Ultimately, by the mid-1960s,
with the gay rights movement on the horizon, homosexuals faced, “police harassment, job
discrimination, [and] state exclusions.”\textsuperscript{185}

\textbf{b) Criminal Law Actions}

The 1924 trial of Nathan Leopold and Richard Loeb for the brutal murder of Bobby Franks
hardened the association between homosexuality, criminal depravity, and psychopathy. Highly
publicized psychiatric expert testimony about the killers’ “(homo)sexually perverted desire,”\textsuperscript{186}
including explicit details about their deviant “symbiotic sexualized relationship” fed a media and
public frenzy over the trial.\textsuperscript{187} Leopold and Loeb, among similar criminal cases\textsuperscript{188} spurred a
“national hysteria” over child sexual molestation.\textsuperscript{189} Between the World Wars, public officials

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{182}] Id.
\item[\textsuperscript{183}] Eskridge, supra note 156, 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.’”).
\item[\textsuperscript{184}] Id. at 48, 75-77.
\item[\textsuperscript{185}] Id. at 93.
\item[\textsuperscript{186}] Mogul et al., supra note 18, at 21 (noting that one of the early prime suspects in the killing was “a
teacher at Frank’s school, “an effeminate man, whom the police suspected of homosexual tendencies.”).
\item[\textsuperscript{187}] Id. at 22.
\item[\textsuperscript{188}] Mogul et al., supra note 18, at 27. In addition to their discussion of the Leopold and Loeb case, Mogul
Ritchie and Whitlock explore a number of “Queer Criminal Archetypes.” For example, they identify Leopold and
Loeb as emblemizing the “gleeful gay killer.” The authors also explore the murder of Freda Ward by her lover,
nineteen-year-old Alice Mitchell in 1892, in particular, discussing the media’s obsession with Mitchell’s “purported
insanity and [the] intrinsic violence of [her] gender nonconformity.” Id.
\item[\textsuperscript{189}] See Eskridge, supra note 156, at 40-43 (“society increasingly turned to control . . . 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
\end{itemize}
\end{footnotesize}
“increasingly...demonized [homosexuals] as a threat to children whose sexual development was so easily derailed.”\textsuperscript{190} State legislators adopted harsher sodomy laws that provided for incarceration or detainment in mental institutions of moral degenerates and sexual perverts.\textsuperscript{191} Under these laws, “the most common conviction was sodomy, including sodomy between consenting adults.”\textsuperscript{192} The District of Columbia’s 1948 “Miller Act”—a sodomy law that carried a twenty-year prison sentence—is indicative of the severity of punishment of laws enacted nationwide.\textsuperscript{193}


The beginning of the gay rights movement, marked by the Stonewall Riots on June 27, 1969, initiated an erosion of what can be fairly classified as discriminatory treatment of homosexuals.\textsuperscript{194} Subsequent to Stonewall, the gay rights movement earned significant number of legal victories in the realm of First Amendment Rights.\textsuperscript{195} “By the middle of the 1970s...[seven] cities and counties had added sexual orientation to their lists of non-discrimination statuses.\textsuperscript{196} In addition, the Civil Service Commission repealed its ban on homosexual employment in the Federal Civil Service.\textsuperscript{197} Also during the 1970s, a number of states decriminalized lesbian and gay intimacy by reforming or eliminating sodomy laws in conformance with changes to the Model Penal Code.\textsuperscript{198}

to exclude homosexuals from citizenship—all in the name of protecting children from a dangerous force threatening their development into heterosexuals.” (“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.”).

