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Thirteenth Amendment Echoes in Fourteenth Amendment Doctrine

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This Article argues that to better understand the historical development of Fourteenth Amendment antidiscrimination doctrine, we should look to the Thirteenth Amendment. The Fourteenth Amendment was drafted in response to debates over the meaning of the Thirteenth Amendment; it was widely understood at the time of ratification as building upon the constitutional commitments embodied in the Thirteenth Amendment; and assumptions about liberty and equality more commonly associated with the Thirteenth Amendment have had a recurring, if underappreciated, influence on judicial interpretations of the Fourteenth Amendment.

I trace these Thirteenth Amendment influences on the Fourteenth Amendment from Reconstruction to some of the Supreme Court's most important twentieth-century racial discrimination cases—such as Buchanan v. Warley, Shelley v. Kraemer, and Brown v. Board of Education—and through more recent decisions, including Obergefell v. Hodges, that extend constitutional antidiscrimination protections beyond race. Once we recover these recurrent, consequential, but rarely acknowledged Thirteenth Amendment echoes in Fourteenth Amendment doctrine, we can recognize the existence of a constitutional principle that operates alongside the tiers-of-scrutiny approach that dominates modern Fourteenth Amendment doctrine. This principle—which I label the principle of equality of rights—modulates the strength of the nondiscrimination requirement to account for the importance of the sphere of activity at issue. Despite its simplicity and intuitive attractiveness, and its foundations in the original understanding of the Fourteenth Amendment, the equality of rights principle has proven deeply unsettling across time, feared both for its potential to radically expand the reach of constitutional antidiscrimination norms and its potential to excessively constrain these norms. I argue that if constitutional law were to recognize and accept this principle, our Fourteenth Amendment doctrine would better reflect foundational commitments of Reconstruction, better explain the Court's most consequential interpretations of the Equal Protection Clause, and better serve the needs of a nation still struggling to realize the emancipatory vision of the Thirteenth Amendment.

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INTRODUCTION

Students of constitutional law quickly learn two things about the limits the Fourteenth Amendment places on the ability of government to treat different groups differently: there are the rules, which involve doctrines of state action, suspect classifications, fundamental rights, and levels of scrutiny; and there are the canonical cases, most of which break these rules.

At the apex of the Fourteenth Amendment antidiscrimination canon stands *Brown v. Board of Education*,[1] a case in which the Supreme Court reached the right outcome only by engaging in a series of obfuscations and half-hearted rationalizations. Another canonical rulebreaker is *Shelley v. Kraemer*,[2] in which the Court declared unconstitutional judicial enforcement of racially restrictive housing covenants. The reasoning of this seminal case in the development of the state action doctrine has baffled generations of scholars and students alike. In *Plyler v. Doe*[3] the Court held that Texas could not exclude undocumented immigrant children from public schools only by sidestepping its own supposed rules for how to interpret the Equal Protection Clause. In recent years, Justice Anthony Kennedy led the Court on some unorthodox doctrinal excursions on the way to expanding constitutional protections against sexual orientation discrimination. His 2015 opinion in *Obergefell v. Hodges*,[4] with its proudly amorphous blend of due process and equal protection doctrine, is notoriously difficult to explain using the standard tools of constitutional doctrine. The pantheon of rulings expanding constitutional protection against discrimination is filled with doctrinal troublemakers.

This Article offers an account of Fourteenth Amendment doctrine that better explains and justifies these and other landmark antidiscrimination cases. I show how the Supreme Court, in persistent if underappreciated ways, has expanded the Fourteenth Amendment's protections against certain forms of discrimination by drawing upon assumptions about liberty and equality more commonly associated with the Thirteenth Amendment. A recent generation of scholars has sought to revitalize the Thirteenth Amendment, presenting the amendment that declared an end to slavery as the centerpiece for a constitutional vision radically different than what the Court currently recognizes.[5] This Article presents another argument for why the Thirteenth Amendment deserves a more prominent place in the American constitutional tradition, one that focuses on the

1. 347 U.S. 483 (1954).
2. 334 U.S. 1 (1948).
3. 457 U.S. 202 (1982).
4. 576 U.S. 644 (2015).
5. *See, e.g.*, THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT (Alexander Tsesis ed., 2010); Alexander Tsesis, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447 (2012); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001); William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007).

subtle and often overlooked ways in which its underlying principles have long operated in the Supreme Court's constitutional jurisprudence.

At the heart of this account is an assumption about the reach of the Constitution's prohibition on certain forms of discrimination that I term the *equality of rights* principle. In its most abstract form, the principle is this: *the strength of the Fourteenth Amendment's nondiscrimination requirement varies in relation to the importance of the sphere of activity at issue*. As innocuous and common-sensical as this formulation sounds, it has no place in modern Fourteenth Amendment doctrine. That doctrine, as law students learn every year, revolves around a set of binary junctures: Is there state action? If not, the Fourteenth Amendment does not apply; if so, it applies to full effect. Is there a suspect classification, or does the classification involve a fundamental right? If so, apply heightened judicial scrutiny; if not, apply only minimal judicial scrutiny. This ruleset captures accurately enough the Fourteenth Amendment doctrine that courts have used in the vast majority of equal protection cases for at least the past half century. But recognizing the operation of this supplementary or alternative doctrinal principle—one that turns on a set of assumptions about the interplay between equality and the conditions of human freedom that are more readily recognized in the history and doctrine of the Thirteenth Amendment—allows us to better understand how the courts have changed Fourteenth Amendment doctrine over time, and particularly those seminal decisions that expand the reach of constitutional protections against racial and other forms of discrimination.

Although this principle has featured in some of the most significant Supreme Court cases in the history of the Fourteenth Amendment, in only rare instances have the Justices or contemporary legal commentators explicitly acknowledged its existence. It does not even have a recognized name. As an operating assumption, it moves Fourteenth Amendment doctrine in new directions, but it does so quietly. It exerts its influence when Justices steer constitutional law in response to their intuitions about freedom and equality, but because it is assumed to lack a lineage, because it is assumed to be not the application of accepted doctrinal rules but the bending or even abandonment of those rules, it arrives furtively, its role obscured by smokescreens (Chief Justice Warren's references to social science in *Brown*, Justice Brennan's doctrinal slights of hand in *Plyler*, Justice Kennedy's philosophical ruminations in *Obergefell*) or explanatory lacunae (*Shelley*). Supreme Court Justices and legal scholars have periodically sought to recognize some version of this principle as its own doctrinal formula, but these efforts have had little success.[6]

6. One prominent example was Justice Thurgood Marshall's efforts in the 1970s to introduce a "sliding scales" alternative to the tiers of scrutiny analysis in equal protection doctrine. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting); *see also* MARK TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991, at 94–115 (1997). I discuss Marshall's sliding scales approach in Part V, *infra*.

The primary contribution of this Article is descriptive. I seek to identify this overlooked and undervalued principle; to give it a label;[7] to reconstruct its genealogy; and to explain why judges and scholars have been unable or unwilling to recognize and accept it as a legitimate approach to interpreting the Fourteenth Amendment.[8]

By bringing the equality of rights principle to light, I also advance, albeit more tentatively, a normative claim. Our constitutional tradition is enriched when we treat the Supreme Court's greatest egalitarian decisions not as doctrinal aberrations or rulebreakers, but as moments when the Court put on display an alternative register of constitutional reasoning. When understood in the context of the history of equality of rights, rulings such as *Shelley*, *Brown*, *Plyler*, and *Obergefell* provide a roadmap to a different way of thinking about equal protection doctrine. It is an approach that is more responsive to the ways in

7. The label I adopt, "equality of rights," can be traced back to Reconstruction-era legal debates. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866) (remarks of Rep. Raymond) (describing the Fourteenth Amendment as "securing an equality of rights among all the citizens of the United States"); 2 CONG. REC. 414 (1874) (remarks of Rep. Lawrence) ("Equality of civil and political rights . . . is simple justice. The [F]ourteenth [A]mendment was designed to secure this equality of rights . . . ."). Several legal scholars have identified equality of rights as a key concept of Reconstruction constitutionalism. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 984, 993, 998, 1127, 1137 (1995); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J 1385, 1393, 1470 (1992). Legal scholars have labeled closely related constitutional principles as "substantive equal protection" and "equal citizenship." For "substantive equal protection," see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 361–65 (1949); Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39 (1967); for "equal citizenship" see Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). The former centers on what is sometimes referred to as the "fundamental rights prong" of equal protection doctrine, and thus does not quite capture the principle at the center of this Article. (In brief: Under equal protection's fundamental rights prong, the strict scrutiny standard is triggered based on the nature of the right at issue, regardless of the classification. The equality of rights principle is different in that heightened scrutiny is triggered by a combined analysis of the nature of the right and the nature of the classification.). The "equal citizenship" concept comes closer, but, for my purposes, the emphasis on citizenship risks (a) losing the vital connection to the Thirteenth Amendment, which revolves around the principle of freedom rather than citizenship; and (b) sweeping so broadly so as to lose the constraining dynamic that I argue is key to the historical persistence of the equality of rights principle. Equal citizenship also risks excluding equal protection cases involving non-citizens, such as *Plyler*.

8. My claim that the equality of rights principle has yet to receive its due may fail to adequately credit recent scholarship describing and defending interlinkages between due process and equal protection. *See, e.g.*, Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015). There are parallels between what Laurence Tribe has called the "legal double helix" of substantive due process and equal protection and the nondiscrimination principle I examine in this Article, particularly in its more recent manifestations in the Supreme Court's sexual orientation decisions. Perhaps in recent years the equality of civil rights principle has to some extent converged with Tribe's legal double helix. But the principle that Tribe and others defend centers on the fundamental right strand of the Due Process Clause, the content of which they argue equality values help to clarify. This is distinct from the equality of rights principle, which is, at base, a nondiscrimination principle. Furthermore, even if the two legal principles have ultimately arrived at a similar place, their historical trajectories are quite different.

which changes in social norms inform the boundaries of constitutional equality while also reaffirming the foundational commitments of the generation of Americans who reconstructed the Constitution in the aftermath of the Civil War. Thirteenth Amendment principles have infused the history of the Fourteenth Amendment from its drafting in 1866 through today, and recognizing this puts us in a better position to add our own chapter to this history.

This Article contains five Parts. Part I locates the origins of the equality of rights principle in the Reconstruction era. I show how this principle was born from the Thirteenth Amendment, codified in the Civil Rights Act of 1866, injected back into the Constitution through the Fourteenth Amendment, and then reaffirmed (albeit in qualified form) in the Supreme Court's initial efforts to interpret the Reconstruction Amendments. Its defenders assumed a commitment to racial nondiscrimination not as a general matter, but only when certain basic rights—typically labelled "civil rights"—were at stake. The application of constitutional limits on discriminatory policy and practices thus required an assessment of the relative importance of the activity at issue, and that assessment involved judgments about the conditions necessary for human freedom. If the state allowed private actors to deny Black Americans their civil rights, then this too could violate the Fourteenth Amendment: the state action doctrine that the Court soon developed was a partial abandonment of the equality of rights principle.

The first iteration of equality of rights as a constitutional principle during Reconstruction was conspicuously limited. The idea that the Constitution would protect civil rights against racial discrimination assumed that other forms of discrimination—discrimination involving "political" or "social" rights—would be permitted. Leading African Americans and their allies decried the limitations of this approach to constitutional equality; from a modern perspective the entire Reconstruction-era idea of civil rights may appear little more than a vehicle for neutering the Fourteenth Amendment.[9] Yet the equality of rights principle also had—and still has—underappreciated egalitarian potential. As I hope to show in this Article, the powerful if amorphous blend of the emancipatory ideals of the Thirteenth Amendment and the egalitarian commitments of the 1866 Civil Rights Act and Fourteenth Amendment suggest an approach to determining the reach of constitutional limits on racial discrimination more robust and responsive than our current equal protection doctrine.

Part II explains how political, doctrinal, and linguistic developments in the late nineteenth century obscured the equality of rights principle. As a political matter, the idea of a variable application of nondiscrimination constraints faced critics from all sides. It was too limited for some (particularly as narrowly applied by the Supreme Court), too open-ended for others. As a doctrinal matter,

9. *See, e.g.*, Jack M. Balkin, Plessy*,* Brown*, and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1696–97 (2005); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 885 (1987).

the Court's narrow reading of the Fourteenth Amendment's Privileges or Immunities Clause in the *Slaughterhouse Cases*[10] removed the most viable textual basis for the equality of rights principle. And as a linguistic matter, the public meaning of the term "civil rights" shifted in the late nineteenth century. The concept of civil rights that had solidified in post-Thirteenth Amendment debates over the requirements of freedom retained a vestigial presence in American constitutionalism, and judges drew upon it at key moments of constitutional development, but they struggled to explain what they were doing.

The next two Parts explore Fourteenth Amendment cases involving racial discrimination that illuminate the persistent if rarely recognized influence of Thirteenth Amendment principles on equal protection doctrine. These cases show how, even as the equality of rights principle became more and more difficult to discern in the twentieth century, it still played a significant role in the development of the Supreme Court's racial equality jurisprudence.

Part III looks at two cases decided prior to the Court's adoption of its tiers of scrutiny framework in which the Court struck down racially discriminatory policies: *Buchanan v. Warley*,[11] where the Court struck down a residential segregation policy, and *Brown v. Board of Education*.[12] These cases are often categorized as aberrations or hopeful harbingers of a more protective antidiscrimination regime to come. But they can also be understood by looking backward, to the Thirteenth Amendment-derived concept of civil rights that the Court occasionally drew on (sometimes self-consciously and explicitly, sometimes more intuitively) when interpreting the Fourteenth Amendment doctrine.

Part IV considers another line of racial discrimination cases that fit awkwardly in modern equal protection doctrine: cases that strain against the Court's "state action" limitation on the reach of the Fourteenth Amendment. I consider two cases: *Shelley v. Kraemer* and *Bell v. Maryland*.[13] In *Shelley*, the Supreme Court expanded the reach of the Fourteenth Amendment by drawing on semi-articulated assumptions about race and rights that can be traced to Reconstruction-era debates over constitutional protections of civil rights against racial discrimination. In *Bell*, in which the Court confronted the question of whether racial discrimination in privately operated public accommodations violated the Fourteenth Amendment, the Court chose not to follow *Shelley*; the majority refused to apply the Fourteenth Amendment to private businesses, regardless of the significance of their role in society. I focus on Justice Arthur Goldberg's dissent, in which he used the equality of rights principle to argue that segregation in public accommodations violated the Constitution.

10. 83 U.S. 36, 80–81 (1873).
11. 245 U.S. 60, 82 (1917).
12. 347 U.S. 483 (1954).
13. Shelley v. Kraemer, 334 U.S. 1 (1947); Bell v. Maryland, 378 U.S. 226 (1964).

