COUNTERPUBLIC ORIGINALISM AND THE EXCLUSIONARY CRITIQUE

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ABSTRACT

McDonald v. City of Chicago *(2010), which applied the Second Amendment to the states, marked the first time in its history that the Supreme Court cited an African-American Convention from the nineteenth century. Could it be that the Roberts Court's occasional originalism is becoming a source for a more inclusive view of constitutional history? According to most critics, the answer is plainly "no." Originalism, by adopting interpretive models from a time when minorities and women were legally excluded from political participation, suffers a crisis of democratic legitimacy and is usually employed to bolster doctrines that disadvantage women and minorities. This critique is so strong that even some originalists have admitted it and attempted to respond with corrective theories.*

This Article argues that such efforts by originalists to fix the exclusionary problem of originalism fail and will continue to fail so long as originalists insist on the assumption of a unitary public meaning. I propose a new form of originalism—Counterpublic Originalism—as a method to better incorporate excluded communities into the narratives of constitutional history. I survey recent originalist efforts to address the exclusionary problem and to incorporate excluded historical voices. Looking at a broad range of originalists, from conservative to progressive, I find that each wrongly assumes some version of a single "public" at the time of ratification, a "public" comprised of the very elites who were benefiting from the exclusionary practices. Focusing on the Reconstruction period, I argue that there was no definitive "public," but instead a series of partial publics, some who were legally and socially privileged and dominant (white men), and others who operated as dissenting communities that developed their own normative discourse and challenged dominant views and interests (feminists, African-Americans). I then argue that these dissenting communities, or counterpublics, provide important sources of public discourse and activity that speak to precisely the questions and ideas raised in constitutional amendments, and particularly in the Reconstruction Amendments.

That originalism has thus far failed to account for such experiences is a significant flaw; yet the very fact that originalism has incorporated some of these counterpublic sources in constitutional discourse at the Supreme Court also shows the importance of considering the potential relationship between historical counterpublics and modern originalism. To help flesh out the concept of Counterpublic Originalism, the Article ends with an application of the theory. I investigate the main sources used by the Court in McDonald *from the perspective of the Reconstruction-era black public sphere and find a more contextualized right to bear arms than the Court or other scholars have discussed.*

INTRODUCTION

In *McDonald v. City of Chicago*, the Supreme Court cited an 1865 convention of South Carolina Freedmen to support its argument that an individual right to bear arms was part of the original understanding of the Fourteenth Amendment.[1] This was the first time the Supreme Court had cited a Black Convention from the nineteenth century. Justice Thomas's concurring opinion expanded on this, quoting from two major black newspapers.[2] The only time either had been cited previously was in *District of Columbia v. Heller* to support essentially the same point.[3] In what many would consider sad irony from a Court that has scaled back affirmative action, restricted the use of equal protection arguments by minorities, and significantly limited the Voting Rights Act,[4] the Roberts Court has invoked long dormant sources from African-American history in interpreting constitutional text.

It could be claimed that the Court's willingness to use African-American texts is merely cover—an instrumentalist use of biracial sources to bolster the creation of an enforceable individual right to own guns that many saw as detrimental to modern black communities.[5] Or perhaps this simply reflects the influence of Justice Thomas's black conservatism on the conservative Court, which makes it slightly more open to African-American sources but only when they align with a generally conservative position.[6] Such explanations, however, fail to capture the potential significance of the move to African-American historical sources. These explanations run the danger of ceding to the Court's conservatives the ground of black historical materials and missing the richness that such history can provide. Rather than dismissing the Court's use of such sources as merely instrumental, this Article, and the longer project of which it is a part, takes up the invitation to consider what a fuller engagement with such sources might look like.

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1. 561 U.S. 742, 771 n.18 (2010).

2. *Id.* at 847–49 (Thomas, J., concurring).

3. 554 U.S. 570, 615 (2008).

4. *See, e.g.*, Reva B. Siegel, *The Supreme Court, 2012 Term – Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013) (analyzing how the Roberts Court has solidified a long-developing bifurcated approach to equal protection and race in which claims by minorities carry a significantly higher burden of proving discriminatory purpose that majorities have not had to meet).

5. *See, e.g.*, Brief of Amicus Curiae the NAACP Legal Defense & Educational Fund, Inc. in Support of Neither Party, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521); Brief of Amicus Curiae the NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

6. *Cf.* Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005) (evaluating Justice Thomas's jurisprudence in light of the tradition of black conservatism).

Despite this recent use of African-American sources by the Court, originalism may seem an odd site from which to explore a more inclusive use of historical sources in constitutional analysis. Originalism is commonly criticized for being inherently hostile to the interests of minorities and women.[7] One version of this criticism—the exclusionary critique—states that originalism, by adopting interpretive models from a time when minorities and women (and many lower class white men) were legally excluded from political participation, is not legitimate by contemporary standards and can be expected to produce answers that disadvantage women and minorities.[8] Some originalists have recently attempted to address this critique. But, as I hope to show in this Article, their attempts are inadequate.

Yet it is in the failings of the originalists' responses so far that we can see the potential for a better engagement. In particular, originalism's recent effort to emphasize the public meaning of text at the time of ratification holds some promise for a more inclusive approach. Originalists err in viewing the "public" that is the source of meaning as a unitary entity comprised of the very elites who were benefiting from the exclusionary practices. In actuality there was no definitive "public," but instead a series of publics, some who were legally and socially privileged and dominant (white men in particular), and others who operated as dissenting communities that developed their own normative discourse and challenged dominant views and interests (feminists, African-Americans). These counterpublics provide important sources of public discourse and activity that sometimes speak to precisely the questions and ideas raised in constitutional amendments, and particularly in the Reconstruction Amendments. The meanings of citizenship and its privileges and immunities, the question of equal protection and due process, each sounded louder and richer in counterpublics than in the dominant sphere.

