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Steven G. Calabresi

Andrea Matthews

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Originalism and *Loving v. Virginia*

Steven G. Calabresi* and Andrea Matthews**

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* Professor of Law, Northwestern University; Visiting Professor of Political Science, Brown University; and Joseph R. Weisberger Visiting Professor of Law, Roger Williams University. We are grateful to Andy Koppelman, Gary Lawson, and Michael Vorenberg for helpful comments and suggestions. We also want to express special thanks to John Tomasi and the Political Theory Project at Brown University and to Corey Brettschneider in the Brown Political Science Department for creating the working environment that led to this article. We dedicate this Article to Gary Lawson from whom we have learned so much about the importance of the original public meaning of legal texts over the intentions of those who were living when a text became a law.

** BA Brown University 2011.

I. INTRODUCTION

*The question is not what the Senator means, but what is the legitimate meaning and import of the terms employed in the bill. . . . What are civil rights? What are the rights which you, I, or any citizen of this country enjoy? . . . [H]ere you use a generic term which in its most comprehensive signification includes every species of right that man can enjoy other than those the foundation of which rests exclusively in nature and in the law of nature.*¹

It is widely agreed among legal academics and judges that originalism cannot explain or justify the United States Supreme Court's 1967 ruling in *Loving v. Virginia*,² which held that laws banning racial intermarriage were unconstitutional. Originalism is a theory of constitutional interpretation expounded by Justices Antonin Scalia and Clarence Thomas as well as by former Judge Robert H. Bork and former Attorney General Edwin Meese III. Originalists believe that the constitutional text should be interpreted according to the original meaning of the words used as that meaning would have been unveiled in contemporary dictionaries, grammar books, and other indicia of objective public meaning.³ The critics of originalism, from Richard Posner⁴ to Cass Sunstein⁵ to Jack Balkin⁶ and Michael Klarman,⁷ all say that the alleged inability of originalism to explain *Loving v. Virginia*, which is one of the great human rights triumphs of the last fifty years, is a major blow against the Scalia-Thomas theory of judging. Even the originalist scholar, former Judge Michael McConnell, who has offered an originalist defense of *Brown v. Board of Education*,⁸ falls silent when it comes to defending *Loving v. Virginia* on originalist grounds. McConnell

1. CONG. GLOBE, 39TH CONG., 1st Sess. 477 (1866) (statement of Sen. Willard Saulsbury).

2. 388 U.S. 1 (1967).

3. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990); see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23–41 (1997) (defending textualism over legislative history).

4. RICHARD A. POSNER, *OVERCOMING LAW* 247–249 (1995) (arguing that originalism cannot support the outcome in *Brown v. Board of Education* much less *Loving v. Virginia*).

5. CASS SUNSTEIN, *Debate on Radicals in Robes*, ORIGINALISM: A QUARTER CENTURY OF DEBATE 293 (Steven G. Calabresi ed., 2007) (arguing that Michael McConnell cannot offer an originalist defense of *Loving v. Virginia*).

6. JACK M. BALKIN, *LIVING ORIGINALISM* 228 (2011).

7. Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1919 (1995).

8. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

evidently feels that there are just too many statements in the congressional legislative history from the 1860s and 1870s in support of laws banning racial intermarriage for *Loving v. Virginia* to be defensible on originalist grounds.⁹ McConnell undoubtedly thinks *Loving* is right as a matter of policy and that it ought never to be overruled, but he is unable to say he would have joined the opinion when it was first handed down in 1967.¹⁰

We think the conventional wisdom on originalism and *Loving* is incorrect. In fact, we think that a proper application of Scalia-style originalism and textualism leads rather easily to the conclusion that *Loving* was rightly decided. The mistake Scalia's critics make is that they rely exclusively on the statements made in the legislative history of the Civil Rights Act of 1866 and of the Fourteenth Amendment, which suggest the framers of those Acts did not expect them to legalize racial intermarriage. Scalia-style originalists and textualists, however, should reject the use of any legislative history as a tool in statutory or constitutional interpretation. Originalists believe that it is the original public meaning of the words of a legal text that govern and not the subjective spin put on that text by members of Congress in the legislative history.¹¹ In other words, Scalia-style originalists should not concern themselves with original intent.

In our view, originalists think that lawmaking in a democracy is a public act whereby the American people, their representatives in the two houses of Congress, and the President all agree on a text, and it is that agreed upon text which becomes the law. Isolated comments by representatives and senators involved in the bill drafting process are not law nor are they reliable guides to what is the law. Such comments do not pass the hurdle of bicameralism and presentment set out in Article I, Section 7, and they are often spin that reflects either wishful thinking by those making the statements or possibly even inaccurate personal views about what a prospective law actually means.¹² Finally, judges should look to the plain textual meaning of the law as it is written when

9. *See id.* at 1018.

10. *See id.*

11. BORK, *supra* note 3, at 144.

12. For a non-formalist discussion of statutory interpretation, *see* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

interpreting it in the courts rather than looking to indicia of legislative intent.¹³

The best indicia of original public meaning come from dictionaries and grammar books that are widely in use at the time a law is passed. Newspaper editorials might also be helpful in recovering the objective original public meaning of a newly enacted legal text. Statements by senators and representatives involved in the drafting process, in contrast, will usually be unknown to the general public when a law is passed and will therefore not be part of the original public meaning of the law. Members of the public who want to write their congressmen and lobby them with respect to a law will usually base their correspondence on the legal text under consideration, but they will not typically have read a committee report or isolated random statements in the Congressional Record.

There are exceptional speeches by sponsors of major legislation, which are widely publicized, and one could wonder if such speeches are indicative of original meaning. Arguably, a famous example of such a writing in American history is *The Federalist Papers* which were published when the Constitution was up for ratification in New York State and which may have swayed voters to approve the Constitution. Even these kinds of sponsor speeches or opinion pieces must be greatly discounted by the fact that the voters will often know that the proponents of a law may be willing to lie about what a proposed law means in order to get it enacted into law. For example, when the Equal Rights Amendment was up for ratification in the states, during the 1970s, its proponents tended to minimize its importance while its opponents predicted that it would lead to a parade of horrors. Everyone then living “knew” that if the ERA was ever ratified, its proponents would have promptly claimed that it changed everything while the ERA’s opponents would have said the opposite. Our point here is that even when sponsors’ reassuring, mellifluous words are widely publicized, as with *The Federalist Papers*, this does not mean the sponsors are being honest nor does the public necessarily assume that the sponsors are being honest. Just because a sponsors’ speech or opinion writings are widely available does not suffice to show that those comments accurately captured the original public meaning of a legal text.¹⁴

13. For an excellent discussion of textualism that comports fully with our understanding, see John Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010).

14. See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1348–50 (1998).

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 as revealed in dictionaries. 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 unenacted 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 unenacted intentions or expectations when they made those laws.

Intent is a slippery enough concept when it is applied to one individual but it dissolves into utter meaningless when it is applied to a group of people like the members of Congress who voted for the Civil Rights Act of 1866 and the Fourteenth Amendment. We cannot possibly say what a group so large and so discordant “intended” to legislate, but we can read the texts they enacted into law with a dictionary and a grammar book to discover the original public meaning of those texts. Original public meaning is an objectively verifiable phenomenon that a court can reconstruct. It is a cousin to the reasonable man standard familiar to lawyers from tort law. It is possible to say with a high degree of certainty what the original public meaning of a legal text was, even if the intentions of those who voted for it were variable and contradictory. It may even be the case that a majority of Congress could vote for a law based on a completely inaccurate understanding of what the law meant.

Legislatures often enact conflicting laws as was illustrated for many years when Congress voted simultaneously for funds to support anti-smoking commercials and for funds to provide financial support to tobacco farmers. Why would Congress vote simultaneously for many decades to discourage and to encourage the production of tobacco? The answer is that a swing group of voters in both Houses wanted to please both the anti-smoking lobby and tobacco growers. Both lobbies were powerful and the road to re-election required pleasing them both, so members of Congress went on record both against and for tobacco use.

Unfortunately, this type of behavior occurs in Congress frequently, which is why it is a fool’s errand to look at legislative history to figure out what a legal text means. Members of Congress often vote for a bill and then deny that it means what it says because that way they can curry

favor both with the bill's proponents and with its opponents. This is essentially what happened during Reconstruction. Congress voted to give African Americans equal civil rights with white Americans while denying this meant an end to laws against racial intermarriage and to school segregation.

The flaw with all the writing that has been done to date on originalism and laws against racial intermarriage is that it asks the wrong question. Instead of asking what the Civil Rights Act of 1866 and the Fourteenth Amendment originally *meant* when they were enacted into law, the commentators and Justices have asked what Congress *intended* to do when it enacted those laws. Commentators have then extrapolated from the fact that the Reconstruction framers expected their laws to be consistent with segregation in schools and bans on racial intermarriage to the conclusion that as a matter of original intent Jim Crow segregation was constitutional. We agree with Yale Law Professor Jack Balkin that all the talk about original public expectations is hogwash and that it is the semantic original public meaning of the enacted texts that should govern.¹⁵ Once one correctly applies Scalia-style originalism and textualism to the Fourteenth Amendment, it becomes very easy to see why *Loving v. Virginia* is correct.

We begin our analysis in Part II below by discussing the historical origins of the Civil Rights Act of 1866 and of the Fourteenth Amendment to show how it is that so many commentators have come to the wrong conclusion that anti-miscegenation laws are consistent with the historical meaning of the Fourteenth Amendment. We then turn in Part III to a discussion of the text of the Civil Rights Act of 1866 and of the Fourteenth Amendment to show why laws against racial intermarriage clearly violate the semantic meaning of those enactments using contemporary nineteenth century dictionary definitions. We rely heavily on precisely those dictionaries that would have been most readily available to the American general public in the 1860s. In Part IV, we quote extensively from newspaper editorials discussing the passage of the Civil Rights Act of 1866 to show that our semantic reading of the Act based on contemporary dictionaries was in fact the meaning that was widely held by the public. This discussion reveals a widespread public awareness of the radical nature of the Reconstruction enactments and the difficulty of the social upheaval that might result. Finally, in Part V, we show that two state supreme courts in the 1870's held that anti-

15. BALKIN, *supra* note 6, at 6–7.

miscegenation laws violated the Civil Rights Act of 1866 and the Fourteenth Amendment. We take these decisions to be further proof of the rightness of our reading of the Fourteenth amendment. We do not address the correctness of *Brown v. Board of Education* in this Article because it raises separate and distinct issues that we will address in another article, which is a companion to this Article.¹⁶ We do think that *Brown*, like *Loving v. Virginia*, is correct as a matter of the original public understanding.

II. THE MISTAKEN RELIANCE ON EVIDENCE OF ORIGINAL INTENT

The mistaken reliance on evidence of original intent rather than of original meaning is quite directly the fault of the U.S. Supreme Court. When the Court in 1953 directed re-argument of *Brown v. Board of Education*, the Court asked the parties to brief the following questions:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
 - (a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
 - (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?¹⁷

These questions all focus on what Congress *contemplated* or *did not contemplate*, and on what it *understood* or what it *did not understand*, when it passed the Fourteenth Amendment in the 1860s. This is, however, the wrong set of questions to ask! What matters is not what

16. Steven G. Calabresi & Michael Perl, *Originalism and Brown v. Board of Education* (forthcoming 2012) (unpublished edited senior research manuscript) (on file with authors).

17. *Brown v. Bd. of Educ.*, 345 U.S. 970, 972 (1953).

Congress thought it was doing when it passed the Fourteenth Amendment but rather what did the words of the Amendment, read in light of its predecessor the Civil Rights Act of 1866, actually mean.

The U.S. Supreme Court in 1953 asked for briefing on a set of questions that might interest a devotee of a jurisprudence of original *intent* but not a devotee of a jurisprudence of original *meaning*.¹⁸ Instead of asking for briefs on the question of what members of Congress thought they were doing, the Supreme Court ought to have instead asked for briefs on what Congress actually did.

Having asked the wrong questions, the Supreme Court quite predictably got a useless set of answers as the opinion in *Brown v. Board of Education* made clear. Chief Justice Warren pronounced that the judgment of history was “inconclusive” because

[t]he most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among “all persons born or naturalized in the United States.” Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.¹⁹

Therefore, Chief Justice Warren concluded that

[i]n approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.²⁰

In other words, the U.S. Supreme Court asked for briefs psychoanalyzing the group intent of the Congress that adopted the Fourteenth Amendment, and when the Court got back the predictable answer that different members of Congress intended different things, it threw up its hands in despair and decided the case based on current

18. Compare RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2nd ed. 1997) (arguing for a jurisprudence of original intent), with BORK, *supra* note 3 (arguing for a jurisprudence of original meaning).

19. *Id.* at 489.

20. *Id.* at 492–93.

public policy needs. As Alexander Bickel said in another context, “No answer is what the wrong question begets.”²¹

The Supreme Court should not have asked in 1953 for information on what the Reconstruction Congress contemplated or understood. They should have asked for briefing on what the words of the Civil Rights Act of 1866 and the Fourteenth Amendment originally meant. This is an entirely different question from the one asked by the Court. Three generations of commentators have puzzled over the original intent of the Reconstruction Congress since *Brown v. Board of Education* was handed down in 1954. The question is both unanswerable and irrelevant. Number one, there was no majority intent and, number two, it is the laws that the Reconstruction Congress passed that bind us today and not Congress’s unenacted intentions.

The leading commentators on *Brown v. Board of Education* took their cues from Chief Justice Warren’s opinion and assumed (1) that it was the intentions of the members of the Reconstruction Congress that matter and not the texts they enacted; (2) that the Members of the Reconstruction Congress clearly did not intend to outlaw school segregation or to create a right to racial intermarriage; and (3) that those rights had to therefore be created afresh by the U.S. Supreme Court evolutively interpreting the Fourteenth Amendment and relying on the so-called living Constitution.²² This approach is epitomized in Alexander Bickel’s famous 1955 essay in the *Harvard Law Review* entitled *The Original Understanding and the Segregation Decision*.²³ Because Bickel’s article epitomizes the mistaken focus on original intent over original meaning, we will summarize his argument and the key evidence he relies on in some detail here.

Bickel begins by noting that the briefs and historical appendices filed with the Supreme Court in *Brown* “amounted to the most extensive presentation of historical materials ever made to the Court.”²⁴ Bickel elaborates that “[t]he heart of this mass of evidence is to be found in the

21. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 103 (1962).

22. Among the commentators who took this view on *Brown v. Board of Education* were BERGER, *supra* note 18 (arguing that *Brown* was wrongly decided); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (critiquing the lack of reasoning from principle in *Brown*); see also BALKIN, *supra* note 6 (arguing in 2011 that *Brown v. Board of Education* can only be justified by living, evolutive originalism).

23. Bickel, *supra* note 22.

24. *Id.* at 6.

reported debates of the first session of the 39th Congress,”²⁵ and he adds that “the debates of the Congress which submitted, and the journals and documents of the legislatures which ratified, the amendment provide the most direct and unimpeachable indication of original purpose and understanding—to the extent, of course, that any such indication is to be found.”²⁶ Bickel’s article goes on to rely *exclusively* on the legislative history of the Civil Rights Act of 1866 and of the Fourteenth Amendment. Bickel never analyzes any of the legal texts that emerged from Reconstruction nor did he even discuss them. Bickel never cites even a single dictionary or grammar book nor does he make any other effort whatsoever to recapture the original public meaning of the words of the laws that the Reconstruction Congress passed.

Thus, the entire body of evidence Bickel relies on in his sixty-five-page *Harvard Law Review* essay on *Brown* is completely irrelevant to a Scalia-style formalist, textualist, or originalist. The only possible use that such an originalist could make of Bickel’s sources would be to use them as aids to confirm some generally understood, socially held, objective public meaning. Bickel does not use his sources in that way, however, and he instead treats isolated snippets of legislative history reflecting the comments of one member of Congress in floor debates as if they were the law. Bickel’s essay is perhaps interesting historically, but it has essentially nothing to do with law. Who cares what the Members of the 39th Congress *thought* they were doing? What we care about is what they actually *did*.

The debates in the 39th Congress were triggered by the North’s reaction to the passage of laws in many southern states oppressing the newly freed African American citizens in the South and to the election by Southern voters of important ex-Confederate officials to high public offices. The laws taking away the rights of African American freedmen were called “The Black Codes,” and Northerners believed these laws were meant to relegate the freedmen to second-class social status by making them not much better off than when they were slaves.

The Black Codes were seen as a de facto nullification by the South of the emancipation of the slaves, and they were seen in the North as an effort by the South to reverse in practice its military loss in the Civil War. The Black Codes

25. *Id.*

26. *Id.* at 6–7.

perpetuated or created many discriminations in the criminal law by applying unequal penalties to Negroes for recognized offenses and by specifying offences for Negroes only. Laws which prohibited Negroes from keeping weapons or from selling liquor were typical of the latter. Examples of discriminatory penalties were the laws which made it a capital offence for a Negro to rape a white woman, or to assault a white woman with intent to rape In addition to the discriminations of the criminal laws, post-war black codes hedged in the Negroes with a series of restraints on their business dealings of even the simplest form. Though in many states the Negro could acquire property, Mississippi put sharp limitations on that right. But most restrictive were the provisions concerning contracts for personal service. Many statutes called for specific enforcement of labor contracts against freedmen, with provisions to facilitate capture should a freedman try to escape. Vagrancy laws made it a misdemeanor for a Negro to be without a long-term contract of employment; conviction was followed by a fine, payable by a white man who could then set the criminal to work for him until the benefactor had been completely reimbursed for his generosity.²⁷

The Black Codes thus denied the freedmen liberty of contract and greatly impaired their right to hold property. The Codes forced free African Americans into labor relationships, which were scarcely different from slavery.

The 39th Congress responded to the Black Codes by drafting the Civil Rights Act of 1866, the first major civil rights law ever to be passed by the U.S. Congress. On January 29, 1866, Senator Lyman Trumbull of Illinois brought up a Civil Rights Bill in the U.S. Senate. Section 1 of Senator Trumbull's bill provided as follows:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; that there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants 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

27. John P. Frank and Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L. Q. 421, 445–446. See generally PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 301–10 (5th ed. 2006) (summarizing historical origins of the Fourteenth Amendment).

States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding.²⁸

Section 1 of Senator Trumbull's bill thus overturned *Dred Scott v. Sandford*, which held that free African Americans were not citizens of the United States, and it established complete equality as to all civil rights among the white and African races. Section 2 of Senator Trumbull's bill provided for criminal penalties, including imprisonment of up to one year in jail, for any person who under color of law deprived a citizen of these fundamental civil rights.

There ensued in the Senate, which passed Senator Trumbull's bill verbatim, and then later in the House of Representatives much debate over the general protection given to civil rights in the abstract at the beginning of Section 1 prior to the specific enumeration of the equal rights to

make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments.²⁹

The very general opening language of Section 1, which came to be called the general civil rights formula, provided "that there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery."³⁰ Critics of the Civil Rights Bill seized on this prefatory language, which they feared was subject to a "latitudinarian" construction,³¹ and complained that it would go beyond overturning the Black Codes and that it would give African Americans the right to vote, the right to serve on juries, the right to attend integrated schools with white children, and the right to racial intermarriage.