Part V shows how the equality of rights principle operated in Fourteenth Amendment cases involving discrimination outside the race context. Although the connection to the Thirteenth Amendment became more attenuated, the basic analytical framework was the same in these cases. The Court considered how particular lines of discrimination operated in particular spheres of activity and then arrived at a constitutional judgment based on an assessment of whether the result amounts to a denial of the conditions of freedom for the subordinated group. At the center of this doctrinal genealogy is *Plyler v. Doe*, a ruling that deserves to stand alongside *Brown* as the landmark cases of a reimagined equal protection doctrine that embraces its roots in the Thirteenth Amendment. This genealogy also helps to explain the Court's cases striking down discrimination on the basis of sexual orientation, including the seminal case of *Obergefell v. Hodges*.

Once we acknowledge the Thirteenth Amendment echoes in Fourteenth Amendment doctrine, we see that key historical junctures in the Supreme Court's equality jurisprudence are not necessarily instances in which the Justices had to abandon their own rules to reach a just result. They become examples of the Court drawing on a principle of constitutional equality that traces back to the creation of the Fourteenth Amendment. Recognizing this history allows us to better understand—and build upon—an approach to constitutional interpretation that has allowed for the Court's most consequential expansions of constitutional protection against oppressive forms of discrimination.

I. THE THIRTEENTH AMENDMENT, CIVIL RIGHTS, AND THE CONCEPT OF CIVIL RIGHTS

The central argument of this Article—that assumptions about liberty and equality that have been most commonly associated with the Thirteenth Amendment have operated in powerful and underappreciated ways in the development of the Fourteenth Amendment—finds ample support in the historical moment from which the two amendments emerged. Debates over the meaning of the Thirteenth Amendment led to the drafting of the Fourteenth Amendment. Within Congress, most supporters of the new amendment, which Congress passed only months after the ratification of the Thirteenth Amendment, saw it as reaffirming in clearer terms the equality of rights principle that they located in the previous amendment. At the heart of this principle was the legal concept of "civil rights," which in 1865 and 1866 was understood to be a category of rights that were so fundamental that to deny them because of one's race was to deny that person freedom. State actors were understood as primarily responsible for ensuring these rights, but the rights (like the Thirteenth Amendment itself) did not map onto the dichotomous state action framework that the Supreme Court would soon develop. Many envisioned the Fourteenth Amendment as doing more than protecting against racial discrimination in the context of civil rights; the broad wording of the Fourteenth Amendment

certainly left open interpretations that moved beyond its Thirteenth Amendment foundations. But if there was a general understanding about the essential minimum that the Fourteenth Amendment accomplished, it was this: that when civil rights were at issue, the Constitution prohibited state actors from using—or from allowing private actors to use—race as a qualification to access these rights. The Fourteenth Amendment was thus inextricably connected with the Thirteenth Amendment from its inception, with the principle of equal civil rights as the key point of connection.

A. THE CIVIL RIGHTS ACT OF 1866

No sooner had the nation ratified the Thirteenth Amendment—which prohibited slavery and involuntary servitude in the United States and empowered Congress to enforce this prohibition[14]—than its elected leaders turned to the question of how to use this power to ensure the freedom of the over four million newly emancipated Black men, women, and children. The challenge was stark. When the members of the Thirty-Ninth Congress arrived in Washington, D.C., to start their first session in early December 1865, less than a year after the end of the Civil War, ex-Confederates across the South were consolidating their power. A centerpiece of their effort to regain control over Southern local and state governments was the suppression of the formerly enslaved. White Southerners passed what were known as "Black Codes," regulations that sought to reduce African Americans to second-class citizenship and, in some cases, to new forms of slavery.[15] To confront this situation, Republicans, who held strong majorities in both houses of Congress, turned to the Thirteenth Amendment, which was officially declared part of the Constitution on December 18, 1865.

The challenge for Republicans with egalitarian leanings was how to secure legislative majorities, as well as public support, for federal regulatory interventions that were without precedent in United States history. This was a challenge of constitutional authority: proponents of aggressive federal intervention into southern racial politics believed the Thirteenth Amendment to be a source of sweeping federal power, but not everyone agreed.[16] And it was a

14. The full text reads:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

15. *See* THEODORE WILSON, THE BLACK CODES OF THE SOUTH (1965); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 198–210 (1988).

16. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 40–41 (1865) (remarks of Sen. Cowan) (expressing support for civil rights protections but arguing that it would require another constitutional amendment); *id.* at 113 (remarks of Sen. Saulsbury) ("Slavery is a status, a condition; it is a state or situation where one man belongs to another and is subject to his absolute control . . . . Cannot that status or condition be abolished without attempting to confer on all former slaves all the civil or political rights that white people have? Certainly.").

challenge of politics: some who might accept that the Thirteenth Amendment gave Congress certain powers did not agree with the racial egalitarian impulse that motivated the legislation. The advent of federal prohibitions on racial discrimination in exercising fundamental rights required some understanding of what these rights were that the federal government could and would protect.

A focal point for this debate was the legal category "civil rights." This was a familiar-sounding term to mid-nineteenth-century Americans. Tracing to the eighteenth century, it could be found in various political proclamations, legal treatises, and judicial opinions.[17] But the debate that took place in the early years of Reconstruction demanded that this term that had been used in varied and often quite amorphous ways be defined so as to be made the basis for statutes and constitutional law.[18]

The underlying assumptions of the principle of civil rights as it emerged in Reconstruction was not new. The idea that certain rights were more fundamental than others and that racial discrimination should be prohibited when these fundamental rights were at stake, even if it might be permissible elsewhere, was integral to the lives of free African Americans before Emancipation. They experienced a patchwork of rights protections in which the success of their claims to equal treatment varied across time and place.[19] This resulted in frustrations and humiliations but also, as recent historical scholarship has shown, opportunities for free Black people to successfully demand and exercise their rights.[20] When antebellum lawmakers debated the legal rights of free people of color, some also drew on the idea of differentiated categories of rights and argued that a racial nondiscrimination principle applied to only some of these categories.[21] Those who supported protecting Black Americans' ability to make contracts, to buy and sell property, and to file lawsuits often drew the line at the franchise or interracial marriage or the right to access certain social spaces.[22]

17. CHRISTOPHER W. SCHMIDT, CIVIL RIGHTS IN AMERICA: A HISTORY 13–15 (2021).

18. *Id.* at 11–31.

19. *See, e.g.*, KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018).

20. *See, e.g.*, MASUR, *supra* note 19; DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH (2003); KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. (2010); STEPHEN KANTROWITZ, MORE THAN FREEDOM: FIGHTING FOR BLACK CITIZENSHIP IN A WHITE REPUBLIC, 1829–1889 (2012); JONES, *supra* note 19, at 2–3; KIMBERLY M. WELCH, BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH (2018).

21. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 290–95 (1970); James Oakes, *Natural Rights, Citizenship Rights, State Rights, and Black Rights: Another Look at Lincoln and Race*, *in* OUR LINCOLN 109–34 (Eric Foner ed., 2008); ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 118–20 (2010); GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 18–39 (2013).

22. *See, e.g.*, Abraham Lincoln, Speech at Charleston, Illinois (Sept. 18, 1858) *in* COLLECTED WORKS OF ABRAHAM LINCOLN: VOLUME 3 145–46 (Roy P. Basler ed., 1953) (asserting that Black people were "equal in their right to 'life, liberty, and the pursuit of happiness,'" yet rejecting "in any way the social and political

Racial discrimination was impermissible when it came to the "civil" rights that constituted the essential conditions of freedom, but the same rule did not apply when "political" or "social" rights were at stake—or so the reasoning went.

During Reconstruction, Black Americans and their white allies advocated the protection of certain fundamental rights against denial on the grounds of race as necessary to the project of emancipation. Hence, proponents of the codification of these rights in the Civil Rights Act of 1866 saw the Thirteenth Amendment as providing the necessary constitutional authority. According to Senator Lyman Trumbull, "It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights. These are rights which the first clause of the [Thirteenth Amendment] meant to secure to all."[23] Federal civil rights legislation was designed to protect these fundamental rights. As Trumbull put it, "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty, and is in fact, a badge of servitude which, by the Constitution, is prohibited."[24]

Samuel Shellabarger, a Republican House member from Ohio, offered a particularly clear articulation of the equality of rights principle. The idea of civil rights was not a purely substantive right, Shellabarger explained; it was a right whose significance, at least with regard to federal intervention, was inextricably connected with an antidiscrimination principle. The "whole effect" of the Civil Rights Act, he explained, "is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery."[25]

The equality of rights principle thus provided a foundation for claims of radical change in American racial politics, while at the same time serving as a limiting principle for this change. This theme has remained a central reason for the principle's resilience across time.

B. THE FOURTEENTH AMENDMENT

A primary purpose of the Fourteenth Amendment, passed by Congress on June 13, 1866, and ratified on July 9, 1868, was to constitutionalize the Civil

equality of the black and white races" and explaining that he was not "in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people").

23. CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

24. *Id.* at 474.

25. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866); *see also id.* at 1760 (remarks of Sen. Trumbull) ("The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment Each State, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens, may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial.").

Rights Act of 1866.[26] Defenders of the Civil Rights Act feared the statute, which only passed over the veto of President Andrew Johnson, might be repealed by a future Congress or overturned in the Supreme Court.[27] Placing its protections on more secure footing by passing the Fourteenth Amendment would, one House member explained optimistically, elevate "that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it."[28]

An early version of the Fourteenth Amendment included a prohibition on racial discrimination "as to civil rights."[29] This language, which would have provided an explicit textual basis for the equality of rights principle, never made it beyond the committee.[30] Instead of a prohibition on racial discrimination in the exercise of civil rights, the final version of what would become Section 1 of the Fourteenth Amendment protected against the deprivation of "liberty, or property, without due process of law," the denial of the "equal protection of the laws," and the abridgement of the "privileges or immunities of citizens"—a category members of Congress seemed to assume functionally equivalent to "civil rights."[31] Not having been a recent focal point of legislative debate, this phrase had somewhat more ambiguity than did "civil rights"—an attribute that likely proved attractive to some of the framers of the Fourteenth Amendment.[32]

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26. CONG. GLOBE, 39th Cong, 1st Sess. 2464 (1866) (Rep. Thayer); *id.* at 2498 (Rep. Broomall); *id.* at 2502 (Rep. Raymond); *id.* at 2511 (Rep. Eliot); *see also* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389 (2018); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 200 (1951); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 48, 104, 216 n.8 (1988); RUTHERGLEN, *supra* note 21, 70–80.

27. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Thaddeus Stevens) (warning that "the first time the South with their copperhead allies obtain command of Congress [the Civil Rights Act] will be repealed"); RUTHERGLEN, *supra* note 21, at 70–80.

28. CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (Rep. James A. Garfield).

29. BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865–1867, at 83 (1914) ("No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.").

30. *Id.* at 83, 106, 301.

31. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866). Early drafts of the Civil Rights Act included the phrase "civil rights and immunities." *Id.* at 43, 1118. On the history of the phrase "privileges or immunities," see KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014); Harrison, *supra* note 7, at 1416–20. According to John Harrison, "in 1866, when people discussed abridgments of the privileges or immunities of citizens, they mainly were talking about laws that deprived certain classes of citizens of the civil rights accorded to everyone else." Harrison, *supra* note 7, at 1388. *See also id*. at 1397, 1416; CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866) (remarks of Rep. Latham).

32. GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 41–42 (1902). As William Nelson has pointed out, the ambiguity of the text of Section 1 of the Fourteenth Amendment must be seen on some level as a conscious choice of its drafters. They had at their disposal relatively more precise language (including "civil rights"). Yet they opted for ambiguity. NELSON, *supra* note 26, at 60–61; *see also* David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 403 (2008) ("Surprisingly little energy was expended in attempting to explain what the central provisions of § 1 were intended to do.").

Exactly what the framers of the Fourteenth Amendment believed the Amendment would accomplish has been the subject of extensive debate. Jurists, legal scholars, and historians have pored over the records of the Thirty-Ninth Congress to determine whether the framers saw the Fourteenth Amendment as "incorporating" the Bill of Rights,[33] protecting unenumerated rights,[34] and prohibiting segregation in schools.[35] Without wading into the deep waters of these long-running debates, the relevant point for the purposes of this Article is that there is scholarly agreement that the drafters of the Fourteenth Amendment understood it to provide a constitutional foundation for the concept of civil rights that was codified in the Civil Rights Act of 1866, and that this seemed to be the general understanding of the Amendment outside of Congress. It is fair to say, then, that the principle of equality of civil rights was a part of the original meaning of the Fourteenth Amendment.

C. EXPANDING THE BOUNDARIES OF CIVIL RIGHTS

Despite the assurances advocates of federal civil rights legislation often made about the bounded qualities of civil rights, the category's borders were never stable—at least not while there was political demand for expanding the federal government's role in protecting Black Americans. Each civil rights victory provided an opportunity to reassess what was contained in this vital category. Each victory offered a stepping stone for African Americans and their allies to claim more rights as necessities of the freedom the Thirteenth Amendment promised.[36]

The first major expansion of civil rights came in the immediate aftermath of the passage of the Civil Rights Act of 1866 and the drafting of the Fourteenth Amendment, when Republican lawmakers extended constitutional protections against racial discrimination to voting rights. A sharp distinction between civil rights and political rights was a guiding assumption during debates over the 1866 Civil Rights Act and the Fourteenth Amendment, but Black activists, along with some more dedicated white egalitarians, had resisted the distinction.[37] The right to vote, they insisted, was every bit as fundamental—every bit a measure of true freedom (for men, at least)—as the right to make contracts and own property.[38]

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33. *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); LASH, *supra* note 31.

34. *See, e.g.*, tenBroek, *supra* note 26; AMAR, *supra* note 33; LASH, *supra* note 31.

35. *See, e.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); McConnell, *supra* note 7; Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

36. *See* Christopher W. Schmidt, *The Fourteenth Amendment and the Transformation of Civil Rights*, 10 J. CIV. WAR ERA 81 (2020).