\textsuperscript{190} Id. at 40.
\textsuperscript{191} Id. at 61.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 99.
\textsuperscript{195} Id. at 111-123 (discussing the First Amendment litigation efforts of the gay rights movement).
\textsuperscript{196} Id. at 130.
\textsuperscript{197} Tina Fetner, Working Anita Bryant: The Impact of Christian Anti-Gay Activism on Lesbian and Gay Movement Claims, 48(3) SOCIAL PROBLEMS 411 (August 2001).
Despite gains, stratification persisted. Organizations embraced the ballot initiative process to repeal pro-gay ordinances: the prime example being 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. This process was followed by cities in Minnesota, Kansas, Oregon, and California to repeal their own gay rights ordinances. 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 to single out same-sex relations for criminal prosecutions. While only nine states enforced such prohibitions and by 2003 most of those states were not actively enforcing those prohibitions, it was nonetheless not until the Supreme Court’s decision in Lawrence that a homosexual couple could engage in private consensual sexual relations without fear of prosecution. Furthermore, the 1990s saw the Defense of Marriage Act (DOMA) and Don’t Ask, Don’t Tell pass Congress, which inhibited the ability of homosexuals individually and as couples to enjoy equivalent freedoms and privileges as heterosexuals as a matter of federal law. Viewed along with its predecessor legislation and regulation beginning in the 1920s these more recent statutes evidence a continuing pattern of relegating homosexuals to a second-class legal status.

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199 Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41(1) AM. J. OF POL. SCI. 258 (Jan. 1997).
200 Lawrence, 123 S. Ct. at 2479 (2003). Many state legislatures modernized their entire system of criminal law “when 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 2480. However, “several states [legislatures] were so appalled to be without a prohibition on homosexual sodomy that they added new laws [specifically] barring it.” Rubenstein, supra note 198, at 19.
202 “Don’t Ask, Don’t Tell” 10 U.S.C.A. § 654 [§ 654. Repealed. Pub.L. 111-321, § 2(f)(1)(A), Dec. 22, 2011, 124 Stat. 3516]; At the time California District Court Judge Virginia Phillips stated, “Don’t Ask, Don’t Tell “denies homosexuals serving in the Armed Forces the right to enjoy “intimate conduct” in their personal relationships . . . 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.”
iv. 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 heterosexuals. As a consequence of an innate feature of their identity, homosexuals 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 homosexuals 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, as I will show in this next section a system of caste nonetheless persists.

D. Sexual Orientation and the Exclusive Allocation of Rights

Building on the historical evidence provided above, this part will focus on some of the rights and privileges currently denied to homosexuals and same-sex couples that support the idea that a caste system existed—and 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, 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.”204 Numerous rights accompany marriage at

204 Katharine K. Baker, The Stories of Marriage, 12 J. L. & FAM. STUD. 1, 5-6 (2010) (In general these, “rights and obligations usually include 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.”)
both the federal and state-level, but I will touch on just a few: taxes, inheritance and intestacy, testimonial privilege, and adoption.

1. Federal Taxes

“Federal tax policy recognizes marriage in numerous respects. For example, the joint return, available also for state income taxes, treats married couples as one taxpaying unit.” However, under DOMA, which defines marriage for the purposes of federal law, as being between one man and one woman, the IRS does not recognize same-sex marriages for federal income, gift or estate tax purposes. Thus, “gay and lesbian couples must file as single people on their federal tax returns.” This creates significant problems for same-sex couples who, living in states that recognize same-sex marriage, must complete state tax forms as a married couple, but federal tax forms as individuals. Perhaps more significant is that 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.”

“Federal law [also] uses marriage as a way to defer tax obligations when an affluent individual dies leaving a widowed spouse, who inherits [assets and property] a benefit denied to same-sex couples. Where “[p]roperty transfers between spouses are not subject to gain-loss valuation,” federal estate tax laws force “same-sex couples [to] face federal marginal tax rates of

206 Bernstein, supra note 204, at 146-147.
207 DOMA, supra note 201.
208 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 (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.”)
210 Id.
212 Bernstein, supra note 204, at 146-147.
up to 45% on the bequest of assets to their surviving partner at death that exceed an excluded amount per estate."²¹³ Thus, "for an equivalent transfer, married couples pay no taxes," where same-sex couples must pay sizeable taxes.²¹⁴

ii. Inheritance and Intestacy

While an individual can bequeath his or her property at death to whomever he or she would like, one area in which same-sex couples find themselves disadvantaged is 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.²¹⁵ 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.²¹⁶ 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,²¹⁷ 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 [may] 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.²¹⁸