The fact that originalism has thus far failed to account for such experiences is a significant flaw; yet the very fact that originalism is the only methodology that has incorporated some of these counterpublic sources in constitutional discourse at the Supreme Court also shows the importance of considering the potential relations between historical counterpublics and modern originalism. As I will suggest, taking such sources seriously will be difficult for originalism, requiring changes to fundamental assumptions such as the nature of public meaning and the need to fix meanings with precision. But originalism also offers a locus in

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7. *See, e.g.*, Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229 (2000); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517 (2011); Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397 (2009–2010).

8. *See infra* Part I.

modern discourse where voices from the past are treated with respect and a measure of authority. The opportunity to include the voices, ideas, and experiences historically excluded from such authority should be embraced.

The study of counterpublics and their effects on constitutional law itself is not new. The work of Reva Siegel on the history of gender, the women's movement, and the constitution;[9] William Forbath's study of the labor movement and constitutional change;[10] and William Eskridge's work on the history of law and homosexuality[11] each investigate forms of counterpublic constitutionalism (although not by that name). Surprisingly little attention has been paid, however, to the African-American counterpublic of the mid-nineteenth century and its potential impact on constitutional law. This has left a gap, into which conservative originalism has stepped (if tentatively) in recent discussions of the Second Amendment. A more complete and inclusive originalism should recognize the inadequate use of such sources by the Court and scholars and explore the sources in ways more responsive to the communities from where they originated.

To engage in this more robust approach, originalism should incorporate a concept of counterpublics in analyzing historical materials and constitutional law. With attention to the development of social movements and subordinated groups, scholars of the public sphere have identified the concept of "counterpublics" as a way to explain and better study oppositional discourses.[12] This concept, I argue, is central to understanding the structure of the actual range of discourse taking place in America around the critical moment of the Reconstruction Amendments because minorities and women were formally excluded from the dominant public

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9. *See, e.g.*, Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2005); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) [hereinafter Siegel, *She the People*]; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

10. *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO STATE L. J. 1115 (2011) [hereinafter Forbath, *The Distributive Constitution*]; William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001); *see also* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); 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).

11. *See, e.g.*, WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 (2008); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333 (2010); Eskridge, *supra* note 10; *see also* William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239 (2009) (setting out a pluralist theory of constitutional law and social movements).

12. On public sphere theory and counterspheres, see, e.g., Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992).

sphere. Moreover, because the exclusion of these groups has since been deemed, legally and culturally, deeply illegitimate, any discussion of legitimacy and constitutional history must identify and account for the discourse and activities of counterpublics.

It is here that Counterpublic Originalism may have some purchase. Because of its focus on counterpublics, it can incorporate ideas of those previously excluded from constitutional discourse. And because it addresses originalism, it has the potential to give these historically excluded voices some degree of authority in contemporary legal discourse—or at least enough to be part of the contemporary dialogue. The project itself is larger than can be developed in a single article. This Article will therefore begin with an analysis of contemporary originalist efforts to address the problems of exclusion in history. It will then explore what a Counterpublic Originalism might look like. To help flesh the concept out, the Article will end with a brief application of the theory. I investigate the main sources used by the Court in *McDonald* from the perspective of the Reconstruction-era black public sphere and find a more contextualized right to bear arms than the Court or other scholars have discussed.

The Article proceeds in five steps. Section I will explain the basic democratic legitimacy claim of originalism and its main critiques. In particular I identify three related critiques: temporal, historicist, and exclusionary. Section II considers approaches by two sets of co-authors—John McGinnis and Michael Rappaport, and Steven Calabresi and Julia Rickerts—arguing that later-in-time inclusive constitutional amendments rehabilitate the earlier, exclusionary Constitution. I conclude that each approach fails by mistakenly assuming a unified conception of the public. In Section III I analyze two of the main studies of the Reconstruction-era views of the Second Amendment that were relied on by the Court in *McDonald*, by Stephen Halbrook and Akhil Amar. Although Halbrook and Amar both use African-American sources, and Amar's overall approach is generally receptive to inclusionary principles, neither incorporates African-American ideas as a source of distinctive ideas, and that failure causes them to misinterpret issues such as the right to bear arms. Section III also considers the progressive originalism of Jack Balkin, which although more capacious than other forms of originalism doctrinally, also falls short by not using African-American sources and largely limiting its view of Reconstruction to the dominant public.

Then, in Section IV I present my alternative: Counterpublic Originalism. Counterpublic Originalism engages a multiplicity of meaning communities by identifying the particular ways in which counterpublic communities conceived of core constitutional concepts. In doing this, Counterpublic Originalism rejects the idea of a unitary public and the concomitant need to find a "fixed" meaning. Instead, Counterpublic

Originalism looks at the claims made by outsider groups and how those claims re-defined meanings, creating ideals of equal citizenship and freedom that were at once both more particular and more universal. Section V offers an application of this theory by looking at sources from the Reconstruction-era black public sphere and demonstrating not only that current originalist views of these materials suffer from reductionism, but also that the sources suggest a rich potential for possible meanings.

The Article concludes with some thoughts on Counterpublic Originalism. It argues that Counterpublic Originalism can provide a more historically sensitive approach to constitutional interpretation and foster a better dialogue between living constitutionalism and originalism, one which sees a multiplicity of historical meanings as productive of a vibrant constitutional discourse rather than a problem to be dismissed or ignored. It also suggests some of the potential questions about the method that remain to be explored.