37. SCHMIDT, *supra* note 17, at 26.

38. *See, e.g.*, *Black Residents of Nashville to the Union Convention*, FREEDMEN & S. SOC'Y PROJECT (Jan. 9, 1865), http://www.freedmen.umd.edu/tenncon.htm (calling for the right to vote and testify in court, which the

With the ratification of the Fifteenth Amendment, the civil rights-political distinction lost much of its relevance. In legal discourse thereafter, voting rights were often batched together with other basic rights as "civil and political rights" or all these rights were subsumed under the "civil rights" label.[39]

The next major congressional debate over the meaning of civil rights involved the distinction between civil rights and social rights. This was a key point of dispute in the five-year debate that culminated in the passage of the Civil Rights Act of 1875, which guaranteed "full and equal enjoyment," without regard to race, "of inns, public conveyances on land or water, theaters, and other places of public amusement."[40] An early version of the law also included schools. Defenders of the law insisted that racial equality in access to public accommodations and schools, like racial equality in making contracts, buying and selling property, and suing and testifying in court, was a basic condition of freedom and therefore properly understood as civil rights, not social rights.[41] The Fourteenth Amendment gave Congress the authority, perhaps the obligation, to banish racial discrimination in this realm of society. The bill's sponsors titled it "An Act to Protect All Citizens in Their Civil and Legal Rights"; supporters referred to it as the "supplementary civil rights bill" and defended it as a necessary extension of the Civil Rights Act of 1866.[42] "Equitable civil rights," insisted one supporter of the law, were as important a fight as emancipation itself.[43]

The definition of civil rights offered by proponents of the 1875 Civil Rights Act never secured broad support. The law only narrowly passed through a lame duck Republican-controlled Congress, it was never seriously enforced, and the Supreme Court would soon strike it down.[44] Yet the debate over the ill-fated 1875 law was a key moment in the early history of the equality of rights principle. It shows that civil rights—a concept that was central to the original meaning of the Fourteenth Amendment—was never a closed category. It shows that from the beginning, people understood its boundaries as open to possible new claims, and that the question of whether to include a rights claim into the

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statement referred as a matter of "equal rights" and "civil rights"); Frederick Douglass, *Speech of Frederick Douglas*, LIBERATOR (Feb. 10, 1865), *in* THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS I:522 (Kurt T. Lash ed., 2021) (lacking the vote, the Black man "is the slave of society, and holds his liberty as a privilege, not as a right").

39. SCHMIDT, *supra* note 17, at 30.

40. 18 STAT. 335 (1875).

41. SCHMIDT, *supra* note 17, at 34–41.

42. *See, e.g.*, *Mr. Sumner's Civil Rights Bill*, HARPER'S WKLY., Apr. 11, 1874, at 310 (describing the legislation as "the completion of the promise of equal civil rights which we have already made" in the 1866 Civil Rights Act). On the 1875 Civil Rights Act, see Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18 W. POL. Q. 763 (1965); McConnell, *supra* note 7; Amy Dru Stanley, *Slave Emancipation and the Revolutionizing of Human Rights*, *in* THE WORLD THE CIVIL WAR MADE 269–303 (Gregory P. Downs & Kate Masur eds., 2015).

43. J.D. Lewis, Letter to the Editor, *Equal Civil Rights*, BOSTON GLOBE, Jan. 1, 1875, at 7.

44. Valeria W. Weaver, *The Failure of Civil Rights 1875–1883 and Its Repercussions*, 54 J. NEGRO HIST. 368 (1969); John Hope Franklin, *Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE 225 (1974); *Civil Rights Cases Decided*, N.Y. TIMES, Oct. 16, 1883, at 4; Civil Rights Cases, 109 U.S. 3 (1883).

category would revolve around an assessment of what it meant to be a fully free individual in American society. Thus, we see Thirteenth Amendment principles infusing the earliest efforts in Congress to give meaning to the Fourteenth Amendment.

D. CIVIL RIGHTS IN THE SUPREME COURT

1. The "One Great Purpose"

As the Supreme Court struggled to come to terms with the effects of the Civil War and Reconstruction on legal protections for individual rights and the balance of authority between the national government and the states, the legal category of civil rights provided an essential touchstone. It was attractive to the Justices for the same reasons it was attractive to the members of Congress who advocated for civil rights legislation: it allowed them to express a commitment to a national norm of equality, but one that was bounded. The Justices disagreed on where exactly the boundaries of this nondiscrimination principle were located, but they all agreed it had limits. They also agreed on the basic analytical move required to draw these boundaries: an inquiry that asked whether that right was necessary to full and free citizenship in the United States. In a legal world turned upside down by war, emancipation, and constitutional reconstruction, the equality of rights principle provided the Justices a point of stability and agreement.

Although the term "civil rights" was not included in the text of the Fourteenth Amendment, the lawmakers who drafted and approved the amendment and the judges who initially interpreted it generally assumed that its central purpose was to ensure this category of rights for freed people. In the early years of the Fourteenth Amendment, few people gave much attention to the division of work between the key provisions of Section 1 of the amendment—the Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause. The lawmakers who voted on the Fourteenth Amendment spoke strikingly little about the distinctive roles they envisioned for the provisions of Section 1.[45] Litigants who brought their first legal challenges under the Fourteenth Amendment took a catchall approach, citing as support each of the provisions of Section 1, as well as the Thirteenth Amendment.[46]

Early judicial interpretations echoed this aggregative approach. The protections enumerated in the Thirteenth and Fourteenth Amendments were a package, together intended to point in a single direction, what the Supreme Court

45. *See* Harrison, *supra* note 7; NELSON, *supra* note 26, at 49–63; *see also* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 79 (2019) (noting that in 1866, "most congressmen referred to [the individual provisions of Section 1] as a set of principles that should be viewed as a whole and reinforce one another").

46. *See, e.g.*, Slaughterhouse Cases, 83 U.S. 36 (1873); *Civil Rights Cases*, 109 U.S. at 89.

called the amendments' "unity of purposes"[47] or their "one great purpose."[48] The "general purpose which pervades" the Reconstruction amendments was to protect the "life, liberty, and property" of "the unfortunate race who had suffered so much," the Court explained in the 1873 *Slaughterhouse Cases*.[49]

> In the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[50]

When the members of the Supreme Court wanted to label this "general purpose," they often used the same term that members of the Thirty-Ninth Congress had turned to: civil rights. The Fourteenth Amendment, the Court wrote in the 1880 jury discrimination case *Strauder v. West Virginia*, "is one of a series of constitutional provisions having a common purpose—namely, securing to a race recently emancipated, a race that, through many generations, had been held in slavery, all the civil rights that the superior race enjoy."[51] What was demanded was not perfect equality, the Justices explained, but equality of a particular kind—equality of civil rights. It demanded, that is, limited equality: an equality not across society or even across government action, but only when those rights required for the "security and firm establishment" of liberty were at stake.

2. On "Running the Slavery Argument into the Ground"

Centering the Thirteenth and Fourteenth Amendments' protections against racial discrimination on the equality of rights principle provided a way in which people could advocate for broader constitutional protections while assuaging skeptics' fears that the federal government was going too far. As a limited vision of constitutional equality, it provided common ground for lawmakers and jurists

47. *Slaughterhouse Cases*, 83 U.S. at 67.

48. Ex Parte Virginia, 100 U.S. 339, 344–45 (1879) (The "one great purpose" of the Thirteenth and Fourteenth Amendments was "to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons").

49. *Slaughterhouse Cases*, 83 U.S. at 70.

50. *Id.* at 70–71; *see also id.* at 81 ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.").

51. Strauder v. West Virginia, 100 U.S. 303, 306 (1880); *see also id.* at 307–08 ("The words of the [Fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.").

of diverse ideological commitments in their efforts to give meaning to the constitutional transformation of the Civil War and Reconstruction. But its strength was also a liability when the Supreme Court adopted a narrow, formalistic approach to the equality of rights principle and used it to contain the egalitarian potential of the Thirteenth and Fourteenth Amendments.

One of the interpretive moves the Justices made in cabining the scope of constitutional equality was to disaggregate their analyses of the Thirteenth and Fourteenth Amendments. By sharpening the separation between claims based on the Thirteenth Amendment and those made on the Fourteenth Amendment, they obscured or dismissed the ways in which Thirteenth Amendment principles could infuse the meaning of the Fourteenth Amendment to produce a distinctive, robust constitutional antidiscrimination principle. This disaggregation also allowed the Court to develop the state action limitation on the scope of the Fourteenth Amendment.

This dynamic was displayed most famously in the 1883 *Civil Rights Cases*,[52] in which the Supreme Court struck down most of the 1875 Civil Rights Act. Writing for an 8–1 majority, Justice Joseph P. Bradley replaced the broad-brushstroke "one pervading purpose" rhetoric of the *Slaughterhouse Cases* with a more particularized approach to the Reconstruction Amendments.[53] "We must never forget that the province and scope of the Thirteenth and Fourteenth Amendments are different," he explained.[54] Bradley first considered whether the Fourteenth Amendment gave Congress the authority to prohibit racial discrimination in public accommodations. He concluded that the amendment's constraints applied only to the actions of state and local government, not to those of private individuals, thereby rejecting the Fourteenth Amendment as the basis for the law.[55] He then turned to the Thirteenth Amendment. Although this Amendment did not have the same "state action" limitation of the Fourteenth, and therefore could be applied to private activity, he insisted that the Thirteenth Amendment only empowered Congress to regulate rights that were necessary to wipe out the "badges and incidents" of slavery.[56] The right to nondiscriminatory access to public accommodations, he concluded, did not fall in this category. "It would be running the slavery argument into the ground," Bradley wrote, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."[57]

By bifurcating the Thirteenth and Fourteenth Amendments, the Court produced a weakened version of the equality of rights principle. The Court

52. Civil Rights Cases, 109 U.S. 3 (1883).
53. *See* RUTHERGLEN, *supra* note 21, at 103–10.
54. *Civil Rights Cases*, 109 U.S. at 23.
55. *Id.* at 11–12.
56. *Id.* at 20–22.
57. *Id.* at 24–25.

refused to read the Fourteenth Amendment as informed by Thirteenth Amendment values—as Republicans in Congress did in the decade following the Civil War[58] and as the Court seemed inclined to do in its earlier cases.[59] Instead, in the *Civil Rights Cases*, the Court took a divide and dismiss approach. The Court concluded that the Fourteenth Amendment failed to justify the 1875 Civil Rights Act because it applied only to state action—ignoring the fact that many involved in the framing and ratification of the Amendment held a more nuanced understanding of the limits of the Amendment; that they understood that a state that refused to protect the civil rights of its people because of their race might be in violation of the Amendment.[60] And the Court concluded that the Thirteenth Amendment failed to justify the 1875 Civil Rights Act because discrimination in public accommodations was not closely enough related to the institution of chattel slavery at which the Amendment was primarily aimed—ignoring the way the equal civil rights principle that emerged from debates over enforcing the Thirteenth Amendment shifted attention from the brutal facts of slavery to the conditions of full freedom in American society.[61]

In the infamous case of *Plessy v. Ferguson*,[62] the Justices followed Bradley's course from the *Civil Rights Cases,* adopting a narrow "badges and incidents" reading of the Thirteenth Amendment—and quoting along the way Justice Bradley's complaints about running slavery arguments into the ground.[63] Justice Henry Billings Brown, writing for an eight-Justice majority that upheld Louisiana's law requiring racial segregation in railroad cars, concluded: "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."[64] He similarly dismissed the Fourteenth Amendment claim: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon

58. *See infra* Part I.A–C.

59. *See infra* Part I.D.1.

60. PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 87–128 (2011); RUTHERGLEN, *supra* note 21, at 71–80.

61. A representative example can be found in the words of Senator Lyman Trumbull during debate over the 1866 Civil Rights Act, when he said: "[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited." CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). The focus here is on citizenship and liberty and "badges of servitude," not on a mechanical application of "the slavery argument" racially discriminatory practices, which was Justice Bradley's approach in the *Civil Rights Cases*.

62. 163 U.S. 537 (1896).

63. *Id.* at 542–43 (quoting Civil Rights Cases, 109 U.S. 3, 24 (1883)).

64. *Id.* at 543.

color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."[65]

The Court thus produced two separate constitutional nondiscrimination principles. One, drawn exclusively from the Fourteenth Amendment, was broad but thin (in that it immunized private actors from constitutional scrutiny). The other, based solely on the Thirteenth Amendment, ran deeper (in that it applied to private actors) but only along a narrow channel (in that it applied only to those rights that involve "badges and incidents" of slavery, narrowly conceived). By insisting upon more precisely defined categories of constitutional analysis, the Court had tamed the fertile ambiguities of Reconstruction constitutionalism.

3. Civil Rights According to Justice Harlan

It was left to Justice John Marshall Harlan, the sole dissenter in the *Civil Rights Cases* and *Plessy*, to push back against the Court's sharply defined categories of analysis. He offered instead a holistic approach, premised on the equality of rights principle. Whereas the majority opinions in the *Civil Rights Cases* and *Plessy* assessed the antidiscrimination protections of the Thirteenth and Fourteenth Amendments separately, Harlan slid back and forth between the two, relying on the category of civil rights to define and delineate his understanding of legal equality. The Thirteenth and Fourteenth Amendments protected not against racial discrimination generally, he reasoned, but racial discrimination when civil rights were at stake.

In his dissent in the *Civil Rights Cases*, Justice Harlan began with a conventional definition of civil rights. They were "those fundamental rights which, by universal concession, inhere in a state of freedom."[66] He went through the rights protected in the 1875 Civil Rights Act, explaining how each implicated civil rights. The ability to travel without constraint was a condition of freedom.[67] The right to lodging was fundamental, with the requirement that innkeepers serve all comers long recognized in common law.[68] The 1875 Civil Rights Act, therefore, did nothing more than protect rights "inhering in a state of freedom, and belonging to American citizenship."[69] Civil rights, according to Harlan,

65. *Id.* at 544.

66. Civil Rights Cases, 109 U.S. 3, 34 (1883).

67. *Id.* at 39.

68. *Id*. at 40–41.

69. *Id*. at 26. With regard to "places of public amusement," access to which were also protecting in the 1875 law, Harlan argued not that access to these spaces implicated civil rights, but the fact that these operations required state licensing "imports in law equality of right at such places among all the members of that public." *Id.* at 41. Harlan also cited *Munn v. Illinois*, 94 U.S. 113, 126 (1877), in which the Court held that the due process clause did not protect private industry against economic regulation, for the argument that property becomes "clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." *Civil Rights Cases*, 109 U.S. at 42 (quoting *Munn*, 94 U.S. at 126). Amusements, Harlan insisted, are "not a matter purely of private concern." *Id.* Harlan employed some rather loose reasoning here. He moved from a discussion of the enforcement provision of the Thirteenth

were "rights of a character so necessary and supreme, that, deprived of their enjoyment in common with others, a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence."[70] His understanding of civil rights did not require him to analogize slavery to discrimination on public transportation or in public accommodations; rather, it required assessing the conditions of human freedom and recognizing the dignity costs of racial exclusion.