28. Civil Rights Act of 1866, 14 Stat. 27 (1866).

29. *Id.*

30. *Id.*

31. BICKEL, *supra* note 21, at 9.

The supporters of the Civil Rights Act of 1866 countered that the bill gave only equal civil rights to African Americans and that it did not confer political rights,³² such as the right to vote or to serve on a jury. Senator William Saulsbury of Delaware, a Democrat, complained:

The question is not what the Senator means, but what is the legitimate meaning and import of the terms employed in the bill What are civil rights? What are the rights which you, I, or any citizen of this country enjoy? . . . [H]ere you use a generic term which in its most comprehensive signification includes every species of right that man can enjoy other than those the foundation of which rests exclusively in nature and in the law of nature.³³

Senator Reverdy Johnson then objected that the Civil Rights Act would ban laws forbidding racial intermarriage, but Senator Trumbull and another supporter of the bill disagreed.³⁴ They claimed laws against racial intermarriage were equal because such laws said that blacks could only marry blacks and whites could only marry whites.³⁵ The Civil Rights Bill passed the Senate in unamended form on February 2 by a vote of thirty-three to twelve.³⁶ The debate on the Bill then moved over to the House of Representatives.³⁷

The debate in the House of Representatives was heated and included objections from a number of speakers that the Bill would require school integration, racial intermarriage, and voting rights for African Americans.³⁸ The Bill's supporters denied this and claimed that the general civil rights proviso at the start of the Bill protected only the rights enumerated at the end of the Bill which included the right

to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment[s]. . . .³⁹

32. CONG. GLOBE, 39TH CONG., 1ST SESS. 476 (1866) (statement of Sen. Lyman Trumbull); BICKEL, *supra* note 21, at 13.

33. CONG. GLOBE, 39TH CONG., 1ST SESS. 477 (1866) (statement of Sen. William Saulsbury).

34. *Id.* at 505–06.

35. *Id.* at 505.

36. *Id.*

37. *Id.* at 606–07.

38. *Id.* at 1121.

39. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

Supporters of the general civil rights proviso thus claimed that it was code for only the specifically enumerated rights and not for anything else.⁴⁰ At one point they even amended the Bill to specifically deny that it conferred a right to vote.⁴¹

Bickel says that “[t]he final expression of Republican misgivings was the most formidable” and most “decisive” because it came from Congressman John A. Bingham, a leader of his party in the House.⁴² Bingham wanted to “strike the [language] at the head of Section [1,] which forbade all ‘discrimination in civil rights [and] immunities’ and to substitute for” the criminal penalty imposed on violators of the bill a right on the part of those discriminated against to file a civil suit for damages.⁴³ Bingham prevailed and the general civil rights language at the head of Section 1 was struck.⁴⁴ Representative James F. Wilson of Iowa, who was managing the Bill in the House, brought the new revised version before the House and made a very important statement. Representative Wilson said:

Mr. Speaker, the amendment which has just been read proposes to strike out the general terms relating to civil rights. *I do not think it materially changes the bill*; but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended.⁴⁵

Representative Wilson added that the specific ban on African American suffrage was no longer needed, and he proceeded to push for a vote in which the House of Representatives overwhelmingly passed the Bill over Representative Bingham’s dissenting vote.⁴⁶ “Two days later the Senate concurred in the House amendments,” and “[t]he President vetoed the bill on March 27.”⁴⁷ President Andrew Johnson, “[i]n discussing section 1, . . . conceded that the only rights safeguarded by it were those enumerated. He did not attack the section on the basis of any alarmist ‘latitudinarian’ construction. His objections were” based on the claim that Congress lacked the constitutional power under Section 2 of

40. CONG. GLOBE, 39TH CONG., 1ST SESS. 1293–95 (1866).

41. *Id.* at 1162.

42. Bickel, *supra* note 22, at 22.

43. *Id.*; CONG. GLOBE, 39TH CONG., 1ST SESS. 1290–93 (1866).

44. CONG. GLOBE, 39TH CONG., 1ST SESS. 1366–67 (1866).

45. *Id.* at 1366 (1866) (emphasis added); *see also* Bickel, *supra* note 22, at 28.

46. Bickel, *supra* note 22, at 28.

47. *Id.*

the Thirteenth Amendment to pass a general civil rights bill.⁴⁸ Since the Thirteenth Amendment banned only slavery and not deprivations of civil rights, President Johnson claimed that Congress's power to enforce the Thirteenth Amendment included only a power to pass federal laws against slavery and not federal laws on the subject of civil rights.⁴⁹

The Senate overrode the President's veto on April 4, 1866.⁵⁰ "There were speeches by Trumbull, Reverdy Johnson, Cowan, and Garrett Davis, Democrat of Kentucky, *who was still maintaining that the bill would abolish antimiscegenation statutes and mark the end of segregation in hotels and railroad cars and churches.*"⁵¹ On April 9, the House overrode the veto.⁵² It marked the very first time in seventy-seven years of American constitutional history that a presidential veto on an important piece of legislation had ever been overridden.

The supporters of Reconstruction feared that the Civil Rights Act of 1866 might be struck down by the federal courts on the ground that Congress had exceeded its power to enforce the Thirteenth Amendment by passing the Act. This was of course the objection to the Act that had been expressed by President Johnson in his veto message. Supporters of Reconstruction were also afraid that a new Congress might be elected with a southern and Copperhead majority and that that new Congress might repeal the Civil Rights Act of 1866. Congress therefore set to work on writing and passing the Fourteenth Amendment to the Constitution. The purpose of the Fourteenth Amendment was at a bare minimum to write the Civil Rights Act of 1866 into the Constitution so that there would be no possibility of it being held unconstitutional or of it being repealed by a later Congress.⁵³

Thaddeus Stevens spoke in favor of the Fourteenth Amendment as follows in a speech to the House of Representatives:

This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a

48. *Id.* at 28–29 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 1680–81 (1866)).

49. CONG. GLOBE, 39TH CONG., 1ST SESS. 1680–81 (1866).

50. Bickel, *supra* note 22, at 29.

51. *Id.* (emphasis added).

52. *Id.*

53. This history of the origins of the Fourteenth Amendment is elaborated in John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877* (1988); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

crime shall punish the black man precisely in the same way. . . .

Whatever law protects the white man shall afford “equal” protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. . . . I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will . . . crush to death the hated freedmen. Some answer, “Your civil rights bill secures the same things.” That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their Copperhead allies obtain the command of Congress it will be repealed. . . . This Amendment once adopted cannot be amended without two-thirds of Congress. That they will hardly get.⁵⁴

There was a widespread consensus that the proposed Fourteenth Amendment constitutionalized the Civil Rights Act of 1866. M. Russell Thayer of Pennsylvania said that “[a]s I understand it, [the Fourteenth Amendment] is but incorporating in the Constitution . . . the principle of the civil rights bill . . . [so that it] shall be forever incorporated.”⁵⁵ Another congressman, John Broomall described the Amendment as “the Civil Rights Act ‘in another shape.’”⁵⁶ Bickel says that “[g]iven the evils represented by the Black Codes, which were foremost in the minds of all men, it must be supposed that [the final] language [of the Fourteenth Amendment] was deemed to protect all the rights specifically enumerated in the Civil Rights Bill.”⁵⁷ Bickel adds that “[i]n this atmosphere, section I became the subject of a stock generalization: it was dismissed as embodying and, in one sense for the Republicans, in another for the Democrats and Conservatives, ‘constitutionalizing’ the Civil Rights Act.”⁵⁸

One question that immediately arises is how did the language of the second sentence of Section 1 of the Fourteenth Amendment incorporate the Civil Rights Act of 1866? That sentence reads:

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

54. BREST ET AL., *supra* note 27, at 308.

55. *Id.* (internal quotation marks omitted).

56. *Id.*

57. Bickel, *supra* note 22, at 57.

58. *Id.* at 58.

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵⁹

The relevant final text of the amended Civil Rights Act of 1866 provided:

[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, and to *full and equal benefit* of all laws and proceedings for the security of person and property, *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁶⁰

The framers of the Fourteenth Amendment believed that the rights “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property” were all “privileges or immunities” of state citizenship which no State could “abridge” (i.e., “shorten” or lessen”) in the making or enforcing of any law.⁶¹ At a bare minimum then, the Fourteenth Amendment’s Privileges or Immunities Clause included the enumerated rights in the Civil Rights Act such as the right to make or enforce contracts. The phrase “privileges or immunities” like the phrase “civil rights,” which was struck from the 1866 Act, might mean a whole lot more than just the rights enumerated in the 1866 Act. But no one doubted that at least the 1866 Act was constitutionalized. Even Raoul Berger, who was to become famous for his narrow interpretation of the Fourteenth Amendment, conceded that the Amendment codified the Civil Rights Act of 1866.⁶²

One opponent of Section 1 of the Fourteenth Amendment, Andrew Jackson Rogers, complained:

This section . . . is no more nor less than an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill. . . .

59. U.S. CONST. amend. XIV, § 1.

60. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (emphasis added).

61. Harrison, *supra* note 53, at 1387, 1402 n.53.

62. BERGER, *supra* note 18.

....

. . . What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities. . . . It will result in a revolution worse than that through which we have just passed.⁶³

Rogers had a valid point. The term “privileges or immunities” was obviously lifted from the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution.⁶⁴ It is clear in that context that privileges and immunities include all civil rights such that one state was obligated to give to all visiting out-of-state citizens the same civil rights, i.e., privileges and immunities, as it gave to its own citizens. States need not give out-of-staters the same political rights to vote in state elections or serve on state juries as are enjoyed by their own citizens, but they must give out-of-state citizens the same civil rights they give their own citizens. The Privileges or Immunities Clause of the Fourteenth Amendment thus resurrected the general guarantee of equal civil rights that had been struck from the Civil Rights Act of 1866! Henceforth, no state could make or enforce any law that abridged the civil rights of citizens of the United States.

Since the first sentence of the Fourteenth Amendment makes it clear that all persons born in the United States were citizens both of the United States *and* of the state wherein they reside it follows ineluctably that both the privileges and immunities of national citizenship and the privileges and immunities of state citizenship are protected.⁶⁵ In fact, the privileges

63. Bickel, *supra* note 22, at 48.

64. U.S. CONST. art. IV, § 2.

65. *But see* The Slaughter-House Cases, 83 U.S. 36 (1872); Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517 (2008). Modern scholarship on the original meaning of the Privileges or Immunities Clause began with John Harrison’s article *Reconstructing the Privileges or Immunities Clause*, *supra* note 53, which argued that the Clause was on an anti-discrimination guarantee and not a fount of substantive due process individual rights. Philip Hamburger reaches the same conclusion in *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011). Akhil Reed Amar and Randy Barnett read the Clause as protecting both against discrimination and as conferring unenumerated individual rights. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (forthcoming 2012);

enumerated in the Civil Rights Act of 1866, like the right to make and enforce contracts, were all common law privileges of *state* citizenship. It follows *a fortiori* that other common law privileges or immunities of state citizenship, like the right to marry, must be protected as well. In fact, since the right to marry is just a subset of the right to make a particular form of contract, the right to marry a person of another race must have been protected by the Civil Rights Act of 1866, even without the Fourteenth Amendment, as we shall argue below.

Alexander Bickel ends his survey of the intentions of the framers of the Fourteenth Amendment by blissfully ignoring the words those framers wrote into law.

The Senate Moderates, led by Trumbull and Fessenden. . . . [Believed the Amendment] covered the right to contract, sue, give evidence in court, and inherit, hold, and dispose of real and personal property; also a right to equal protection in the literal sense of benefiting equally from laws . . . permitting ownership of firearms, and to equality in the penalties and burdens provided by law.⁶⁶

Bickel adds:

Hence one may surmise that the Moderates believed they were guaranteeing a right to equal benefits from state educational systems supported by general tax funds. But there is no evidence whatever showing that for its sponsors the civil rights formula had anything to do with unsegregated public schools; Wilson, its sponsor in the House,

RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 62–65 (2004). Kurt Lash argues in a series of three law review articles, which he is turning into a book, that the Privileges or Immunities Clause protects both against discrimination and enumerated but not unenumerated individual rights. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329 (2011); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010); Kurt T. Lash, *The Constitutional Referendum of 1866: Andrew Johnson and the Original Meaning of the Privileges or Immunities Clause*, GEO. L.J. (forthcoming 2012), available at <http://ssrn.com/abstract=2128822>. Robert Natelson argues in *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009), for the John Harrison and Philip Hamburger interpretation of the Privileges and Immunities Clause of Article IV, Section 2. Our own view of the Privileges or Immunities Clause of the Fourteenth Amendment is that (1) it protects against laws that discriminate on the basis of class or caste and that are not just laws enacted for the good of the whole people; and (2) it protects both enumerated individual rights and unenumerated individual rights that are deeply rooted in history and tradition, subject always to the caveat that the states can override such rights if they pass a just law that is enacted for the general good of the whole people. Our reading grows out of the foundational case of *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

66. Bickel, *supra* note 22, at 56.

specifically disclaimed any such notion. Similarly, it is plain that the Moderates did not intend to confer any right of intermarriage, the right to sit on juries, or the right to vote.⁶⁷

Intend, intend, intend. Professor Bickel's overwhelming focus on what the framers of the Fourteenth Amendment "intended" prohibits him from asking what the words they enacted into law meant in dictionaries in common use in 1866. It is to that legal and non-psychological question we now turn.

III. THE ORIGINAL MEANING OF THE RECONSTRUCTION TEXTS

Section 1 of the Fourteenth Amendment completely transforms American constitutionalism and federalism. In the first sentence of Section 1, all persons born or naturalized in the United States are made citizens both of the United States and of the state wherein they reside.⁶⁸ In the second sentence of Section 1, citizens are protected from caste- or class-creating state laws, and all persons are protected from arbitrary and capricious executive and judicial action and from the failure of state executives and judges to provide the equal protection of those laws already on the books. The exact language of section 1 of the Fourteenth Amendment reads as follows:

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 laws.*⁶⁹

It is impossible to overstate the import of this broad language.

The first sentence of Section 1, like the first sentence of the Civil Rights Act of 1866, overturned the *Dred Scott* opinion and made all persons born in the United States citizens of the United States, including African Americans. By raising African Americans up to the level of full citizenship, Section 1 made it clear that African Americans in the South had the same rights to own guns and engage in free speech as were

67. *Id.*

68. For a discussion of the citizenship clause, see CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED* (1997).

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

enjoyed by the white citizens of whatever southern state they were residing in. The Privileges and Immunities Clause of Article IV obligates the states to give out-of-staters the same privileges and immunities, i.e., civil rights, that it gives to its own citizens. In fact, the reason Chief Justice Roger B. Taney was so eager to claim that free African Americans were not citizens in *Dred Scott*⁷⁰ was to allow the southern states to disarm them and to censor abolitionist speech.⁷¹

The second sentence of Section 1 of the Fourteenth Amendment is the only sentence that is addressed to the “making” and “enforcing” of laws. It provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁷² What are the privileges or immunities of citizens of the United States? It is obvious from the first sentence of Section 1 that citizens of the United States enjoy privileges or immunities of national citizenship and also privileges and immunities of citizenship in the State wherein they reside. We know at a bare minimum that Section 1 of the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866. That means that Section 1 somehow constitutionally protects the rights to

make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment[s]⁷³

How does Section 1 accomplish this goal? It protects the common law rights of state citizenship, which are privileges or immunities that no state can abridge. Section 1 and the history recounted above make it clear that the conclusion in *The Slaughter-House Cases* that the Privileges or Immunities Clause protects only privileges or immunities of *national* citizenship is absurd. If *The Slaughter-House Cases* were right, the Fourteenth Amendment would have failed to accomplish its prime goal. The text of Section 1, and the history recounted so far, make it absolutely clear that Section 1 protects state as well as national privileges or immunities of citizenship.

70. *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1856).

71. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 237–38, 263 (1998).

72. U.S. CONST. amend. XIV, § 1.

73. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

What then did the words “privileges” and “immunities” originally mean in 1868 when the Fourteenth Amendment was ratified? Noah Webster’s 1828 Dictionary of the English Language defined the word “privilege” as follows:

[Fr. from L. *privilegium*; *privus*, separate, private, and *lex*, law; originally a private law, some public act that regarded an individual.]

1. A particular and peculiar benefit or advantage enjoyed by a person, company or society, beyond the common advantages of other citizens. A privilege may be a particular right granted by law or held by custom, or it may be an exemption from some burden to which others are subject. The nobles of Great Britain have the *privilege* of being triable by their peers only. Members of parliament and of our legislatures have the *privilege* of exemption from arrests in certain cases. The powers of a banking company are *privileges* granted by the legislature.

He pleads the legal *privilege* of a Roman. *Kettlewell*.

The *privilege* of birthright was a double portion. *Locke*.

2. Any peculiar benefit or advantage, right or immunity, not common to others of the human race. Thus we speak of national *privileges*, and civil and political *privileges*, which we enjoy above other nations. We have ecclesiastical and religious *privileges* secured to us by our constitutions of government. *Personal privileges* are attached to the person; as those of ambassadors, peers, members of legislatures, &c. *Real privileges* are attached to place; as the *privileges* of the king’s palace in England.

3. Advantage; favor; benefit.

A nation despicable by its weakness, forfeits even the *privilege* of being neutral. *Federalist, Hamilton*.

Writ of privilege, is a writ to deliver a privileged person from custody when arrested in a civil suit. *Blackstone*.⁷⁴

Several things are made clear by this dictionary definition. First, the word “privilege” refers not to the natural and inalienable rights mentioned by Thomas Jefferson in the Declaration of Independence but instead to positive law entitlements of particular individuals. The right to make or enforce contracts or the right to sue are “privileges” but the right to “life, liberty, and the pursuit of happiness” is not. The rights protected

74. 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 43 (Rosalie J. Slater, ed., Found. Am. Christian Educ., 5th ed. 1987) (1828).

by the word “privilege” in Section 1 of the Fourteenth Amendment are *positive* law rights not *natural* law rights.

This same conclusion is also reached when we consider the original public meaning of the word “immunities.” Webster’s 1828 dictionary defines “immunity” as meaning:

[Fr. *immunité*; L. *immunitas*, from *immunis*, free, exempt; *in* and *munus*, charge, office, duty.]

1. Freedom or exemption from obligation. To be exempted from observing the rights or duties of the church, is an *immunity*.
2. Exemption from any charge, duty, office, tax or imposition; a particular privilege; as the *immunities* of the free cities of Germany; the *immunities* of the clergy.
3. Freedom; as an *immunity* from error. *Dryden*.⁷⁵

Once again, the original meaning connotes positive law rights and not natural law rights. The privileges or immunities of federal and of state citizenship are thus to be found in positive law and not in the writings of John Locke or of other natural law philosophers. This is confirmed if we examine the etymology of the words “privilege”⁷⁶ and “immunity.”⁷⁷

What sources would an objective reader of American English have turned to in 1868 to figure out what were the positive law privileges or immunities of state citizenship? The conclusion is inescapable that such a reader would have looked at the body of rights that Article IV, Section 2 calls “privileges and immunities” and that are protected rights of out-of-

75. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 105 (Rosalie J. Slater, ed., Found. Am. Christian Educ., 5th ed. 1987) (1828).

76. See THE BARNHART DICTIONARY OF ETYMOLOGY 841 (Robert K. Barnhart, ed., 1988) [hereinafter BARNHART DICTIONARY] (describing the etymology of “privilege” as follows: “n. 1137 *privilegie* a grant, commission, license, in Peterborough Chronicle; later *privilege* a distinction, power (probably before 1200, in *Ancrene Riwe*), and a special right, advantage, or favor (1340, in *Ayebite of Inwyt*); borrowed from Old French *privilege*, learned borrowing from Latin, and borrowed directly from Latin *privilegium* law applying to one individual, (later) privilege, prerogative (*privus* individual; see PRIVATE + *lex* genitive *leges* law; see LEGAL). It is probable that the early borrowing in Peterborough Chronicle was directly from Latin *privilegium*.”).