²¹⁴ Id.
²¹⁵ Bernstein, supra note 204, at 149.
²¹⁶ Id.
iii. Evidentiary Privileges in State and Federal Courts

In federal courts “until 1933, a married person was deemed incompetent to testify in favor of his spouse in federal court.” This rule, in the Federal Rules of Evidence 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.” However, “under [DOMA], federal statutes and regulations that provide special treatment to marriages or spouses apply only to opposite-sex marriages.”

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. 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 their significant other or face being held in civil contempt or prosecuted for criminal contempt. 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.”

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219 Bernstein, supra note 204, at 148 (citation omitted).

220 Id.


222 See, John Bergstresser, 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) (“one 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.”).

223 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).

224 Id.
Presently in “thirteen states, a person can stop his or her spouse from testifying adversely. The broader confidential-communications privileges covers disclosure between husbands and wives in the confidence of the marital relationship.”

Similar to the issues faced in the federal system, in states that have both evidentiary laws that provide for spousal privilege and their own versions of the Defense of Marriage Act (sometimes called mini-DOMAs) same-sex spouses face significant barriers to asserting evidentiary privileges intended to protect the marital institution.

iv. Adoption

Adoption is another area where individual homosexuals and same-sex couples are legally disadvantaged relative to their heterosexual peers. “Same-sex partners 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 [their] same-sex partner. 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. Legislators and courts continue to “expand the legal definition of the American family.” This changing understanding of family has undoubtedly led to the erosion of legislation denying same-sex couples the ability to adopt. For

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225 Bernstein, supra note 204, at 152.
226 Lisa Yurwit Bergstrom and W. James. Denvil, Availability of Spousal Privileges for Same-Sex Couples, 11 U. Md. L.J. Race, Religion, Gender & Class 224, 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 “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, the privileges [in many states and in Federal Court] not available to same-sex couples.”
230 Wooster, supra note 227, 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.”).
instance, Arkansas and Florida recently struck down laws “categorically prohibit[ing] lesbians and gay individuals from adopting children.”  

Nonetheless, significant disparity between same-sex and different-sex couples persists among state adoption law and application of that 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. Yet other states continue to deny same-sex couples the right to adopt less explicitly. Utah’s adoption law prevents adoption by a couple that “is not [in] a legally valid and binding marriage under [state law].” Thus, unless Utah chooses to allow for same-sex marriage, a same-sex couple cannot adopt there. In addition, “[s]tate courts in Michigan have ruled that unmarried individuals may not jointly petition to adopt.” Second-parent adoptions have also faced significant challenges. Courts in Kentucky, Nebraska, Ohio, and Wisconsin have ruled second-parent adoptions impermissible under current state law.  

Furthermore, where a state has not outright legislatively or judicially addressed the issue of same-sex adoption (joint or second-parent) “prospective adoptive parents who are lesbian, gay,


232 Miss. Code. Ann. § 93-17-3 (West) (“Adoption by couples of the same gender is prohibited.”).  

233 Utah Code Ann. § 78B-6-117 (West). 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:
  
(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) 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. (emphasis added).


bisexual, or transgender . . . still encounter discrimination during the adoption process."\textsuperscript{236} According to the Human Rights Campaign, "only [eighteen] states and Washington, D.C. [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."\textsuperscript{237} Only twenty-one states and the District of Columbia expressly provide for second-parent adoption or offer a stepparent alternative.\textsuperscript{238} In the remaining states, adoption statutes are often vague, providing significant room for judicial discretion. This creates a case-by-case analysis, and also subjects same-sex couples to the subjective prejudices of the individual evaluator.\textsuperscript{239}

\textit{v. 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 homosexuals under the law, one could determine that a system of caste presently exists. 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 their bedroom, these disparities nonetheless support that homosexuals face a second-class status. The next part addresses how denying same-sex marriage further perpetuates that system, and thus violates the original meaning of Section One.

