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AKHIL REED AMAR & JED RUBENFELD

A Dialogue

I. THE ORIGINALIST CASE FOR *BROWN*

JED RUBENFELD: Akhil, you and I have a great deal in common, but also some fundamental differences, at least in principle. Equal protection doctrine might provide a good backdrop to make these differences clear. When it comes to *Brown v. Board of Education*, our disagreements are not of a fundamental nature. You're inclined to be much more accepting than I of the claim that the Fourteenth Amendment was originally understood to bar racial segregation (at least of some kinds), so you don't see *Brown* as the revolutionary case that many of us do. I take *Brown* to be a clear case of the rejection of an original No Application Understanding; you don't. But this is not a fundamental disagreement because, if I understand you correctly, you do not object to my central thesis: Original No Application Understandings may be rejected when doing so does justice to the text and the original paradigm cases.¹

But you and I do have fundamental disagreements on other matters of equal protection law, because—again, if I understand you correctly—you believe in something I don't. You believe in foundational No Application Understandings, whereas I say that the only foundational paradigm cases are Application Understandings. For you, the inapplicability of the Fourteenth Amendment to “political” rights such as voting was part of the original understanding and remains binding on judges today. In other words, on your view, the Fourteenth Amendment cannot today be properly read to strike down racial discrimination in cases involving “political” rights.

With respect to racial discrimination in voting cases, you will of course point out that the Fifteenth Amendment takes care of things. But doesn't this

1. Thus, I think you also probably accept my basic account of how the First Amendment today is properly read to strike down blasphemy laws, even if, on the original understanding, the First Amendment would have had no application to blasphemy laws.

mean that it would be perfectly constitutional for a state to deny blacks (on the basis of race) “political” rights other than voting? The Fourteenth Amendment would not apply because, on your view, you are bound by the original understanding that the Fourteenth Amendment would have no application to “political” rights. And the Fifteenth Amendment would not apply, because that Amendment only concerns the right to vote. Do I state your view correctly? If so, does this implication of your view cause you any concern? Are there any examples of other nonvoting political rights that you can think of to which this view might apply?

AKHIL AMAR: Jed, I like your idea of discussing equal protection issues as a way of illustrating the similarities and the differences of our approaches. In a nutshell, I think the Reconstruction Amendments, rightly read, plainly prohibited Jim Crow in 1896 and 1954. On the other hand, I also believe that Section 1 of the Fourteenth Amendment simply does not apply to political rights such as voting. And so many voting rights and other political rights cases that the modern Court has analyzed under the Equal Protection Clause would, I believe, be more properly considered under the Republican Government Clause of Article IV and various voting rights Amendments, beginning with the Fifteenth.

If it’s okay with you, let’s start with the issue of state-mandated racial segregation—Jim Crow—and then work our way forward toward voting rights. As I read the text and history of the Fourteenth Amendment, a state would clearly be prohibited from branding a person as a second-class citizen—as an inferior—simply because he was born black. (This is the principle that I believe is affirmed in the Amendment’s first sentence.) Thus, a state law whose candid preamble explicitly proclaimed that black Americans are hereby declared inferior to white Americans would, I believe, violate the core meaning of the Amendment. (In this, I think I rather closely follow your paradigm case method, as you have noted.) The question as of 1896 or 1954 is thus for me a simple one: Does the regime of Jim Crow—a vast and pervasive system of racial regulation—in fact proclaim just this message in its purpose, effect, and social meaning?

My answer to this question is that Jim Crow was, in both 1896 and 1954, a rather clear case of governmental action seeking to create and reify a constitutionally impermissible caste structure, a regime of second-class citizens for those born with dark skin, a vast state program that stretched out its tentacles to keep blacks down. Jim Crow was never equal in fact or in purpose—or in how it was perceived by society, both white and black. Such a system of racial apartheid thus violated the central meaning of the Reconstruction Amendments.

Of course, I am aware that some—many, in fact—of the supporters of the Fourteenth Amendment denied that it would ban all forms of segregation. But many other framers and ratifiers disagreed. More to the point, the precise nature of the pro-segregation argument that came from the framers and ratifiers in the 1860s does not cause me to read the text of the Amendment as somehow inapplicable to segregation. Some segregationists claimed that segregation could and would in fact be equal. But Jim Crow was not equal in 1896 or 1954 and genuine civil equality is the constitutional test, as set out by the text. Other segregationists may have persuaded themselves that the Amendment did not apply to formally symmetric laws imposing restrictions on both races: Blacks over here and Whites over there. But nothing in the text signals its categorical inapplicability to symmetric laws. True, symmetric laws are not always and necessarily unequal on my view; but neither are symmetric laws categorically exempt from the equality test laid down by the text. Yet other segregationists in 1866 seemed to believe that private schools that received irregular subsidies would fall outside the ambit of state action. But Jim Crow circa 1896 and 1954 was undeniably and pervasively the product of state action. And still other segregationists apparently believed that the Amendment did not apply to the federal government (including the galleries of Congress itself). But the first sentence of the Amendment most emphatically did apply to all governments, as did the companion language of the Civil Rights Act of 1866.²

As I read the historical evidence, none of the segregationist arguments in 1866 were codified into the words of the Amendment itself in a way that supports *Plessy* or undercuts *Brown*. The Amendment's text thus fits better with the views expressed by its many antisegregationist supporters and ratifiers. I mention all this because I think you are rather too quick in dismissing the basic originalist argument for *Plessy*'s wrongness and *Brown*'s rightness. The arguments that I have made thus far do concededly owe a large debt to your paradigm-case method—thank you!—but they do not strike me as wholly nonoriginalist. You seem to think that *Brown* cannot be defended on originalist grounds, but I wonder whether I haven't just done so, if a sensible originalism focuses, as it should, on the text in light of the history (including what you would describe as No Application Understandings, but focusing on the pervasiveness and precise content of those historical understandings in relation to the constitutional text). So before we turn to voting rights, I would

2. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 380–83 (2005) [hereinafter AMAR, *AMERICA'S CONSTITUTION*]; see also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 195 n.*, 281–83 (1998) [hereinafter AMAR, *THE BILL OF RIGHTS*].

be interested to know whether you find my defense of *Brown* nonoriginalist or whether you think it is originalism based on an implausible view of history.