I. ORIGINALISM, DEMOCRATIC LEGITIMACY, AND THE EXCLUSIONARY CRITIQUE

One of originalism's central legitimating principles is popular sovereignty.[13] The basic claim runs something like this: The Constitution was ratified through "one of the most profoundly democratic moments in human history."[14] Because of the democratic process used to ratify the Constitution and its amendments, the specific language chosen has the special imprimatur of popular sovereignty and a heightened claim to democratic legitimacy.[15] It then follows that the original meaning—the public meaning associated with the words and phrases used—was the

13. *See* Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (describing popular sovereignty as the "most common and most influential" justification for originalism). *See generally* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–59 (1999). For two recent summaries of originalism and popular sovereignty by critics of originalism, see Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, at 1631–37 (2013); Stein, *supra* note 7, at 406–13.

14. Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 43 (Robert W. Bennett & Lawrence B. Solum eds., 2011). Solum is well aware of the criticisms of this point but finds them unavailing.

15. By using the term "democratic legitimacy" here I focus on the type of legitimacy claims made by originalists, which refer to the participatory process for the creation of constitutional text. The basic idea is that because a supermajority is required for ratification, the ratified text has greater democratic legitimacy than either normal legislation or judicial decisions. *See generally* sources cited *supra* note 13. As discussed below, to the extent that the supposed supermajority excludes substantial portions of the governed population because of exclusionary suffrage rules or otherwise, the resulting text may not be democratically legitimate even as that idea is understood by originalists. This Article is not intended to address directly the complex questions about the democratic legitimacy of constitutional law or judicial review.

meaning chosen democratically. The best way to implement democracy is for interpreters to follow those original public meanings where possible.[16]

This democratic justification is used to counter both judicial interpretations of a living Constitution variety and legislation enacted through normal political processes that conflict with original meanings. The unelected judiciary is the easier case, and the restraint of judicial "activism" was a mainstay of twentieth-century originalism.[17] But current originalists voice equally strong opinions about the superiority of original public meaning to legislation, even (or especially) national legislation enacted relatively recently. This is both because originalists presume that ratification was a more deeply "legitimate" democratic process,[18] and because they take a particularly cynical view of modern legislation.[19] In the end, original public meaning becomes the standard for democratic legitimacy against which all other interpretations are judged.

The critiques of the popular sovereignty justification for originalism are as extensive as the justifications themselves. One form of critique—what we might call the temporal democratic critique—is well articulated by Jack Rakove, who observes that originalism "is always in some fundamental sense anti-democratic, in that it seeks to subordinate the judgment of present generations to the wisdom of their distant (political) ancestors."[20] That is, even granting originalists the contestable points of whether the original ratification was sufficiently democratic and the original meaning sufficiently knowable, the very act of imposing the interpretations of past generations on contemporary politics and law is itself anti-democratic. A similar point is made by living constitutionalists who argue that originalism upsets constitutional agreements reached over time through complex political, legal, and cultural means and ignores the importance of the development of law over time.[21] Under this view, respect

16. For an earlier version of this argument, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 22–23 (2d ed. 1997) (Nonoriginalism "displaces the choices made by the people in [the ratifying] conventions" and so "violates the basic principle of government by consent of the governed."); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 10 (1988) (Originalism enforces "the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue.").

17. *E.g.*, BERGER, *supra* note 16; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). "New" originalism focuses less on judicial activism. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 607–12 (2004).

18. Lash, *supra* note 13, at 1444 (describing constitutional rules as "the product of a more deeply democratic process" than legislation).

19. *E.g.*, Solum, *supra* note 14, at 42–43; Lash, *supra* note 13, at 1445.

20. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, at xv n. (1996).

21. *E.g.*, Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627 (1997); *see also* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205–20 (arguing that

for democracy entails both a respect for contemporary lawmaking and a respect for the history or tradition of lawmaking in a democratic republic. Originalism potentially swallows up both democratic tradition and contemporary democratic actions. By acting as a heavy trump against other democratic actions, originalism is anti-democratic.

Second, historians have criticized originalism for its poor approach to history, a criticism that also has implications for originalism's claims to democratic legitimacy. According to many historians, originalism is often a form of advocate's history, misstating the historical record by cherry-picking sources that support a particular viewpoint. This is most directly evident in originalism's emphasis on looking for (and apparently finding) answers to specific legal questions by looking at historical materials that are in fact full of ambiguity and conflict, both internally and when viewed in the full historical context.[22] Or, as Mark Tushnet once said: "Originalist history requires definite answers . . . and clear ones . . . . The universal experience of historians belies the originalist effort. Where the originalist seeks certainty and clarity, the historian finds ambiguity."[23]

Much of the criticism by professional historians focuses on originalism as bad history.[24] To some extent this is a cross-disciplinary critique of method that does not explicitly address questions of democratic legitimacy. However, the critique of originalism as bad history holds significant implications for originalism's legitimacy precisely because originalists claim to be right about the historical meanings. Like the temporal critique, the historical methods critique can grant originalists their foundational argument about popular sovereignty and still show that originalism is anti-democratic. If originalists are wrong about the reliability of their evidentiary claims and about their capacity to find correct or consistent

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originalism fails to account for the historical contexts and changes that form a central part of American constitutional and political history).

22. *See, e.g.*, Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 295–304 (2011) (offering a critique of originalism as poor historical method).

23. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 36 (1988).