Harlan also took on the majority's concern that the legislation attempted to regulate social rights. "I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals," he noted.[71] "No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern."[72] But social relations were not the issue here. "The rights which Congress, by the act of 1875, endeavored to secure and protect are legal, not social, rights."[73] And "equality of civil rights," by virtue of the amended Constitution, "now belongs to every citizen."[74]

Justice Harlan's famous dissent in *Plessy v. Ferguson*,[75] in which he concluded that access to public modes of transportation was a civil right (and not a social right as the majority held), also emphasized the interlinkages between the Thirteenth and Fourteenth Amendments. He wrote:

> The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country.[76]

When that amendment was "found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship and to the security of personal liberty . . . ."[77] He then brought the two together as expressing the unified principle of equal civil rights: "These two amendments, if enforced according to their true intent and meaning, will protect all the civil

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Amendment to a discussion of the enforcement provision of the Fourteenth Amendment. From here, he slid into a discussion of the first section of the Fourteenth Amendment (the basis for the due process claim raised by the business owners in *Munn*). He then concluded by insisting that he had only been talking about the enforcement provision of the Thirteenth Amendment. *Id.* at 43.

70. *Id.* at 39–40.
71. *Id.* at 59.
72. *Id.*
73. *Id.*
74. *Id.*
75. 163 U.S. 537, 562 (1896).
76. *Id.* at 555.
77. *Id.*

rights that pertain to freedom and citizenship."[78] The "color-blind" Constitution prohibited second-class citizenship, he wrote.[79] "In respect of civil rights, all citizens are equal before the law."[80]

Justice Harlan's dissents provide a lost alternative in the genealogy of the equality of rights principle. He shows what Fourteenth Amendment jurisprudence would have looked like in the decades following Reconstruction if the Court had been more attuned to ways in which those who drafted and defended the Fourteenth Amendment understood Thirteenth Amendment values as permeating its meaning. He showed how the equality of rights principle could blur the sharp edges of the "state-action" limitation on the Fourteenth Amendment and expand the Amendment's protections against racial discrimination. The touchstone of Justice Harlan's racial egalitarianism was freedom. Whereas Justice Brown dismissed the significance of the discrimination at issue in the *Civil Rights Cases*, Justice Harlan described the case as involving nothing less than "the protection of freedom and the rights necessarily inhering in a state of freedom."[81] In this way, he insisted on keeping slavery, emancipation, and the Thirteenth Amendment as animating values of his Fourteenth Amendment jurisprudence.

II. THE EQUALITY OF RIGHTS PRINCIPLE OBSCURED

The period from the end of the Civil War through the end of the nineteenth century was the only time in the history of the Fourteenth Amendment when jurists openly accepted the principle of equality of rights as a legitimate basis for determining the reach of the Amendment's antidiscrimination requirement. Justice Harlan disagreed with the other Justices about how the principle should be applied, but they all agreed that the constitutional limits on discrimination had to take account not only of the grounds for the discrimination but also the sphere of activity in which the discrimination took place. In the twentieth century, the principle of equality of rights never went away—and I make the case in the following Parts of this Article that it played a key role in some of the Supreme Court's most significant Fourteenth Amendment decisions—but it became harder to discern. The obscuring of this equality of rights principle in the twentieth century was the result of changes in legal doctrine, language, and politics.

A. DOCTRINE

The decline of the Reconstruction-era constitutional principle of equal rights was, in part, a product of the Supreme Court's disaggregation of the three key rights provisions of Section 1 of the Fourteenth Amendment—the Privileges

78. *Id.*
79. *Id.* at 559.
80. *Id.*
81. Civil Rights Cases, 109 U.S. 3, 34 (1883).

or Immunities Clause, the Equal Protection Clause, and the Due Process Clause—and the Thirteenth Amendment. As discussed above, during Reconstruction, judges and lawmakers typically recognized the principle as embodied in all of these constitutional provisions, with little attention to distinctions between the component parts. But if there were to be a single constitutional provision in which to place the equality of rights principle, it would have been the Privileges or Immunities Clause. At the time of the drafting of the Fourteenth Amendment, this was the phrase understood as a substitute for "civil rights."[82] During the early stages of the five years of debate that led to the passage of the Civil Rights Act of 1875, most of the bill's advocates looked to this clause as the primary basis for congressional authority.[83]

Yet in the *Slaughterhouse Cases*[84] the Court narrowed the provision's meaning to a slim band of rights that pertain to an individual's relationship to the national government (a category that did not include the fundamental rights identified in the 1866 Civil Rights Act).[85] To interpret the Privileges or Immunities Clause otherwise, the majority warned, would make the Court "a perpetual censor upon all legislation by the States."[86]

Following the Court's ruling in the *Slaughterhouse Cases*, judges and legislators channeled racial nondiscrimination claims into either equal protection or due process categories. This channeling, as described above, diminished the relevance of the equality of rights principle. By the late nineteenth century, Fourteenth Amendment doctrine was moving down two increasingly distinct tracks: fundamental constitutional rights (protected under *Lochner*-era substantive due process doctrine against unreasonable infringement, without any special attention to race) and nondiscrimination (protected under equal protection doctrine). A more robust privileges or immunities doctrine might have allowed courts to recognize the possibility of rights claims that combined a concern with racial discrimination with the nature of the rights at stake.

B. LANGUAGE

Even as the Supreme Court sought to narrowly circumscribe the definition of civil rights, in the realm of public discourse, its usage indicated an alternative definition.[87] Outside the courts, in the years following the *Civil Rights Cases*,

82. *See* BOUTWELL, *supra* note 32, at 41–42.

83. McConnell, *supra* note 7, at 998.

84. 83 U.S. 36 (1873).

85. *Id.* at 75–76, 79–80.

86. *Id.* at 78. When opponents of the proposed federal public accommodations bill cited *Slaughterhouse* to support their argument that Congress lacked the authority to pass such legislation, McConnell, *supra* note 7, at 1000–01, the bill's defenders increasingly emphasized the Equal Protection Clause as the constitutional basis for the law. John P. Frank & Robert F. Munro, *The Original Understanding of Equal Protection of the Laws*, 50 COLUM. L. REV. 131, 160 n.150 (1950); Harrison, *supra* note 7, at 1426–33; McConnell, *supra* note 7, at 1001–04.

87. SCHMIDT, *supra* note 17, at 48–52, 55–57.

people increasingly used the term civil rights to refer specifically to those rights that the Supreme Court insisted were *not* civil rights: rights of access to public accommodations. African Americans formed civil rights leagues to support passage of state-level public accommodations, and state legislatures across much of the nation responded with what they typically labeled "civil rights" laws.[88] Although, as a matter of constitutional interpretation, the Supreme Court had held that access to private businesses that served the public was *not* a civil right, activists and politicians at the state level took a different path. According to the words they used and the laws they passed, these were civil rights. "It is nothing but civil rights for a Colored man to have the same privileges which can be bought by any other man," explained the editors of a Black newspaper in 1890.[89]

It might appear that by the turn of the twentieth century, the very definition of civil rights that the Court rejected in the *Civil Rights Cases*—a definition that assumed nondiscriminatory access to public accommodations was just as much a condition of freedom as the right to make contracts and own property—had become, as a result of congressional debate and state-level activism and lawmaking, the prevailing understanding of civil rights. Yet the version of civil rights that emerged from the battles over the 1875 Civil Rights Act and the wave of state-level "civil rights" laws turned on a rather different premise. Whereas the Reconstruction concept of civil rights was understood to encompass the most essential of rights, in the decades after Reconstruction, Americans increasingly used the term in a way that was narrower and stripped of the assumption that its distinguishing characteristic was that it stood above all other rights categories.

By the closing decades of the nineteenth century and early decades of the twentieth, when activists, lawyers, and scholars referenced "civil rights" in the context of racial justice efforts, they typically did so to single out legislation and litigation involving nondiscrimination in public facilities and public accommodations.[90] Newspaper accounts of "civil rights cases" almost always involved controversies involving racial discrimination in public accommodations or schools.[91] When groups that formed to advance the interests of African Americans proclaimed the importance of civil rights or charged a

88. SHAWN LEIGH ALEXANDER, AN ARMY OF LIONS: THE CIVIL RIGHTS STRUGGLE BEFORE THE NAACP 30 (2012); SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915, 316 n.10 (2013); MILTON R. KONVITZ, A CENTURY OF CIVIL RIGHTS 157–58 (1962); DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954, at 89–91 (2005).

89. Elizabeth Dale, *"Social Equality Does Not Exist Among Themselves, nor Among Us": Baylies vs. Curry and Civil Rights in Chicago, 1888*, 102 AM. HIST. REV. 311, 318 (1997) (quoting WESTERN APPEAL, Jan, 4, 1890).

90. *See* FRANKLIN JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO 26–32 (1918).

91. *See, e.g.*, *Stray Southern Notes*, N.Y. TIMES, Dec. 11, 1884, at 5; *Civil Rights in Georgia*, N.Y. TIMES, Aug. 26, 1886, at 5; WILFORD SMITH, *The Negro and the Law*, *in* THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE AMERICAN NEGROES OF TO-DAY 125–59 (Booker T. Washington ed., 1903).

committee with advancing civil rights, they were usually referencing efforts to enforce state public accommodations laws.[92]

Then, in the mid-twentieth century, Americans remade the public meaning of civil rights once again. A term that first described a collection of essential rights and then morphed into a label for antidiscrimination policy involving public accommodations took on a new meaning, this time as a general norm of government racial nondiscrimination. It was this iteration of civil rights that became the commonplace label for the modern movement for racial equality.[93] With this latest version of civil rights ascendent in public discourse, the very phrase that best captured the predominant nondiscrimination norm of Reconstruction—"equal civil rights"—took on an archaic quality, its meaning obscure, or seemingly redundant. The evolution of the meaning of this critical term make the lineage of the equal rights principle less accessible to modern Americans.

C. RACIAL POLITICS

Political developments also worked to marginalize the equality of rights principle in mainstream legal discourse. Those who sought to limit the egalitarian potential of Reconstruction attacked the equal rights principle as too threatening to the status quo, seeing it as an entering wedge for more expansive federal nondiscrimination requirements.[94] For those who sought to limit the transformative potential of the constitutional revolution of the Reconstruction amendments, whether in the name of federalism or white supremacy, a robust, dynamic equality of rights principle went too far and risked too much disruption to the racial status quo. As the Reconstruction moment was gradually displaced by a re-imposition of white supremacist control across the South and a loss of interest in continued federal intervention in Washington, D.C.,[95] the principle of equal civil rights—a principle born in part from a felt need to rein in the egalitarian abolitionist vision of Radical Republicans—needed to be reined in still further. This, in effect, was what the Supreme Court did in the *Civil Rights Cases*, *Plessy*, and numerous other decisions in the late nineteenth and early twentieth centuries: nominally accepting equality of rights as a constitutional principle but defining it narrowly so that it failed to provide federal protection against the tightening noose of Jim Crow.

This is not to say that African Americans and more egalitarian-minded whites put up much of a fight on behalf of the equality of rights principle.

92. *See, e.g., Our New Legal Bureau*, CRISIS, Jan. 1, 1914, at 139.

93. I detail the evolution of the term civil rights in the twentieth century in SCHMIDT, *supra* note 17, 53–134; *see also* RISA GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 16–50 (2007); Christopher W. Schmidt, *The Civil Rights–Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1, 21–24 (2016); Christopher W. Schmidt, *Legal History and the Problem of the Long Civil Rights Movement*, 41 L. & SOC. INQUIRY 1081, 1094–97 (2016).

94. This was the core argument of opponents of the 1875 Civil Rights Act, SCHMIDT, *supra* note 17, at 34–41, and of the majority in the *Civil Rights Cases*, 109 U.S. 3, 42–44 (1883).

95. *See* FONER, *supra* note 15, at 460–601.

Although it served an important role in allowing the constitutional transformation of Reconstruction to move forward, it was always an approach to constitutional equality distinguished as much by its limits as by its liberatory potential.[96] From the perspective of freed people who were trying to craft a dignified life out of the abstract promises of equality emanating from Washington, D.C., the legalistic distinctions between spheres of rights that so occupied lawmakers, judges, and editorial writers failed to capture their lived experiences. Just as leaders in the African American community resisted the idea of placing the vote into a category of rights that was somehow less urgent and fundamental than the rights to make contracts, own property, and go to court, they also resisted the idea of placing the affronts to dignity that accompanied denial of service by public accommodations into some lesser category of racial harms.[97] After passage of the 1866 Civil Rights Act, some attempted to use the new law to demand access to public accommodations.[98] They fought for the broadened concept of civil rights contained in the 1875 Civil Rights Act and condemned the Supreme Court when it struck the Act down.[99] The people who were most dedicated to fighting for racial equality fought for "civil rights" when the opportunity presented itself, but this was not a term or a concept that they generally rallied around. If they were going to frame their demands for racial justice in terms of rights, African Americans tended to talk of the rights of citizens or public rights[100] or, simply, equal rights.[101]

When political circumstances and ideological commitments were right, the principle of equal civil rights could be a powerful tool for extending the reach of constitutional nondiscrimination norms. Congressional Republicans during Reconstruction showed the principle's potential, as did Justice Harlan in the decades following Reconstruction. But when circumstances and commitments changed, its limitations and liabilities were exposed, and it was left with few advocates. And it was not the kind of principle that activists working outside the

96. *See* SCHMIDT, *supra* note 17, at 11–52.

97. *See* "Memorial of the National Convention of Colored People Praying to be Protected in Their Civil Rights," H.R. and S. Docs., 1584, 43rd Cong., 1st Sess., Misc. S. Doc. No. 21 (Dec. 19, 1873) ("The recognitions made within a few years respecting in part our rights, make us more sensitive as to the denial of the rest . . . . The protection of civil rights in the persons of every inhabitant of the country is the first and most imperative duty of the Government."); *The Civil Rights Convention*, N.Y. TIMES, Dec. 12, 1873, at 1; HUGH DAVIS, "WE WILL BE SATISFIED WITH NOTHING LESS": THE AFRICAN AMERICAN STRUGGLE FOR EQUAL RIGHTS IN THE NORTH DURING RECONSTRUCTION 102–09 (2011).

98. *See* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 45–54 (1908); MASUR, EXAMPLE, *supra* note 20, at 112.

99. SCHMIDT, *supra* note 17, 45–46.

100. *See* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777 (2008); Rebecca J. Scott, *Discerning a Dignitary Offense: The Concept of Equal "Public Rights" During Reconstruction*, 38 L. & HIST. REV. 519 (2020); FONER, *supra* note 45, at 140–42.

101. *See, e.g.*, "Civil Rights: Resolutions of the Legislature of South Carolina," H.R. and S. Docs., 1617, 43rd Cong., 1st Sess., Misc. H.R. Doc. No. 25 (Dec. 15, 1873). (Discrimination against Black people in travel and public accommodations results in a "degradation of their manhood and the violation of their equal rights as human beings").

formal institutions of power rallied around. It was a principle that channeled and chastened egalitarian sentiment, and hence was ill-suited to the language of mobilization and protest.