JED RUBENFELD: Certainly you are making an originalist argument. The question, I suppose, is whether it is convincing—and whether what you say about racial segregation will undermine your further claim that the Fourteenth Amendment (Section 1) does not apply to political rights. If by originalism we meant that a judge should strike down a specific kind of law under a constitutional prohibition only if there is evidence showing that the framers and ratifiers specifically so understood the prohibition—or at least that a majority of them did—then it sounds as if your argument is not convincing.

I am only citing the evidence that everyone cites, but that Congress provided for racially separate schools in Washington, D.C., as well as allowed racial segregation in congressional galleries, does in my view argue against the notion that the Fourteenth Amendment's framers believed that the principles of equality and citizenship lying behind it required an abolition of racial segregation.³ As far as the public understanding goes, the maintenance of racially separate schools in such large northern cities as New York and Cincinnati (even as integration took place in, say, Chicago) has always seemed to me to speak pretty seriously against the notion of a shared, common understanding that the Fourteenth Amendment barred such schools.

Of course, you could take the view that where there was disagreement among the framers and ratifiers on an issue, and, further, that where the evidence does not convince you of a dominant, majority understanding on either side of the issue, an originalist judge is free to go either way, at least so long as the text permits it. Perhaps you feel that the applicability of the Fourteenth Amendment to racial segregation belongs in this kind of category. If that is your view about the state of the historical evidence, I am not sure I agree with it, but to me—and to you, if I read you correctly—it does not really matter in the end: Original No Application Understandings have been jettisoned in many areas of constitutional law. I think you agree with this

3. See, e.g., John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 460-62; Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2339-43 (1995) (reviewing OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* (1994)); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995). Note that the segregation decisions of the Fourteenth Amendment's congressional framers' reflect their views of the principles underlying that Amendment, regardless of whether they viewed Section 1 as a limitation by its own terms on the federal government.

observation, even if you do not agree that the phenomenon is as common as I have described it.

Moreover, I think we agree about the basic idea that justifies this: Judges may override original No Application Understandings to do justice to the text in light of its paradigm cases. So even if there had been an original understanding that the Fourteenth Amendment would not bar racial segregation in public schools and other public facilities, neither you nor I would necessarily view courts as bound by that understanding. We both believe that the Fourteenth Amendment's paradigm cases are properly read to stand (at the very core) for the principle that a state may not deliberately brand or treat blacks as inferior or second-class citizens. We both believe that "separate but equal" did just that. So we both believe that *Brown* is justified regardless of whether it comported with the specific understanding of the majority of the framers and ratifiers.

Let me just add that I consider this defense of *Brown*—the paradigm case defense of *Brown*—to be an originalist defense. But if I follow you, what we disagree about is this: Some No Application Understandings, on your view, are special. They are specially central to the original meaning, and, more than this, they are reflected in a special way in the text. When there exists a No Application Understanding of this kind, judges are not free to abandon it. Racial segregation of particular public facilities does not fall in this category for you. Even if there had been an original understanding that the Fourteenth Amendment did not bar racial segregation—in the senatorial gallery or perhaps even in public schools, for example—such a No Application Understanding would not have fallen into this special category. So as to racial segregation, I think you and I do not have to take issue with the history: It does not matter.

By contrast, on your view, the understanding that the Fourteenth Amendment's prohibitions had No Application to political rights did fall into this special category. On your view, it was central to the original meaning, and it was reflected in a special way in the text of Section 1. Do I have this right?

II. VOTING RIGHTS AND THE FOURTEENTH AMENDMENT

JED RUBENFELD: I am sure you will elaborate this view in your next reply, but for now another question. If the Fourteenth Amendment, by reference to its paradigm cases, can be properly read to prohibit states "from branding a person as a second-class citizen, as an inferior, simply because he was born black," how will you avoid recognizing that this principle is violated when a person is denied the vote merely because he was born black? Certainly this denial brands blacks as "inferior." You will have to say that it doesn't, however, make them "second-class citizens." But I think you may have a problem here,

even if voting was not then considered a specific privilege or immunity of citizenship.

AKHIL AMAR: You pose a great question—and one that I have wrestled with over the years. But I think that you, too, may have a problem—as may anyone else who truly seeks to capture the text of the Constitution in a particular way. Here is one way to put the problem: If the Fourteenth Amendment applies to voting, then what exactly was all the fuss over the Fifteenth Amendment about? And how can we make sense of the Fifteenth Amendment’s text as anything more than a supremely curious and clumsy redundancy?

I will eventually try to answer these questions, but let me start—autobiographically—by tracing my own interpretive journey on these issues. My initial view was that the text of the Fourteenth Amendment demanded equality; and that at its core was a prohibition on explicit race-based inequality that privileged whites over blacks. And what could be more straightforward than saying that laws explicitly barring blacks from voting (or imposing stricter standards on black voters) were just like the Black Codes that you and I both believe were the very laws the Fourteenth Amendment clearly meant to prohibit?