24. For a recent critique from a historian of the methods of original meaning originalism on the issue of the Second Amendment, see Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150 (2007). For a recent review of the literature on historians' critiques of the Supreme Court's use of history, see FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 107–18 (2013). The concern with originalism as bad history is even stronger for popular or political versions of originalism. *See* JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY 123–24 (2010) ("Setting aside the question of whether [originalism] makes good law, it is, generally, lousy history . . . . Set loose in the culture, and tangled together with fanaticism, originalism looks like history, but it's not; it's historical fundamentalism, which is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution."); *id*. at 8 (describing originalism and its political cognates as "antihistory" because they ignore or reject actual historical developments.).

"original" meanings, then their claim to have a democratically legitimate basis to override contemporary legal decisions—especially those of democratic bodies—fails. More significantly, if originalism improperly suggests coherent and non-ambiguous answers for significant legal questions based on historical evidence when in fact the historical record is much more ambiguous and conflicted, originalism will divert and undermine contemporary democratic discourse and resolution, which would be more, not less, democratically legitimate than what is asserted by originalists.

The temporal and the historical critiques attack originalism's claim of democratic legitimacy indirectly, by challenging its application and methods. A third line of criticism—what we can call the exclusionary critique—challenges the legitimacy claim head on. For this critique, originalism is anti-democratic at its very root because the political culture and process that produced both the text and the original meanings were themselves not democratic. At the founding, suffrage was largely limited to white male property-holders.[25] The group that wrote, approved, and commented on the original Constitution comprised a small subset of people living in America, and many of them were slaveholders. As Paul Brest suggested in 1980 and Mark Stein has recently developed more fully, the "original exclusions" of women, African-Americans, Native-Americans, and the non-propertied lower classes present originalism with a foundational justificatory problem: whether from a moral or a democratic viewpoint, ratification of constitutional provisions through a process that excluded most people simply cannot claim the mantle of legitimacy.[26] There was no original Valhalla of popular sovereignty. It is not just that the "dead hand"[27] of the past is being used to overturn legislation (a temporalist critique), but that the dead hand carries the stench of anti-democratic corruption.

The exclusionary critique also shows originalism to be especially problematic on issues of race. As Jamal Greene has argued, not only did the original ratification exclude African-Americans, it affirmatively "preserved and protected both slavery itself and slavery's institutional

25. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 1–25 (2000).

26. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 316–19 (1991); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229 (1980); Stein, *supra* note 7, at 399, 449–52.

27. *See, e.g.*, Reva B. Siegel, Heller *and Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399 (2009) (arguing that, while the dead hand argument presents theoretical problems for originalism, the actual practice of originalism reveals it to be a form of popular, living constitutionalism).

infrastructure."[28] The Constitution ratified in that "profoundly democratic" moment was deeply racist; an original public that *meant* to support racial slavery cannot provide us with democratically legitimate meanings.[29] In addition, to the extent that originalism seeks to enforce the meanings of those past generations, it is seeking to now, in a post-slavery, post-Jim Crow democracy, enforce meanings from a racial-slavery society. This, argues Greene, is affirmatively hostile to persons of color and, ultimately, to racial progress today.[30] The effort to fix in time the "correct" interpretive meaning in the meaning of a past ruling class is inevitably to exclude the alternative meanings of "dissenting normative communities" such as African-Americans, women, and the poor.[31] Not only does originalism privilege meanings from a racist (and sexist) age, the competing meanings of the subordinated groups are deemed invalid for contemporary interpretive discourse. This is the heart of what Greene calls originalism's "race problem."[32]

This view gains further support from the fact that many originalists do a poor job of evaluating the Reconstruction Amendments, the very parts of the Constitution that helped transform American society into a modern, inclusive republic. The Fourteenth Amendment is, in Jamal Greene's phrase, "the Mr. Cellophane of originalist writing," a text that is simply ignored for issues of incorporation of the Bill of Rights.[33] This blind spot occurs because the Fourteenth Amendment does not fit originalism's key characteristics. The Fourteenth Amendment speaks the language not of

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28. Greene, *supra* note 7, at 519; *see also* DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009); Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123 (2012) (reviewing GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC (2010)).

29. Justice Marshall famously argued that the bicentennial of the Constitution was a misplaced celebration for just these reasons. *See* Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Haw. (May 6, 1987), *in* 30 HOW. L.J. 915 (1987).

30. Greene, *supra* note 7, at 521.

31. *Id.* at 522. Greene describes this as an application of one of Robert Cover's insights about normative communities. *See generally* Robert M. Cover, *Foreword: NOMOS and Narrative*, 97 HARV. L. REV. 4 (1983).

32. *See* Greene, *supra* note 7.

33. Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012). This problem is compounded by the performance of originalist Justices on issues such as affirmative action. As Andrew Koppelman has noted, the conservative Justices "disingenuousness is particularly striking in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007), in which the majority, including all of the 'originalist' justices, declined even to discuss the massive evidence, presented to them in the briefs, that race-conscious means of achieving integration were consciously adopted by the Framers of the Fourteenth Amendment." Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 729 n.5 (2009) (citing Brief of Historians as Amici Curiae in Support of Respondents, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915)).

restoration but of redemption.[34] The equality goals of the Amendment were not realized in their time and are only made real by a constant effort to achieve them aspirationally. The Amendment also does not work well with the originalism goal of determinacy. The Amendment, according to Greene, "presupposes and reinforces a commitment to pluralism rather than assimilation," and this leads to some degree of indeterminacy.[35] For all these reasons, originalists largely ignore Reconstruction originalism on issues of incorporation, equal protection, and federalism.[36]

These three lines of critique—temporal, historical, and exclusionary—each lead to basic questions about the legitimacy of originalism. Contemporary originalism, however, is not without its rejoinders. Before considering them, however, it may help to consider the more general question of why, given the critiques above, it is worth considering how to resolve them. That is, for people who are sympathetic to the critiques, what is the point in engaging further with what seems to be an interpretive methodology that lacks democratic legitimacy and is frequently hostile to contemporary efforts at increased democratic inclusiveness in law?