III. DEFINING THE BOUNDARIES OF RACE DISCRIMINATION

By the early decades of the twentieth century, equality of rights was no longer a recognized principle of Fourteenth Amendment doctrine. Judges showed more interest in deploying the Fourteenth Amendment as a bulwark against economic regulation than against white supremacy. Racial justice activists rallied around broader and bolder visions of racial equality. The very label that described the core of the equality of rights principle—civil rights—had been repurposed in mainstream American discourse. The loss of this doctrine meant that American political and legal discourse no longer had a legal category that had played a critical role in the Amendment's first decades—at times strengthening the cause of racial justice, at times limiting it, and often doing both at the same time.

Yet even as these developments pushed aside the equality of rights principle, the Supreme Court continued to rely on its core assumptions because the Justices still wanted to apply a nondiscrimination principle that could strike down certain forms of racial discrimination while upholding others. For this reason, the equality of rights principle lived on, often featuring in highly consequential cases, but its role was obscured, causing more confusion than direction for those trying to make sense of the Court's Fourteenth Amendment doctrine.

In this Part, I consider two landmark twentieth-century Supreme Court decisions involving racial discrimination in the context of rights the Court deemed to be fundamental to civic life. *Buchanan v. Warley* involved property rights; *Brown v. Board of Education*, education. In each, the Justices struggled to offer a persuasive account of what they were doing, leaving legal commentators, at the time of the decisions and ever since, to puzzle over the doctrinal justifications and implications of these decisions. Much of this confusion, I argue, can be traced to the disappearance of the equality of rights principle as a recognized feature of Fourteenth Amendment jurisprudence. In both *Buchanan* and *Brown*, the Court operated on a set of assumptions that were familiar to the Reconstruction generation but that had become obscured to later generations.

A. BUCHANAN V. WARLEY

In its unanimous 1917 decision in *Buchanan v. Warley*, the Supreme Court struck down a Louisville, Kentucky city ordinance designed to preserve the city's patterns of residential segregation.[102] Louisville's "ordinance to prevent

102. 245 U.S. 60, 82 (1917).

conflict and ill feeling between the white and colored races" prohibited African Americans from moving into blocks that were majority white and whites from moving into blocks that were majority African American.[103] The regulation, according to Justice William R. Day, "destroy[ed] the right of the individual to acquire, enjoy, and dispose of his property" and thus violated the Due Process Clause of the Fourteenth Amendment.[104]This was an impressive victory for the battle against Jim Crow at a time when such victories were rare, and racial justice activists praised the ruling.[105] Moorfield Storey, president of the National Association for the Advancement of Colored People, described *Buchanan* as "the most important decision that has been made since the Dred Scott case."[106]

For commentators at the time of *Buchanan* and for generations of scholars ever since, the most puzzling aspect of the case was why the Supreme Court struck down this particular segregation law while leaving untouched other precedents that upheld segregation laws.[107] *Plessy v. Ferguson*, which upheld segregation on railroad travel, remained good law in the wake of *Buchanan*, as did an 1899 Supreme Court ruling that rejected a challenge to segregated schools and an 1883 ruling that rejected a challenge to a state anti-miscegenation law.[108] Before *Buchanan*, state courts that had upheld residential segregation policies cited these cases as precedents to justify their rulings.[109] According to the Kentucky Court of Appeals, "we see but little difference in the prevention by law of the association of white and colored pupils in the schools of the state and in the prevention of their living side by side in their homes."[110]

The best explanation for *Buchanan* was that the Justices viewed property rights as different from the rights involved in public accommodations or education or marriage. The Court's reasoning thus turned on a simple, if never

103. *Id.* At 70–71.

104. *Id.* At 80.

105. PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 65, 72–75 (2009) (describing the decision's energizing effect on the early NAACP); *see also* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 939, 947 (1998); Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. HIST. 179, 198–99 (1968); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 508–09 (1982) (describing press response).

106. Schmidt, *supra* note 105, at 522.

107. *Id.* At 509–11 (summarizing law review commentary on *Buchanan*).

108. Plessy v. Ferguson, 163 U.S. 537, 548–49 (1896); Cumming v. Richmond Cnty. Bd. Of Educ., 175 U.S. 528, 545 (1899); Pace v. Alabama, 106 U.S. 583, 585 (1883).

109. *See, e.g.*, Harden v. City of Atlanta, 93 S.E. 401, 402–03 (Ga. 1917); Harris v. City of Louisville, 177 S.W. 472, 476–77 (Ky. 1915).

110. *Harris*, 177 S.W. at 477. Contemporary legal commentators criticized *Buchanan* on this ground, noting the inconsistencies of allowing segregation in schools and on public transportation while striking it down in this context. *See, e.g.*, S.S. Field, *The Constitutionality of Segregation Ordinances*, 5 VA. L. REV. 81, 82–83 (1917); Note, *Constitutionality of Segregation Ordinance*, 16 MICH. L. REV. 109, 110 (1917); Comments, *Unconstitutionality of Segregation Ordinances*, 27 YALE L.J. 393, 393 (1918).

fully articulated, assumption: that certain forms of state-mandated racial discrimination were constitutionally permissible, while others were not.[111]

To the extent that Justice Day articulated and defended this assumption (*Buchanan* is a notoriously opaque opinion), he did so by drawing on the legal achievements of Reconstruction. He referenced the Civil Rights Act of 1866 and jury discrimination cases from 1879–80 in which the Court included sweeping assertions of the racial egalitarian goals of the Reconstruction Amendments.[112] Day asked:

> In the face of these constitutional and statutory provisions can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?[113]

Justice Day went on to delineate a limiting principle to his nondiscrimination holding. Property was different from other potential nondiscrimination claims because it was a fundamental right. The precedents and statutes that had prohibited racial discrimination "did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."[114] In support of this point, Justice Day cited the *Civil Rights Cases*, in which the Court, in the process of declaring public accommodations outside the realm of civil rights, and thus beyond the reach of the Thirteenth Amendment, emphasized that property rights were at the core of the civil rights category.[115] Justice Day's reading of Reconstruction justified his conclusion that regulation that infringed property rights required a distinctive antidiscrimination analysis.

> The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.[116]

Buchanan was an opinion whose reasoning was grounded in the Reconstruction-era equality of rights concept, but it was decided at a moment in history when that concept had become obscured in legal discourse. Most

111. Alongside the right to own property, the Court placed the right to pursue one's profession as so fundamental that racial distinctions were generally not permitted. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (striking down on equal protection grounds the racially discriminatory application of a laundry licensing policy); Truax v. Raich, 239 U. S. 33, 38 (1915) (striking down on equal protection grounds an Arizona law that limited employment of non-citizens). In *Truax*, the Court treated the right to pursue one's profession, like the property right recognized in *Buchanan*, as not a free-standing right against government regulation, but a right that could not be conditioned on certain grounds—in this case, citizenship. Truax thus offers something of a preview of the equality of rights principle as it would develop in the 1960s and 1970s. *See infra* Part V.

112. Buchanan v. Warley, 245 U.S. 60, 76–79 (1917).

113. *Id.* At 78.

114. *Id*. At 79.

115. *Id.* (citing Civil Rights Cases, 109 U.S. 3, 22 (1883)).

116. *Buchanan*, 245 U.S. at 81.

notably, the term "civil rights" no longer served to delineate and differentiate categories of rights. A decision that would have been readily explainable using the rights categories of the 1860s and 1870s puzzled many Americans of the early twentieth century. *Buchanan* remains today an awkward fit in histories of the Court's interpretation of the Fourteenth Amendment.[117]

B. BROWN V. BOARD OF EDUCATION

Chief Justice Earl Warren's reasoning in *Brown v. Board of Education* followed a path analogous to Justice Day's in *Buchanan.* Its holding was premised on the assumption that rights pertaining to certain realms of society were more fundamental than others, and that racial restrictions on the most fundamental of rights should be treated differently when applying the Fourteenth Amendment. In *Buchanan*, the fundamentality of the right at issue was beyond question; property rights were foundational to Anglo-American constitutionalism and the right to buy and sell property was one of the rights enumerated in the Civil Rights Act of 1866. The right at issue in *Brown*—education—had a thinner historical pedigree. It was not among the rights enumerated in the 1866 Civil Rights Act. African American activists and Radical Republicans sometimes claimed education as a fundamental right of citizenship or a necessary condition of freedom,[118] and a prohibition on racial discrimination in access to public schools had been included in early versions of the Civil Rights Act of 1875.[119] But this claim was always deeply contested, and supporters of the 1875 Civil Rights Act cut the schooling provision as too controversial.[120]

Chief Justice Warren's challenge in *Brown* was to write an opinion that would strike down state-mandated segregation in schools as a violation of the Fourteenth Amendment but to do so in a way that did not declare all state-mandated discrimination unconstitutional. An opinion based on a sweeping anti-racial-classification rule would entangle the Court in constitutional questions that the Justices preferred to save for another day (particularly interracial marriage bans).[121] Chief Justice Warren needed a rationale for why education was different, for why it was a more important right than other potential racial

117. *See* Christopher W. Schmidt, Buchanan v. Warley *and the Changing Meaning of Civil Rights*, 48 CUMBERLAND L. REV. 463, 464–66 (2018).

118. *See* McConnell, *supra* note 7, at 953–54.

119. CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870).

120. Critics argued that the school provision would result in the shutting down of schools. CONG. REC. 3, 43rd Cong., 2d Sess. 954, 979, 981, 999, 1003 (1875); *The Civil-Rights Bill*, CHI. TRIB., Nov. 3, 1874 at 4. President Grant criticized the inclusion of schools in an early version of the bill, arguing the regulation of "social relations" belonged to states and localities. *President Grant and the Civil Rights Question*, BALT. SUN, Nov. 21, 1874, at 1. Some African American congressmen expressed a willingness to abandon the school provision if it would allow the rest of the bill to pass. CONG. REC. 3, 43rd Cong., 2d Sess. 957–58, 981 (1875). The House cut the school provision (by a vote of 128 to 48) and then passed the bill 162 to 99. *Id.* At 1010–11. The Senate passed the bill several weeks later. *Id.* At 1861–70.

121. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 241–45 (1991); Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 219–25 (2008).

discrimination claims. But Fourteenth Amendment history offered the Justices little. Those involved in the framing, ratification, and early judicial interpretation of the Fourteenth Amendment generally assumed that education was less fundamental a right as compared to those rights involving market relations and access to the courts that were the Amendment's central concerns.

Chief Justice Warren ultimately built his case for education's fundamentality not with materials drawn from history but with other, more contemporary materials.[122] He emphasized the importance of education in modern society.[123] And he turned to social psychology to demonstrate the supposed mentally damaging effects school segregation had on African American children.[124] For these reasons, Chief Justice Warren explained, education was distinctively important, meriting special attention from the Court when it determined the reach of the Fourteenth Amendment.[125] Chief Justice Warren's plausible but thinly reasoned case for education exceptionalism gave him the space to strike down racial segregation in education without necessarily uprooting it elsewhere.

No one, including the Justices who joined the *Brown* decision, really believed the Court's conclusion that the Fourteenth Amendment's prohibition of state-mandated segregation applied only to schools. Commentators responded to *Brown* by declaring *Plessy* dead and Justice Harlan's "colorblind" reading of the Constitution (stripped of its "civil rights" qualification, whose significance was lost on Americans in 1954) the law of the land.[126] The Court soon followed its *Brown* decision with a series of rulings striking down segregation in state operations beyond schools, such as beaches, parks, golf courses, and buses, offering only cursory *per curiam* opinions citing *Brown* as justification.[127] Although in the aftermath of *Brown* these were hardly shocking rulings, even

122. *See* McConnell, *supra* note 7, at 1131–37. Warren also floated, but then abandoned, the argument that education was an unenumerated fundamental right under the Due Process Clause. In his initial draft of *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the companion case to *Brown* involving segregated schools in the District of Columbia, included a reference to education as a "fundamental liberty." Other justices were uncomfortable using the Due Process Clause to declare rights that were not enumerated in the Constitution's text, an approach they had criticized when earlier Supreme Courts had used unenumerated rights, such as the "freedom of contract," to strike down economic regulation. Warren revised *Bolling* so that he read the Fifth Amendment's Due Process Clause as requiring the federal government to provide equal protection of the laws—a more creative exercise in constitutional interpretation, but one that avoided echoes of the Court's discredited economic liberty decisions. Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 44–50 (1980).

123. Brown v. Board of Education, 347 U.S. 483, 492–93 (1954).

124. *Id.* At 494–95.

125. Hence the limiting clause in Warren's summary of the Court's holding: "We conclude that, *in the field of public education*, the doctrine of 'separate but equal' has no place." *Id.* At 495 (emphasis added).

126. *See, e.g.*, Editorial, *Justice Harlan Concurring*, N.Y. TIMES, May 23, 1954, at E10; Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 153 (1955); Schmidt, *supra* note 121, at 231–33.

127. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (golf courses); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches).

some sympathetic observers wondered how exactly a decision that seemed to turn on the uniquely important place of education in modern American society and the supposed psychological harms segregation caused in school-age children could serve as a rationale for desegregating a golf course.[128]

Brown, which Chief Justice Warren wrote as a decision that turns on the fundamentality of education, soon became a decision representing, for many, a general principle of racial nondiscrimination. This anti-classification reading of *Brown* was always contested, though. In the following decades, when race-conscious affirmative action programs were at issue, conservatives would rally to a colorblind reading of the Fourteenth Amendment, declaring the true legacy of *Brown* and the civil rights revolution to be a prohibition on racial classifications by government of all kinds.[129] Liberals insisted that the legacy of *Brown* and the civil rights movement was a Fourteenth Amendment that was read to prohibit not racial classifications but racial subordination.[130] In this ongoing debate over the meaning of *Brown*, almost no one reads the decision's rationale as turning on the fact that education deserves more protection under the Equal Protection Clause than other, less fundamental areas of society. The assumption, with its echoes of the Reconstruction-born equality of rights principle, served a valuable role, allowing the Court to chart new ground in extending Fourteenth Amendment protection against racial discrimination, but to do so in a limited manner. The equality of rights principle quietly emerged to provide the compromise position the Justices believed they needed to navigate the constitutional politics of the day. But lacking a label, and with a lineage largely lost in the miasma of skewed memories of Reconstruction, most saw its role in Fourteenth Amendment doctrine as a sign of disingenuousness or confusion.