Then I began to do historical research. I found that the virtually uniform, highly visible, public pronouncements of the Fourteenth Amendment’s backers—in a vast number of official places and publications—insisted that the Amendment did not apply to “political rights” such as voting, but rather encompassed only “civil rights.”⁴ These pronouncements were central to the political debate over the Amendment’s framing and ratification. Without these clear public pronouncements—which shaped the American people’s understanding of the pending Fourteenth Amendment—the Amendment would, I think, have been defeated. But even more significant (for me) was what these supporters said, and its relationship to the text of the Amendment. They said that the domain of equality affirmed by the text is limited: The Amendment extends to civil equality but not political equality.⁵ And, as I shall explain below, I now see how this near-universal explanation of the Amendment by its supporters was codified into the Amendment’s text and public meaning.

It is useful to begin by comparing various no-application-to-voting statements from the 1860s to some of the no-application-to-segregation

4. See AMAR, *THE BILL OF RIGHTS*, *supra* note 2, at 216-17 & n.* (citing dozens of statements).

5. This is why, at one key point in my earlier comments, I used the phrase “civil equality” as an important qualification of my anti-*Plessy*, pro-*Brown* analysis.

statements from the 1860s that I discussed earlier. To repeat, some 1860s segregationists simply said that separate could and would in fact be equal. But these arguments conceded that true civil equality was the textual test. Other segregationists, by contrast, seemed to think the Amendment did not apply to the federal government. But the text of the first sentence does limit all government, and so did the companion language—almost *in haec verba*—of the Civil Rights Act of 1866. Moreover, many framers understood this point.⁶ It's also worth noting that the applicability of the first sentence of the Amendment to the federal government was a central feature of some of the first Justice Harlan's landmark opinions—both for the Court and for himself.⁷ (So on this point, I capture both the text and early doctrine.)

Thus, when confronting 1866 pronouncements by the Amendment's official supporters and sponsors that the Amendment would have No Application to voting, my initial inclination was to ask, "where does it say *that* in the Amendment's text?" And then I began to see the answer—which I would not have seen but for my willingness to pay heed to paradigmatic No Application Understandings at the time of enactment (the very sort of data your approach tends to dismiss, I think.). One point—though not strictly textual—was that the Amendment was in ordinary everyday parlance referred to as "the Civil Rights Amendment." The companion Act of 1866 was officially known as the Civil Rights Act. (Recall that the first sentence of the Fourteenth Amendment is lifted almost word for word from this Act, which was closely linked in the public mind to the Amendment itself.) And as noted above, "civil rights" was used emphatically in contrast to "political rights" such as voting.⁸

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6. Perhaps others did not, in part because the first sentence was a rather late addition to the Amendment's text.
 7. See, e.g., *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896) (Harlan, J., majority opinion) ("[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law. The guarantees of life, liberty and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race. Those guarantees, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the Nation and of the State, without reference to considerations based upon race."). Note that in his reference to "political rights," Harlan was of course relying on the Fifteenth Amendment. See also *Plessy v. Ferguson*, 163 U.S. 537, 556 (1896) (Harlan, J., dissenting) (quoting *Gibson*).
 8. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981) (officially captioned as "An Act to protect all Persons in the United States in their Civil Rights"). The phrase "civil rights" was also used in contrast to "social rights." For me, the distinction between civil rights and social rights is reflected in two basic Fourteenth Amendment ideas. First, the Amendment does not automatically apply of its own self-

Two more—and clearly textual—points then began to crystallize for me. First, the Amendment’s opening sentence talks about the rights of all citizens born in America—women as well as men, blacks as well as whites. To be a citizen is different than being a voter. Women in 1866 were seen by Republicans as equal birthright citizens who could, for example, sue and be sued in diversity jurisdiction. The *Dred Scott* case had said that blacks could never be citizens (and thus could not invoke diversity jurisdiction). But the framers of the Fourteenth Amendment emphatically rejected *Dred Scott*’s holding and much of its reasoning; indeed, they tried to overrule it by statute in the 1866 Civil Rights Act—whose key citizenship sentence later became the opening sentence of the Fourteenth Amendment. *Dred Scott* had said that blacks could not be citizens because they were not allowed to vote in many places. The *Dred Scott* dissenters rejected this logic: Equal citizenship rights did not entail equal voting rights. Civil rights (of blacks and of women) should not be conflated with political rights, said the *Dred Scott* dissenters. And the framers of the Fourteenth Amendment apparently agreed with this. They wrote an Amendment whose domain extended to “civil equality” but not “political equality.” They said that blacks were not improperly demeaned as citizens when not allowed to vote, just as women were not demeaned as citizens when disenfranchised. (Of course, this view of the Fourteenth Amendment must be revisited in light of the later Fifteenth and Nineteenth Amendments.)