77. *Id.* at 510 (describing the etymology of “immunity” as follows: “n. About 1384 *ymmunite* exemption from taxation, service, laws, etc., freedom from prosecution, in the Wycliffe Bible; borrowed probably from Old French *immunite*, and directly from Latin *immunitatem* (nominative *immunitas*) exemption from performing public service or charges, from *immunis* exempt from a service or charge, exempt, free (*im-* not, variant of *in-* before *m* + *munis* performing services; see COMMON); for suffix see -ITY. . .”).

state residents in a state, which may wish to discriminate against such out-of-staters. Article IV, Section 2 allows a state to deny out-of-staters political rights like the right to vote or to serve on a jury, but it does not allow a state to deny out-of-staters the benefit of state common law or of state constitutional or statutory provisions conferring civil rights on state citizens.⁷⁸ Thus, under Article IV, Section 2, the rights “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens”⁷⁹ are all privileges and immunities of state citizenship as to which the states cannot discriminate against out-of-staters. These common-law rights are therefore also Fourteenth Amendment “privileges or immunities,” which no state can “abridge” while “making” or “enforcing” any law. The word “abridge” in 1868 meant:

1. To make shorter; to epitomize; to contract by using fewer words, yet retaining the sense in substance – used or writings. . . .
2. To lessen; to diminish; as to *abridge* labor; to *abridge* power or rights. . . .
3. To deprive; to cut off from; followed by *of*; as to *abridge* one of his rights, or enjoyments. To *abridge from*, is now obsolete or improper.⁸⁰

The Black Codes “abridged” the contractual freedom, or privilege, of African Americans by giving African Americans a lesser and diminished set of contractual freedoms than were enjoyed by white citizens. This understanding of “abridge” is also confirmed when we examine the etymology of the word.⁸¹ This is why the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866 and forever rendered the Black Codes unconstitutional.

The second sentence of Section 1 of the Fourteenth Amendment also includes a Due Process Clause and an Equal Protection Clause that were originally meant to play a subsidiary role relative to the Privileges or Immunities Clause which was all important. The Due Process Clause protected life, liberty, and property from arbitrary and capricious

78. See U.S. CONST. art. IV, § 2.

79. Civil Rights Act of 1866, 14 Stat. 27 (1866).

80. WEBSTER, *supra* note 75.

81. BARNHART DICTIONARY, *supra* note 76, at 4 (describing the etymology of “abridge” as follows: “v. About 1303 *abregen* curtail, lessen, borrowed from Old French *abregier* or *abreger*, from Late Latin *abbreviare* make brief. . . . The sense “to make shorter, condense” appeared about 1384 in the Wycliffe Bible.”).

executive or judicial action, but it was not originally meant to restrain the power of state legislatures to make laws. The Equal Protection Clause forbade state executives from giving white Americans the *protection* of laws against violence while denying “equal *protection*” to African Americans.⁸² The noun in the Equal Protection Clause is *protection* not equal, and it is the *protection* of the laws that the Clause is all about.

After eviscerating the Privileges or Immunities Clause in *The Slaughter-House Cases*, the Supreme Court settled on the Due Process Clause of the Fourteenth Amendment as the Clause that substantively protected individual rights from state legislative infringement, and it located the Fourteenth Amendment’s anti-discrimination command in the Equal Protection Clause.⁸³ None of this makes the least bit of sense as an original matter,⁸⁴ but the expansive mistaken meanings of the Due Process and Equal Protection Clauses effectively undo much of the damage caused by the evisceration of the Privileges or Immunities Clause in *The Slaughter-House Cases*. We only mention this history here because we are trying to offer an originalist defense of *Loving v. Virginia* and doing that requires that we apply the Constitution before *The Slaughter-House Cases* mangled it.⁸⁵

So is the right to marry a privilege or immunity of state citizenship as to which the states could not constitutionally discriminate in 1868? The answer is unquestionably yes. State common law rights in 1868 included liberties of contract, rights to hold property, rights to sue for torts, rights to testify in court, and rights to inherit among many other rights. The right to marry would surely have been thought to be a fundamental and longstanding common law right in 1868.

One way to think about this question is to ask about it in the context of the Privileges and Immunities Clause of Article IV, Section 2. Suppose a state allowed its citizens to marry their second cousins but not their first cousins or their siblings. Could such a state have denied an out-

82. U.S. CONST. amend. XIV, § 1.

83. The Equal Protection Clause was transformed from a guarantee that all classes would be equally protected by state executive officials and by the common law as enforced by state courts into an additional guarantee that state legislature would make only equal laws.

84. The modern Supreme Court’s construction of the Fourteenth Amendment’s Due Process Clause wrongly implies that a clause about process has a substantive component. The Court’s construction of the Equal Protection Clause overlooks the fact that the noun in the Clause is “protection” and not “equal” and that the Clause is therefore addressed to inequalities in the administration of the law rather than in the making of it.

85. For an apt discussion of *Slaughterhouse’s* mangling of Section 1 of the Fourteenth Amendment, see BLACK, *supra* note 68.

of-stater resident in the state the right to marry his second cousin? The answer would be certainly not! The right to marry would have been viewed as being a privilege and immunity of state citizenship as to which no discrimination against out-of-staters would have been allowed.

Similarly, the right to marry, which was the subject of *Loving v. Virginia*, would have been described in 1868 as being a privilege or immunity that the Fourteenth Amendment protected from abridgement. Could a state constitutionally, after 1868, have a Black Marriage Code and a White Marriage Code without being guilty of abridging the privileges or immunities of citizens of the United States? The answer is clearly “no” even though almost no-one realized it at the time. The ban on racial intermarriage limited the contractual freedom of African Americans in a way related to the way in which the Black Codes limited the contractual and common law rights of African Americans. Just as the plain language of the Fourteenth Amendment banned the Black Codes so too did it ban a racial marriage code.

The legislative history of the Fourteenth Amendment does suggest that some of the framers of the Amendment may have understood the Article IV, Section 2 Privileges and Immunities Clause to be confined to only the protection of *fundamental* rights and that they may also have thought that fundamental rights could be trumped where there was a *compelling governmental interest*. Many of the Fourteenth Amendment framers, when asked what the phrase “privileges or immunities” meant referred to the definition of that phrase given in Justice Bushrod Washington’s rambling opinion in *Corfield v. Coryell*.⁸⁶ Justice Washington said in *Corfield*:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints

86. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

as the government may justly prescribe for the general good of the whole.⁸⁷

Is the right to marry a fundamental right which, in Justice Washington's words has "at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign?"⁸⁸ The answer is obviously yes. The right to marry is clearly a fundamental right or, as we would say today, it is a right that is deeply rooted in history and tradition.⁸⁹

A closer question may be raised if we ask whether the right to racial intermarriage is "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."⁹⁰ We do think some restrictions on the right to marry are "just" and are for "the general good of the whole" which is why we have incest laws and polygamy laws, which do after all limit the right to marry. Is a law that forbids racial intermarriage a "just" law enacted for "the general good of the whole" against the backdrop of a constitutional amendment that was billed as ending the nation's racial caste system? It is hard to see how the answer to that question could be "yes" given that most systems of caste are kept in place by bans on intermarriage. Obviously, many of the framers of the Fourteenth Amendment thought that the government had a compelling governmental interest in preventing racial intermarriage, but it is just as obvious that it was the ban on racial intermarriage which lay at the bottom of the very racial caste system that the Fourteenth Amendment was written to extirpate.

Recent scholarship by Philip Hamburger has revealed that Justice Washington's opinion in *Corfield* was an activist attempt by a southern judge to limit Article IV, Section 2 privileges and immunities so as to prevent free African Americans in the South from being able to carry guns or to speak freely against slavery.⁹¹ The Reconstruction framers who trotted out *Corfield* in the legislative history of the Fourteenth Amendment may thus have been relying on erroneous dicta in a faulty precedent. There is, moreover, no reason to suppose that the American people generally understood the phrase privileges or immunities in 1868 the way Justice Washington had understood it. To the contrary, most

87. *Id.* at 551–52.

88. *Id.*

89. Calabresi, *supra* note 65, at 1517, 1533–34.

90. *Corfield*, 6 F. Cas. at 551–52.

91. *See* Hamburger, *supra* note 65, at 93–96.

Americans who could read the Constitution would have analogized the Privileges or Immunities Clause of the Fourteenth Amendment to the Privileges and Immunities Clause of Article IV—without Justice Washington’s obscure gloss. The right to marry was a privilege or immunity in 1868 as to which the government could not discriminate on the basis of race. *Loving v. Virginia* was thus rightly decided based on the original meaning of the text of the Fourteenth Amendment.

But suppose we follow Raoul Berger and Alexander Bickel and deny that the phrase “privileges or immunities” was anything more than code for the rights enumerated in the Civil Rights Act of 1868? Suppose we claim against all the evidence of original meaning set forth above that the only fundamental rights as to which racial discrimination is prohibited are the rights “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”⁹² Do laws banning racial intermarriage “abridge” or shorten or lessen the literal right of African Americans and white Americans “to make and enforce contracts?” The answer is obviously yes. If 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 then it is obvious that his ability to make marriage contracts has been abridged. A marriage contract is a contract and just as the Civil Rights Act of 1866 protected the contractual rights of African Americans in the workplace so too did its literal language protect contract rights in family law as well.

Alexander Bickel may have been right that the Framers of the Civil Rights Act of 1866 did not understand that Act to ban anti-miscegenation laws, but maybe the Framers of the Act were simply wrong about what it said or maybe some of them secretly thought the Act banned anti-miscegenation laws but thought it impolitic to say so publically. After the general civil rights language was amended out of the 1866 Act, Rep. Wilson said: Mr. Speaker, the amendment which has just been read proposes to strike out the general terms relating to civil rights. *I do not think it materially changes the bill . . .*⁹³

Let us return to the language of the Civil Rights Act of 1866, this time armed with dictionaries, and ask whether laws against racial

92. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 18 U.S.C. § 242 (2012) and 42 U.S.C. §§ 1981-1982 (2000)).

93. CONG. GLOBE, 39TH CONG., 1ST SESS. 1366 (1866) (emphasis added).

intermarriage violated not only the Fourteenth Amendment but also the Civil Rights Act of 1866 as well.

The full and final text of the Civil Rights Act of 1866 is reproduced below with critical language highlighted in italics. The Act says:

April 9, 1866

An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, *shall have the same right*, in every State and Territory in the United States, *to make and enforce contracts*, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to *full and equal benefit* of all laws and proceedings for the security of person and property, *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.⁹⁴

To summarize succinctly, the Act says that “citizens, of every race and color . . . *shall have the same right*, in every State and Territory in the United States, *to make and enforce contracts* . . . and to *full and equal benefit* of all laws and proceedings for the security of person and

94. Civil Rights Act of 1866, §§ 1-2 (emphasis added) (italics omitted).

property, *as is enjoyed by white citizens.*⁹⁵ Let us repeat, again, for emphasis what we just said: Citizens of every race and color shall have the same right to make contracts as is enjoyed by white citizens. If a white citizen can contract to marry another white citizen, then it follows *a fortiori* that citizens of every race and color “shall have the same right.”⁹⁶ This may well be a legal outcome that the framers of the 1866 Act did not “intend,” but it is an outcome that they legislated. We do not know or care whether the framers of the Civil Rights Act were fools, knaves, or crafty abolitionists. All we know is what the Act says.

Consider the dictionary definitions of such key words in the 1866 Act as “same,” “full,” and “equal.” The original public meaning of these words all supports our conclusion that bans on racial intermarriage violated the Civil Rights Act of 1866.

A. Same

The word “same” today means an equality or exact likeness of characteristics.⁹⁷ An examination of multiple dictionaries resources from 1828 to 1866 shows not only that in 1866 the word “same” was understood to mean precisely what it means today but also that the meaning of the word had remained consistent in the nearly four decades leading up to the passage of the Civil Rights Act. Noah Webster’s authoritative 1828 *Dictionary of the English Language* defines the term “same” as meaning: “1. Identical; not different or other. . . . 2. Of the identical kind or species, though not the specific thing. . . . 3. That was mentioned before. . . . 4. Equal; exactly similar.”⁹⁸ These definitions are remarkably consistent with the current understanding of the word “same,” though they are more than a century old. Same means “identical,” “equal,” or “exactly similar.”⁹⁹ African Americans must have the identical right to enter into marriage contracts as is enjoyed by white citizens. If a white citizen could contract to marry a white citizen, then according to the plain words of the Civil Rights Act of 1866 African Americans must have the identical right.

95. *Id.* (emphasis added).

96. *Id.*

97. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY, DELUXE 1602 (2d ed. 1983).

98. WEBSTER, *supra* note 75.

99. *Id.*

The authority of Noah Webster's dictionary in the nineteenth century is beyond question.¹⁰⁰ While more could usefully be written about the history of dictionaries and their use, it is clear that in the field of American English, Webster's dictionary is dominant and has been since the first edition in 1828.¹⁰¹ Indeed, Webster's dictionary remains in widespread use even today. Webster's first dictionary, the 1828 edition we have cited above, was published in two volumes containing 70,000 words, and it included 40,000 more definitions than had ever been published before in an English dictionary.¹⁰² Subsequent editions followed in 1840, and after Webster's death in 1843, another edition was published in 1864.¹⁰³ Webster's 1828 dictionary was an incredible achievement, and one that took twenty years to finish.¹⁰⁴ Webster had already established a reputation as an author of grammar and spelling readers—his *Grammatical Institute of the English Language*, colloquially known as Webster's Spelling Book, was estimated to have sold over sixty-two million copies by 1889.¹⁰⁵

One concern that a reader might have with our reliance here on Webster's 1828 dictionary is the possibility of an evolution in the meaning of the language over time. The forty year passage of time from the publication of Webster's first dictionary in 1828 to the time of Reconstruction in 1868 is cause enough for concern, but combined with the social upheaval of the Civil War, it might not be a surprise to find that definitions of key terms changed between 1828 and 1868. But the evidence does not bear out this possibility. Webster's 1840 dictionary offers the exact same definition of same as did his 1828 dictionary: "identical, not different or other."¹⁰⁶ Finally, Webster's 1865 dictionary also defines "same" as: "1. Not different or other; identical. 2. Of like kind, species, sort, dimensions, or the like; not differing in character or in the quality or qualities compared; corresponding; not discordant; similar; like."¹⁰⁷ Clearly, the definition of the word "same" did not change in meaning from 1828 to 1865, and it is not different at all from the

100. HISTORY OF THE DICTIONARY (Christopher Wortzenspeigel ed., 2011)

101. *Id.*

102. Joshua Lawrence Eason, *Dictionary-Making in the English Language*, 5 PEABODY J. EDUC., 347, 352 (1928).

103. *Id.*

104. *Id.*

105. *Id.* at 351.

106. NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE (19th ed. 1840).

107. NOAH WEBSTER ET AL., A DICTIONARY OF THE ENGLISH LANGUAGE (1865).

definition of the word “same” today. The etymology of the word “same” suggests as well that its meaning has been constant for centuries.¹⁰⁸

It follows that items described in 1866 as being the “same” were expected to be identical, and not different in character or quality. In 1866, to say that two groups of people had “the same right” was understood to have meant identical, not different, and equivalent rights. The usage of the phrase “the same right” in the Civil Rights Act of 1866 thus recognizes no difference whatsoever between the contractual rights afforded to citizens of every race and color and white citizens. If a white citizen could enter into a marriage contract with another white citizen in 1866, then so could citizens of all other races and colors.

B. Full

The second operative phrase in the Civil Rights Act of 1866, “full and equal benefit” appears in the following language: “citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, . . . and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”¹⁰⁹ One key question is what do the words “full” and “equal” mean here as a matter of original public meaning in 1866. Webster’s authoritative 1828 dictionary defines the word “full” as meaning:

1. Replete; having within its limits all that it can contain; as a vessel full of liquor.
2. Abounding with; having a large quantity or abundance; as a house full of furniture; life is full of cares and perplexities.
3. Supplied; not vacant. . . .
4. Plump; fat; as a full body.
5. Saturated; sated. . . .
6. Crowded, with regard to the imagination or memory. . . .
7. Large; entire; not partial; that fills; as a full meal.
8. Complete; entire; not defective or partial; as the full accomplishment of a prophecy.
- 9.

108. Barnhart describes the etymology of “same” as follows:

adj. Probably about 1200, in *The Ormulum*; probably abstracted from the adverbial use in Old English *swā same* the same as, likewise, in part by influence of Scandinavian use (compare Old Icelandic *samr, same, sama* same); cognate with Old Saxon *so sama* the same, Old High German and Gothic *sama* same, from Proto-Germanic *samōn*. Cognates outside Germanic include Old Irish *samail* likeness, Latin *similis* like, *simul* together, at the same time, Greek *homós* same, *heís, hén* one, *háma* together, Lithuanian *sam-, sa-* with, Old Slavic *so-* with, *samŭ* one, and Sanskrit *samā-s* level, equal, same, *-samā-m* together, from Indo-European *sem-/som-/sm-* (Pok.902).

BARNHART DICTIONARY, *supra* note 76, at 954.

109. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphasis added) (current version at 18 U.S.C. § 242 (2012) and 42 U.S.C. §§ 1981–1982).

Complete; entire; without abatement. . . . 10. Containing the whole matter; expressing the whole; as a *full* narration or description. 11. Strong; not faint or attenuated; loud; clear; distinct; as a *full* voice or sound. 12. Mature; perfect; as a person of *full* age. 13. Entire; complete; denoting the completion of a sentence; as a *full* stop or point. 14. Spread to view in all dimensions; as a head drawn with a *full* face. . . . 15. Exhibiting the whole disk or surface illuminated; as the *full* moon. 16. Abundant; plenteous; sufficient. We have a *full* supply of provisions for the year. 17. Adequate; equal; as a *full* compensation or reward for labor. 18. Well fed. 19. Well supplied or furnished; abounding. 20. Copious; ample. The speaker or the writer was *full* upon that point.¹¹⁰

All of these definitions suggest that the word “full” had the exact same public meaning in 1828 that it does today. For citizens of every race and color to have the “full and equal benefit of all laws and proceedings” as was enjoyed by white citizens would require that they have exactly the same rights. It would require that if white citizens could enter into marriage contracts with white citizens then citizens of every race and color must also have the same contractual right.

As with the word “same,” subsequent dictionary definitions of “full” suggest that the meaning of the word did not change between 1828 and 1866. An 1840 dictionary thus defined the term “full” as: “*a.* having all it can contain, satisfied. *n.* complete measure, or state. *ad.* fully, quite, without abatement.”¹¹¹ An 1862 dictionary offered a similar lengthy definition of “full” which we have reproduced in the margins.¹¹² All of

110. WEBSTER, *supra* note 75.

111. *Id.*

112. NOAH WEBSTER ET AL., A DICTIONARY OF THE ENGLISH LANGUAGE (1862). The 1862 dictionary defines “full” as:

Adjective: 1. Replete; having within its limits all that it can contain; as, a vessel *full* of liquor. 2. Abounding with; having a large quantity or abundance; as, a house *full* of furniture; life is *full* of cares and perplexities. 3. Supplied; not vacant. 4. Plump; fat; as, a *full* body. 5. Saturated; sated. 6. Crowded, with regard to the imagination or memory. 7. Large; entire; not partial; that fills; as, a *full* meal. 8. Complete; entire; not defective or partial; as, the *full* accomplishment of a prophecy. 9. Complete; entire; without abatement. . . .10 Containing the whole matter; expressing the whole; as, a *full* narration or description. 11. Strong; not faint or attenuated; loud; clear; distinct; as, a *full* voice or sound. 12. Mature; perfect; as, a person of *full* age. 13. Entire; complete; denoting the completion of a sentence; as, a *full* stop or point. 14. Spread to view in all dimensions; as, a head drawn with a *full* face. . . .15. Exhibiting the whole disk or surface illuminated; as, the *full* moon. 16. Abundant; plenteous; sufficient. We have a *full* supply of provisions for the year. 17. Adequate; equal; as, a *full* compensation or reward for labor. 18. Well fed. 19. Well supplied or furnished; abounding. 20. Copious; ample. Noun: 1. Complete

these definitions are consistent with the modern meaning of “full.” Finally, yet another edition of Webster’s, issued in 1864, defined “full” as:

Adjective: 1. Filled up; having within its limits all that it can contain; supplied; not empty or vacant;—said primarily of hollow vessels, and hence, of any thing else as, a cup *full* of water; a house *full* of people. 2. Abundantly furnished or provided; sufficient in quantity, quality, or degree; copious; ample; adequate; as, a *full* meal; a *full* supply; a *full* voice; a *full* compensation. 3. Amply provided or furnished; abounding in; well laden with;—often with *of*; as, a house *full* of furniture, and the like. 4. Not wanting in any essential quality; complete; entire; perfect; adequate; as, a *full* narrative; a person of *full* age; a *full* stop; a *full* face; the *full* moon.¹¹³

In sum, there was absolutely no change whatsoever in the meaning of the word “full” between 1828 and 1866. In fact, the etymology of the word “full” suggests its meaning had been constant for centuries.¹¹⁴

measure; utmost extent. This instrument answers to the *full*. 2. The highest state or degree. 3. The state of satiety; as, fed to the *full*. The *full* of the moon, is the time when it presents to the spectator its whole face illuminated, as it always does when in opposition to the sun. Adverb: 1. Quite, to the same degree; without abatement or diminution. 2. With the whole effect. 3. Exactly. 4. Directly; as, he looked him *full* in the face. It is placed before adjectives and adverbs to heighten or strengthen their signification; as, *full* sad. *Full* is prefix to other words, chiefly participles, to express utmost extent or degree.

113. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Chauncey A. Goodrich & Noah Porter, eds., Mass., G. & C. Merriam Co. 1864). Additional meanings of full in this dictionary included:

5. —*Full and by* (*Naut.*), sailing close-hauled, having all the sails *full*, and lying as near the wind as possible.—*Totten*. 6. *Full band* (*Mus.*), a band in which all the voices and instruments are employed 7. —*Full moon*, the moon with its whole disk illuminated, s when opposite to the sun; also, the time when the moon is *full*. 8. *Full organ* (*Mus.*), an organ in which all or most of the stops are out. Noun: 1. Complete measure; utmost extent; the highest state or degree. Adverb: 1. Quite; to the same degree; without abatement or diminution; with full force or effect; completely; exactly; entirely. 2. *Full* is prefixed to other words, chiefly participles, to express utmost extent or degree; as, *full*-bloomed, *full*-blown, *full*-crammed, *full*-grown, *full*-laden, *full*-stuffed, and others. Such compounds are self-defining. Verb intransitive: 1. To become full or wholly illuminated; as, the moon *fulls* at midnight.

114. Barnhart offers the following etymology of the word “full”:

adj. Old English *full* complete, full (917, in the *Anglo-Saxon Chronical*); cognate with Old Frisian *full*, *fol* full, Old Saxon *full*, Dutch *vol*, Old High German *fol* (modern German *voll*), Old Icelandic *fullr*, and Gothic *fulls*, from Proto-Germanic **fullaz*, earlier **fulnaz*. Outside Germanic cognates are found in Latin *plēnus* full, *plēre* to fill, Greek *plērēs* full, *plērhein* to be full, Albanian *plot* full, Old Irish *lān* full, Old Welsh *laun*, Welsh *llawn*, Armenian *li*, Lithuanian *pilnas*, Old Slavic *plünŭ* and Sanskrit *pūrṇá-s* full, from Indo-European **p̥l̥nós*, root **pelə-* Much of the relationship among the

C. Equal

The Civil Rights Act of 1866 uses the word “full” in tandem with the word “equal” in the following phrase:

[C]itizens, of every race and color . . . *shall have the same right*, in every State and Territory in the United States, *to make and enforce contracts . . . and to full and equal benefit* of all laws and proceedings for the security of person and property, *as is enjoyed by white citizens*.¹¹⁵

The meaning of the word “equal” is particularly important for the purposes of our inquiry. As we will subsequently show, the word “equal” was used frequently in public discourse concerning the Civil Rights Act. Achieving an understanding of the word “equal” is thus necessary to developing an understanding of the original public meaning of the Act.

Noah Webster’s landmark 1828 Dictionary of the English language defines the word “equal” as meaning:

1. Having the same magnitude or dimensions; being of the same bulk or extent; as an *equal* quantity of land; a house of *equal* size; two persons of *equal* bulk; an *equal* line or angle. 2. Having the same value; as two commodities of *equal* price or worth. 3. Having the same qualities or condition; as two men of *equal* rank or excellence; two bodies of *equal* hardness or softness. 4. Having the same degree; as two motions of *equal* velocity. 5. Even; uniform; not variable; as an *equal* temper or mind. . . . 6. Being in just proportion; as, my commendation is not *equal* to his merit. 7. Impartial; neutral; not biased. . . . 8. Indifferent; of the same interest or concern. He may receive them or not, it is *equal* to me. 9. Just; equitable; giving the same or similar rights or advantages. The terms and conditions of the contract are *equal*. 10. Being on the same terms; enjoying the same or similar benefits. . . . 11. Adequate; having competent power, ability or means. The ship is not *equal* to her

cognates can be obtained from the reconstructed Indo-European form **p[̥]nós*, as in Old Welsh and Old Irish, which show the usual Celtic loss of Indo-European *p* that is found independently in Armenian, and also independently in Sanskrit *r* (in *pūrṇá-s*), which represents *l*. The *ll* in the Germanic words is from *-ln-* (compare Lithuanian *pilnas*) and is a continuation of an Indo-European adjective with the *-n* suffix. More immediately of note is that among the so-called West Germanic languages the *o* (as in Old High German *fol*) is represented by Old English *u*.

BARNHART DICTIONARY, *supra* note 76, at 413.

115. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 1 (1866) (emphasis added) (codified as amended at 18 U.S.C. § 242 (2012) and 42 U.S.C. §§ 1981–1982).

antagonist. The army was not *equal* to the contest. We are not *equal* to the undertaking.¹¹⁶

This clearly suggests that equal is a synonym for the word “same” and that “equal rights” are therefore “the same rights.” This understanding persists in the 1840 edition of Webster’s in which the term “equal” was defined as: “Adjective: like in amount or degree, even, just. Noun: one of the same rank or age. Verb transitive or intransitive: to make equal, to be equal.”¹¹⁷ In an 1862 edition of Webster’s, the term equal was defined as:

Adjective: 1. Having the same magnitude or dimensions; being of the same bulk or extent; as, an *equal* quantity of land; a house of *equal* size; two persons of *equal* bulk; an *equal* line or angle. 2. Having the same value; as, two commodities of *equal* price or worth. 3. Having the same qualities or condition; as, two men of *equal* rank of excellence; two bodies of *equal* hardness or softness.¹¹⁸

Again, there is no shift in meaning. Finally, in the 1864 edition of Webster’s, “equal” is defined as: “Adjective: 1. Not disagreeing in quantity, degree, value, or the like; having the same magnitude, dimensions, the same value, the same degree, or the like; neither inferior nor superior, greater nor less, better nor worse; corresponding; alike; as, . . . persons of *equal* stature or talents; commodities of *equal* value.”¹¹⁹

116. NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE, (5th ed., Found. Am. Christian Educ., 1828).

117. NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE ABRIDGED FROM THE AMERICAN DICTIONARY, FOR THE USE OF PRIMARY SCHOOLS AND THE COUNTING HOUSE 151 (N.Y., F.J. Huntington & Co., 19th ed. 1840).

118. WEBSTER ET AL., *supra* note 112. Additional meanings of equal in this dictionary include:

4. Having the same degree; as, two motions of equal velocity. 5. Even; uniform; not variable; as, an equal temper or mind. 6. Being in just proportion; as, my commendation is not equal to his merit. 7. Impartial; neutral; not biased. 8. Indifferent; of the same interest of concern. He may receive them or not, it is equal to me. 9. Just; equitable; giving the same or similar rights or advantages. The terms and conditions of the contract are equal. 10. Being on the same terms; enjoying the same or similar benefits. 1. Adequate; having competent power, ability, or means. The ship is not equal to the contest. We are not equal to the undertaking. Noun: 1. One not inferior or superior to another; having the same or a similar age, rank, station, office, talents, strength, &c. Verb transitive: 1. To make equal; to make one thing of the same quantity, dimensions, or quality as another. 2. To rise to the same state, rank, or estimation with another; to become equal to. Few officers can expect to equal Washington in fame. 3. To be equal to. 4. To make equivalent to; to recompense fully; to answer in full proportion. 5. To be of like excellence or beauty.

119. WEBSTER, *supra* note 113, at 458. Additional definitions of “equal” in this dictionary include:

There is thus no change at all in the meaning of the word “equal” from 1828 to 1866 on down to the present day. Indeed, the etymology of the word “equal” suggests that the meaning of the word has not changed in many centuries.¹²⁰ The “full and equal benefits” promised by the Civil Rights Act of 1866 are quite literally the same, identical benefits as are enjoyed by white citizens. If white citizens could contract to marry another white citizen then citizens of every race and color have the identical, same right.

One question that readers may wonder about at this point is whether *Plessy v. Ferguson*¹²¹ was correctly decided, in 1896, when it upheld a Louisiana law mandating racial segregation in railway cars.¹²² Homer Plessy, who despite being one-eighth African descent was designated as being black by Louisiana law, was arrested for sitting in the whites only car on a train and for refusing to move to the car designated for African

2. Bearing a suitable relation; of just proportion; having competent power, abilities, or means; adequate; fit; as, he is not equal to the task. 3. Evenly balanced; not unduly inclining to either side; dictated or characterized by fairness; unbiased; just; equitable. 4. Of the same interest or concern; indifferent. [They who are not disposed to receive them may let them alone or reject them; it is equal to me.] 5. (Mus.) Intended for voices of one kind only; —said of a composition in performing which the voices are either all male or all female. [Rare] 6. Syn.—Even; equable; uniform; adequate; proportionate; commensurate; fair just; equitable. Noun: 1. One not inferior or superior to another; one having the same or a similar age, rank, station, office, talents, strength, or other quality or condition; an equal quantity. Verb transitive: 1. To be or become equal to; to have the same quantity, or value, or degree, or rank, or the like, with; to be commensurate with. 2. To make equal return to; to recompense fully. 3. To make equal or equal to; to cause to be commensurate with or unsurpassed by; to equalize; hence, to compare or regard as equals.

Id. at 458–59.

120. Barnhart offers the following etymology of “equal”:

adj. About 1390, in Chaucer’s *Canterbury Tales*; borrowed from Latin *aequālis* uniform, identical, equal, from *aequus* level, even, just, of uncertain origin A parallel form *egal* equal, equivalent (obsolete in English since the 1650’s) was widely used in Middle English, first recorded in 1380, in Chaucer’s translation of Boethius’ *De Consolatione Philosophiae*, and borrowed from Old French *egal*, *igal*, from Latin *aequālis*. Its derivative in French *égalité* (earlier borrowed into Middle English, 1380, in Chaucer’s translation of Boethius’ *De Consolatione Philosophiae*, but becoming obsolete by 1650) and thence *égalitare* was used with the suffix *-ian* to form *egalitarian* in English. French *égalité* had also been borrowed into English (Middle English *egalyte*, in Chaucer’s Boethius, 1380), but it, too, became obsolete by 1650, until apparently re-formed by Tennyson, in 1864.

BARNHART DICTIONARY, *supra* note 76, at 337.

121. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

122. *Id.* at 537–38.

Americans.¹²³ Plessy argued the Louisiana law segregating railway cars violated the Fourteenth Amendment's guarantee of equality.¹²⁴ By a vote of seven to one, the Supreme Court held that laws providing for separate but equal public facilities and accommodations for the races were constitutional.¹²⁵ Justice Harlan dissented, powerfully arguing that the Constitution was colorblind and neither knew nor tolerated any systems of caste.¹²⁶

The Louisiana law upheld in *Plessy* was in blatant violation of both the Civil Rights Act of 1866 and of Section 1 of the Fourteenth Amendment. It did not give African Americans the same right to make contracts as was enjoyed by white citizens. Under the Louisiana law, a white citizen could contract to ride in the whites-only railway car, but an African American citizen could not make the same contract. The Louisiana railway car segregation law directly impeded the contractual and economic liberty of African Americans much as the Black Codes had done thirty years before. The Black Codes were overturned by the Civil Rights Act of 1866 and by the Fourteenth Amendment in significant part to ensure that African Americans would have the same liberty of contract as was enjoyed by white citizens. Jim Crow segregation impaired that liberty of contract and was thus blatantly unconstitutional. The *Plessy* majority evidently thought that it was somehow possible for the Fourteenth Amendment to ban the Black Codes while allowing for Jim Crow segregation. This is plainly not the case. Both the Black Codes and Jim Crow limited the liberty of contract of African Americans as compared to white Americans, and they were therefore both unconstitutional for the same reason. There is no "daylight" between the Black Codes and Jim Crow such that the Fourteenth Amendment could somehow ban the one without also banning the other. *Plessy v. Ferguson* was thus wrong on the day it was decided in 1896.

We have now shown that whatever the intent was of the 39th Congress when it enacted the Civil Rights Act of 1866 and the Fourteenth Amendment, the semantic meaning of those enactments clearly forbade both anti-miscegenation laws and Jim Crow segregation. The Reconstruction legislators passed laws that were far more sweeping

123. *Id.* at 538–39.

124. *Id.* at 542.

125. *Id.* at 552.

126. *Id.* at 552–64 (Harlan, J., dissenting).

than many members of Congress may have realized at the time. We now turn to the public discussion of these texts in prominent newspapers in major cities at the time the texts were enacted. This discussion shows that many citizens appreciated the sweeping nature of the enactments in question. The original public meaning of the Reconstruction texts as it is revealed in the newspaper debates is quite consistent with the semantic dictionary meaning we have just discussed in the material above.

IV. PUBLIC PERCEPTION

It is clear to a student of the history of Reconstruction that at the end of the Civil War the nation found itself in the largest societal experiment since the Founding. The rebuilding and integration of the northern and southern states presented gargantuan social, political, and economic challenges. The status of newly freed slaves and their integration into, or the creation of, slave-less societies in the South and elsewhere was just one set of issues presented at the end of the Civil War. The fate of the freed men and women in the South represented a moral challenge to the nation. Reconstruction began hopefully under President Abraham Lincoln only to devolve into President Andrew Johnson's fraught and accommodating treatment of southern states, which led ultimately to the passage of the Fourteenth and Fifteenth Amendments. The proponents of equal rights for the freed slaves began by arguing for equal common law rights, they moved to arguing for equality in civil rights, and they ended Reconstruction favoring equal political rights¹²⁷ and opposing school segregation.¹²⁸ The opponents of equal rights for the freed slaves made their opposition clear first with the passage of the Black Codes and later with the passage of Jim Crow laws. The end result was a gradual (and shamefully slow) broadening of the classes and content of rights available to African Americans. Though it took more than a century to accomplish what should have been done immediately the end of the Civil War, the question we address here is exactly when full equality as to civil rights was mandated by the letter of the law.

The history of Reconstruction shows that there was no consensus about the scope and substance of rights for African Americans in 1865, even among elected Republicans and New England abolitionists.¹²⁹ While the content of the rights properly afforded to freedmen was

127. See U.S. CONST. amend. XV.

128. See McConnell, *supra* note 8, at 1093–1100.

129. See FONER, *supra* note 53.

debated throughout Reconstruction, there was a steady movement between 1865 and 1877 toward greater protection of the rights of African Americans. This is shown most dramatically by the adoption of the Fifteenth Amendment giving African American men the right to vote in 1870 when a mere four years earlier the Congress that had passed the Fourteenth Amendment was opposed to voting rights for African Americans. Indeed, while in 1870 the expansion of suffrage to freedmen was passed with constitutional supermajorities in Congress and the ratifying states, measures to extend the franchise in 1865 were met with procedural hang-ups in Congress and overwhelming disapproval in the popular electorate.¹³⁰ The process of extending equal rights to African Americans began with the common law rights conferred by the Civil Rights Act of 1866, broadened into the conferral of equal civil rights in the Fourteenth Amendment, and culminated with the granting of equal political rights in the Fifteenth Amendment. As Senator Lyman Trumbull explained in defending the Civil Rights Act:

But, sir, the granting of civil rights does not, and never did, in this country carry with it political privileges. A man may be a citizen in this country without a right to vote or without a right to hold office. The right to vote and to hold office in the States depends upon the legislation of the various States. The right to hold certain offices under the federal government depends upon the Constitution of the United States So that the fact of being a citizen does not necessarily qualify a person for an office, nor does it necessarily authorize him to vote. Women are citizens, children are citizens, but they do not exercise the elective franchise by virtue of their citizenship.¹³¹

Thanks to the focus of the Black Codes on limiting the economic freedom of African Americans, the first civil rights guaranteed African Americans were related to freedom of economic opportunity through rights to labor and to make and enforce contracts. In the immediate

130. In December 1865, a popular referendum was held in the District of Columbia which put enfranchisement of the freedmen to a vote. Thirty-five votes were tallied in favor of suffrage, and 6951 were tallied against it. CONG. GLOBE, 39TH CONG., 1ST SESS. 74 app. at 217 (1866); DAVID HERBERT DONALD, CHARLES SUMNER 239–41 (1996); FONER, *supra* note 53, at 240 (citing GEORGES CLEMENCEAU, AMERICAN RECONSTRUCTION 1865–1870, at 63 (1928)); CONSTANCE McLAUGHLIN GREEN, THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITAL 75–77 (1967); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869, at 141–46 (1st ed. 1974); HANS L. TREFOUSSE, BENJAMIN FRANKLIN WADE: RADICAL REPUBLICAN FROM OHIO 263 (1963).

131. Lyman Trumbull in a response to President Johnson's Veto of the Civil Rights Act. Lyman Trumbull (1866) *reprinted in* BOS. DAILY J., Apr. 6, 1866.

months after the end of the Civil War, all eyes were fixed on economic freedom, which the freedmen viewed as a necessary component of liberty. In the words of radical Republican Benjamin F. Flanders, the freedmen were bedeviled by the fact that Democrats devoted “[t]heir whole thought and time . . . to plans for getting things back as near to slavery as possible.”¹³² The earliest fights over civil rights thus focused on the interrelated rights to labor, freedom of movement, and freedom of contract, as unsympathetic state and local governments enacted limitations on the forms of employment available to freedmen and strict penalties for crimes like vagrancy.¹³³ These laws, the earliest of the Black Codes, virtually banned African Americans from working as anything but farmers and servants.¹³⁴ Some of the Black Codes provided for sweeping punishments for those who violated them, which could then be used to return convicted offenders to a state of servitude.¹³⁵ An example can be found in a code enacted in 1865 by the state of Alabama, which defined vagrants as including “a stubborn or refractory servant; a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause” and provided that the punishment for vagrancy should not exceed “hard labor, either in or out of [a poor-house or house of correction], the use of chain-gangs, putting in stocks . . .”¹³⁶ Under the Black Codes, families were split apart (as had happened under slavery) because parents were deemed incapable of caring for their children. The children in these cases would then be bound to work as unpaid apprentices sometimes for their white former slave owners without the consent of the youth’s parents.¹³⁷

The actions by southern legislatures to reinvent slavery as a legal institution with the Black Codes led directly to the text of the Civil Rights Act of 1866. We see in the text of the Act a direct response to the challenges posed by the Black Codes. The Civil Rights Act’s guarantee to African Americans of “the same right[s] . . . as is enjoyed by white citizens” “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey . . . property”

132. FONER, *supra* note 53, at 199 (quoting Letter from Benjamin F. Flanders to Henry C. Warmoth, (Nov. 23, 1865), in WARMOTH PAPERS).