The answer lies in two features of modern originalism. First, originalism is a significant interpretive approach in legal scholarship, in the Court, and in public discourse.[37] Despite the hopes of many progressives that originalism would collapse from its own fragility, it is more respectable now than it ever has been. This increased popular strength has been bolstered by increasingly sophisticated scholarly explorations of the justifications and architecture of a more sustainable originalism.[38]

The success of originalism has created a challenge for progressive constitutionalism. Even if one accepts the legitimacy critiques of originalism, progressives run the risk of ceding at least a portion of the

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34. Greene, *supra* note 33, at 981, 997–1001.

35. *Id.* at 981, 997.

36. *Id.* at 988–91. For other recent criticisms of originalism as applied to the Fourteenth Amendment, see Colby, *supra* note 13, at 1630; Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201 (2009).

37. *See* Jamal Greene, Nathanial Persily, & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009); *see also* Friedman, *supra* note 36, at 1204 (describing a "crescendo of support" for original understanding methodologies over the past generation); Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1185–86 (2012) (describing originalism's success in the academy); *cf.* Reva R. Seigel, *The Supreme Court, 2007 Term–Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

38. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); O'NEILL, *supra* note 13; KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Lash, *supra* note 13; Solum, *supra* note 14; Whittington, *supra* note 17. *But cf.* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 570 (2006) (arguing that originalism is successful not because of its scholarly development but because of how it works as a tool for political mobilization).

field of constitutional history to originalism. In its effort to distance itself from originalism, progressive constitutionalism could suffer from a weaker engagement with history and, as a consequence, provide a less compelling claim on popular and political legitimacy.[39] In addition, when only conservative originalists engage with historical evidence, large swaths of American history, including the history of subordinated groups that are often the core concerns of progressive constitutionalism, fail to become part of the tapestry of constitutional theory and law.[40]

The second, more substantive, feature of originalism that warrants engagement from progressive constitutionalism is that originalism as now practiced—what is called the new originalism—emphasizes the original public meaning of constitutional language.[41] This is in contrast to some earlier versions of originalism that focused on the original intent of the framers or ratifiers of constitutional texts. The move to public meanings opens the door to a reconfiguration of originalism that better accounts for the ideas and experiences of women, minorities, and the working class. Public meaning originalism—at least *in concept*—allows some space to consider the opinions of people who were un- or under-represented in Congress and during ratification. By expanding to a general public understanding, it becomes possible to better incorporate African-American voices and experiences, including those of black women, in the interpretative process employed by originalism.[42]

With a few exceptions, however, originalists have failed to explore historical African-American understandings of the Reconstruction Amendments. This is true despite the fact that the development of Second Amendment constitutionalism has spurred a closer look at the antebellum and Reconstruction periods by originalists, and it is true across the range of originalism, from libertarian originalism, to traditional conservative originalism, to progressive originalism. As I shall explain, this omission occurs because the current originalist definition of public meaning itself excludes subordinated communities. Similarly, originalism's need for a

39. Post and Siegel argue that liberals have failed to meet originalism's popular appeal with an effective constitutional narrative (or rhetoric). *See* Post & Siegel, *supra* note 38, at 571–72. They would, however, disagree with my effort to engage originalism scholarship, an effort they see as misplaced.

40. Jack Balkin has made a similar point regarding originalism's focus on "adoption history": "[T]his focus [on adoption history] has had a cost; it has diverted our attention from the vast realm of history that is irrelevant to originalism." Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 655–56 (2013).

41. *E.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011); Whittington, *supra* note 17.

42. A third aspect of New Originalism—the interpretation–construction distinction—might also be seen as a location for engagement. I discuss the problems with this rubric below. *See infra* Part III.B (discussing Jack Balkin's theory).

single, determinate meaning[43] renders it closed to the multiple meanings that we actually find historically. In this sense originalism's commitment to determinate meanings is in fundamental conflict with its quest for public meanings. To properly incorporate excluded groups into "originalism," one must be open to multiple meanings, or to what I call Counterpublic Originalism. If we make that move, there is, I believe, a rich cache of possible meanings and perspectives to engage in constitutional history. Before doing so, however, we need to consider the moves some originalists have made in this direction.

II. ORIGINALISM, THE FOURTEENTH AMENDMENT, AND THE EXCLUSIONARY PROBLEM

Originalists have recently offered substantial responses to the exclusionary critique. Two particular models have been proposed recently: Restoration by Amendment and Synthetic Originalism. This section will explore these approaches and conclude that neither is able to adequately account for excluded voices, primarily because they each misconstrue the nature of the "public" behind any conception of public meaning.

A. Restoration by Amendment: McGinnis and Rappaport

John McGinnis and Michael Rappaport, in their recent work justifying originalism as the best method for implementing the supermajoritarian choices made through the constitutional process, address directly the criticism that originalism is illegitimate because the original constitutional process excluded African-Americans and women.[44] Although their approach is grounded on utilitarianism,[45] their adoption of a process-based justification is similar to other justifications of originalism.[46] As McGinnis and Rappaport recognize,[47] any justification for originalism based on the

43. This is what Larry Solum describes as the fixation thesis. *See* Solum, *supra* note 14, at 4. In a recent article Solum suggests that the fixation thesis does not require a single meaning but could account for multiple "fixed" separate meanings and for fixed but underdetermined (or vague) meanings. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

44. They state: "[P]revious defenses of originalism have often been flawed because they failed to address . . . the exclusion of African-Americans and women from the constitutional enactment process." John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1697 (2010); *see, e.g.*, Brest, *supra* note 26, at 230. For related criticisms of McGinnis and Rappaport's attempts to parry the exclusionary critique, see Stein, *supra* note 7, at 426–29.