Second, the second sentence of the Fourteenth Amendment fleshed out the first by elaborating that what it meant to be an equal birthright “citizen” was to enjoy certain “privileges” and “immunities.” Now, as a matter of ordinary language and plain meaning, the right to vote certainly can be understood as a “privilege”—and so can the related political rights of jury service, militia service, and governmental service. But this was plainly not how the supporters of the Fourteenth Amendment were using these words. (And here again, it is my focus on paradigmatic No Application Understandings that caused me to

executing force to certain nongovernmental activities. (Hence the state action doctrine, whose textual font is the opening “No state shall” language of the Amendment’s second sentence.) Second, although Congress does have power under Section 5 to enforce the equal-birth-citizens idea of the Amendment’s opening sentence (which does not use the phrase “No state shall”) against various nongovernmental practices and institutions that might threaten a regime of equal citizenship, there are real boundaries to this congressional power. For example, Congress, cannot under Section 5 require private persons to refrain from race discrimination in private dinner parties and dating. Such “social” practices lie beyond the domain of equal citizenship, which may extend beyond the strictly governmental (especially if Congress so provides) but does not apply to highly private spaces governed by individual associational-social freedom.

read the text in a different way than you might.) In effect, the Fourteenth Amendment's supporters were using the phrase "privileges or immunities of citizens" as a kind of legal term of art closely akin to the usage of a similar phrase in Article IV. The Article IV phrase promised out-of-staters equality with in-staters across a wide spectrum of civil rights—of property, speech, religion, access to courts, and so on—but not political equality in voting, military service, jury service, or governmental service. A New Yorker visiting Virginia has as much of a right to speak or to sue as does a Virginian, but the visitor has no right to vote in Virginia elections. The intratextual linkage between Article IV and the Fourteenth Amendment thus confirms that the text of the latter likewise applies to civil equality but not political equality.

These two textual points are not just my own idiosyncratic reading of the Fourteenth Amendment but in fact closely track the textual, historical, and intratextual arguments explicitly made by the Supreme Court in the 1875 case of *Minor v. Happersett*.⁹ So my reading captures both the text and the (early) doctrine. In *Minor*, no one even thought to argue that the Equal Protection Clause applied to voting. Everyone understood that the key clause of Section 1 focused on privileges and immunities of citizens. Textually, the Equal Protection Clause focused more on the equal application of laws than on the basic substance of laws. But for me, the key point is that the Equal Protection Clause is aimed at persons, not citizens, and was understood by all as paradigmatically focused on the rights of (nonvoting) aliens—a rather awkward text for voting rights. And if this text, or some other text does indeed apply to voting, then I come back to my earlier question: What is the Fifteenth Amendment about, if the Fourteenth already applied to voting?

So here are my questions for you. What do you think of my intratextual claims about Article IV and the Fourteenth Amendment? Can the Amendment be read as semantically inapplicable to voting? If it can be read this way—and also can be read more broadly—what is the role of near-universal No Application Understandings in making the interpretive choice? What is the role of the precise reasons given for the No Application claim by those who made this claim in the 1860s while the Amendment was still pending? And if the Fourteenth Amendment really can be stretched to apply to voting, notwithstanding the near-universal public understanding in 1866-1868, then just how are we to make sense of the text and enactment history of the Fifteenth? Is this Amendment, on your view, otiose?

9. 88 U.S. 162 (1874).

JED RUBENFELD: Your argument sounds as if it were directed to someone who refused to acknowledge that the Fourteenth Amendment, Section 1, was originally intended to have no application to racial discrimination in the suffrage. But of course I do acknowledge that. Never mind the superfluity of the Fifteenth Amendment: The framers would never have written Section 2 of the Fourteenth Amendment, imposing political penalties on states that denied black men the vote, if they thought such denials were already barred by Section 1.

The question, however, is whether it is proper today to read the Fourteenth Amendment to bar racial discrimination in voting. To me the answer to that question is obvious: Yes. On the basis of its paradigm cases, the Fourteenth Amendment is compellingly read to stand, at its core, for the principle that states cannot deliberately treat blacks as second-class citizens, and denying blacks the vote plainly violates this principle. In fact, you wrote above that “a state law whose candid preamble explicitly proclaimed that black Americans are hereby declared inferior to white Americans would . . . violate the core meaning of the [Fourteenth] Amendment.” Surely a law denying blacks the vote does just that: It proclaims that black Americans are inferior to white Americans. I don’t quite see how you avoid this conclusion.

Putting that question to you aside, I can think of three different objections you might make to this conclusion. Here are the objections and my answers to them.

First, you might say that I disregard the original understanding. If so, I plead guilty. You already know my answer: This was a No Application Understanding; modern constitutional law repudiates many original No Application Understandings; and that’s perfectly legitimate so long as judges are doing justice to the text in light of its paradigm cases. That’s how revolutions by judiciary come about.

Second, you might be making a further point about the text and the clarity with which Section 1 of the Fourteenth Amendment excludes political rights, once we really understand how that text was originally understood. In other words, on your view, once we acknowledge that for the framers, voting was not a privilege or immunity of citizenship—and that the framers chose these terms of art consciously and precisely to exclude political rights—it must follow that we cannot read the Fourteenth Amendment to ban racial discrimination in voting laws. Such a reading of the Fourteenth Amendment would violate, and make no sense of, the very language we’re purporting to interpret.

Honestly, I don’t think this objection is as strong as you believe, even on your own premises. Let me try to persuade you. I grant that the framers and ratifiers of the Fourteenth Amendment did not see voting as a privilege or immunity of citizenship. I will even grant for purposes of this argument that

these are terms of art in a special sense, so that later interpreters are somehow semantically barred from ruling that voting is a privilege or immunity of citizenship. (I don't actually accept this idea, but I'm going to accept it here *arguendo*.) Does it follow from these premises that denying the vote to blacks does not make them second-class citizens?

No. Take the Yale Law School. Let's stipulate that being Dean of the Law School is not a privilege or immunity of being a professor here. That is, if Yale Law School Professor *X* is denied the post, he is not denied a privilege or immunity of his professorship. Let us add further, hypothetically, that even eligibility for the deanship is not a privilege of professorship: Perhaps the Yale Law School deanship is open only to professors who were junior professors here, have been at Yale for at least twenty years, and teach constitutional law (now that's really hypothetical). Taking all these facts as true, if Yale Law School were to enact a rule banning black professors from the deanship, the school would have made blacks second-class professors. Don't you think?