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The Justices in *Buchanan* and *Brown* struggled with the doctrinal tools they had inherited to justify the Court's holding. They looked to the Reconstruction period, finding promising hints of justifications in its legal legacy. But, in the end, they simply followed their intuition that the interests at stake were a relevant factor in assessing the scope of constitutional equality. The equality of rights principle resonated across time for the same reason it resonated during Reconstruction: because it justified expanded legal protections against racial discrimination while simultaneously cabining this expansion. Rarely given its name or historical pedigree, it existed as a shadow presence, operating as an amorphous collection of intuitions and undertheorized conclusions that

128. *See* Hutchinson, *supra* note 122, at 60–61 (describing critical reaction of legal scholars to the per curiam decisions).

129. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1500–01 (2004).

130. *Id.* At 1474.

produced rulings that history has deemed to be correct in outcome but failures of doctrinal analysis.

IV. DEFINING THE BOUNDARIES OF STATE ACTION

Thirteenth Amendment echoes can also be found in civil-rights-era racial discrimination cases in which the Supreme Court confronted the Fourteenth Amendment's state action limitation. The state action doctrine, as developed by the Court in the late nineteenth century, turns on the straightforward premise that the constraints of the Fourteenth Amendment apply to state actors, but not to private actors.[131] As a formal matter, the doctrine does not take account of the nature of activity; its only concern is whether or not the government is the one violating someone's Fourteenth Amendment rights.[132] The state action analysis is supposed to work the same regardless of whether the right at issue is procedural due process, free speech, or racial discrimination.

This is not how the doctrine has worked in practice. At least, this was not how the Supreme Court dealt with the state action limitation during the period from the 1940s through the 1970s. In cases involving particularly egregious acts of racial discrimination—racial discrimination that involved the denial of important rights—the Court adopted a more lenient approach, finding ways to expand the reach of the Equal Protection Clause further into the private sphere.[133] The Court did this not by abandoning the state action principle, but by adopting a more expansive view of government responsibility when it came to private racial discrimination that affected particularly important societal interests.[134]

The Court struggled, however, to explain what it was doing in these cases. It left behind a trail of rulings that are notoriously confused—a "conceptual disaster area" as Charles Black described state action jurisprudence in 1967.[135] One way to explain and justify these cases is to look to the Thirteenth Amendment. The Thirteenth Amendment stands apart from other rights-protecting provisions of the Constitution in that it has no state action limitation. The prohibition on slavery or involuntary servitude—including the "badges and incidents" of slavery that the Court has recognized as protected by the Amendment—applies to state and private action alike.[136] Once we give space to Thirteenth Amendment values in our interpretation of the Fourteenth

131. *See, e.g.*, Civil Rights Cases, 109 U.S. 3, 11, 17 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment . . . . The wrongful act of an individual . . . is simply a private wrong.").

132. Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 599–600.

133. *Id.* At 591–93.

134. *Id.*

135. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

136. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); RUTHERGLEN, *supra* note 21, at 137–51.

Amendment, we can recognize the possibility of a more contextual state action doctrine: one that recognizes that our understanding of state responsibility for private action may be different when assessing claims involving discrimination in access to different categories of rights.

Recent historical scholarship has revealed that this was basically how lawmakers and jurists during and immediately after Reconstruction understood the state action concept.[137] They seemed to accept that the Fourteenth Amendment could be triggered when states failed in their duty to protect certain fundamental rights—sometimes describes as "natural" or "secured," in that government did not create or confer them but merely secured them against violation.[138] The same reasoning did not apply, however, when states failed to protect against racial discrimination outside this realm of fundamental rights.[139] The rights generally understood to fall in this category of "secured rights" were those identified in the 1866 Civil Rights Act (the right to property, to make contracts, to physical security).[140] In this way, early judicial assessments of the scope of the "badges and incidents" of slavery in the Thirteenth Amendment overlapped with the scope of the state action requirement of the Fourteenth Amendment.[141] And the rationale that explained this overlap was the equality of rights principle.

When the Supreme Court, in the middle decades of the twentieth century, sought to place certain forms of private racial discrimination within the ambit of the Equal Protection Clause, there was historical material that could have been used to justify a reconceptualized state action doctrine. At times, the Justices did indeed draw on this history, although they did so only sporadically, never adequately explaining what they were doing or offering a coherent alternative to existing state action doctrine. In this Part, I consider the most famous example in which this took place: the enigmatic landmark of twentieth-century

137. BRANDWEIN, *supra* note 60, at 87–128; RUTHERGLEN, *supra* note 21, at 76–79; G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME 2: FROM RECONSTRUCTION THROUGH THE 1920S 26–49 (2016).

138. BRANDWEIN, *supra* note 60, at 95–97.

139. *Id.*

140. *Id.*

141. Most of the rights recognized as protected in the 1866 Civil Rights Act require, by definition, a state actor. The right to sue, to testify in court, to make contracts, and to own property involve formal legal processes, and thus necessarily involved government actors. *See* Civil Rights Cases, 109 U.S. 3, 17 (1883) ("An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment, and amenable therefor to the laws of the State where the wrongful acts are committed."). The most significant way in which this reading of state action could allow for regulation of what is sometimes called state "inaction" under the Fourteenth Amendment would be the failure of the state to protect individuals from private violence. *See* BRANDWEIN, *supra* note 60, at 161–83; RUTHERGLEN, *supra* note 21, at 77–80; G. Edward White, *The Origins of Civil Rights in America*, 64 CASE WESTERN RESERVE L. REV. 755, 780–812 (2014); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

Fourteenth Amendment jurisprudence, *Shelley v. Kraemer*.[142] I then turn to another instance in which the Court struggled with the state action doctrine in the context of private racial discrimination, *Bell v. Maryland*,[143] the culmination of a line of cases in which the Court considered whether racial discrimination in privately owned public accommodations violated the Equal Protection Clause. Although the Court divided on the constitutional question, Justice Arthur Goldberg wrote a concurrence in which he drew on the history of Reconstruction, including the idea of equal civil rights, to justify his conclusion that racial discrimination in public accommodations violated the Constitution.[144] Justice Goldberg's opinion offers the clearest effort by a Supreme Court justice to articulate an approach to the state action doctrine that incorporated the equality of rights principle.

A. SHELLEY V. KRAEMER

Shelley v. Kraemer, the 1948 ruling in which the Court struck down judicial enforcement of provisions in property deeds that prohibited the sale of the property to certain racial groups as a violation of the Equal Protection Clause, can be illuminated by recognizing the Court's tacit reliance on the principle of equality of rights. The core puzzle of *Shelley* was why the Court struck down judicial enforcement of one particular kind of private agreement, racially restrictive covenants, while upholding judicial enforcement of virtually every other kind of private agreement—including other private agreements that, if converted into state policy, would have violated the Constitution.[145]

The reasoning of Chief Justice Fred Vinson's opinion reveals little. There was nothing exceptional about the role of the state in the case. Courts regularly enforced private agreements, including agreements that entailed acts of racial discrimination, and doing so had never before been understood as the kind of state action that demanded application of constitutional standards.[146] Generations of scholars have sought to fill in the void, suggesting various rationales for why this particular instance was different.[147]

142. 334 U.S. 1 (1948).

143. 378 U.S. 226 (1964).

144. *Id.* at 286–318 (Goldberg, J., concurring).

145. *See* Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 458–70 (2007).

146. *See* Corrigan v. Buckley, 271 U.S. 323 (1926).

147. *See, e.g.*, Rosen, *supra* note 145; Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988); Laurence Tribe, *Refocusing the "State Action" Inquiry: Separating State Acts from State Actors*, CONSTITUTIONAL CHOICES 248, 259–66 (1985); David Haber, *Notes on the Limits of* Shelley v. Kraemer, 18 RUTGERS L. REV. 811 (1964); Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 PA. L. REV. 473 (1962).

But another way to make sense of *Shelley* is to connect it to the Thirteenth Amendment and the Reconstruction concept of civil rights.[148] In his opinion for the Court, Vinson even invoked this concept by name:

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.[149]

As evidence that the Court had already accepted this reading of the Fourteenth Amendment, Vinson cited *Buchanan*.[150] Under this approach, property rights might be treated differently than other kinds of rights. They were more fundamental and therefore they would be more thoroughly protected under the American constitutional system. So judicial enforcement of restrictions on property might be unconstitutional even though judicial enforcement of other forms of private racial discrimination might not be. When it came to racially exclusionary practices, property was different. This was a premise of civil rights circa 1866—and, more generally, the equality of rights principle that guided early conceptions of the Fourteenth Amendment.

Yet by 1948, this principle did not resonate as it had in the 1860s. Having the Equal Protection Clause apply one way to government action involving a select group of fundamental rights, and another way to other government action, strained against contemporary trends in equal protection doctrine and racial justice activism, both of which were moving toward a general presumption against racial discrimination in public life. The *Shelley* Court did not want to apply this presumption. To do so would sweep too far, calling into question judicial enforcement of all sorts of private activity. The Justices instead turned to the older concept of civil rights—and even called it out by name—because it allowed them to expand the reach of the equal protection clause while at the same time cabining that expansion. Justice Vinson's half-hearted efforts to explain the Court's reasoning, including his oblique references to Reconstruction history, made little sense to commentators then or now.

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148. This basic insight—that *Shelley* can best be justified by looking to the Thirteenth Amendment— tracks an argument that Mark Rosen made in his important 2007 article. Rosen, *supra* note 145. The primary distinction between my approach and Professor Rosen's is that he argues that *Shelley* would have been better justified on the basis of the Civil Rights Act of 1866, as authorized by the enforcement clause of the Thirteenth Amendment. *Id.* at 483–98. In contrast, I argue that *Shelley* could be better justified not by removing it from the Fourteenth Amendment canon, but by recognizing the Thirteenth Amendment principles that informed the Court's reading of the Fourteenth Amendment—and thereby reconceptualizing the doctrinal foundations of the Fourteenth Amendment canon.

149. Shelley v. Kraemer, 334 U.S. 1, 10–11 (1948).

150. *Id*. at 11. The connection between *Shelley* and the equality of civil rights principle is further illustrated by turning to *Shelley*'s companion case, *Hurd v. Hodge*, 334 U.S. 24 (1948), which challenged the judicial enforcement of a racially restrictive covenant in Washington, D.C. As the Fourteenth Amendment did not apply to the governing policies of the nation's capital, the Court decided this case on the alternate grounds of the Civil Rights Act of 1866. *Id.* at 30–31.

B. BELL V. MARYLAND

The Supreme Court's confrontation with appeals of criminal convictions of people who were arrested for taking part in the lunch counter sit-in protest movement that swept across the South in the winter and spring of 1960 raised issues that were analogous to *Shelley*. The legal issue in these cases centered on the state action doctrine. Specifically, the cases asked whether people who operated businesses that catered to the general public—indeed that provided a vital service of public life—should be treated as state actors and therefore constrained by the requirements of the Fourteenth Amendment (at least when it came to racial discrimination in their service policies); or, alternately, whether a state government that criminally prosecutes sit-in protesters on charges of trespass or disorderly conduct—prosecutions that were formally race-neutral but originated as acts of racial discrimination—was in violation of the Equal Protection Clause.[151]

The challenge for the Court in the sit-in cases was analogous to the challenge the Court faced in *Buchanan* and *Brown*. In those cases, the Court had to explain why the Fourteenth Amendment prohibited government from mandating racial segregation in the realm of property ownership and schooling, respectively, while not necessarily prohibiting all forms of government mandated racial segregation. In the sit-in cases, for those Justices who wanted to overturn the convictions of lunch counter sit-in protesters as unconstitutional on equal protection grounds, the challenge was to justify this holding without exploding the entire state action limitation on the Fourteenth Amendment. (The idea of abandoning the state action requirement had some support in the academic community at the time, but none of the Justices on the Supreme Court expressed interest in completely abandoning the state action doctrine[152]). The most intuitively plausible approach was to simply recognize that public accommodations were different from other privately operated businesses and that racial segregation in this realm of society was more wrongful—that it crossed the threshold from a policy issue to a constitutional one. To achieve this end, the largely forgotten but not quite lost language of 1866 civil rights proved helpful.

In the last of the sit-in cases, *Bell v. Maryland*,[153] Justice Arthur Goldberg wrote a concurrence in which he concluded that racial discrimination in privately owned public accommodations violated the Equal Protection Clause.[154] He read *Brown* as having "affirmed the right of all Americans to public equality."[155] He favored the broad brushstroke, aggregative approach to the Reconstruction

151. *See* CHRISTOPHER W. SCHMIDT, *The Justices*, *in* THE SIT-INS: PROTEST AND LEGAL CHANGE, IN THE CIVIL RIGHTS ERA 114–51 (2018).

152. *See* Christopher W. Schmidt, *The Sit-ins and the State Action Doctrine*, 18 WM. & MARY BILL OF RTS. J. 767, 781–86 (2010).

153. 378 U.S. 226 (1964).

154. *Id.* at 286–318 (Goldberg, J., concurring).

155. *Id.* at 288.

Amendments that was common among lawmakers during Reconstruction and that was carried on by Justice Harlan in the 1880s and 1890s. "The Thirteenth, Fourteenth and Fifteenth Amendments," Justice Goldberg wrote in his concurrence, "do not permit Negroes to be considered as second-class citizens in any aspect of our public life . . . . Our fundamental law . . . insures an equality of public benefits."[156]

Justice Goldberg defended his reading of the Reconstruction Amendments as based on the "intent and purposes of the Framers."[157] He then offered a series of quotations from cases in which the Court located a general equal civil rights principle in the Thirteenth and Fourteenth Amendments.[158] He cited, for example, the 1879 case of *Ex Parte Virginia*,[159] in which the Court wrote that the "one great purpose" of the Thirteenth and Fourteenth Amendments was "to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of rights with all other persons."[160]

Justice Goldberg then argued that the framers of the Fourteenth Amendment understood the category of civil rights to include access to public accommodations. He centered this argument on the Civil Rights Act of 1866, the legislative "precursor of the Fourteenth Amendment," which, he claimed, was generally "understood to open to Negroes places of public accommodation."[161] He concluded: "A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart both of the contemporary legislative proposals and of the Fourteenth Amendment encompassed the right to equal treatment in public places . . . ."[162] Although Justice Goldberg's reading of the history is questionable—Reconstruction lawmakers were far more skeptical toward including public accommodations in the civil rights category than he recognized[163]—his line of reasoning in *Bell* illustrates the way the principle of equal civil rights provided a limited reconceptualization of the Fourteenth Amendment's state action limitation. It allowed Goldberg to conclude that the Equal Protection Clause applied to this particular form of private activity—racial discrimination in public accommodations—while still maintaining the state action limitation in other circumstances.

156. *Id.*

157. *Id.* at 289.

158. *Id.* (quoting Slaughterhouse Cases, 83 U.S. 71 (1873); Ex Parte Virginia, 100 U.S. 339, 344–45 (1879); Strauder v. West Virginia, 100 U.S. 303, 307 (1880); Neal v. Delaware, 103 U. S. 370, 386 (1880)).