45. *See* McGinnis & Rappaport, *supra* note 44, at 1698–99.

46. On the problems of McGinnis and Rappaport's supermajoritarianism justifications, see Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists*, 101 NW. U. L. REV. 1905 (2007).

47. McGinnis & Rappaport, *supra* note 44, at 1969–97.

democratic superiority of the constitutionalizing process must confront the basic criticism that until Reconstruction African-American men were largely excluded from participation, and until the 1920s most women were similarly excluded. Otherwise, the only "originalism" that is democratically legitimate is one that begins with the views of the ratifying public for amendments adopted *after* August 18, 1920, a position that would render originalism largely inconsequential for most major interpretive debates.

McGinnis and Rappaport seek to remedy this defect with what they describe as a "theory of supermajoritarian failure."[48] They argue that, faced with democratic defects, society, at the time it corrects these defects, can choose to adopt a new constitution, adhere to the old document with duly enacted amendments, or permit judicial constructions to alter the constitution as implemented.[49] For reasons not relevant here, they argue that adherence to the constitutional text and its original meaning, modified by amendment, is better—more likely to produce welfare-maximizing results—than either new constitutionalizing or change by judicial construction.[50] For this point to work as counterargument to the exclusionary critique, however, it must explain why the most conservative (that is, the most past-preserving) of the three options adequately incorporates minorities and women into the Constitution.

With respect to African-Americans, McGinnis and Rappaport justify their position in three steps. First, they argue that the Reconstruction Amendments, by abolishing slavery, prohibiting state violation of civil rights, and prohibiting racial discrimination in voting, "provide African-Americans with the provisions they would have been able to obtain in 1789 if there had been no supermajoritarian failure."[51] Next, they argue that it is not possible to know what other changes might have been made to the Constitution had African-Americans participated in ratification of the initial Constitution, so it is still best to rely on the original constitutional meanings and not permit judicial constructions that attempt to implement constitutional meanings more consonant with democratic ideals.[52] Third, they argue that following the original meaning of the Reconstruction Amendments would in fact have prevented the legal support for Jim Crow seen in *Plessy v. Ferguson*[53] and other cases, thus showing that originalism is *more* advantageous for minority rights and interests than is judicial activism.[54]

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48. *Id.* at 1697.
49. *See id.* at 1753.
50. *See id.* at 1697.
51. *Id.* at 1759.
52. *See id.* at 1760.
53. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
54. *See* McGinnis & Rappaport, *supra* note 44, at 1760–61.

This justification fails for multiple reasons. First, the assumption that a fully inclusionary constitutional process in the 1780s would have produced precisely the amendments adopted eighty years later after a horrific civil war is not sustainable. It is almost impossible to conduct the counterfactual thought-experiment necessary to arrive at this conclusion. It requires us to imagine a society based on racial slavery that enables slaves to participate in a constitutional convention and ratification process and then to imagine what provisions would have been agreed to.[55] It is not at all clear why we should assume such a process would have produced the abolition of slavery and the implementation of civil and political equality. It is much more likely that it would have produced nothing at all—that no constitution could have been adopted to cover all sections of the country and to satisfy both slave owners and slaves. It is more probable that the country would have taken a very different path, perhaps fracturing into two or more countries or state-based alliances that would become non-slave and slave-based, respectively.

This is especially so given the actual facts we do know: (1) even without black participation, the problem of slavery nearly threatened the demise of the constitutional process in 1789;[56] (2) the Reconstruction Amendments, including the Thirteenth, were adopted by a highly unusual post-war process that to some extent compelled acceptance by the white South as the price for secession and war, and it is not feasible to project that assent back onto the federal period;[57] (3) assumptions about civil and political rights were quite different in 1789 from those in 1868, with many whites in 1789 also being denied both civil and political rights, and with property ownership and gender being the clearest markers of status necessary for either—so it makes no sense to imagine drafters in 1789 granting suffrage and equal rights to blacks; and (4) because ideas of rights and liberties were so different in 1868 from 1789—in part because cultural ideas develop in response to actual historical practices, such as slavery—the identification in 1868 of liberty with an individual right to labor, contract, travel, and do other things associated with nineteenth-century liberalism was not present, or at least not in any *cultural* sense, in the 1780s, and so both the language and the meaning of the language of the Reconstruction Amendments were simply impossible in the prior period.[58]

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55. McGinnis and Rappaport contend that advocating for judicial constructions or interpretations to correct the exclusionary defects is a form of constitutional "nirvana fallacy." *Id.* at 1697. I would suggest that their own imagining of a purified founding better deserves that label.

56. *See* WALDSTREICHER, *supra* note 28, at 71–90.

57. *See* Colby, *supra* note 13, at 1641–56.