\textbf{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 either a prohibition on caste or class legislation on the same-sex marriage question. It aims to support the proposition that an originalist could find denying same-sex marriage

\begin{itemize}
\item \textsuperscript{236} Wooster, \textit{supra} note 227, at §1.
\item \textsuperscript{237} ERC: Second Parent Adoption, \textit{supra} note 235.
\item \textsuperscript{238} National Center for Lesbian Rights, \textit{supra} note 228, at 4.
\item \textsuperscript{239} ERC: Joint Parent Adoption, \textit{supra} note 234 ("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.").
\end{itemize}
marriage to violate the Fourteenth Amendment, and therefore, that laws prohibiting homosexual couples to enter 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) that the existence and impact of direct and indirect statutes and regulations based on sexual orientation indicate a history of class legislation which relegated homosexuals to second class citizenship; and (3) that despite erosion of this caste system, today there are still many areas in which heterosexual 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, one could conclude that laws denying same-sex marriage or an equivalent bundle of rights 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.240 One argument against finding that denying same-sex marriage violates the anti-caste command is that homosexuals 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.

240 In Windsor, 699 F.3d 169 (2d Cir. 2012) the Government argued that one reason why the Defense of Marriage Act should be preserved is “fiscal prudence” because expanding the group entitled to spousal government benefits would be an increased strain on the federal budget. The Second Circuit rejected this argument. 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.
Such an argument would merely be a modern twist of the type of “separate but equal” rationale that preserved anti-miscegenation laws in cases like *Pace v. Alabama*, and was rejected by the Supreme Court in *Loving v. Virginia*. In *Loving*, Virginia argued that “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 . . . because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage.” 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. Professor Steven Calabresi has responded to these critics by explaining how the outcome in *Loving* was nonetheless proper under an original meaning originalist approach. He argues that the Civil Rights Act of 1866 ensured that:

> [C]itizens, 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 shall have the same right, in every State and Territory in the United

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242 388 U.S. 1 (1967)
243 Loving v. Virginia, 388 U.S. 1, 7-8 (1967).
244 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*, BALKANIZATION (Oct. 28, 2009), http://balkin.blogspot.com/2009/10/scalias-biggest-problem-isnt-brown-its.html (nothing that “the 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. OF L. AND 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 a 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 miscegenation ban . . . possibly be unconstitutional if it was a common at the time of Reconstruction.”).

States ... (emphasis added) 246

If one accepts that marriage is a civil legal contract,247 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 been abridged." To impair the "liberty of contract" would be "blatantly unconstitutional." 248 Extending this framework to sexual orientation and same-sex marriage, if we accept the Fourteenth Amendment at a bare minimum constitutionalized the Civil Rights Act of 1866 249 but also goes beyond race one could find that denying an individual the freedom to enter into a marriage contract (a legal agreement 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.250 It may be that legislation denying same-sex marriage explicitly or affirming that heterosexual marriage 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 whom they love. Conversely, such laws could be understood as singling out heterosexual couples for the special benefit of the privilege of entering into a legally binding marital

247 Calabresi & Matthews, supra note 46, at 60 n.91 (citing 2 William Blackstone, Commentaries 421) Blackstone states, “[o]ur law considers marriage in no other light than as a civil contract... [T]he law treats it as it does all other contracts.” William Blackstone, Commentaries *421. As well, both a modern dictionary and one from the time of ratification recognize marriage as a civil contract agreement. Black’s Law Dictionary (9th ed. 2009); Marriage Definition, ARTFL Project: Webster’s Unab. Dictionary 1828 (last visited Dec. 21, 2012), http://machaut.uchicago.edu/?action=search&word=Marriage&resource=Webster%27s&quicksearch=on;
248 Calabresi & Matthews, supra note 46, 40.
249 Id. at 23.
250 Saunders, supra note 98, at 281.
relationship with the person whom they love. From either perspective, the law in this area is not “operating upon [one] man equally upon all.” 251

For reasons discussed in the previous section, one could make the argument that by providing homosexual men and 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: where heterosexuals have the commitment to the person they love recognized by law and are accorded a slew of rights and privileges as a result, same-sex couples are denied that opportunity. At 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 legal heterosexual marriage.