159. 100 U.S. 339.

160. Bell v. Maryland, 378 U.S. 226, 252 (1964) (quoting *Ex Parte Virginia*, 100 U.S. at 344–45).

161. *Id.* at 290 n.5.

162. *Id.* at 293.

163. Some of Goldberg's more sweeping historical assertions push well beyond the historical record. *See, e.g.*, *id.* at 290 ("[I]t appears that the contemporary understanding of the general public was that freedom from discrimination in places of public accommodation was part of the Fourteenth Amendment's promise of equal protection.").

C. STATE ACTION AND EQUALITY OF RIGHTS

The equality of rights framework illuminates critical junctures in the historical development of state action doctrine. It helps to explain how the framers of the Fourteenth Amendment could understand its protections as potentially reaching certain private activities (those that involve racial exclusions pertaining to fundamental rights),[164] while leaving most of the private sphere outside its reach. It helps to explain how the Supreme Court's state action doctrine, as laid out most famously in the *Civil Rights Cases*, relied on a partial rejection of the equality of rights approach.[165] And it helps to explain how, in the middle decades of the twentieth century, the equality of rights principle operated in subtle and underrecognized ways to undermine the strictures of the modern state action doctrine.

V. THIRTEENTH AMENDMENT ECHOES BEYOND RACE

In this Part, I turn to how the equality of rights principle operated in Fourteenth Amendment cases beyond race. The linkage to the Thirteenth Amendment is necessarily lessened in these cases—the Thirteenth Amendment echoes fainter—yet the central elements of the equality of rights principle remain. The Justices made the same basic analytical moves as in the race cases discussed above. Rather than following the tiers rulebook and its assumption that the appropriate level of scrutiny could be found by separately analyzing the nature of the classification and nature of the interests, the Justices in these cases considered how a given basis of discrimination operated when applied to a particular sphere of activity. They then determined whether the discriminatory policy denied what Harlan referred to as "the rights necessarily inhering in a state of freedom."[166] The subjectivity of this determination is unavoidable, and it has been a frequent point of critique for cases that adopt an equality of rights approach.

Yet the value of this approach was found not only in its ability to break through the stasis that had infected the tiers approach and expand the reach of the Fourteenth Amendment's equality protections, but also in its ability to constrain. Across generations, jurists have been pulled to the equality of rights principle because it was, in critical ways, more limited than alternatives. Assessing new claimants for constitutional protections under the tiers approach has an all-or-nothing quality. When given the choice, the Court for the last half century has typically chosen nothing. The equality of rights approach allowed

164. To be more precise: at least some of the framers seemed to assume that if a state refused to protect freedpeople from private violations of their civil rights, then that particular form of state inaction could amount to a violation of the Fourteenth Amendment, enforceable by congressional legislation under the amendment's enforcement clause and/or by the courts.

165. *See supra* Part I.D.2.

166. Civil Rights Cases, 109 U.S. 3, 34 (1883).

for an assessment of potential constitutional violations that is more flexible but also more directed.

A. THE TIERS OF EQUAL PROTECTION

In the late 1960s and early 1970s, as Earl Warren's term as Chief Justice came to an end and Warren Burger's began, the Court sought to make sense of what it had done with equal protection doctrine over the previous decades. The Warren Court had given new meaning to the Fourteenth Amendment, expanding the role of the courts in using the Amendment to protect vulnerable minorities, most especially racial minorities. Yet, for all the Warren Court's unity of vision on its role in the social upheavals of its day,[167] underlying divisions emerged when it came to translating that vision into constitutional doctrine. Much of the transformative work of the Warren Court was built upon a mixture of hints of ambitious doctrinal departures that were qualified with offramps, fallbacks, and compromises.[168] The contours and limits of the Warren Court's transformation of the Fourteenth Amendment remained uncertain. And although the Burger Court had its own equal protection innovations (most notably its adoption of heightened scrutiny for sex-based classifications)[169] much of its contribution in the field of equal protection would be in crafting a doctrinal rulebook designed to explain, and often contain, the innovations of the Warren Court.[170]

The centerpiece of this rulebook was the two-tiered approach to assessing equal protection claims. Under this approach, all equal protection claims receive "rational basis review"—the most deferential form of judicial scrutiny—and the challenged policy is presumed constitutional unless one of two factors is met: the classification at issue is "suspect" or the classification involves access to a right that is "fundamental."[171] If either factor is met, a demanding strict scrutiny standard applies, and the challenged policy is presumed unconstitutional.[172] Although there were rumblings of dissatisfaction with this rulebook as it was taking shape,[173] by the 1970s most of the Justices had come to accept it as blackletter law.

The Burger Court's more conservative members were particularly insistent in articulating and defending the tiered approach. It provided a basis for their

167. *See generally* GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT (2019); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1998).

168. A particularly valuable account of the development of Equal Protection doctrine in this period is Klarman, *supra* note 121; *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005).

169. Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976).

170. *See generally* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016).

171. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 826 (5th ed., 2015).

172. *Id.*

173. Justice John Marshall Harlan II, for example, critiqued the entire fundamental rights prong of equal protection doctrine as misguided. Shapiro v. Thompson, 394 U.S. 618, 658–63 (1969) (Harlan, J., dissenting).

efforts to accept and legitimate key elements of the Warren Court's equality jurisprudence while cutting off most claims for further expanding its reach. With the prominent exception of sex discrimination (which the Court classified as a "quasi-suspect" class, activating an intermediate form of scrutiny),[174] the Burger Court largely shut off the category of suspect classifications to new entrants. It rejected efforts to recognize as suspect classifications indigency,[175] age,[176] and mental disability.[177] The Burger Court took the same approach to the category of fundamental rights, accepting those that the Court had already categorized as fundamental—procreation,[178] marriage,[179] travel,[180] voting[181]—but, with the prominent exception of abortion,[182] refusing to recognize additional fundamental rights. The Court applied rational basis review in rejecting equal protection challenges involving access to welfare benefits,[183] housing,[184] and education.[185]

B. SLIDING SCALES

This new equal protection rulebook that the Burger Court inherited from the Warren Court had prominent critics inside and outside the Court. These critics questioned whether the tiered framework actually described what the Court had been doing, and they questioned whether it was an approach that described what the Court should be doing. Writing in 1972, constitutional scholar Gerald Gunther described a "mounting discontent with the rigid two-tier formulations of the Warren Court's equal protection doctrine."[186] The primary frustration was its sharply dichotomous approach. "Justices, from all segments of the Court, sought formulations that would narrow the gap between the widely separated tiers of the Warren Court's equal protection."[187] "None of these gropings has produced a fully developed alternative," he concluded, "but all signify a widespread inclination to reexamine old rationales."[188] A critical question, which the Court had yet to answer, Gunther noted, was "whether

174. Craig v. Boren, 429 U.S. 190 (1976).
175. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
176. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).
177. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).
178. Edwards v. California, 814 U.S. 160 (1941).
179. Loving v. Virginia, 388 U.S. 1 (1967).
180. Shapiro v. Thompson, 394 U.S. 618 (1969).
181. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969).
182. Roe v. Wade, 410 U.S. 113 (1973).
183. Dandridge v. Williams, 397 U.S. 471 (1970).
184. Lindsey v. Normet, 405 U.S. 56 (1972).
185. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
186. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).
187. *Id.* at 17.
188. *Id.* at 18.

suspect classifications and fundamental interests were separate or interrelated categories."[189]

On the Court, the most concerted effort to craft from these "gropings" a doctrinal alternative came from Justice Thurgood Marshall. In a series of dissenting and concurring opinions in the 1970s and 1980s, Marshall criticized the tiers framework. Its most serious flaw, he explained, was its inflexibility. The Court "has apparently lost interest in recognizing further 'fundamental' rights and 'suspect' classes,"[190] Marshall lamented in a 1976 dissent. This development was "the natural consequence of the limitations of the Court's" approach.[191]

> If a statute invades a "fundamental" right or discriminates against a "suspect" class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always . . . is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all. It should be no surprise, then, that the Court is hesitant to expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered category.[192]

But to leave all other classifications to a rational basis review standard—and hence presume them constitutional—was insufficient. Justice Marshall explained:

> It cannot be gainsaid that there remain rights, not now classified as 'fundamental,' that remain vital to the flourishing of a free society, and classes, not now classified as 'suspect,' that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members. Whatever we call these rights and classes, we simply cannot forgo all judicial protection against discriminatory legislation bearing upon them, but for the rare instances when the legislative choice can be termed 'wholly irrelevant' to the legislative goal.[193]

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189. *Id.* at 9 n.36. Gunther cited several law review notes and articles that explored this line of analysis: *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969); Frank Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 36 (1969); Comment, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 106 (1972). Writing toward the end of the 1970s, another legal scholar wrote, "[a] majority of the Court appears ready to abandon formally the rigid two tiered approach if something better could be found to take its place." David M. Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 TULSA L.J. 183, 194 (1980).

190. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 318–19 (1976) (Marshall, J., dissenting).

191. *Id.* at 319.

192. *Id.*

193. *Id.* at 320; *see also id.* at 319 n.1 ("Some classifications are so invidious that they should be struck down automatically absent the most compelling state interest, and by suggesting the limitations of strict scrutiny analysis I do not mean to imply otherwise. The analysis should be accomplished, however, not by stratified notions of 'suspect' classes and 'fundamental' rights, but by individualized assessments of the particular classes and rights involved in each case. Of course, the traditional suspect classes and fundamental rights would still rank at the top of the list of protected categories, so that in cases involving those categories analysis would be

Yet, "happily, the Court's deeds have not matched its words," Marshall wrote.[194] The rigid tiers of scrutiny analysis "simply do[es] not describe the inquiry the Court has undertaken—or should undertake—in equal protection cases. Rather, the inquiry has been much more sophisticated, and the Court should admit as much," he explained.[195] "Time and again, met with cases touching upon the prized rights and burdened classes of our society, the Court has acted only after a reasonably probing look at the legislative goals and means, and at the significance of the personal rights and interests invaded."[196] He concluded: "All interests not 'fundamental' and all classes not 'suspect' are not the same; and it is time for the Court to drop the pretense that, for purposes of the Equal Protection Clause, they are."[197]

As an alternative, he advocated a "spectrum of standards" analysis that would take into account both the "constitutional and societal importance of the interest adversely affected" and the "invidiousness of the basis upon which the particular classification is drawn."[198] Such an approach, Marshall believed, would better allow the court to use equal protection jurisprudence to uproot social injustices beyond cases involving explicit racial classifications—when, for example, mental disability intersected with where one could live[199] or when socioeconomic status intersected with educational opportunity.[200] Although Marshall did not explicitly reference the Thirteenth Amendment as informing his sliding scales approach to Fourteenth Amendment doctrine, he did emphasize human freedom as one of its animating principles. In one opinion, he wrote of the need for the courts to be vigilant against discrimination that denied vulnerable groups "human freedom and fulfillment."[201]

Justice John Paul Stevens also took issue with the tiers of scrutiny approach. In a concurrence in *Craig v. Boren*, the case in which the Court first adopted an intermediate scrutiny standard for sex classifications, Stevens wrote:

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functionally equivalent to strict scrutiny. Thus, the advantages of the approach I favor do not appear in such cases, but rather emerge in those dealing with traditionally less protected classes and rights.").

194. *Id.* (citing Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); Frontiero v. Richardson, 411 U.S. 677 (1973) (Powell, J., concurring in judgment); James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Casualty & Surety Co., 406 U. S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971)).

195. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 318 (1976).

196. *Id.* at 320.

197. *Id.* at 321.

198. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting); *see also* Plyler v. Doe, 457 U.S. 202, 230–31 (1982) (Marshall, J., concurring); *Murgia*, 427 U.S. at 319–21 (Marshall, J., dissenting); Chicago Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

199. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 460–65, 478 (1985) (Marshall, J., concurring).

200. *Plyler*, 457 U.S. at 230–31.

201. *Cleburne*, 473 U.S. at 461 ("The interest of the retarded in establishing group homes is substantial . . . . Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of a community."); *see also Murgia*, 427 U.S. at 320.

> I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.[202]

He advocated a single rational basis review standard, but one that did not assume blanket judicial deference.[203] Nine years later, in a concurrence in *Cleburne v. Cleburne Living Center*, in which he was joined by Chief Justice Burger, Stevens wrote that rather than strictly delineated tiers of scrutiny, "our cases reflect a continuum of judgmental responses to differing classifications."[204]

The Court never took up Justice Marshall's sliding-scale or Justice Stevens' continuum approaches. Justice Stewart dismissed one of Justice Marshall's efforts to articulate his approach as "imaginative."[205] Majorities of the Court relied on a strict tiers-of-scrutiny approach in denying heightened scrutiny to classifications based on indigency,[206] on age,[207] and on mental disability.[208] As Justice Powell explained in *San Antonio v. Rodriguez*, in which the Court held that education was not a fundamental right, fundamentality as a constitutional principle did not turn on the "relative social significance" of a particular activity.[209] The only question was "whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[210] On this reasoning, the Court also rejected efforts to frame welfare benefits[211] and housing[212] as fundamental rights. Critics on both the left and the right[213] have criticized the tiers-of-scrutiny approach, but no alternative gained traction.

Yet cases continued to arrive in which a majority of the Court chafed against the constraints of the tiers-of-scrutiny method. In these cases, the Justices stumbled toward the more contextual approach to equal protection that Justice Marshall encouraged, that operated in *Buchanan* and *Brown,* and that was embodied in the Reconstruction concept of civil rights. They relied, in other words, on the equality of rights principle.

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202. Craig v. Boren*,* 429 U.S. 190, 212 (1976) (Stevens, J. concurring).
203. *Cleburne*, 473 U.S. at 452–54 (Stevens, J. concurring).
204. *Id.* at 451.
205. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring).
206. *Id.* at 40.
207. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976) (per curiam).
208. *Cleburne*, 473 U.S. at 435.
209. *Rodriguez*, 411 U.S. at 33.
210. *Id.*
211. Dandridge v. Williams, 397 U.S. 471 (1970).
212. Lindsey v. Normet, 405 U.S. 56 (1972).
213. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting); Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 49 NAT'L. AFFS. 72 (2019), https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny.

C. PLYLER V. DOE

In *Plyler v. Doe*[214] the Supreme Court held that Texas violated the Equal Protection Clause when it denied free access to public schools to undocumented immigrant children. Writing for a five-Justice majority, Justice William Brennan conceded that undocumented immigrants are not a suspect class, but he then sought to distinguish the children who were being excluded from public education from adults who came into the country illegally.[215] He also conceded that education was not a fundamental right, "[b]ut neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[216] He nonetheless applied what appeared to be a version of intermediate scrutiny[217]—albeit without explicitly identifying it as such[218]—and struck down Texas's policy.