58. McGinnis and Rappaport also suggest that the constitutional framework that was adopted, with slavery, may have been the best option for enslaved blacks. They argue that sectional governments might have resulted in a South that "treated African-Americans even worse," and that it would have "retarded the progress of a liberal social order based on markets that made slavery ideologically

Second, even though McGinnis and Rappaport rely on the counterfactual of black slave participation in the initial framing period, they object to the use of counterfactuals on the next logical question of what else would have changed about the Constitution had blacks participated.[59] But this is actually a much easier counterfactual to address than the one they do accept. We know what provisions and structures in the initial Constitution came about in part due to compromises over slavery.[60] For instance, the Three-Fifths Clause[61] struck a compromise over representation in the House, the battle over large-state versus small-state control, and the structure of presidential elections through the electoral system.[62] By getting partial-person value for slaves, Southern states gained disproportionate power both in the House and in presidential elections. Although it is hard to know what precise method would have been chosen for selecting the President, it is quite doubtful it would have been the byzantine process of the Electoral College that slavery-preservation produced. The other options in play for selecting a President were direct elections by actual voters and selection by Congress, either of which would have led to a very different national history.[63] As Paul Finkelman has observed, the effects of the

anomalous." *See* McGinnis & Rappaport, *supra* note 44, at 1758 n.204. Judicial interpretations that tried to end slavery would have had the same result. *Id.* This Panglossian view of the period from the Founding to Reconstruction is wholly unsupported by historical fact or scholarship. It is more plausible that without the protections afforded slavery by the economic and political success of a united government, slavery would not have seen the very significant resurgence and economic entrenchment that it did in the early nineteenth century. And the authors' suggestion that slavery was contrary to American market liberalism (early industrial capitalism) is highly questionable; slavery and capitalism were integral and interdependent parts of the American economy. *See generally* ROBIN BLACKBURN, THE AMERICAN CRUCIBLE: SLAVERY, EMANCIPATION AND HUMAN RIGHTS (2011); DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD (2006); CALVIN SCHERMERHORN, THE BUSINESS OF SLAVERY AND THE RISE OF AMERICAN CAPITALISM, 1815–1860 (2015); SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY 98–135 (2014); Sven Beckert, *Slavery and Capitalism*, CHRONICAL OF HIGHER EDUCATION (December 12, 2014), http://chronicle.com/article/SlaveryCapitalism/150787 (last visited March 9, 2016). As Schermerhorn shows, the country's slavery-capitalism empire also depended on the forced removal of Native American tribes from large swaths of the South and the concomitant internal improvements of roads and transportation, both spearheaded by the federal government, which enabled the expansion of high-profit, labor-intensive crops. *See* SCHERMERHORN, *supra*, at 18–19.

59. *See* McGinnis & Rappaport, *supra* note 44, at 1759.

60. *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3–36 (2001); Stein, *supra* note 7, at 427–28; *see also* WALDSTREICHER, *supra* note 28, at 71–90; Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845 (2011); Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002) [hereinafter Finkelman, *Proslavery Origins*].

61. U.S. CONST. art. 1, § 2, cl. 3 (repealed 1865).

62. WALDSTREICHER, *supra* note 28, at 83–87; Finkelman, *Proslavery Origins*, *supra* note 60, at 1154–56. Note the irony of having the more "democratic" branch, the House, be the branch granting slaveowners greater power through the three-fifths provision. Slavery was baked into the very structure of the original Constitution's concept of democracy.

63. Finkelman, *Proslavery Origins*, *supra* note 60, at 1152–54.

Three-Fifths Clause on presidential elections were felt immediately, handing the election of 1800 to Jefferson instead of Adams.[64]

Similarly, the requirement of a three-fourths majority of states to amend the Constitution protected slavery in perpetuity (absent amendment by civil war) if slavery did not wither in the South of its own accord.[65] The convention also gave up a congressional power to tax exports—a substantial concession and handicap on federal power—because of the South's fear of such taxes being a backdoor burden on slavery.[66] And the convention's prohibition on direct taxes except by state apportionment meant that Congress could never tax slaves.

Given the role of federalism in brokering the slavery issue in 1787, and given that federalism was itself radically altered in a pro-nationalist direction once slavery was ended in 1865, it is also plausible that an anti-slavery founding constitution would not have balked at a more nationalized structure, including the adoption of James Madison's proposal to provide a federal veto over state legislation.[67] Of course all of this is speculation. The basic point is that slavery had a powerful, intricate, and essential effect on the structure, language, and meaning of the Constitution and nature of the federal government, an effect felt still to this day. McGinnis and Rappaport's simple hypothetical fails to account for such rich historical connections.

Despite the fact that we have a pretty good idea that significant provisions of the Constitution were written and enacted because of slavery and the exclusion of enslaved African-Americans from the constitutionalizing process, McGinnis and Rappaport still argue that this knowledge is too "speculative" to support judicial construction of the Constitution to better implement the very inclusiveness that they admit is so problematic for originalism. Indeed, their fear of judicial development of constitutional law is so great that they would rather courts adhere to the original meanings from a period that McGinnis and Rapport themselves acknowledge was *in fact* anti-democratic than to risk judicial creation of constitutional law that would be *potentially* anti-democratic. Their fear of modern judicial over-reaching may or may not be justified, but in itself it provides no answer to the problem they claim to address: the democratic illegitimacy of the initial Constitution and its original meanings.

Third, McGinnis and Rappaport's argument that originalism would have been more protective of black rights in the Jim Crow era had the Court followed Reconstruction-era meanings, while more plausible than

64. *See id*. at 1156–57.

65. *Id.* at 1157; Stein, *supra* note 7, at 447–48.