133. *Id.* at 198–203.

134. *Id.* at 200.

135. ALABAMA BLACK CODES, NO. 112 (transcribed from microfiche), *available at* <http://home.gwu.edu/~jjhawkin/BlackCodes/BlackCodes.htm>.

136. *Id.*

137. FONER, *supra* note 53, at 201.

enshrines in federal law the exact civil rights that southern legislatures associated with economic freedom and attempted to abridge in order to reintroduce a form of de facto slavery.¹³⁸ The Civil Rights Act's provision that all citizens "shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding"¹³⁹ can be understood as a rebuke to southern courts that imposed penalties aimed at condemning freedmen to involuntary servitude and uncompensated menial labor for violations of the Black Codes. Finally, the Civil Rights Act of 1866's provision "[t]hat the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act"¹⁴⁰ extended the protection of federal courts as a haven from the bias of southern judges and juries. Though limited in scope to civil rights involving economic opportunity, the Civil Rights Act of 1866 was clearly understood to be a rebuke to the attempts of southern legislatures to reinstate slavery through a patchwork of labor and vagrancy laws.

The original public meaning of the Civil Rights Act of 1866 has been the subject of dispute. Dictionary definitions, as we have seen, compel the conclusion that anti-miscegenation laws violated the Act. The objective meaning of the words in the Act being clear, we turn now to evidence that the general public understood the Act as having the meaning that dictionary definitions suggest. To establish this, we look at editorials about the Act published in the leading newspapers of the time.

Newspaper editorials played a key role in the public debates over the Act during the time it was under consideration by Congress. We look here at editorials in the most widely circulated newspapers in the five most populous American cities at that time: Baltimore, Boston, New York, Philadelphia, and Saint Louis.¹⁴¹ We find that, although there was disagreement as to whether the Civil Rights Act of 1866 was a good idea as a matter of public policy, the interpretation of the Act as conferring

138. Civil Rights Act of 1866, 14 Stat. 27, § 1 (1866).

139. *Id.*

140. *Id.* § 3.

141. Baltimore had a population of 212,000 in 1860 and 267,000 in 1870. Boston had a population of 178,000 in 1860 and 251,000 in 1870. New York had a population of 175,000 in 1860 and 1,478,000 in 1870. Philadelphia had a population of 566,000 in 1860 and 674,000 in 1870. Saint Louis had a population of 161,000 in 1860 and 311,000 in 1870. B.R. MITCHELL, INTERNATIONAL HISTORICAL STATISTICS: THE AMERICAS 1750–2005, at 46–48 (6th ed. 2007).

the same common law civil rights on all citizens without regard to race was broadly accepted across the country. We look at statements by both the proponents and the opponents of the Act and find that both groups thought the Act mandated equality of common law civil rights.

The earliest press coverage of the Civil Rights Bill focused on its use of terms like “the same right,” “full and equal benefit,” and “there shall be no discrimination”—terms which we have just shown suggest anti-miscegenation laws were banned by the Act. These editorials, published in January of 1866, show that the public debate over the Civil Rights Act of 1866 began with a full realization of the fact that the law was an equalizing measure that sought the exact same rights for all citizens of the United States. Thus, the *Philadelphia Inquirer* describe the content of the Act as follows on January 4, 1866:

The [civil rights] bill is of a permanent character and applicable to all parts of the United States. It declares that the inhabitants of every race and color, without regard to former slavery, shall have the same right to make and inforce contracts, sue, be parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains and penalties, and none other, any law, statute, regulation or custom to the contrary notwithstanding.

Other provisions of the bill make it a criminal offense for any person under color of law or custom to deprive another of his civil rights and immunities, give the United States Courts exclusive jurisdiction of the cases of all persons thus discriminated against, and of all offenses committed against the provisions of the act; make it the duty of the judicial authorities of the United States, aided, if necessary, by the military forces, to execute the law and provide all the machinery for making the bill effective.

Nearly all the provisions of the old fugitive slave act are incorporated into this bill, and the statute originally devised to keep in slavery is now reversed to secure their freedom.¹⁴²

The general public in New York and Philadelphia was thus informed of the content and language of the Act.¹⁴³ The need for the Civil Rights

142. *Senator Trumbull's Bill*, PHILADELPHIA INQUIRER, Jan. 5, 1866; see also *The Freedmen's Bureau and the Protection of Civil Rights*, N.Y. TRIBUNE, Jan. 5, 1866.

143. See *The Bill to Protect All Persons in their Civil Rights*, PHILADELPHIA INQUIRER, Jan. 30, 1866. The *Philadelphia Inquirer* adds on January 30, 1866:

Act of 1866 was explained to readers in the following language from the *New York Tribune* on February 5, 1866:

Mr. Trumbull's two bills—to enlarge the powers of the Freedmen's Bureau, and to protect all the American People in their natural civil rights—are notoriously demanded by and adapted to our existing state of facts. If the laws and usages of the Southern States were just and equal, they would be superfluous. They are needed simply because at the South a Black man, solely *because* he is Black, is denied the common rights of human beings—is treated as having no rights that Whites are bound to respect. The laws of the South, and still more the dominant opinion and spirit of the South, treat the Blacks as brutes rather than men. All this will pass away; but meantime, a good many of the humbler race will be starved or lashed to death, unless Congress shall protect them. This, and nothing more, is what Mr. Trumbull's bills aim to do—what they seem admirably calculated to do; and Congress is not merely justified in passing them—it could not fail to do so without a gross and cruel violation of public faith.¹⁴⁴

Subsequent editorial content in favor of the bill not only concurred on its meaning, but also on its purpose in constructing a freer and fair society for the freedmen in every state. Citizens across the country were aware of the immense discrimination in the South and of the fact that the Black Codes were intended to re-subjugate the African American population. But editorial writers were also aware of racially discriminatory statutes in northern states and in the territories that violated the provisions of the Civil Rights Bill, and editorialists accepted that the bill, if enacted, would nullify these discriminatory measures as well. Remarkably, supporters recognized the necessity of removing these

Mr. Trumbull called up the bill to protect all persons in the enjoyment of their civil rights, and to furnish the means of their vindication. It provides that there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery; but the inhabitants 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 to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains and penalties, and to none other; any law, statute, ordinance, regulation or custom to the contrary notwithstanding. The remainder of the bill prescribes punishments for the violation of the above provision by fine and imprisonment.

Id.

144. *Denunciation of Congress*, N.Y. TRIBUNE, Feb. 5, 1866.

racially discriminatory laws in order to create a more just and cohesive society. These sentiments were best captured in the *North American and United States Gazette* on February 5, 1866, which wrote as follows:

On Friday last the United States Senate passed an act, introduced by Mr. Trumbull, of Illinois, to guarantee civil liberty to all the people of the United States, the importance of which cannot easily be exaggerated. . . . [I]t was so clearly demanded by the present condition of affairs at the south, that various attempts at accomplishing the same purpose have been made this session in both houses of Congress. This one of Mr. Trumbull is thoroughly elaborated, and superior to all the rest of the measures pending The House is devoting its attention to constitutional amendments, two of which it has already passed, while the Senate has passed two statutes intended to apply to evils at the south.

Of these the one now before us is much the most important, although it could hardly be carried into effect without the other, which provides the machinery for the purpose, by extending the operations of the Freedmen's Bureau

The first section of the bill declares to be citizens of the United States all men born in its limits, not subject to any foreign Power, excluding Indians not taxed, and orders that there shall be no discrimination in civil rights or immunities among the inhabitants of any State or territory in the republic on account of race, color or previous condition of slavery, and that all shall have the same right to make and to enforce contracts, to sue, be parties and give evidence, to inherit, purchase, sell, hold, and convey real and personal property, and be entitled to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.

This section states the whole matter at issue at this time, for if these things were guaranteed by the south voluntarily, all trouble would be ended and the reign of harmony prevail everywhere. It is precisely because they are not so guaranteed by the revolted States that the national government is perplexed to know how to deal with the subject. . . . Even in States where partial concessions have been made, codes of laws to regulate the freed men have been passed most barbarous in their character. It is plain, then, that this statute of Senator Trumbull supplements the policy of President Johnson—takes up the work where the conquered rebels stopped short, and carries it through to the end.

[I]t nullifies at one stroke all the whole mass of black codes the rebellious States have been so carefully cooking up since the recovery of their State powers, to keep the black race in hopeless servitude. It recognizes all persons born under our flag to be citizens of the United States, so that for the first time in our history the entire colored race will be, in the eye of the law, people with a birthright of freedom and civil equality before the law. It is not alone in the south where this will be felt. States like Oregon and Indiana, which still maintain black codes, will find them annulled by this act, for as the Constitution guarantees to the citizens of any one State the liberty to go freely into any other State, statutes of exclusion, such as disgrace the codes of Oregon and Indiana, are not less obnoxious to the provisions of this act than the black codes of South Carolina and Mississippi.

We presume that suffrage, being a political and not a civil right, is not included by the words of the bill, within the civil rights granted to all by its first section, although we perceive that some of our cotemporaries suppose so. The section particularizes in detail all the civil rights and immunities intended to be guaranteed, and suffrage is not among them. . . .

Altogether, this is a most important bill, and one destined to work a thorough change in the condition of affairs, if properly enforced, as we cannot doubt it will be. It is thorough and stringent, but not a bit too much so.¹⁴⁵

Again, this editorial is striking in that it recognizes both that the Civil Rights Act of 1866 created full equality of civil rights, although not of political rights, *and* that the Act would lead to changes in the law in Indiana and Oregon in so far as those states discriminated against African Americans. There is no hint here that the states would retain a power to pass Jim Crow laws.

Two days after the publication of this remarkable editorial, the *Boston Daily Journal*, wrote on February 7, 1866:

The passage of the bill shows the noble determination of Congress to provide for the security and rights of the emancipated race, and to watch over their interests in the transition from slavery to freedom amid the prejudices and the resentment of their [unreadable] masters. There has already been a revival of much old pro-slavery legislation in which the freedmen are treated as “vagrants,” but the action of Congress will

145. *The Civil Liberty Bill*, N. AM. & U.S. GAZETTE, Feb. 5, 1866.

convince the Southerners that colored people have recognized rights which white men are “bound to respect.”¹⁴⁶

The *Boston Daily Journal* does not suggest that somehow a category of Jim Crow laws might be allowed whereas the Black Codes were not. Instead, the paper posits a state of either slavery or freedom, and it presumes that the Civil Rights Act of 1866 mandates total freedom as to the specific civil rights the Act protected. Six days after that, the *North American and United States Gazette* wrote on February 12, 1866:

The Civil Rights bill, to which we alluded on its passage by the Senate, is properly connected with this Freedmen’s Bureau bill, and taken together they will undoubtedly work great changes in the rebellious States. They must render nugatory all efforts of the dominant rebel influence to re-impose a pernicious system of caste upon the south and to deprive the freedmen of their civil rights, or of the legal means of defence.¹⁴⁷

Again, the *North American and United States Gazette* did not mention any category of social rights (an important omission that we will discuss later in this Article), as to which there need not be equality between the races, nor did it leave any room for allowance of Jim Crow laws while overturning the Black Codes. Instead, the paper rejected the South’s effort to re-impose a caste system—a system that was ultimately sustained by the ban on racial intermarriage. The next day, the *North American and United States Gazette* wrote:

Our duty is plain enough. We have it imperatively resting on us to protect the freedmen, enforce their civil rights, see them allowed a fair chance for rising in the scale of civilization, break up the legal [unreadable] some of the States are trying to organize under the name of militia to act as patrols and make men slaves again on the old plantations, annul every rebel act of their executives or legislatures, maintain freedom of speech and of the press, the liberty of migration, white or black, and in fact, to destroy the reign of terror at the south, upon which alone rests the whole power of the plantation oligarchy. We cannot retreat from this line of policy without peril to the future of the republic. If we act up to it steadily, unflinchingly, heeding no

146. *Senator Sumner’s Speech – Debate on the Indemnification of Legal West Virginia – Speech of Senator Clark of N.H. – The Passage of the Freedman’s Bureau Bill*, BOS. DAILY J., Feb. 7, 1866.

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

resistance or clamor, or influence intended to arrest our progress, a short time will break up the danger entirely.¹⁴⁸

The paper clearly recognized that the South was trying to reinforce a racial caste system to maintain the power of oligarchical plantation interests.

The focus of the Civil Rights Act of 1866 on protecting all civil rights was recognized in the *Boston Daily Journal* on February 23, 1866, when it wrote: “There is no substantial disagreement among loyal men respecting their civil rights. We all agree that they must have the civil rights of any other class of citizens, the rights of person and property, to sue and to be sued—in short equality before the laws.”¹⁴⁹

The *Philadelphia Inquirer* said essentially the same thing on the same day:

There is no substantial disagreement amongst loyal men respecting their civil rights. We all agree that they must have the civil rights of any other class of citizens. The right of person and property, to sue and be sued, and to certify, in short, equality before the law; but whether they shall also have the suffrage is a pending question.¹⁵⁰

Equality of civil rights was taken to be a given—the only area of disagreement was whether to give freed African Americans equal voting rights as well. The *New York Daily Tribune* on February 28, 1866, went further and hinted at some voting rights for African Americans:

We appeal, then, to the Statesmen of the South—and she still has statesmen—to take ground boldly for a comprehensive and complete reconciliation—one that shall include every class in every section—that shall leave no discontents, no heart-burnings, no chances of future insurrections and civil war. ALL RIGHTS FOR ALL—is our platform; which does not imply that every man shall be a voter, but that color shall not be a perpetual disqualification—that every rational youth or man may confidently aspire and hope to become a member of the body politic by faithfully endeavoring to qualify himself therefor.¹⁵¹

The *New York Daily Tribune* called for “all rights for all.” It would be hard to read that as somehow allowing for Jim Crow while disallowing the Black Codes.

148. *The Present Attitude at the South*, N. AM. & U.S. GAZETTE, Feb. 13, 1866.

149. *The Country in No Peril*, BOS. DAILY J., Feb. 23, 1866.

150. *Views of David Dudley Field*, PHILADELPHIA INQUIRER, Feb. 23, 1866.

151. *The Main Question – Partial or Perfect Peace*, N.Y. DAILY TRIBUNE, Feb. 28, 1866.

It is necessary to clarify here that the Black Codes, which were nullified by the Civil Rights Act of 1866, did not all discriminate on their face. Some of the Black Codes were stripped of textual references to race precisely to elude accusations of racial discrimination and because word of the impending passage of the Civil Rights Act of 1866 had spread. Following an uproar in the North over the harsh and explicitly racist Black Codes of Mississippi and South Carolina, subsequent southern legislatures enacting Black Codes omitted explicit textual references to race.¹⁵² But, as famed Reconstruction historian Eric Foner notes in a quotation from Alabama planter and Democrat John W. DuBose, when the Black Codes spoke of vagrants, “the vagrant contemplated was the plantation negro.”¹⁵³

As the winter of 1866 wore on, President Andrew Johnson startled congressional Republicans by vetoing the first Freedman’s Bureau Act.¹⁵⁴ Johnson thought the Act was too socialistic, but he also opposed giving African Americans equal civil rights with white Americans.¹⁵⁵ Senate Republicans tried and failed to overturn the veto.¹⁵⁶ For a while, some congressional Republicans working on passing the Civil Rights Act of 1866 hoped that President Johnson would sign that act because it gave African Americans equal civil rights but it did not give them equal political rights.¹⁵⁷ The *New York Daily Tribune* thus wrote on March 1, 1866:

Whatever else may fail, we trust that Mr. Trumbull’s bill extending legal protection to the civil rights of Blacks, which has already passed the Senate, will soon pass the House also. That it is urgently needed, the action of Southern legislatures abundantly proves. Say, if you can,

152. FONER, *supra* note 53, at 201.

153. FONER, *supra* note 53, at 201 (citing and quoting S. EXEC. DOC. NO. 6, 172–77, 180–83, 222–26, 209–10 (1866); JOHN W. DUBOSE, ALABAMA’S TRAGIC DECADE: TEN YEARS OF ALABAMA, 1865–1874, at 55 (James K. Greer ed., 1940); JOHN T. O’BRIEN, FROM BONDAGE TO CITIZENSHIP: THE RICHMOND BLACK COMMUNITY, 1865–1867, at 304 (1974); MICHAEL WAYNE, THE RESHAPING OF PLANTATION SOCIETY: THE NATCHEZ DISTRICT 1860–80 46–47 (1983); THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 96–100 (1965); William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 35–50 (1976)).

154. FONER, *supra* note 53, at 247.

155. See Andrew Johnson’s Veto of the Second Freedmen’s Bureau Bill, Feb. 19, 1866, reprinted in 1 VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, WITH THE ACTION OF CONGRESS THEREON 289 (Benjamin Perley Poore, comp. 1886); see also Andrew Johnson’s Veto of the Civil Rights Act to the Senate of the United States, Mar. 27, 1866, *id.* at 297.

156. FONER, *supra* note 53, at 249.

157. FONER, *supra* note 53, at 250.

that all the direct and positive testimony of White outrages on the Freedmen is false—and there is more of it than can be cited in support of any fact in history—yet the single fact that *no single Southern Legislature has yet recognized the right of Blacks to the civil rights accorded to every White alien*, suffices to prove the need of such legislation by Congress as Mr. Trumbull’s bill provides. We believe no single Southern State has yet enabled Blacks to sue and be sued, to give testimony and rebut testimony, on equal terms with Whites. All that they do, under the pressure of necessity, is meanly, grudgingly, shabbily done. What can be more absurd than to provide that a Black may testify in cases between Blacks and Whites, but *not* when the parties are both White? If he would ever swear falsely, would he not be likely to do so in a case between a White and a Black? And, if his oath can be taken in cases where he will naturally have a bias, why not in cases where he is likely to have none? . . .

Why is the distinction made but to insult and degrade the Blacks? *The Cincinnati Commercial* has a letter from a correspondent traveling through Mississippi, who states that the barbarous Vagrant law recently passed by the Rebel State Legislature is rigidly enforced, and under its provisions the freed slaves are rapidly being reenslaved. No negro is allowed to buy, rent, or lease any real estate; all minors of any value are taken from their parents and bound out to planters: and every freedman who does not contract for a year’s labor is taken up as a vagrant. The officers of the Freedmen’s Bureau are often not accessible, and the freedmen are kept back, by the distance, from complaining. Finally, as the writer estimates, it would take an army of 20,000 men to compel the planters to do justice to the freedmen.

Mr. Trumbull’s bill takes right hold of this matter, and subjects the oppressors to pains and penalties which they will seldom choose to invoke. We pray that it be passed soon, even though it should cost the Copperheads and impenitent Rebels more than they can well afford to pay for the powder they will expend in celebrating the Veto.¹⁵⁸

On March 9, 1866, the House of Representatives debated a suggestion to amend the bill, striking the general provision concerning civil rights and leaving the specifically enumerated list of rights in Section 1.¹⁵⁹ The general civil rights language, which was eliminated, provided “[t]hat there shall be no discrimination in civil rights or immunities among the

158. *Civil Rights*, N.Y. DAILY TRIB., Mar. 1, 1866.

159. CONG. GLOBE, 39TH CONG., 1ST SESS. 1290–93 (1866).

inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery.”¹⁶⁰

On March 13, the House adopted the version of the bill that did not include the general civil rights language.¹⁶¹ Alexander Bickel’s focus on original intent characterizes this event as an important one in determining the meaning of the bill.¹⁶² However, not only did the bill’s main proponent in the House of Representatives disagree on whether the deletion of the general language changed the meaning of the bill,¹⁶³ the common understanding of the bill seemed to remain the same. Concurrent with and immediately after the revision, the pending Civil Rights Act of 1866 was described as follows by the *New York Herald*.