Brennan's opinion made motions in various directions. At times, he seemed to characterize the policy as irrational, and thus unconstitutional even under a deferential rational basis standard of review.[219] In other places, he implied a heightened standard of review.[220] He made some broad references to the history of the Fourteenth Amendment, writing that the "Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises,"[221] but in the end his focus was more current and consequentialist. "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[222]

In dissent, Chief Justice Burger wrote that the majority "abuses" the Fourteenth Amendment with an "unabashedly result-oriented approach"[223] and a holding that "rests on such a unique confluence of theories and rationales . . . will likely stand for little beyond the results in these particular cases."[224] "[B]y patching together bits and pieces of what might be termed quasi-

214. 457 U.S. 202.

215. *Id.* at 219–20.

216. *Id.* at 221.

217. *Id.* at 224 (writing that the discrimination at issue in this case "can hardly be considered rational unless it furthers some substantial goal of the State").

218. At the time of *Plyler*, the Court had established its intermediate scrutiny standard in two lines of cases: equal protection claims involving children born to unmarried parents, *Mathews v. Lucas*, 427 U. S. 495 (1976), and those involving sex-discrimination claims, Craig v. Boren, 429 U.S. 190 (1976). Brennan never indicated that the Court in *Plyler* was applying this standard.

219. Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

220. *Id.* at 227–30.

221. *Id.* at 216.

222. *Id.* at 223.

223. *Id*. at 244 (Burger, C.J., dissenting).

224. *Id.* at 243.

suspect-class and quasi-fundamental-rights analysis," the Chief Justice wrote, "the Court spins out a theory custom-tailored to the facts of these cases."[225]

Plyler has always been recognized as something of a doctrinal puzzle. At the time of the decision, legal scholar Dennis Hutchinson wrote that it "may be the Court's most important and groundbreaking interpretation of the Equal Protection Clause in a decade or a limited and somewhat untidy response to a novel case."[226] For those who believe it a "constitutional landmark," noted Hutchinson, the Court's opinion "cut a remarkably messy path through other areas of the Court's jurisprudence."[227] A chorus of critics echoed Chief Justice Burger's lamentations.[228]

Justice Marshall wrote a brief concurrence in *Plyler*, in which he offered his sliding scales approach as a straightforward way to resolve this case. Looking back to his dissent in *San Antonio v. Rodriguez*, he wrote:

> [T]he facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[229]

The premise here is that when certain foundational rights are at stake, such as the right to education, the nondiscrimination norm runs deeper. Marshall's rationale in *Plyler* offers a clear application of the equality of rights principle.[230] Bringing to the foreground the latent principle of equality of rights allows us to recenter the place of *Plyler* in our equal protection canon. It allows us to transform this case from a doctrinal puzzle or embarrassment to a methodological touchstone. The equal rights principle provides an unifying

225. *Id.* at 244, *see also id.* at 248 ("The Equal Protection Clause guarantees similar treatment of similarly situated persons, but it does not mandate a constitutional hierarchy of governmental services.").

226. Dennis J. Hutchinson, *More Substantive Equal Protection—A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167, 167 (1982). Among the questions Hutchinson said that *Plyer* raised but failed to answer was whether the Court had adopted Marshall's sliding-scales approach to Equal Protection Clause. *Id.* at 167–68.

227. *Id.* at 184.

228. *See, e.g.*, David Livingston, Plyler v. Doe*: Illegal Aliens and the Misguided Search for Equal Protection*, 11 HASTINGS CONST. L.Q. 599, 601 (1984) ("Adding only confusion to an already incoherent and uncertain area of equal protection jurisprudence, the Court left unresolved nearly as many constitutional questions as it attempted to answer.").

229. Plyler v. Doe, 457 U.S. 202, 231 (1982) (quoting *Rodriguez*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting)); *see also Plyler*, 457 U.S., at 233 (Blackmun, J., concurring) (noting that "certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis").

230. An important precursor to *Plyler* was *Truax v. Raich*, 239 U.S. 33 (1915), in which the Court struck down on equal protection grounds an Arizona law that limited employment of non-citizens. The Court connected the non-discrimination requirement in the context of the right to pursue one's profession to the history behind the passage of the Fourteenth Amendment (described in a distinctly Thirteenth-Amendment-inflected manner): "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Id.* at 41.

thread connecting the Thirteenth and Fourteenth Amendments, to *Buchanan*, *Brown*, and *Plyler*. And if we push the principle to a slightly more abstracted level, it can also help to explain and justify the recent transformations in the constitutional status of sexual orientation discrimination.

D. LIBERTY AND EQUALITY IN JUSTICE KENNEDY'S JURISPRUDENCE

The constitutional challenges to discrimination based on sexual orientation in recent decades has produced a new wave of criticism and calls for new approaches to areas of Fourteenth Amendment doctrine. And Justice Anthony Kennedy's efforts to expand constitutional protections against sexual orientation discrimination provides another opportunity to see at work the equality of rights principle and its foundational assumption that nondiscrimination principles run deeper when important rights are at stake.

Beginning in the 1990s, Justice Kennedy wrote a series of decisions striking down discrimination on the basis of sexual orientation in which he attempted to draw together principles of equality and liberty. These rulings struck down discriminatory policies without ever holding that gays and lesbians would be treated as a suspect class and that classifications based on sexual orientation required some form of heightened scrutiny.

In *Romer v. Evans*,[231] Justice Kennedy wrote the opinion of the Court striking down an amendment to the Colorado constitution that prohibited sexual orientation as a basis for state or local antidiscrimination policy. One of the rationales that Justice Kennedy relied on was the idea that any law that placed a particular group at a disadvantage when seeking supportive government policy was unconstitutional. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[232] Although he does little to elaborate on the point, the justification for the holding seems to be the intersection of the nature of the classification and the seriousness of the disadvantage it produces on a right as basic as "seek[ing] aid from the government."[233]

Justice Kennedy further pursued this distinctive approach to Fourteenth Amendment doctrine in *Lawrence v. Texas*,[234] the 2003 case striking down anti-sodomy legislation as a violation of a fundamental right to private sexual intimacy between consenting adults. Although he framed *Lawrence* as a due process holding, Justice Kennedy insisted that his reading of the Due Process Clause's substantive content was shaped by equality principles. "Equality of treatment and the due process right to demand respect for conduct protected by

231. 517 U.S. 620 (1996).

232. *Id.* at 633.

233. *Id*. at 634–35. As an alternative rationale, Kennedy also deemed the state interest in the amendment based in animus and therefore categorically illegitimate even under a rational-basis review standard. *Id*.

234. 539 U.S. 558 (2003).

the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[235] He approached this issue from the other direction in *United States v. Windsor*, nominally an equal protection ruling, but one that drew on due process principles in striking down a provision of the federal Defense of Marriage Act.[236]

The most significant of Justice Kennedy's gay rights decisions was also his most explicit in insisting that due process and equal protection be understood as mutually supportive constitutional principles. According to the reasoning of his majority opinion in *Obergefell v. Hodges*,[237] the Court's 2015 ruling striking down bans on same-sex marriage, the mere fact of discrimination based on sexual orientation was not enough to justify striking down bans on same-sex marriage.[238] Nor were constraints on the right to marry enough.[239] But together, Justice Kennedy found the two met the threshold of a finding of unconstitutionality.

> The Due Process Clause and the Equal Protection Clause are connected in a profound way though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right . . . . This interrelation of the two principles furthers our understanding of what freedom is and must become.[240]

Justice Kennedy's opinion can be read as yet another instantiation of the equality of rights principle.[241] A central assumption of the holding seems to be that when certain important rights are at issue—rights that are essential to a fully free existence—antidiscrimination principles apply more forcefully. Much of Justice Kennedy's opinion is dedicated to demonstrating the importance of marriage to American society, which then forms the basis for recognizing the significance of discrimination in this context:

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235. *Id.* at 575.

236. 570 U.S. 744, 769 (2013) (holding Defense of Marriage Act unconstitutional as it "violates basic due process and equal protection principles").

237. 576 U.S. 644 (2015).

238. *Id.* at 675.

239. *Id.* at 665.

240. *Id.* at 672; *see also id.* at 673 ("Each concept liberty and equal protection leads to a stronger understanding of the other.").

241. There are other ways to read the opinion, of course. Kenji Yoshino argues that *Obergefell* is best read as a fundamental rights decision in which equal protection values help to define the nature of the right, or, as he puts it, "a substantive due process case inflected with equality concerns." Yoshino, *New Equal Protection*, *supra* note 8, at 173. Yoshino terms this approach "antisubordination liberty." *Id.* at 174. My reading of *Obergefell* in no way detracts from that of Yoshino or others who have framed it as primarily a due process case. But, much like *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down state prohibitions on interracial marriage on both due process and equal protection grounds, *Obergefell* should be understood as a landmark of both fundamental liberty and equality.

> As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.[242]

The dissenters cried foul about Justice Kennedy's doctrinal innovations. Missing from Justice Kennedy's discussion of the Equal Protection Clause, Chief Justice Roberts noted, "is anything resembling our usual framework for deciding equal protection cases."[243] He dismissed Justice Kennedy's efforts to create some sort of symbiosis between the Due Process and Equal Protection Clauses and complained, "the majority fail[ed] to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position."[244] He then noted that under a rational basis review standard, prohibitions on same-sex marriage should be upheld.[245]

Enigmatic and frustrating when assessed according to the rules of modern Fourteenth Amendment doctrine, *Obergefell* can best be explained as yet another example of the Court calling upon the equality of rights principle as the solution to a Fourteenth Amendment doctrine that has become too rigid and too detached from the values that animated those who fought to add this Amendment to the Constitution. It offers another demonstration of the lingering echoes of the Thirteenth Amendment in so many of our most important Fourteenth Amendment cases.

E. THE FAILURE OF TIERS OF EQUAL PROTECTION

Tiers of scrutiny was never a particularly generative framework for equal protection doctrine. The Justices formally introduced it in the late 1960s as a way of explaining and justifying work that they had already done. From that point on, its primary role was to shut the door on novel equal protection claims.[246] This was why Justice Marshall and others insisted there were better alternatives, and why so many of the most significant equal protection rulings since the 1970s reached their outcomes only after sidestepping the tiers of scrutiny framework. Even if the Court was to seriously consider adding to the category of suspect classes, the multi-factor test it has used to assess the question—looking at factors such as the mutability and visibility of defining characteristics, political power, and history discrimination[247]—was barely workable at is inception and has only become less so over time.

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242. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

243. *Id.* at 707 (Roberts, C.J., dissenting).

244. *Id.*

245. *Id*.

246. The last classification to be deemed "suspect" by the Court was nonmarital parentage in 1977. Trimble v. Gordon, 430 U.S. 762, 766–76 (1977). On the "closure of the heightened scrutiny canon," see Yoshino, *New Equal Protection*, *supra* note 8, at 755–59.

247. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973). The foundation for this analysis is the reference to "discrete and insular" minorities in the famous footnote four of *United States v. Carolene Products*

The equality of rights approach that is the focus of this Article offers an alternative framework for identifying equal protection violations.[248] As compared to the tiers of scrutiny, it has a better grounding in the history that gave rise to the Fourteenth Amendment. It better captures the motivating assumptions of the Supreme Court's most important equal protection rulings. And when we once again get a Court with a majority of Justices who want to extend the protections of the Equal Protection Clause to new claimants, it will provide stronger basis for doing so.

CONCLUSION

Modern American constitutionalism should give more attention to the Thirteenth Amendment. It is a font of alternatives to our current constitutional practices—alternatives too often forgotten or misunderstood. This basic insight has been at the heart of legal academia's Thirteenth Amendment revivalism of recent decades, and one of my goals in this Article is to contribute to this body of scholarship by bolstering the case for the relevance of the Thirteenth Amendment.

This Article, in contrast to much recent scholarship on the Thirteenth Amendment, does not argue for using the Thirteenth Amendment as the basis for a radically different constitutional vision than the one we currently have.[249] My effort takes a more moderate and more realistic approach. Instead of envisioning what a very different Supreme Court or Congress might one day do to unleash the potential of the Thirteenth Amendment, I focus on what the Court has done. The benefit of this approach is that it offers a historical pedigree for an approach to the Fourteenth Amendment that better explains the Amendment in action.

Co., 304 U.S. 144, 152 n. 4 (1938), which also has not aged particularly well. *See, e.g.*, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

248. The other major alternative scholars have offered is to reframe potential equality claims as due process claims. *See, e.g.*, Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491 (2002); Yoshino, *New Equal Protection*, *supra* note 8.

249. Scholars have argued that the Court should use the Thirteenth Amendment to strike down varied forms of subordination, such as prohibitions on abortion, mass incarceration, and hate speech. *See, e.g.*, Carter, *supra* note 5; Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990); PROMISES OF LIBERTY, *supra* note 5; *Symposium—The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications*, 112 COLUM. L. REV. 1447 (2012). Others have focuses on the Thirteenth Amendment's enforcement provision as providing congressional authority for ambitious federal regulatory schemes. *See, e.g.*, RUTHERGLEN, *supra* note 21; James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002). Jamal Greene has insightfully critiqued this scholarship—at least as it pertains to pursuing judicial recognition of Thirteenth Amendment claims—for relying on an unrealistic commitment to "Thirteenth Amendment optimism." Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012). Greene acknowledges that beyond the realm of judicial constitutionalism, aspirational Thirteenth Amendment claims can provide "a potential tool for progressive political mobilization." *Id.* at 1737.

The Thirteenth Amendment-based idea of equality of rights does not fit within the modern doctrinal categories. It aligns, however, with intuitions about how constitutional rights should work that have been given recurring expression in Supreme Court doctrine. These intuitions acknowledge the variability of discrimination harms. They presume that a given form of discrimination can be more or less constitutional depending on the significance of the interests at stake. They recognize that sweeping generalizations about state versus private action or about suspect versus non-suspect classifications fail to account for the way the courts have given shape to equality and liberty norms.

In these patterns, we can find submerged alternatives. Although this Article provides material that could be used to make originalist arguments, my goal is not to look to the past to locate definitive answers to our current constitutional controversies (in this history, I see more debate and ambiguity than resolution) but instead to loosen conceptual limitations on how we understand where we are now and how we got here. This history reveals alternative approaches to contemporary problems. In comparison to the equal protection doctrine that prevails in courts and casebooks today, an approach to the Fourteenth Amendment that is infused with Thirteenth Amendment principles is less rigid in application, more capable of translating evolving norms of equality into constitutional doctrine, and better grounded in the Amendment's original meaning. American constitutionalism would be more honest and capable of producing more just outcomes if we acknowledge, embrace, and expand on the Thirteenth Amendment values that echo through the history of the Fourteenth Amendment.