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.”252

However arguments in favor denying same-sex marriage as a matter of general welfare are often predicated on ignorance, like a fear of homosexual recruitment, or blanket assertions, such that “the decline of marriage over the past few decades has reduced the number of men who are helping women raise their children . . . [and that] [s]ame-sex marriage likely will contribute to this decline, even among heterosexual men.”253 Another common argument is that “marriage is ordered toward the procreation of children and that the legal support given to marriage are given with that

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251 Saunders, supra note 98, at 255.
252 Saunders, supra note 98, at 260.
end in view. Marriage needs the protection of laws because society must be concerned about its own preservation and continuity into the next generation.”

Yet, the notion that same-sex marriage poses a threat to procreation seems to misunderstand the nature of homosexuality and its influence on the family. The American Physiological 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.” Even legally grounded arguments appear to be 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.

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. Nonetheless, 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 in which the Supreme Court engages under its existing Equal Protection precedents, and is therefore far from the “easy” case that 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.

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256 For an overview of the arguments supporters of a ban on same-sex marriage may put forward in the upcoming cases before the Court, see Lyle Denniston, Same-sex marriage III: The arguments against, SCOTUSBLOG (Nov. 29, 2012, 12:05 AM), http://www.scotusblog.com/2012/11/same-sex-marriage-iii-the-arguments-against/.
CONCLUSION

Justice Scalia has asserted that same-sex marriage is an easy case. The Constitution, in his view, could not possibly sanction homosexual sodomy 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 that can be established by reference to historical materials.” 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, 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 impermissible. If the scientific research provided is correct, then the extensive history of laws targeting directly and indirectly homosexuals may establish such a system. Further, laws prohibiting same-sex marriage or limiting marriage and/or an equivalent bundle of rights to heterosexual couples could be an impermissible and unconstitutional perpetuation of that system in violation of the Fourteenth Amendment. If the original meaning is a prohibition on special or partial legislation singling out a particular group for a unique burden or allocating 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 it is more than a normal legal agreement? Does the anti-caste command extend to marriage? Does the

257 Barnett, supra note 26, at 660.
258 Maynard v. Hill, 125 U.S. 190, 210-11 (1888) (famously noting 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
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. Nonetheless, a case can be made for how originalism may find denying same-sex marriage constitutional. Perhaps it is not such an easy question for originalism after all.

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 e.g., Linda C. McClain, “God’s Created Order,” Gender Complementarity, and the Federal Marriage Amendment, 20 BYU J. PUB. L. 313, 315, 322 (2005-2006) (discussing proponents of the Federal Marriage Act who held that marriage as an institution is necessarily “gender complementarity” and that “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. See Michael Novak, What Marriage Is, 156 THE PUB. INT. 24, 27 (2004) (commenting that heterosexual marriage is a religiously "privileged union” and that “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, 6 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.”)

Calabresi explains that, “the framers of the Fourteenth Amendment distinguished between civil rights, which were possessed by all citizens, including women and children, and political rights, which were exercised only by the male subset of population.” Regarding gender discrimination, the Fourteenth Amendment did not grant political rights as “political rights [were viewed as being] rarer and [were] more jealously guarded.” However, in his view when the Nineteenth granted political rights to women (as the Fifteenth had done for Black men) this placed women on equal footing with male peers. He argues that the Nineteenth guides our reading of the Fourteenth Amendment—once complete political rights were granted no less restrictive civil rights can justifiably be denied. Oddly, Calabresi argues that because there has not been a constitutional amendment akin to the Nineteenth or 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. See Calabresi, supra note 64, 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.