Writing on April 13, 1866, the paper said:

This is the law. It sweeps away not only all the old slave codes and free negro laws of the Southern States, but the legislation which they have adopted in reference to their black population since the suppression of the rebellion and their submission to the supreme authority of the United States.¹⁶⁴

A sister paper, the *New York Tribune*, said the next day on March 14, 1866:

It is of very great importance that *some* legislation should be perfected for the protection of the freedmen. We believe this bill contains the seeds of a reform sure to be widely beneficial. It is just, moderate, and constitutional; and while other measures are delayed, there is the more urgent need for the speedy enactment of this. Let us do something—let Congress do something—to assure the country that its zeal for justice and equal rights is not to issue in fruitless dissensions.¹⁶⁵

The paper was clearly appealing in the wake of President Johnson’s veto of the first Freedman’s Bureau Bill for some moderate legislation protecting equal civil rights. The *North American and United States Gazette* described the Civil Rights Bill on March 16, 1866, saying: “This bill, against which these Democrats voted, merely guarantees to the freedmen the right to hold property, to collect wages by suit, and to

160. *Id.* at 474–75.

161. *Id.* at 1366–67.

162. BICKEL, *supra* note 21, at 25–26.

163. CONG. GLOBE, 39TH CONG., 1ST SESS., 1366.

164. N.Y. HERALD, Mar. 13, 1866.

165. N.Y. TRIB., Mar. 14, 1866.

protect their liberty by legal proceedings.”¹⁶⁶ The same day the *Boston Daily Journal* said, “The Senate concurred to-day in the amendments of the House to the bill for the protection of all persons in the United States in their civil rights, and for furnishing the means of their vindication.”¹⁶⁷

Supporters of the Civil Rights Act of 1866 described it as giving African Americans equal civil rights with white Americans, thus overturning the Black Codes and Chief Justice Roger Taney’s statements in *Dred Scott v. Sandford* to the effect that free African Americans could never be citizens or the white man’s equal. As the *New York Herald* said on March 17, 1866:

In a word, this bill, in regard to his civil rights, places the black man throughout the United States upon the same footing with the white man, and furnishes ample facilities for the enforcement of the law everywhere by the executive, judicial and military authorities of the United States. This is a tremendous transformation of the old order of things, when it was decreed from the Supreme Court by Chief Justice Taney that the negro, bond or free, was not an American citizen, and had “no rights which the white man was bound to respect.” But this decision we find under the constitution as it was, when these civil disabilities of the African race were accepted or tolerated by all departments of the government as necessary to the protection of the Southern institution of African slavery. With the abolition of this institution, the foundation upon which all of these distinctions rested, they too are all swept away. Under the constitution as it is slavery is abolished and interdicted over all the States and Territories, and Congress has “the power to enforce this article by appropriate legislation.”

But does the power to enforce the freedom of the blacks involve the power to enforce their equal civil rights as citizens over the legislation of the several States? It seems to us that such is the scope of this constitutional amendment. Take away slavery, and as there is no color in the constitution, all men of every color stand upon the same level as citizens of the United States. The enforcement of this amendment, therefore, abolishing slavery, involves the power to enforce this equality in civil rights. Upon this subject it follows that not only are all the old slave codes and black laws of the South abolished, but that the reconstructive legislation of the late rebel States, from Virginia to Texas, embracing one system of laws for the whites, and another for

166. *The Question of Civil Rights*, N. AM. & U.S. GAZETTE, Mar. 16, 1866.

167. *Passage of the Civil Rights and Deficiency Bills*, BOS. DAILY J., Mar. 16, 1866.

the blacks, must all go by the board. Does this interfere with the reconstruction policy of President Johnson? We think not. On the contrary, it relieves him of a vast amount of the troublesome work in the protection of the civil rights of the freedmen.

This Civil Rights bill we regard, accordingly, as a practical, just and beneficent measure, and one which the President will cheerfully approve. It does not touch the question of negro suffrage, and it does not provide for the encouragement of laziness among the Southern blacks and white refugees by inviting them to laugh and grow fat upon the public treasury.¹⁶⁸

This *New York Herald* editorial emphasizes that while the Civil Rights Bill did not give African Americans the right to vote, it did “place[] the black man throughout the United States upon the same footing with the white man”¹⁶⁹ The editorial clearly realizes that the Civil Rights Bill gave African Americans equal civil rights to white Americans.¹⁷⁰ While the editorial does not say the Bill will allow racial intermarriage, it does not recognize a social sphere in which Jim Crow laws might be constitutionally permissible while the Black Codes were not.¹⁷¹

An editorial in a Boston paper two days later would have gone even further and would have given African American men the right to vote. Thus, the *Boston Daily Journal* wrote on March 19, 1866:

[T]he prevalent opinion here is that it [the Civil Rights bill] will be signed and will become a portion of the law of the land. Black men at the South will then “be entitled to the full and equal benefit of all laws for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, and to none other.” The question then arises, if these black men can receive civil rights from Congress, should they not also receive from the same source the political right to suffrage?¹⁷²

The *Baltimore Sun* took note of the contents of the Civil Rights Bill.¹⁷³

168. *The Civil Rights Bill—Its Probable Approval by the President*, N.Y. HERALD, Mar. 17, 1866.

169. *Id.*

170. *Id.*

171. *Id.*

172. *The Civil Rights Bill*, BOS. DAILY J., Mar. 19, 1866.

173. The *Baltimore Sun* noted:

The Senate sponsor of the Civil Rights Bill had been Senator Lyman Trumbull of Illinois, a former friend and competitor of President Abraham Lincoln.¹⁷⁴ Trumbull was a staunch advocate of equal rights for African Americans.¹⁷⁵ It is thus interesting to see what the Illinois newspapers said about the meaning and purpose of the Civil Rights Bill. The *Chicago Tribune*, on March 28, 1866, described it as follows:

The bill itself is a simple enactment to carry into effect the Constitutional Amendment abolishing slavery, as was justly characterized by Senator Trumbull as the most important measure that had been considered by Congress since the adoption of the Amendment. The spirit of the bill is fully expressed in its title—a bill to secure the civil rights of men, who, heretofore being slaves, had no civil rights which anybody was bound to respect. It proposed to confer no political rights. It gave to the freedman that which the laws of all civilized nations give to every man—the right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease sell, hold and convey real and personal property, and full and equal benefit of all laws and proceedings for the security of person and property. The machinery for the bill was operative only in States where these natural and inalienable rights were denied by the rebellious majority of the whites, as for instance in the State of Mississippi, one of whose statutes provides that if any person of African descent residing in that State travels from one county to another without having a pass or certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority. Other provisions of the state prohibit any negro or mulatto from having fire-arms, and one provision of the statute declares that for “exercising the functions of a minister of the Gospel free negroes and mulattoes, on

The civil rights bill, which has passed both houses of Congress and now awaits the action of the President, is intended to secure to all persons of whatever race or color, exclusive of Indians not taxed, “the same right in every State and Territory to make and enforce contracts, to sue, to be sued, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens,” and to make them subject to the same penalties, pains and punishments, and no others, any law, statute, ordinance, regulation or custom to the contrary notwithstanding. It provides that any person who shall cause any citizen to be deprived of either of the rights above recited shall be punished . . .

The Civil Rights Bill, BALT. SUN, Mar. 24, 1866.

174. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848–1865, at 9–11 (Roy P. Basler ed. 2008) (Letter to Jesse Olds Norton, Feb. 16, 1855); *id.* at 355 (Letter to Lyman Trumbull, Feb. 3, 1859).

175. *Senator Trumbull’s Speech on the Veto*, BOS. DAILY J., Apr. 4, 1866.

conviction, may be punished by any number of lashes not exceeding thirty-nine, on the bare back, and shall pay the costs.” Other provisions of the statute of Mississippi prohibit a free negro or mulatto from keeping a house of entertainment, and subject him to trial before two justices of the peace and five slaveholders for violating the provisions of this law. The statutes of South Carolina make it a highly penal offense for any person, white or colored, to teach blacks to read. These and similar laws violating the spirit of Republican institutes abound in all the Southern States. Their purpose is to keep slavery alive until it can be re-established by law. Against this whole slave machinery the Civil Rights bill is battering ram. Without it, or something equally effective, the Constitutional Amendment is a delusion—a mere mouthful of spoken wind—a glittering generality as worthless to enforce the great fist of the people, as was the Declaration of Independence itself to give freedom to all men.¹⁷⁶

This *Chicago Tribune* editorial clearly did not contemplate that a category of Jim Crow laws would survive the Civil Rights Bill’s enactment while the Black Codes would not.

On March 27, President Andrew Johnson, already embroiled in disagreement with his own party regarding his recent veto of the first Freedmen’s Bureau Bill, issued a veto message that rejected the specific terms and underlying principle of the proposed Civil Rights Act of 1866.¹⁷⁷ The two bills taken together had united the radical and moderate wings of the Republican Party behind Senator Trumbull, who was widely viewed as being a Republican moderate and leader in the Senate who had sponsored both pieces of legislation.¹⁷⁸ Support for the Freedman’s Bureau Bill and the Civil Rights Bill had grown steadily as report after report had arrived in Washington, D.C., from the southern states describing pervasive persecution of freedmen, of loyal white citizens, and of northerners then living in the South.¹⁷⁹ In light of the emerging conclusion that the southern states could not refrain from blatant discrimination without federal intervention, Republicans felt secure that President Johnson would sign both the first Freedmen’s Bureau Bill and the Civil Rights Bill.¹⁸⁰ Yet on February 19 of 1866, President Johnson had vetoed the Freedmen’s Bureau Bill, mischaracterizing the agency as

176. *The Second Veto*, CHI. TRIB., Mar. 28, 1866.

177. FONER, *supra* note 53, at 250.

178. *Id.* at 246–47.

179. *Id.* at 246.

180. *Id.* at 247.

a “permanent branch of the public administration” when it was meant to be temporary, and making arguments that foreshadowed his veto of all subsequent Republican Reconstruction legislation, including the Civil Rights Bill.¹⁸¹

Johnson’s veto message regarding the Civil Rights Bill was stunning in its harsh racism, and it permanently alienated Johnson from both the moderate and radical wings of the Republican Party.¹⁸² Johnson’s veto message crystallized the resolve of congressional Republicans to override his veto, and it provoked outrage from both sides in the public debate over the Bill.¹⁸³ The *Chicago Tribune*, on Thursday, March 29, 1866, articulated the oft-made distinction between civil and political rights, and expressed support for granting freedmen the former:

The President asks if they “possess the requisite qualifications to entitle them to all the privileges and immunities of citizens.” This bill does not confer on them the right of suffrage, but only protection to person and property. What “qualifications” does the President think a man ought to possess in order to be entitled to protection. What “qualifications” must a black man have more than a white man needs to enable him to sue for his wages, to own land, to hire a house, to labor for his family, to defend his house, his wife and children? . . .

. . . .

Finally the President leaves wholly out of view the fact that the bill has no operation *per se*, except in so far as the Southern people give it operation and effect, by attempting to pass different laws for the blacks over those that govern the whites. . . . [I]t only begins to operate when the Southern whites begin to oppress . . . and it ceases altogether when oppression ceases. The author of the veto of such a bill will go down in history side by side with Taney and John Tyler, if he does not rise to an infamy still more conspicuous.¹⁸⁴

181. See Andrew Johnson’s Veto of the Second Freedmen’s Bureau Bill (Feb. 19, 1866), 1 VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, WITH THE ACTION OF CONGRESS THEREON 289 (Benjamin Perley Poore, comp. 1886); see also President Andrew Johnson’s Veto of the Civil Rights Act to the Senate of the United States (Mar. 27, 1866), available at http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf.

182. *The Second Veto*, CHI. TRIB., Mar. 28, 1866; President Andrew Johnson’s Veto of the Civil Rights Act to the Senate of the United States (Mar. 27, 1866), available at http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf.

183. *Senator Sherman and the President’s Veto*, N.Y. HERALD, Mar. 31, 1866; *How the President’s Veto was Received*, N.Y. TRIB., Mar. 31, 1866.

184. *The Veto Message*, CHI. TRIB., Mar. 29, 1866.

The very same day, the *Boston Daily Journal* editorialized in favor of the necessity of equality as to civil rights to secure the good of the Union. The *Boston Daily Journal* wrote on March 29, 1866:

We deeply regret the appearance of [the veto]. The bill which it seeks to suppress was framed in furtherance of an object of transcendent importance, made necessary by the triumph of the national cause, and dear to the hearts of the patriotic masses. That object is to secure the equality of American citizenship, to realize for the first time the fundamental doctrines of the Declaration of Independence and carry out the avowed purposes of the Constitution. The loyal people are perfectly convinced that in this way only can we end up the gigantic evils illustrated by and inherited from the rebellion, and restore solid harmony and prosperity to the regenerated Union. As the flag is one and the country is one, the law must be one, reaching to every citizen alike, conveying the same rights and securities, without regard to color or former class and condition. When we get down to that broad and solid foundation everything will [unreadable] well, and not before.

And yet when a measure of those beneficent aims is brought before the President, instead of looking upon it favorably, and even, as might be supposed, stretching his desire to approve the main features of the bill to cover some objectionable details, he makes the details the main thing and regards the whole bill as critically as if its purpose were to give power to a corporation or to a class, instead of diffusing equality among all. No great measure—certainly no measure adequate to the exigency which this is designed to meet—could be criticized in this minute way without finding many apparent objections, and it must be said that several of those urged by the President are only apparent . . .

Everything in the Southern States is now against the negro—the laws, the customs, the habits, and the prejudices of the white and ruling class. All the dice are loaded against the freedman, and he has a fair chance nowhere, outside the protection of the Federal bayonets and the Federal laws. This civil rights bill was designed to furnish him adequate and permanent security, and we believe it does it with no injury and as little inconvenience to the whites as is possible under the circumstances. We are sorry that the President does not so regard it, and we hope it will be repassed over his veto.¹⁸⁵

Let us emphasize here that the *Boston Daily Journal* recognized that “[a]s the flag is one and the country is one, the law must be one, reaching to every citizen alike . . . without regard to color or former class and

185. *The President's Veto of the Civil Rights Bill*, BOS. DAILY J., Mar. 29, 1866.

condition.”¹⁸⁶ There is no room here to read the Civil Rights Bill as if it somehow allowed Jim Crow laws while disallowing the Black Codes. The paper clearly calls for the complete abolition of all racial classifications in lawmaking.

Public opinion supporting Andrew Johnson’s veto of the Civil Rights Bill echoed his view that to legally equalize all citizens was to disempower white citizens.¹⁸⁷ As in Johnson’s veto message, the editorials supporting the veto display blatant racism.¹⁸⁸ They also contain the constitutional arguments that the Fourteenth Amendment ultimately repudiated.¹⁸⁹ Again and again the opponents of the Civil Rights Bill expressed fear about blacks voting, even though it was well understood by everyone that the Bill conferred equal civil rights but not equal political rights.¹⁹⁰ In light of the commonly understood distinction between civil and political rights, it is hard not to think that the arguments the opponents of the Civil Rights Bill raised were not a red herring. The framers and proponents of the Civil Rights Bill had, by this time, said over and over again that the extension of equal civil rights to blacks did not mean the extension of equal political rights. It was well known that some proponents of the Civil Rights Bill hoped the vote would be extended someday, and this desire was in fact articulated in several of the editorials we cite here.¹⁹¹ But the argument that the Civil Rights Bill secured any rights aside from full equality of civil rights was contrary to both the text of the Bill and to all the statements of its meaning in newspaper editorials.

Still, the critics of the Civil Rights Bill did raise the specter of enfranchisement *and of social equality* as a means for drumming up further opposition to the Bill. Thus, the *New York Herald* on March 29, 1866, wrote:

186. *Id.*

187. *Endorsement of President Johnson*, N.Y. HERALD, Mar. 29, 1866.

188. *Andrew Johnson and Andrew Jackson—The Moral Power of Moral Courage*. N.Y. HERALD, Mar. 31, 1866; *The Connecticut Election—The Real Issues Before the Voters*, N.Y. HERALD, Mar. 31, 1866; *In Favor of President Johnson’s Policy, Against Negro Equality, Opposed to \$450,000 Additional School Tax*, ST. LOUIS MO. REPUBLICAN, Mar. 29, 1866; *Negro Superiority*, ST. LOUIS MO. REPUBLICAN, Apr. 8, 1866.

189. *President Johnson’s Appeal to the People*, N.Y. HERALD, Mar. 29, 1866.

190. *Veto of the Civil Rights Bill*, N. AM. & U.S. GAZETTE, Mar. 28, 1866. *The Present Attitude at the South*, N. AM. & U.S. GAZETTE, Feb. 13, 1866; *The Civil Rights Bill*, BALT. SUN, Mar. 24, 1866.

191. *The Civil Rights Bill*, BOS. DAILY J., Mar. 19, 1866. *The New Veto*. N.Y. TRIB., Mar. 28, 1866.

The veto message shows irrefutably that the radicals design to make this a mongrel government. It has unmasked them; they can no longer maintain their hypocritical pretence of philanthropy. They hope and expect to confer the right of suffrage upon the negroes; to elect negro members of Congress from the Southern States; to make negroes eligible for the highest offices in the land. The political equality for the blacks thus conceded, how can their social equality be denied? They must be permitted to propose marriage to our daughters; to sit at table with white persons; to mingle familiarly in the best society.

More than this: we are asked to give the semi-civilized negro a preference over the intelligent immigrant who lands upon our shores; to punish a parent who refuses to allow a negro to marry his child; to cast into prison any judge who decides the dicta of Congress unconstitutional; . . . This is what the radicals demand, and all this they have embodied in the Civil Rights bill, which ought to be called a bill to deprive white men of all rights. . . . All who are in favor of assassinating the republic in order to make the negro equal to the whites will take sides with Congress.¹⁹²

The *New York Herald* explicitly claims that the Civil Rights Bill would lead to voting rights for African Americans as well as to racial intermarriage and “a mongrel government.” As the paper says, “all this they have embodied in the Civil Rights bill.”¹⁹³ More credible opponents of the Civil Rights Bill confined themselves to expressing concern over its consequences for the relative role of the federal government and the states.¹⁹⁴

192. *President Johnson's Appeal to the People*, N.Y. HERALD, Mar. 29, 1866. This paragraph continues:

For the sake of three millions of negroes forty millions of white people have already been involved in civil war; half of a great nation has been crippled and desolated; a heavy debt has been placed upon the shoulders of our citizens; blood has been poured out like water; precious lives have been ruthlessly sacrificed; but all this is not enough. Now, for the sake of three millions of negroes, the white people of this country are asked to submit to the abrogation of the constitution; to the exclusion of eleven States from the Union; to the super-sedure of the State judiciary; to the petty tyranny of irresponsible spies, paid to prefer complaints, whether justly or unjustly.

Id.

193. *Id.*

194. See *The President's Objections to the Civil Rights Bill*, BALT. SUN, Apr. 2, 1886.

The more closely the provisions of the civil rights bill are considered, the more powerfully will every candid mind be impressed with the importance of the service which President Johnson has rendered by vetoing the measure. It is not so much the evils which practically might flow from the administration of the law as the dangerous consequences

Intermixed into the editorial comments of the opponents of the Bill are also concerns about social equality that fit neither into the scheme of civil nor political rights.¹⁹⁵ These concerns seem clearly intended as scare tactics designed to incite racially charged hatred. The particular mention of interracial marriage as a possible result of the Civil Rights Act was raised in Congress by members in the debates,¹⁹⁶ by President Johnson in his veto message,¹⁹⁷ and in the public discourse.¹⁹⁸ Legislators and popular commentators struggled to explain how the Bill could guarantee liberty of contract to African Americans without also condoning interracial marriage.¹⁹⁹ This blind spot in the debate over the Civil Rights Bill shows the pervasive nature of the racism alive at the time, and the stunning magnitude of the social changes brought about by the abolition of slavery. The idea that marriage is the outcome of a contract had been long established by 1866. Blackstone's Commentaries had said as much authoritatively a century prior to Reconstruction.²⁰⁰

That the ability to enter into marriage contracts pertained to liberty of contract, or to the security of property, could not be questioned. The Civil Rights Act plainly on its face protected liberty of contract. Many of the editorials we have presented here make this point abundantly clear. That dissonance existed between the stated intent of the Bill with regard to the equalization of marriage rights and the legal reality of the Bill's

to public liberty from the admission of the general powers which the bill asserts, that mark the President's message and give it intrinsic value.