If so, then simply because voting was not considered to be a privilege or immunity of citizenship, it does not follow that denying the vote to blacks does not make them second-class citizens. Quite the contrary: Denying blacks the vote is an extraordinarily powerful and effective way of treating them as second-class citizens, even if voting is not itself a privilege or immunity of citizenship.

If it were true, as you say, that the framers or ratifiers somehow believed that race-based denials of the vote did not "demean blacks as citizens," this belief would be, in my view, completely irrelevant. It's wrong, and it's bottomed on a No Application Understanding, which later interpreters are free to reject. Once you accept, on the basis of paradigm-case reasoning, that Section 1 of the Fourteenth Amendment stands at least for the principle you and I both agree it does stand for—no deliberate treatment of blacks as second-class citizens—it is no objection to striking down a race-based denial of the vote that voting is not itself a privilege or immunity of citizenship. In other words, if the text of the Fourteenth Amendment permits the principle we agree to, then I think it must permit the result you resist—or at any rate, I think you have not yet stated a textual (as opposed to historical) argument against that result.

This is, I think, a problem for you. If the chief way you get to *Brown* and its progeny is through the no-second-class-citizenship principle—meaning that you need that principle to defend the wholesale eradication of "separate but equal" after *Brown*—then I think you're in some difficulty, because denying blacks the vote does make blacks second-class citizens, regardless of whether voting is itself a privilege or immunity of citizenship. I understand that you want the no-second-class-citizenship principle to be limited to matters of "civil

rights”; that you want it limited to denials of rights that are in and of themselves privileges or immunities of citizens; and that you think that voting cannot today be interpreted as a privilege or immunity of citizenship. For present purposes, I’m granting that voting is not a privilege or immunity of citizenship. But if that’s the only textual argument you have for keeping voting out of the no-second-class-citizenship principle, I do not think you have made a very strong argument yet.

The framers of the Fourteenth Amendment committed themselves and the nation to more than they bargained for. They committed the nation to principles of equal citizenship and equal protection of the laws, and these principles turn out to require more than the framers thought. These principles, it turns out, plainly require a prohibition on denying blacks the vote – the right that is today the quintessential right of citizenship. Nothing in the text of the Fourteenth Amendment rules out this view. On the contrary, the text either cries out to judges to interpret the concept of citizenship and to deliver their best account of what the privileges and immunities of citizenship include – or, at a minimum, it invites precisely the principle that you and I both endorse, the principle that states cannot deliberately treat blacks as second-class citizens. This principle fully authorizes judges to strike down racial discrimination in voting, even if voting is not, in itself, a privilege or immunity of citizenship.

Both the Citizenship Clauses of the Fourteenth Amendment and the Equal Protection Clause, in my view, support this result. To stick with the Privileges or Immunities Clause for one moment longer, we might say that (1) one clear privilege or immunity of citizenship is the right not to be treated as a second-class citizen; (2) we derive this principle from the Fourteenth Amendment’s paradigm cases; (3) the framers of the Fourteenth Amendment may have held the view that treatment as second-class citizens did not occur when blacks were denied political rights, on the theory that political rights were not themselves privileges or immunities of citizenship; but (4) this view, if they indeed held it, was logically faulty, morally faulty, is not the only way to do justice to the text, and reflects a No Application Understanding not binding on subsequent interpretation.

III. TEXTS AND COMMITMENTS

JED RUBENFELD: Your final objection to my view might derive from the Fifteenth Amendment. This is a perfectly valid textual point. You are surely correct that it counts against an interpretation of Section 1 of the Fourteenth Amendment that it makes superfluous both Section 2 of that Amendment and the entirety of the Fifteenth Amendment. Although this is a good point, in the end I do not think it is anywhere near sufficient. Intratextualism is a

methodology I approve of, but our Constitution is not so perfectly wrought a document that one provision may not be read in such a way as to make another provision needless. The Tenth Amendment and the Necessary and Proper Clause basically become superfluous on a certain reading of the latter Clause, the enumerated Article I, Section 8 powers, and other constitutional provisions. But I accept that reading, I think you do too, and I think *McCullough* does as well. It is a feature of the commitment-based paradigm-case approach that constitutional rights and powers can come to mean more than they were originally intended to mean. If that is true, then it becomes quite possible for constitutional right *A* to come to mean something that duplicates constitutional right *B*. That is what has happened with the Fourteenth and Fifteenth Amendments.

The reading of the Fourteenth Amendment that I endorse is not, however, otiose or merely duplicative of the Fifteenth. On my view—and of course on most people’s view—the Fourteenth Amendment easily and naturally is read to prohibit racial discrimination with respect to all “political” rights, including those not covered by the Fifteenth. Thus for me *Strauder v. West Virginia*,¹⁰ in which the Court held that the Fourteenth Amendment prohibited states from excluding blacks from jury service, is an easy case and a strong, clear example of the kind of paradigm-case reasoning I advocate. You, on the other hand, have to take the view that *Strauder*’s holding is wrong: The Fourteenth Amendment has no application to jury service, because jury service is a “political right.”

To be sure, you will say that *Strauder* was rightly decided, but only because you have some very interesting arguments to make showing that the Fifteenth Amendment is properly read to cover jury service. But you are in the position of having to say either that the Fifteenth Amendment covers all “political” rights, including those that do not seem to involve voting (for example, militia service and governmental service)—to me, a pretty doubtful proposition—or else you will have to invoke some other clause somewhere else in the Constitution to explain why states cannot deny blacks “political” rights. I am not saying you cannot make these arguments, but do you not find them a little strained—perhaps a little goal-oriented? To me, the much stronger, eminently justified, and satisfying position is that the Fourteenth Amendment bars this kind of blatant discrimination, the purpose of which would be to treat blacks as inferiors and as second-class citizens. The Fourteenth Amendment’s Equal Protection and Citizenship Clauses committed the nation to eradicating such laws, even if all the requirements of this commitment were not fully

10. 100 U.S. 303 (1880).

understood at the time of enactment, and even if the framers believed they had produced a text that did not include them.

AKHIL AMAR: Jed, your comments nicely illustrate the differences between your methodology and mine. Candidly, I do worry about how your approach seems to create a kind of bait-and-switch in the actual process of drafting and ratifying amendments: The American public agrees to one set of publicly understood rules, codified in the very words of the amendment, and then judges say, “Aha! You forgot to say ‘Simon Says!’”

Let me elaborate my uneasiness with your approach by sticking with our case studies involving the Fourteenth Amendment’s application or nonapplication to segregation and voting. On segregation, I do not see the national conversation in the 1860s as one in which the Amendment’s supporters universally said, “the civil equality norm will not apply to segregation.” Rather, some supporters in effect said that “segregation does not necessarily violate civil equality” and other supporters disagreed.¹¹ The two sides of this debate did not uniformly treat the Amendment’s text as if it said: “Civil equality—but segregation laws are categorically exempt from this command.” But in the voting context, I do think that this is how the text was almost universally defended and understood by both sides: “Civil equality—but emphatically not political equality.” Had the Amendment’s framers drafted and ratified a text that explicitly said “This amendment does not apply to political rights” then surely judges would be bound by this semantic No Application, even on your view, right? My claim is essentially a semantic one: The Amendment’s framers did say this, once one understands how they were using words. Granted, they did not use the words “no political rights” but they did use a legal term of art that, in the great national conversation of the 1860s, meant the same thing: “privileges or immunities of citizens” à la Article IV.¹²

As a formal matter, the Fifteenth Amendment can be read as declaratory, as can the Tenth Amendment, and (later) the Twenty-Fourth. But the Tenth was widely understood as declaratory when adopted, whereas virtually no one thought the Fifteenth was merely declaratory and redundant of the Fourteenth when both Amendments were drafted, debated, and ultimately ratified. So your approach does rather less justice to history and to the actual deeds of the

11. See Klarman, *supra* note 3; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

12. Had the Amendment explicitly declared its inapplicability to political rights, your argument about the invidious social meanings of racial disenfranchisement would, I think, be too clever by half—an evasion of the clear limits on the Amendment’s scope. For me, the same is true of your argument as applied to the Amendment as it was actually drafted and ratified.

American people in the amendment process than does a more standard originalism focusing on the text, in light of the history and how Americans in the amendment process actually used words.

On your view, should judges have properly held race-based suffrage laws unconstitutional in 1868, one day after the ratification of the Fourteenth Amendment? Given your view that such laws, with their strong message of racial inequality, violate the Fourteenth Amendment's core principle—its central paradigm case—then surely you must believe that courts were obliged to strike down such laws from day one. And if so, shouldn't they also have held sex-based suffrage laws unconstitutional, since these laws, too, could be said to reflect an impermissible governmental declaration of women's inferiority as a matter of birth status?¹³ Of course, woman suffrage was the very issue litigated in *Minor v. Happersett*, in which, as I have mentioned, the Court unanimously argued that the text and history of the Fourteenth Amendment, and its intratextual echo of the language of Article IV, all made clear that the Amendment did not enfranchise women.¹⁴

As for *Strauder*, I believe that its result is correct and that in fact it failed to go far enough—it prohibited race discrimination in juries only in cases with black defendants. In a landmark 1875 law, Congress had already gone further, prohibiting race discrimination in all juries, state and federal, regardless of the race of the defendant. And this law explicitly echoed the language of the Fifteenth Amendment—in keeping with my view that this Amendment was indeed understood to embrace voting rights in a wide variety of political contexts—the right to vote for governmental officials, to be sure, but also the right to vote in various government bodies such as legislatures and juries.¹⁵

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13. The Fourteenth Amendment's text did not speak merely of race discrimination but of birth equality more generally—and was so understood by many of its framers and ratifiers, as I have argued. See AMAR, *AMERICA'S CONSTITUTION*, *supra* note 2, at 383-85, 392-95; AMAR, *THE BILL OF RIGHTS*, *supra* note 2, at 215-18, 239-41, 245-46, 260-61, 293-94.
 14. The Waite Court's logic in this case also seemed to imply that the Fourteenth Amendment likewise did not enfranchise black men.
 15. Compare U.S. CONST. amend. XV ("The right of *citizens of the United States* to vote shall not be denied or abridged by the *United States* or by any State on account of race, color, or previous condition of servitude.") (emphasis added), with Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 335, 336 ("[N]o citizen . . . shall be disqualified for service as grand or petit juror in any court of the *United States*, or of any State, on account of race, color, or previous condition of servitude . . .") (emphasis added). In three earlier Reconstruction statutes, Congress had likewise linked the language of the Fifteenth Amendment to the right to hold office. See Virginia Readmission Act of Jan. 26, 1870, ch. 12, 16 Stat. 62, 63 ("[I]t shall never be lawful for the said State to deprive any *citizen of the United States*, on account of his race, color, or previous condition of servitude, of the right to hold office") (emphasis added); Mississippi Readmission Act of

Language is sometimes metaphoric, and legal language is no different. For example, in the Fifth Amendment, “life and limb” can be read literally—in which case double jeopardy is permitted outside cases of death and dismemberment. But “life and limb” can also be read more metaphorically, to apply to all serious criminal punishment. I think the latter reading makes more sense of the framers’ and ratifiers’ basic purposes, as I have explained elsewhere.¹⁶ In the Fifteenth Amendment context, I do indeed believe that the “right to vote” was understood—for a variety of overlapping and interlocking reasons that I shall not repeat here but that I have catalogued in both *America’s Constitution*¹⁷ and *The Bill of Rights*¹⁸ and that have been extensively documented in works by other scholars as well¹⁹—as encompassing political rights more generally.