Id.

195. *President Johnson's Appeal to the People*, N.Y. HERALD, Mar. 29, 1866.

196. CONG. GLOBE, 39TH CONG., 1ST SESS. 1121 (1866).

197. President Andrew Johnson's Veto of the Civil Rights Act to the Senate of the United States (Mar. 27, 1866), available at http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf.

198. *The Veto of the Civil Rights Bill*, ST. LOUIS MO DEMOCRAT, Apr. 3, 1866. *President Johnson's Appeal to the People*, N.Y. HERALD, Mar. 29, 1866.

199. *Id.*

200. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: CHAPTER THE FIFTEENTH: OF HUSBAND AND WIFE 421, available at http://avalon.law.yale.edu/18th_century/blackstone_bk4ch15.asp ("Our law Considers Marriage in no other light than as a Civil Contract"). In fact, Blackstone's Commentaries were so well known, and held in such high regard, that Senator Lyman Trumbull invoked them in January 1866 on the Senate floor, citing directly from the text as he sought to authoritatively define "civil liberty" as

no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public . . . In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.

CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866).

text can be attributed to genuine misunderstanding or willful misrepresentation for the purpose of securing its passage. Despite the level of detail available on these debates both in the public sphere and in the legislature, this is one distinction we may never be able to clarify.²⁰¹

Ironically, the strongest arguments for the equality of all contract rights, including rights to enter into marriage contracts, is perhaps best articulated by the detractors of the Civil Rights Act.

The *St. Louis Missouri Democrat* on April 3, 1866, summarized President Johnson's reasons for vetoing the Civil Rights Bill. The paper said:

What are the President's objections? That the Southern Congressmen have not been admitted! That the bill declares the freedman a citizen! That it makes him, *before the law*, an equal to another citizen! That this is an interference with the reserved rights of the States! That it abrogates the State statutes that discriminate against him because he has "a skin not colored like our own!" That the bill is, therefore, unconstitutional, tends to an undue centralization of government powers, and as a consequent subversion of Republican principles! [Unreadable] the noblest sentiment that ever inspired a people tried in the fires of a war between the demon of oppression and the angel of justice—is far less admirable than Taney's demonstration that "the black man has no rights which the white man is bound to respect." The "intensely logical spirit of evil" has been even more successful in its sophistries, but rarely more false to humanity than in this instance.²⁰²

On April 6, 1866, the Senate passed the Civil Rights Act over the President's veto.²⁰³ The House followed three days later.²⁰⁴ The passage of the act marked the first time Congress had enacted major legislation over a presidential veto in seventy-seven prior years of the history of the United States.²⁰⁵ The passage of the Civil Rights Act was lauded by some and bemoaned by others, but regardless of the rhetoric attached, the common understanding of the bill was that it stripped away any differences between white and African American citizens with regard to

201. Though Senator Lyman Trumbull addressed the implications of the bill on interracial marriage explicitly in Congress, he did not do so in his response to President Johnson's veto message. This may be of note, given that Johnson raised a number of specific objections to the civil rights bill, each of which was addressed and refuted by Trumbull in his response, with the exception of the question of interracial marriage.

202. *The Veto of the Civil Rights Bill*, ST. LOUIS MO. DEMOCRAT, Apr. 3, 1866.

203. CONG. GLOBE, 39TH CONG., 1ST SESS. 1789 (1866).

204. *Id.* at 1865.

205. FONER, *supra* note 53, at 250–51.

the civil rights associated with the protection of contract, person, and property.

The Act's passage was celebrated in the *Chicago Tribune*, Senator Trumbull's hometown newspaper, which said on Saturday, April 7: "The action of the Senate yesterday is a *great victory*. It will tell powerfully on the country, on the coming elections, and even the semi-barbarians whose treatment of colored people renders a Civil Rights Bill necessary."²⁰⁶ And on Sunday, April 8, the *Chicago Tribune* further elaborated:

The Southern Legislature can now enact that a colored man shall not own real or personal property, shall not work at any mechanical trade, shall not learn to read, shall not have a house, shall not leave his employer's premises without a pass, shall be subject to corporal punishment at the hands of his 'master' or any other of those oppressive and mischievous laws by which the Southern Legislatures have already attempted to re-enslave the three millions which Abraham Lincoln and our Union armies made free. Every member of a Legislature who votes for a law, and every judge or officer who enforces one which operates any differently on a black man than it does upon a white, is liable to a fine of one thousand dollars and a term of imprisonment. Colored men born in this country are henceforth citizens of the United States and their respective states "and are to be so regarded.

The achievement of this great triumph sent a thrill of satisfaction and relief throughout the hearts of the entire loyal people. We breathed freer, on learning that at last the law-making power, the supreme legislature of the country has asserted its own rights, and vindicated the cause of liberty, and that an effectual check is at least imposed on the President, who has all the arbitrary disposition of a Napoleon without his capacity to respond to the progressive instincts of the people.²⁰⁷

The *Tribune* clearly thought the Civil Rights Act of 1866 had secured full equality of all civil rights. On the dissenting side, the *St. Louis Missouri Republican* on April 8, 1866, commemorated the passage of the Act by writing:

Negro Superiority: The charge of the Radical revolutionists seek to bring about "negro equality" is faulty in not going far enough. The fact is, that they seek to give the negro a preference over the white man.

206. *Passage of the Civil Rights Bill*, CHI. TRIB., Apr. 7, 1866.

207. CHI. TRIB., Apr. 8, 1866.

They talk very plausibly about making all men “equal before the law,” but are at the same time contriving measures to make them unequal. Such is the character of the measures embodied in the bills, whose passage President Johnson has so nobly resisted. The same spirit is betrayed by some of those who are intrusted with the management of the freedmen.²⁰⁸

. . . The negro, more favored, has . . . services for nothing. Is this that equality before the law, which these Radicals profess to desire so earnestly? . . . The truth is, the Radical politicians who now wield the power of Congress with such reckless and demoniac energy, mean to prefer the blacks over the great mass of whites.²⁰⁹

The *New York Herald* asked sarcastically on April 9, 1866, after the Senate passage of the Civil Rights Act over President Johnson’s veto:

And what next? Having secured their great object of placing all races and colors in all the States and Territories of the Union as citizens on a footing of equality in regard to their civil rights, and having placed the Southern blacks under the protection of the President, the Freedmen’s Bureau, and the judicial and military authorities of the United States, etc., may we not conclude that the radicals will be prepared to consider the claims of the excluded Southern States to a hearing in Congress?²¹⁰

Note that the *Herald* concedes that the Civil Rights Act led to complete equality between the races as to civil rights. From the *St. Louis Missouri Democrat*, on Tuesday, April 10, 1866:

What They Think of the Veto in Canada.

Here is what the Toronto Globe thinks of the President’s last veto:

It is difficult to realize that this man, who has the hardihood to make these objections to the civil rights bill, is the same man who, during the war, was a violent advocate of abolition—who, after the war was over, promised to be the special protector of the blacks,

208. The editorial adds:

This is shown in a recent order from the Freedmen’s Bureau, instructing all assistant commissioners to act as claim agents for colored soldiers and sailors [sic], in collecting their claims against the United States without charge, excepting for revenue stamps, salaries, fees, etc. Here, it is shown, the Government is made to step on and act as agent for black soldiers and sailors [sic], thus saving black men the expense of employing an agent, while no such favor is extended to white soldiers and sailors.

209. ST. LOUIS MO. REPUBLICAN, Apr. 8, 1866.

210. *The Civil Rights Bill—Probable Action of the House To-Day*, N.Y. HERALD, Apr. 9, 1866.

and talked of taking care that loyal men, white and black, should govern the South; and declared that the rebels should be punished, and that their treason should be made odious. What a change have a few months wrought in his Excellency! In the worst days of slavery its avowed advocates hardly put their hostility to justice between race and race in bolder or more shameless language. The civil rights bill deprives the States of the power to make civil distinctions between the two races—it deprives them of the right to have one set of laws for the blacks and another for the whites—of having one set of pains and penalties for white offenders and another for black—and, therefore, it is vetoed! These are the very reasons which ought to induce any honest man—any friend of justice—to sanction the measure.

These are words of truth and soberness, not prompted by any of the partisan feeling which may be supposed to animate the journals of this country. It will be noticed, says the *Chicago Republican*, that they don't differ much from what Republicans think and say on this side of the border.²¹¹

The *St. Louis Missouri Democrat* continues saying:

The Veto Vetoed.

The Bill is not, as misrepresented, a bill admitting the freedmen to the ballot-box, or advancing him a step towards social equality with the white man, but simply to secure practically to him the rights which the common law from time immemorial has conceded to the humblest, yet which slavery had swept away, and which the ex-slaveholders were not ready to restore.²¹²

The paper concludes by saying:

To Honest Conservatives.

When the Constitution was adopted there were “free persons” and “persons held to labor or service”—freemen and slaves. The former, both black and white participated in adopting the Constitution. People of color voted in a majority of the States, and being citizens of those States were thereby, by the terms of the National Constitution, invested with the privileges and immunities of citizens of the other States also. But slavery assailed the citizenship of the free colored man and sought to place him politically on the plane of the slave. Slavery now being

211. *What They Think of the Veto in Canada*, ST. LOUIS MO. DEMOCRAT, Apr. 10, 1866.

212. *The Veto Vetoed*, ST. LOUIS MO. DEMOCRAT, Apr. 10, 1866.

legally dead, the National Constitution recognizes only free persons, and with equal sacredness guarantees the rights of them all. In the light of the Constitution, the rights of the four millions of freedmen are as full and perfect, as holy and inviolable as are the rights of any other four millions of free persons within the United States.²¹³

The editorials we have recounted above²¹⁴ do not, for the most part, specifically address the issue of the meaning of the Civil Rights Act of

213. *To Honest Conservatives*, ST. LOUIS MO. DEMOCRAT, Apr. 10, 1866. The editorial adds: Slavery was recognized by the Constitution, but freedmen as distinguished from freemen or “free persons” are not so recognized. The freedmen are, under the National flag and Constitution, absolutely free, part and parcel of “the people of the United States,” and have as valid a claim to the benefit of a Republican form of government as their white fellow citizens. If the Southern States will concede this claim the controversy will then end; but if not, the duty of enforcing the claim is by the Constitution in the most explicit terms devolved upon the General Government.

Id.

214. One final editorial that bears mention is from the *Baltimore Sun*, on April 24, 1866:

In the reflections which we have heretofore submitted to the public in connection with the civil rights bill, we stated that our objections to the measure rested not upon the kind of protection which it affords to negroes for persons or property, but because legislation of that character on the part of Congress was beyond the scope of its constitutional powers, and an invasion of the plain line of separation between State and federal authority. Regarding the restraints of the constitution as the efficient means for preserving our institutions, we estimated any overthrow of constitutional barriers not by its immediate practical consequence, but by the unbridled license of arbitrary power, which thenceforth would have no check but its own caprice. Stating in this manner the magnitude of the evil we contemplated, we further argued that there was no justification or adequate [unreadable] in the exigency of circumstances for such usurpation of power by Congress—for that the people whom this law was designed to protect had, in most cases already the benefit of its provisions; that under the laws of the several States they are already secure in their persons and property, and that it is neither the purpose nor the interest of the white race to disturb them in the just fruition of the returns of honest industry. Our further argument was that the mutual wants and dependences of capital and labor, to say nothing of higher moral considerations, were rapidly adjusting the two races to the altered circumstances which the overthrow of slavery has occasioned, and that without the aid of legislation an intelligent regard for their mutual interest is solving much more rapidly, healthfully and happily the social problems of the times than legislation by the federal government possibly can. That we have not misapprehended or overstated the sentiment of the people of Maryland in the views we have expressed, the resolutions adopted by the mass meeting of the citizens of Somerset county on the 10th may be [unreadable] as one proof, wherein it is declared that since the amendment of the Federal constitution abolishing slavery it is our duty to favor all legislation necessary to protect the enjoyment of his freedom and personal rights, but protesting against all attempts to make him the special object of national favoritism, etc.

But, a reference to the actual legislation of the State will be accepted as perhaps more convincing and more substantial proof of what The Sun said, and may serve the further purpose of correcting some false impressions in regard to our laws, which, through accident, design, or ignorance, may have found [unreadable] in some minds.

1866 for interracial marriages. These editorials do, however, all make clear that it was widely if not universally understood that the Act guaranteed equality with respect to civil rights albeit not with respect to political rights. At a bare minimum, most people reading these editorials must have thought that once the bill became a law it would give to African Americans the same common law rights as were enjoyed by white citizens. Since a white citizen had a common law right to marry a white citizen, an African American citizen must have obtained the “same” right under the Civil Rights Act of 1866. To the extent that people did not expect this, they were willfully misleading themselves by failing to consider the plain meaning of the text that had become law.

We agree with Yale Law Professor Jack Balkin that it is not the original expected applications of a legal text that bind us, but it is instead the words that are enacted into law.²¹⁵ It is thus irrelevant whether people in 1866 expected the Civil Rights Act to confer a right to racial intermarriage. What matters instead is what the Act said given the original public meaning of the words used at the time it was enacted into law. The editorials we have surveyed offer no hope to those who would claim that the Act somehow banned the Black Codes while allowing for

While the condition of servitude existed in Maryland, it was considered essential for the security of the institution that the free negro population should be subjected to many disabilities, and that the number of that class should be restricted as far as possible. Hence the enactments which prohibited free negroes from coming into the State, and prohibited those who had left the State from returning under severe penalties; hence the stringent provisions in regard to the arrest of the vagrants, and the regulations in respect to their violations of contracts for hiring, and many other restrictions of the same class, and designed to carry out the same general policy. All of these disabling laws have, without exception, been repealed at the very first session of the Legislature after the adoption of the present constitution by which slavery in Maryland was . . . extinguished. . . .

But the legislation of the State has not stopped with the removal of the disabilities which attached to the enjoyment of liberty and property by the Negro. The law of [unreadable] March, 1865, chapter [unreadable], section 119, provides for the establishment of public schools for the instruction of the colored people of the State, by setting apart the entire school tax levied upon the colored people of the State for that purpose, to be under the control of the educational board of the State, as is the school system for whites. . . .

. . . .
. . . . By a comparison of these laws with the provisions of the civil rights bill, it will be further discovered that there is no likelihood of the aid of that beneficent piece of legislation being invoked amongst us.

The Laws of Maryland and the Civil Rights Bill, BALT. SUN, Apr. 24, 1866.

215. Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663 (2009).

a later generation of Jim Crow laws. The language of the Civil Rights Act in conferring equal rights of contract on persons of every race and color to make the same contracts white people could make is unequivocal. We think the editorials we have surveyed lead to the same conclusion as did the dictionaries that we surveyed. The Civil Rights Act of 1866 gave African Americans the same right to enter into marriage contracts with white citizens as was enjoyed by white citizens. *Loving v. Virginia* is thus correct as a matter of the original meaning of the Civil Rights Act and therefore of the Fourteenth Amendment as well.

V. THE CASE LAW ON RACIAL INTERMARRIAGE IN THE 1870S AND LATER

Prior to the adoption of the Civil Rights Act of 1866, there had been a very long history in the United States of legal bans on racial intermarriage.²¹⁶ As Cyrus E. Phillips IV explains:

Prohibitions against miscegenation date back to the earliest colonial times, and the first record of sanctions imposed for this act in the Virginia colony appears in Hening's extract from the judicial proceedings of the Governor and Council of Virginia:

September 17th, 1630. Hugh Davis to be soundly whipped, before an assembly of negroes and others for abusing himself to the dishonor of God and shame of Christians, by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath day.

That prohibitions against miscegenation have been widespread in the United States can be seen in the fact that they have appeared in the statutes of some forty states. Of these forty, twenty-three [had repealed their statutes by the time of the decision in *Loving v. Virginia* but seventeen states had not done so.]²¹⁷

It is sad to say, but by 1866 laws against racial intermarriage were deeply rooted in American history and tradition.

The question, which arose after the adoption of the Civil Rights Act of 1866, was whether the Act barred state laws prohibiting miscegenation. Our analysis here has benefitted from a blog post by

216. PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2009).

217. Cyrus E. Phillips IV, *Miscegenation: The Courts and the Constitution*, 8 WM. & MARY L. REV. 133, 133 (1966) (citation omitted).

David Kopel on *The Volokh Conspiracy*.²¹⁸ We discovered this post only after writing the analysis in this Article up to this page, and Kopel's post, which relies on a book by Peggy Pascoe called *What Comes Naturally: Miscegenation Law and the Making of Race in America*,²¹⁹ is especially helpful to our argument in this essay. Kopel notes that the first state Supreme Court decision to address the question of whether the Civil Rights Act of 1866 banned state anti-miscegenation laws came in the Alabama Supreme Court's decision in 1872 in *Burns v. State*.²²⁰ Strikingly, the Alabama Supreme Court said in 1872 that "the state's 1866 constitutional ban on miscegenation violated the 'cardinal principle' of the Civil Rights Act and of the Equal Protection clause."²²¹

The Alabama constitutional provision in question was added to the state constitution in 1866 when the Alabama state legislature first reconstituted itself after the end of the Civil War and was dominated by ex-Confederate forces.²²² Other southern states passed similar anti-miscegenation laws at the same time as the adoption of the Black Codes.²²³ In 1867, a new Reconstruction government held a new election in Alabama in which large numbers of freed African Americans were eligible to vote for the first time.²²⁴ This expanded electorate produced a three judge white Republican dominated state supreme court. It was that new state supreme court which held in 1872 that the 1866 anti-miscegenation law violated the Civil Rights Act of 1866 and the Fourteenth Amendment.²²⁵

The 1872 Alabama Supreme Court adopted the reasoning we set forth in Part III of this Article as to why the 1866 anti-miscegenation law violated the Civil Rights Act of 1866 and the Fourteenth Amendment. The unanimous state supreme court in *Burns* said:

218. David Kopel, *The Original Meaning of the 14th Amendment Regarding Interracial Marriage*, THE VOLOKH CONSPIRACY, (Dec. 5, 2011, 5:39 PM), <http://volokh.com/2011/12/05/the-original-meaning-of-the-14th-amendment-regarding-interracial-marriage>; see also Michael Ramsey, THE ORIGINALISM BLOG (Dec. 6, 2011, 07:00 AM), <http://originalism.blog.typepad.com/the-originalism-blog/2011/12/originalism-in-the-blogsmichael-ramsey-1.html> (reposting David Kopel's post).

219. PASCOE, *supra* note 216.

220. 48 Ala. 195 (1872).

221. Kopel, *supra* note 218.

222. PASCOE, *supra* note 216, at 29–30, 57–58.

223. *Id.* at 28–30.

224. FONER, *supra* note 53, at 314.

225. PASCOE, *supra* note 216, at 58.

Marriage is a civil contract, and in that character alone is dealt with by the municipal law. The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other. If so, laws prohibiting the races from suing each other, giving evidence for or against, or dealing with one another, would be permissible. The very excess to which such a construction would lead is conclusive against it.²²⁶

The *Burns* court adds:

One of the rights conferred by citizenship, therefore, is that of suing any other citizen. The civil rights bill now confers this right upon the negro in express terms, as also the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation.²²⁷

The *Burns* opinion obviously reads the text of the Civil Rights Act and of the Fourteenth Amendment, which constitutionalizes it, in exactly the same way we do in Part III of this Article. The right to marry is the right to make a certain kind of contract, and the Civil Rights Act of 1866 gives African Americans “the right to make any contract which a white citizen may make.”²²⁸ Since a white citizen could make a contract to marry a white citizen, it follows inexorably that citizens of any race or color could also make such a contract.