Once Americans agreed to the Fifteenth Amendment, then it might well be the case that good interpreters should read the Fourteenth more expansively than they would have otherwise—just as, on my view, good interpreters should read the Fourteenth more expansively once the Nineteenth Amendment was ratified. (More on this below.) But if we today should read the Fourteenth Amendment to mean far more than it meant to ratifying Americans in 1868, it is, on my view, largely because these later Amendments (the Fifteenth and Nineteenth) are doing much of the heavy lifting. As a way of sharpening this point, I return to my questions about what a good judge should have done about black suffrage and women suffrage one day after the ratification of the Fourteenth Amendment (and long before America had agreed to the letter and spirit of the later Fifteenth and Nineteenth Amendments).

JED RUBENFELD: On bait-and-switch: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness” The man who wrote this sentence owned slaves, as did many of the men who signed the text in which it appears, as did the people for whom they claimed to speak. Men are capable of holding principles whose

Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (same); Texas Readmission Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (same).

16. See Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1810-12 (1997).
17. AMAR, *AMERICA’S CONSTITUTION*, *supra* note 2, at 400 & n.*, 612 n. 106.
18. AMAR, *THE BILL OF RIGHTS*, *supra* note 2, at 94-96, 273-74 & n.*; see also AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 167-68 (1997).
19. See, e.g., Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998).

full implications they do not want to accept. Men are capable of committing such principles to writing. Sometimes they do so in constitutions. When they do, later interpreters are not constrained to put on the blinders of the past; the blinders of the present will be quite sufficient.

If the Declaration's most famous sentence had been written into the Constitution, it would not have been improper for a court, a century later, to hold that this language outlawed slavery. On the contrary, a court that did not so hold would fail to do justice to the text. And this would be true, on my view, no matter how often the framers of that text had made public statements that the text did not outlaw slavery, no matter how clearly they said that they had chosen these words because these words had been used before by people who didn't believe they outlawed slavery, and no matter how widespread that No Application Understanding became in the public conversation surrounding the enactment.

This is not bait-and-switch. The framers of a constitutional text can always use narrower, less majestic, less principled language. No one stops them. Certainly it is not as if the courts lure constitution-makers into grand statements of principle, promising a narrow construction only to laugh in their faces later. By the 1860s, if not well before, the capacity of courts to interpret broad constitutional language broadly was well established. The framers knew *Marbury v. Madison*; they knew *McCullough v. Maryland*, which explicitly says that courts should construe broad constitutional language broadly; and so on. By contrast, the requirement that judges must construe constitutional provisions in accordance with specific original intentions was not then any better established than it is today.

If the framers of the Fourteenth Amendment had wanted to enshrine or entrench the states' right to deny blacks the vote, they could have easily done so. For example, they could have added a Section 6, providing: "The enumeration of certain rights in this amendment shall not be construed to deny or disparage the power of the several states to deprive the Negro of the right to vote or of any other political right." Why did they not do this, if they wanted to be absolutely certain that no court would ever construe the Fourteenth Amendment to cover so-called political rights? Perhaps they could not stomach it. Perhaps they actually did not want to impose that prohibition on later interpreters. We cannot know. The answer, "They didn't think it was necessary," is plainly insufficient. To begin with, it makes them seem like fools: See, once again, *Strauder v. West Virginia*, in which the Court would in fact, just twelve years later, interpret the Fourteenth Amendment to strike down a state law denying blacks what you say was originally understood as a "political" right, not a "civil" right (jury service). More importantly, an excess of caution is always possible and usually prudent when constitutional framers

are genuinely insistent on a particular construction of their text—as the Tenth Amendment illustrates. For whatever reason, the framers of the Fourteenth Amendment didn't include a Section 6. In the absence of such a prohibition, judges have full authority to do justice to the principle committed to writing. Indeed, that is their job.

In my view, the argument we are having is not semantic. It concerns the nature of commitment. The Fourteenth Amendment makes no commitment to any state power to deny blacks the vote. To be sure, the Amendment was originally understood not to forbid that particular brand of racism. But it made no commitment to that effect. Judges are bound only by the Constitution's commitments—which, in the case of the Fourteenth Amendment, includes a commitment to the equal protections of the laws and against the abridgment of the privileges or immunities of citizens of the United States. Judges are called on to do justice to these commitments even if that means reversing original No Application Understandings.

But in a way you agree to most of this. You are willing to read the Fifteenth Amendment broadly, perhaps even “metaphorically,” to cover all political rights. In my view, what you are doing is elaborating a broad principle from the paradigm case—the right to vote. As a matter of fact, you make the Fifteenth Amendment cover matters—like militia and governmental service—that seem to me to go further toward “switching” its text, from what it actually says to something quite different, than I am prepared to accept. (I think I'm much more of a textualist than you!) You do the same for women under the Nineteenth Amendment. I gather that you are willing to go beyond literal or plain meaning here because you think that it conforms to the framers' and ratifiers' own interpretation, at some level of generality, of what they were doing.

AKHIL AMAR: A few quick responses. As for what the Court said in 1880, I find it far less plausible as an accurate account of the original meaning of the Amendments that Congress proposed, and that Americans ratified, in the 1860s and 1870s than what Congress itself said and did in its landmark statute of 1875—which, to repeat, prohibited race-based jury discriminations based on language directly borrowed from the Fifteenth Amendment, not the Fourteenth. Not coincidentally, Congress thereby protected black rights more expansively than did the *Strauder* Court. Only three years after *Strauder*, the Supreme Court went on to repudiate other sections of the 1875 statute in the infamous *Civil Rights Cases* of 1883. I say “infamous” because much of what the majority said in this case—over a passionate and brilliant dissent by Justice Harlan—is hard to square with the Fourteenth Amendment's text and enactment history. In general, the post-Reconstruction Court is not an

infallible guide to the original meaning of the Reconstruction Amendments—see, for example, the *Slaughterhouse Cases*, the *Civil Rights Cases*, and *Plessy*. But, then again, there is *Minor v. Happersett*, which did in my view cohere with the Amendment’s text and enactment history.

This points up another difference between your approach and mine: You are rather more generous to the Court. I am often more skeptical, focused as I am on the original meaning of the Constitution itself as ordained and then amended. Almost none of the judges on the post-Reconstruction Court were themselves open supporters of the Fourteenth Amendment when it was pending.²⁰ And history was moving at lightening speed in these years. What was politically impossible to propose as a constitutional amendment in 1866—universal race-neutral suffrage—was in fact the core of an amendment proposed only three years later. Conversely, many of the promises of the Reconstruction Amendments were simply not fulfilled by Justices hearing cases several years after the promises were in fact made.

IV. WRITERS AND INTERPRETERS OF THE CONSTITUTION

JED RUBENFELD: I wonder if you can make the same defense, though, of the quite fancy move in which you read back from the Nineteenth Amendment to reinterpret the Fourteenth Amendment in such a way as to jettison original No Application Understandings concerning sex discrimination. If I understand your view, the Nineteenth Amendment, which speaks of the right to vote, ends up not only guaranteeing women all “political” rights (including rights that only “metaphorically” involve voting), but also guaranteeing women, through a retroactive effect on the meaning of the Fourteenth Amendment, equal “civil” rights as well. Is it your claim that this is how the makers of the Nineteenth Amendment interpreted what they were doing?

On my view, their interpretation is not what counts. The words they committed to writing count; their paradigm cases count. But the writers of a constitutional text are not, in our system, its interpreters. You claim to give much more weight to the framers’ and ratifiers’ interpretation of their own texts than I. For me, their interpretation is simply irrelevant.

You ask a good question about whether, on my view, a judge the day after enactment ought to have read the Fourteenth Amendment to bar segregation or to block racist voting laws. I have two answers. First, it will usually be the case that if an original interpretation of a constitutional provision was

20. See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 655-78 (1994).

genuinely universal, judges will share it. (Indeed, there's something suspicious for me in the claim that your no-political-rights interpretation of the Fourteenth Amendment was so "universal" in 1867 that the words of the Amendment could not "semantically" have been understood in any other way, given that all but two Justices of the Supreme Court in 1880 didn't follow that interpretation.) Second, judges probably ought in most cases to stick to genuinely widespread, clearly intended meanings in the period directly following enactment. A new constitutional enactment needs time to work its way into the real fabric of society before the nation can be described as fully committed to it. After time passes, the binding force of the commitment is no longer open to doubt, and judges will be in a better position to assess whether the intended Application Understandings are enough or whether the commitment in reality requires more than was originally understood.

AKHIL AMAR: As for the sex discrimination question, I believe that the Fourteenth Amendment as originally written was in fact far more attentive to issues of sex discrimination than is conventionally understood; and that the Nineteenth Amendment did indeed regloss the Fourteenth Amendment's text with an additional egalitarian overlay. A great many Americans pondering the Nineteenth Amendment when it was proposed did in fact understand its relevance to issues of jury composition, legislative eligibility, and other political rights. There is rather a lot of history here that is quite revealing.²¹ And as for issues of military service, additional constitutional texts come into play—including the Second Amendment, which reflects the ideal that in a sound republic ("a free state") the military force ("the militia") should look like the voters ("the people") and the voters should constitute the military. This isn't the place to rehearse the entire argument exploring linkages between voting rights and military service—I've done so at length elsewhere²²—but the argument does reflect my desire to understand the Constitution holistically, to see how different provisions adopted at different times cohere to form one supreme law.

In your own way, I know that you, too, aspire to holism, and to textualism. Where I think we disagree is how enactment history comes into the picture, and how much we should trust, and defer to, judicial doctrine that breaks free

21. See AMAR, AMERICA'S CONSTITUTION, *supra* note 2, at 426-28, 619-21 nn.50-54; Amar & Brownstein, *supra* note 19.

22. AMAR, THE BILL OF RIGHTS, *supra* note 2, at 48-49 & n.*; Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889; see also AMAR, AMERICA'S CONSTITUTION, *supra* note 2, at 17, 19, 67, 322-26, 358, 373, 376, 396-97, 400, 424-25, 445-47, 607 n. 51.

from that history. But these differences should not obscure our similarities. And so let me end where you began, by acknowledging that “you and I have a great deal in common.” Jed, I cannot tell how much it warms my heart to hear you describe yourself as “much more of a textualist” than I am. I am truly grateful for your company.