Kopel goes on to note in his blog post that the Texas Supreme Court unanimously ruled in 1872 in *Bonds v. Foster*, an inheritance case, that “the law prohibiting such a [common law] marriage [between a white and a black] had been abrogated by the 14th Amendment to the Constitution of the United States.”²²⁹ The Texas Supreme Court thus reached the same conclusion, in 1872, as had the Alabama Supreme Court. Kopel cites Pascoe’s book for the striking proposition that “in the years after the Civil War, eleven states repealed their bans on interracial marriage.”²³⁰ This suggests that condemnation of interracial marriage

226. *Burns v. State*, 48 Ala. 195, 197 (1872), *overruled by* *Green v. State*, 58 Ala. 190 (1877).

227. *Id.* at 198.

228. *Id.* at 197.

229. *Bonds v. Foster*, 36 Tex. 68, 69–70 (1871) (inheritance case), *quoted in* Kopel, *supra* note 218.

230. Kopel, *supra* note 218.

was perhaps not as widespread during Reconstruction as Professor Alexander Bickel's analysis, discussed in Part II of this Article above, might otherwise have suggested.

This fact and the two southern supreme court opinions in Alabama and Texas protecting a right to interracial marriage are especially striking because the year before those two decisions were handed down, the Indiana Supreme Court sitting in a northern state reached the exact opposite conclusion on the constitutionality of bans on interracial marriage in a case called *State v. Gibson*.²³¹ The Indiana Supreme Court concluded in *Gibson* in 1871 that marriage was more than a contractual relationship because it led to a special kind of social and civil status or institution. As the *Gibson* court said, "The right, in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance, and cannot be surrendered."²³² For that reason, it concluded that the Civil Rights Act of 1866 and the Fourteenth Amendment did not apply to anti-miscegenation laws.²³³ As Kopel points out, this holding was especially influential because the Indiana Supreme Court was a northern state supreme court, a fact which made *Gibson* "the essential citation."²³⁴

The *Burns* decision was eventually overruled by the Alabama Supreme Court in 1877, after the end of Reconstruction, in *Green v. State*.²³⁵ The groundwork for this decision was laid in 1874 when the Democrats regained their majority control of the Alabama state legislature and the state supreme court. The new anti-Reconstruction supreme-court majority in *Green* asked:

Is marriage . . . nothing more than a civil contract? Is it, "in that character alone," dealt with by the municipal law?

Doubtless, it is by a contract—that is, by the agreement of the parties—that they enter into the state of marriage. But, as was said by the Supreme Court of Delaware, it is a contract "of a peculiar character and subject to peculiar principles. It may be entered into by persons who are not capable of forming any other lawful contract; it can be violated and annulled by law, which no other contract can be; and its rights and obligations are derived rather from the law relating to it, than

231. *State v. Gibson*, 36 Ind. 389 (1871).

232. *Id.* at 403.

233. *Id.* at 405.

234. Kopel, *supra* note 218.

235. *Green v. State*, 58 Ala. 190 (1877).

from the contract itself.” According to Judge Story: “Marriage is not treated as a mere contract between the parties, subject as to its continuance, dissolution and effects, to their mere pleasure and intentions. But it is treated as a civil institution, the most interesting and important in its nature, of any in society.”²³⁶

The *Green* court thus rejected the argument that marriage was covered by the liberty of contract that was protected against racial discrimination by the Civil Rights Act of 1866 and by the Fourteenth Amendment. The court concluded by saying that “[t]he amendments to the Constitution were evidently designed to secure to citizens, without distinction of race, rights of a civil or political kind only—not such as are merely social, much less those of a purely domestic nature. The regulation of these belongs to the States.”²³⁷

As Kopel notes, the Texas Intermediate Court of Appeals reached the same conclusion in 1877 in *Frasher v. State*.²³⁸ The court in that case held:

Marriage is not a contract protected by the Constitution of the United States, or within the meaning of the Civil Rights Bill. Marriage is more than a contract within the meaning of the act. It is a civil status, left solely by the Federal Constitution and the laws to the discretion of the states, under their general power to regulate their domestic affairs.²³⁹

Kopel goes on to say perceptively:

The regressive *Frasher* decision is one more data point in support of the observation in Henry Sumner Maine’s great 1861 book *Ancient Law*: “we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.” Maine’s book elaborates in great detail why marriage law fits this paradigm.²⁴⁰

By the time the U.S. Supreme Court addressed the issue of the constitutionality of a state law that penalized interracial marriage, Reconstruction was clearly at an end. In *Pace v. Alabama*, Justice

236. *Id.* at 193 (citation omitted) (quoting *Townsend v. Griffin*, 4 Del. 440, 442 (1846)). For another contemporaneous account articulating this reasoning, see JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 200, at 168 (1834).

237. *Green*, 58 Ala. at 196.

238. Kopel, *supra* note 218 (noting *Frasher v. State*, 3 Tex. Ct. App. 263 (1877)).

239. *Frasher v. State*, 3 Tex. Ct. App. 263, 276 (1877) (emphasis omitted).

240. Kopel, *supra* note 218.

Stephen Field upheld Alabama's anti-miscegenation law for a unanimous court.²⁴¹ The case involved Tony Pace, an African American man, who was living with Mary Cox, a white woman.²⁴² They were prosecuted in 1881 for living together in an extra-marital sexual relationship contrary to a law that penalized interracial, extra-marital relationships more harshly than similar relationships between two white people or two black people.²⁴³ Under the 1866 Alabama State Constitution, as reinterpreted in *Green v. State*, it would have been illegal for Pace and Cox to marry. Pace and Cox were convicted and sentenced in 1882 to two years in jail, and they appealed to the Alabama Supreme Court challenging the constitutionality of the 1866 ban on interracial marriage and fornication.²⁴⁴ The court upheld the law saying:

The evil tendency of the crime of . . . adultery or fornication is greater when it is committed between persons of the two races Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.²⁴⁵

Pace appealed his conviction to the U.S. Supreme Court, which decided the case during the same year in which it botched *The Civil Rights Cases*.²⁴⁶

Pace argued that Alabama discriminated on the basis of race when it punished interracial fornication and adultery more harshly than the same acts when committed between two white people or two black people.²⁴⁷ Justice Field's opinion began by conceding that the Civil Rights Act forbade any discrimination in civil rights on the basis of race.²⁴⁸ Justice Field said, however, that

[t]he defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama The two

241. *Pace v. Alabama*, 106 U.S. 583 (1883), *overruled in part by* *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964).

242. *Id.* at 584.

243. *Id.* at 583–84.

244. *Id.* at 584.

245. *Pace v. State*, 69 Ala. 231, 232 (1881).

246. *The Civil Rights Cases*, 109 U.S. 3 (1883).

247. *Pace*, 106 U.S. at 584.

248. *Id.*

sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offence committed between persons of different sexes; the other prescribes a punishment for an offence which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Sect. 4184 equally includes the offence when the persons of the two sexes are both white and when they are both black. Sect. 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offence against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.²⁴⁹

The Supreme Court's opinion in *Pace v. Alabama* was joined even by Justice John Marshall Harlan, who dissented in *The Civil Rights Cases*²⁵⁰ and later in *Plessy v. Ferguson*.²⁵¹ It is ironic, to say the least, that the case came out of Alabama—the very same state whose state supreme court in 1872 had said that bans on racial intermarriage violated the “cardinal principle” of the Civil Rights Act of 1866 and of the Fourteenth Amendment.²⁵² Justice Field's analysis was perfunctory, unpersuasive, and failed even to cite or respond to the Alabama and Texas State Supreme Court rulings in 1872, which had reached the opposite conclusion.²⁵³ It was a thoroughly disgraceful performance.

As David Kopel points out, the acceptance of the constitutionality of bans on racial intermarriage and sexual relationships laid the critical groundwork for the whole edifice of Jim Crow era segregation. Once it became permissible to outlaw racial intermarriage, why would it be impermissible to deny interracial seating on railroad trains? As Kopel says:

By the time that *Plessy v. Ferguson* was decided in 1896, the Supreme Court majority, which was willfully oblivious to contemporary social reality (e.g., if blacks consider a segregation mandate to be a “badge of

249. *Id.* at 585.

250. *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

251. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

252. *Burns v. State*, 48 Ala. 195, 198 (1872); PASCOE, *supra* note 216, at 58 (“[T]he Alabama Supreme Court declared the Alabama miscegenation law unconstitutional on the ground that it was in direct opposition to the ‘cardinal principle’ of the Civil Rights Act of 1866 and the Fourteenth Amendment guarantee of equal protection.”).

253. *Burns*, 48 Ala. at 195; *Bonds v. Foster*, 36 Tex. 68 (1871) (inheritance case).

inferiority,” that is “solely because the colored race chooses to put that construction upon it”), was also lazily ignorant of legal history: “Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contact, [sic] and yet have been universally recognized as within the police power of the state.” The sole citation for this allegedly “universal” recognition was [the Indiana State Supreme Court’s 1871 decision in] *State v. Gibson*. The Court was right that as of 1895, miscegenation laws were constitutionally safe, but the Court seemed quite unaware that during the first years when the 14th Amendment and the Civil Rights Act were the law of the land, the issue was in dispute.²⁵⁴

Pace v. Alabama suggested to the majority in *Plessy* that there was a whole sphere of so-called social rights, as to which race discrimination was allowed, which sphere was separate and apart from the civil rights protected by the Civil Rights Act of 1866 and by the Fourteenth Amendment and from the political rights of African American men protected by the Fifteenth Amendment. The fact that the great Reconstruction texts make no mention of these supposed social rights was simply overlooked and was swept under the rug.

The majorities in *Pace v. Alabama* and in *Plessy v. Ferguson* never asked themselves whether it was at all plausible that a constitution which guaranteed African American men the political right to vote could somehow sanction depriving American citizens of their civil right to marry anyone they so chose without regard to race. The Reconstruction framers made it clear over and over again that the political right to vote was a right that was at the apex of the pyramid of rights while civil rights, like the right to marry, were at the pyramid’s base.²⁵⁵ Under the reasoning of the Reconstruction Congress, it is implausible that African American men might be given the political right to vote but might be denied the civil right to marry anyone of whatever race they chose.²⁵⁶ If someone can be trusted to vote for President, Senator, or Governor, surely that person can make a contract to sit in the same railway car as white people or to marry a white person.

The post-Reconstruction cases from 1871 to 1896 are important because they show the validity of the semantic-meaning arguments we make in Part III, after consulting Reconstruction dictionaries, and in Part

254. Kopel, *supra* note 218 (citations omitted).

255. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 47–48 (2011).

256. *Id.*

IV, after consulting Reconstruction editorials. Real state supreme court justices in Alabama and in Texas in 1872 read the text of the Civil Rights Act of 1866 and the Fourteenth Amendment and came to the exact same conclusions as to its implications for racial intermarriage as we have argued for in Parts III and IV above. The hard, plain-meaning textualist reading we give to the Civil Rights Act of 1866 was the very same reading given to that Act by two pro-Reconstruction state supreme courts. Were the justices on those courts biased toward Reconstruction? Maybe to some degree they were, as were arguably the congresses that produced the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments. Conversely, the Alabama Supreme Court justices who took away the right to racial intermarriage in 1877 were undoubtedly biased against Reconstruction, and even at the height of Reconstruction, there was blatant racism in the South and throughout the country.

The point here is that our hard, plain-meaning textual reading of the Civil Rights Act of 1866 as protecting a right to racial intermarriage was quite plausible to legal interpreters at the time of Reconstruction. We have not conjured up some bizarre law professor's reading of the legal texts that went unnoticed at the time. To the contrary, our view was initially the law in Alabama and Texas after 1872.

The U.S. Supreme Court eventually overruled *Pace v. Alabama* and held anti-miscegenation laws unconstitutional in *Loving v. Virginia*.²⁵⁷ This Article has attempted to show that, notwithstanding statements in the legislative history, the original public meaning of the text of the Civil Rights Act of 1866 and of the Fourteenth Amendment strongly supports the outcome in *Loving*. Unfortunately, the Supreme Court in *Loving*, as in *Brown v. Board of Education*, remained spooked by a legislative history that should have been irrelevant to its decision. The Court expressed its queasiness in the following paragraph:

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and

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

not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources “cast some light” they are not sufficient to resolve the problem; “[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States.’ Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.”²⁵⁸

The opinion in *Loving* is spooked quite unnecessarily by the legislative history of the Civil Rights Act of 1866 and of the Fourteenth Amendment. At the same time, the Supreme Court seemed incapable of making a hard, plain-meaning textual argument, even though all the material for such an argument was right before them.

Once one applies the original public-meaning textualism of Justices Antonin Scalia and Clarence Thomas to this problem, all difficulties disappear. The statutes that banned racial intermarriage and that forbade African Americans from sitting in the same railway cars as white Americans did not give “the same right . . . to citizens of every race and color . . . to make or enforce contracts . . . as was enjoyed by white citizens.”²⁵⁹ The Alabama Supreme Court figured this all out back in 1872 in *Burns v. State* when it said that under the Civil Rights Act of 1866 an African American could make any contract that a white American could make.

There is the argument of *Green v. State* that marriage contracts are unique in that they create a legal status, but this argument overlooks the fact that the Civil Rights Act of 1866 on its face applies to *all* contracts. Surely marriage is at least in part a matter of contract and is therefore within the protection of the 1866 Civil Rights Act. Even if it were not, marriage is clearly a Privilege or Immunity under the Fourteenth

258. *Id.* at 9 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954)); see also *id.* at 10 (“We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished.” (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964))); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

259. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (2012)).

Amendment,²⁶⁰ which cannot be abridged on the basis of race, just as marriage is clearly a Privilege and Immunity under Article IV as to which states may not discriminate with respect to out-of-staters.²⁶¹

The bottom line is that it is not the original, public-meaning Justices on the U.S. Supreme Court whose theories of constitutional interpretation cannot account for *Loving v. Virginia* and who cannot say that *Pace v. Alabama* was wrong the day it was decided in 1883. The Justices who cannot explain *Loving* are the ones who accord primacy to doctrine and case law, as Chief Justice Roberts seems to do, or Justice Stephen Breyer, who would defer to the people's democratically expressed sentiments. It is Justice Breyer's approach that leads to *Pace v. Alabama* and to *Plessy*, not Justice Scalia or Justice Thomas's.

VI. CONCLUSION

At the end of the Civil War, the United States engaged in its greatest experiment in social change since the Founding. The process of bringing three million people from slavery to freedom, which some may argue is still unfinished, was bitterly contested. Building a consensus in a democracy is difficult by design, but perhaps no struggle has been as labored or as important as achieving equal rights for Americans regardless of race. A key problem was the question of exactly what civil rights had the freed African Americans obtained when slavery was abolished in 1865. As Senator Lyman Trumbull said during the debates on the Civil Rights Act of 1866:

It is difficult, perhaps, to define accurately what slavery is and what liberty is. Liberty and slavery are opposite terms; one is opposed to the other

“Civil liberty is no other than natural liberty, so far restrained by human laws, and no further, as is necessary and expedient for the general advantage of the public.”²⁶²

We contend that by virtue of the Civil Rights Act of 1866 and the Fourteenth Amendment that the freedmen gained the same right to marry a white person or to sit in the best railway car on a train as was enjoyed

260. U.S. CONST. amend. XIV, § 1.

261. U.S. CONST. art. IV, § 2.

262. CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866) (Senator Lyman Trumbull's remarks in Congress regarding the Civil Rights Bill, Jan. 29, 1866).

by white citizens. Our position is supported by the text, albeit not by the legislative history, of the 1866 Act and the Fourteenth Amendment.

We think that legislatures write and pass laws, while it is the job of the courts to give those enacted texts their objective original public meaning when judges construe the texts. It is our position that in this process, courts must interpret the laws according to the plain meaning of the text as it would have been generally understood by the objective meaning of its language at the time of enactment. We hold to this conclusion particularly in times when the plain meaning of the text may be at odds with the legislative history surrounding its enactment—a view that is not shared by all jurists, legal scholars, or originalists but that is associated with the originalism of Justice Antonin Scalia. Unfortunately, the law of civil rights and of racial equality in the United States is a case study in the consequences of botched efforts at judicial interpretation. At multiple critical moments during the struggle for civil rights, faulty judicial interpretations of legislation and of the Constitution hamstrung efforts to protect freedom and corrupted the original understanding of the legislative and constitutional provisions that were before the federal courts.

Originalists—starting with Raoul Berger, who was an advocate of original intent—have struggled to construe Reconstruction era legislation regarding civil rights. This is due to the fact that originalism started out advocating original intent and only evolved into advocacy of the original public meaning of legal texts under the intellectual leadership of Justice Scalia. We think Scalia is right and that Raoul Berger was wrong. Applying Scalia-style textualism here, we conclude the Fourteenth Amendment did secure a constitutional right to racial intermarriage.

Lawmaking and constitution-making are public acts. Words in a proposed statute or constitutional amendment must be given their original public meaning because it is that meaning that would have led constituents to speak about proposed laws and voice their preferences to their elected representatives, and it is that meaning that might have led to the offering in Congress of proposed amendments. In communicating legislative preferences to their elected representatives, constituents can only act on the basis of giving the proposed text its original public meaning. The secret “understandings” of legislators about what a text “really” means will not be known to the democratic polity whose representative will enact a text and then enforce it in the executive and judicial branches. After all it is “We the People” acting through “Our” elected representatives who determine whether or not legislation will

pass in Congress and be signed by the President. A bill may mean one thing to a senator or congressman, but it is the original public meaning of a bill that will determine the public's view of the bill and therefore a representative's vote. It is for this reason that courts ought to rely more on dictionaries than they do on legislative history. A congress that knows that courts will interpret what it passes literally will take more care in drafting bills and will pay more attention to precision in legal texts. In contrast, a congress that thinks courts will pay attention to legislative history will become sloppy in drafting legal texts. It is the text and not the legislative history that is voted on in both Houses of Congress and which the President signs or vetoes. We should employ rules of statutory and constitutional construction that give Congress an incentive to pay attention to the texts that it passes.

We have discussed above the fundamental change in Supreme Court doctrine that occurred between the holding in *Pace v. Alabama* and *Plessy v. Ferguson*²⁶³ and the contrary holding in *Loving v. Virginia*, which overruled *Pace*. It is commonly thought that Scalia-style originalism cannot explain or justify the outcome in *Loving v. Virginia*. We think we have shown in this Article that this is not the case. The Fourteenth Amendment and the Civil Rights Act of 1866 gave African Americans the same right as is enjoyed by white citizens either to marry a white citizen or to contract to ride in a certain railway car on a train. *Pace v. Alabama* and *Plessy v. Ferguson* were thus both wrong on the day they were decided as well as being wrong on May 17, 1954, when *Brown v. Board of Education* was decided.²⁶⁴ No evolution in constitutional meaning was needed to justify *Brown* or *Loving v. Virginia*. The Fourteenth Amendment mandates color blindness as to all civil rights and has done so from the time of its adoption in 1868. It is Scalia-style originalism that explains *Loving v. Virginia* just as it is the advocates of legislative history who cannot explain that great case.

263. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

264. We believe segregation in public schools violated the Fourteenth Amendment as well as racial restrictions in contract law violated that amendment. The argument is sufficiently complex, however, to require treatment in a separate, additional law review article, which we are now in the process of writing.