66. WALDSTREICHER, *supra* note 28, at 93.

67. *See* RAKOVE, *supra* note 20, at 51–53.

their other points, also exemplifies a failure to consider historical evidence in its complicating fullness. McGinnis and Rappaport correctly note that the failure of both the Court and Congress to enforce voting rights in the Jim Crow era greatly undermined the potential for racial justice, and that such failures were arguably contrary to the original meaning behind the Fifteenth Amendment (although they overstate this point).[68] There is also some support for their claim that the Reconstruction-era understanding of the Fourteenth Amendment was that it barred *some* state-mandated segregation.[69] But it is also true that some state-based segregation was intended to be left alone. The distinction relevant at the time was between segregation that barred blacks from access to basic rights, such as the freedom to travel and the right to testify in court, and segregation that provided separate access points to the same good, such as education. The Black Codes enacted by Southern states at the end of the war enforced the former, and they were clearly the target of the Fourteenth Amendment.[70] The latter type of segregation, however, was not rejected by the framing public. Much of the education that was provided to blacks in the South by the Freedmen's Bureau was segregated because the crucial, immediate need was access to the good (education) rather than desegregation itself, which would have inflamed whites and threatened the success of any education program.[71] Many Republican supporters of the Fourteenth Amendment rejected opponents' claims that the Amendment would require school integration.[72] While some Reconstruction governments in the South did pass integrated school legislation, most states did not.[73] Congress notably failed to include a provision of the Civil Rights Act of 1875, which

68. McGinnis & Rappaport, *supra* note 44, at 1761. The framing public accepted restrictions based on property, tax payments, education, literacy, and other non-racial grounds (broader protections having been rejected in the drafting process). KEYSSAR, *supra* note 25, at 102. It was precisely these qualifications on suffrage that Southern states later implemented to secure political Jim Crow. *Id.* at 111–12.

69. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 470–71 (1988).

70. *Id.* at 257–58.

71. *Id.* at 145. Francis Cardozo, one of the black leaders of the South Carolina Constitutional Convention in 1868, stated that the goal was to have free schools for everyone and acknowledged that separate schools would likely persist given the desires of both white and black South Carolinians. David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 248 (1986). Other black delegates disagreed. *See* JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 111 (1961).

72. FONER, *supra* note 69, at 256, 367–68; Michael J. Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303, 326. At the time of the ratification of the Fourteenth Amendment, Northern states had a spotty record on integrating schools, and in most locales with substantial black populations the schools were segregated. Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response To Professor McConnell*, 81 VA. L. REV. 1881, 1885–88 (1995); *see also* FRANKLIN, *supra* note 71, at 97–98 (describing radical Republican support for integrated schools as "infrequent" and "feeble").

73. Alfred H. Kelly, *The Congressional Controversy over School Segregation, 1867–1875*, 64 AM. HIST. REV. 537, 540 (1959); Tyack & Lowe, *supra* note 71.

would have required desegregated public schools, and also failed to desegregate the schools in the District of Columbia.[74] On the other hand, public accommodation laws barring segregation of railroads, inns, and other public spaces were a frequent feature of Reconstruction governments.[75] Certainly many who advocated for education for blacks in the South would have preferred integrated education, and those arguments are important to consider, but one cannot claim that integration was *the* public meaning, as opposed to *one of* the *contested* meanings of the Fourteenth Amendment, even in the heady days from 1867 to 1875. In fact, the record of the time looks, to modern eyes, at best inconsistent and at worst hypocritical. But for white and black Republicans of the time, the focus was more on ensuring that blacks had *access* to certain fundamentals of citizenship, including education, and less on making sure that such access was integrated.[76]

Ultimately this tension reveals just how time-bound the framers were, attempting to negotiate ideals of equal citizenship within a context of severe racial oppression. Given this historical complexity, it is also not clear how broadly the Amendment was meant to be taken by the ratifying public. While McGinnis and Rappaport are probably correct that *Plessy* was contrary to the meaning or intent of people who wanted to prevent the Black Codes, the Court's refusal to overturn state bans on interracial marriage in *Pace v. Alabama*[77] was also entirely consistent with the framing public's expected application of the Amendments. Interracial marriage was consistently raised as the "bugbear" by opponents of the Fourteenth Amendment, and supporters of the Amendment just as consistently denied that it was covered by the Amendment.[78] McGinnis and Rappaport write as if the waters of originalism would have washed away the sins of legal segregation, citing *Plessy* and ignoring *Pace*. But as the

74. Kelly, *supra* note 73, at 545–63. Several Northern states passed school desegregation laws during and after Reconstruction, but in fact most localities in the North where whites strongly opposed integrated schools were successfully able to ignore the law. Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-*Brown *North*, 44 UCLA L. REV. 677, 684–97 (1997).

75. FONER, *supra* note 69, at 370.

76. FONER, *supra* note 69, at 367–68, 372; FRANKLIN, *supra* note 71, at 107–13; James Fox, *Fourteenth Amendment Citizenship and the Reconstruction-Era Black Public Sphere*, 42 AKRON L. REV. 1245, 1261–62 (2009). African-American communities were also divided over the question of integrated schools, given that employment at those schools was *not* integrated (black teachers were almost never hired) and that black students were subject to racist treatment. Douglas, *supra* note 74, at 697–700. However, although Republicans, black and white, often did not press for legally mandated *integration*, they did generally oppose legally mandated *segregation*. FONER, *supra* note 69, at 372. It is this belief that the equality principles embodied by the Fourteenth Amendment prohibited legally mandated segregation that best supports McGinnis and Rappaport's claim that *Plessy* was contrary to the original meaning of the Amendment.

77. 106 U.S. 583, 585 (1883), *overruled in part by* McLaughlin v. Florida, 379 U.S. 184 (1964).

78. FONER, *supra* note 69, at 321.

issue of interracial marriage makes clear, the framing public had (what appears to us) an ambivalent and inconsistent idea of what those sins were.[79] Unless McGinnis and Rappaport are willing to reject *Loving v. Virginia*'s overturning of state bans on interracial marriage,[80] the only way their argument in favor of Reconstruction originalism can work is if they reject the more constraining version of originalism that focuses on the expected applications of the Amendments by the framing public and move instead to a general principles originalism that is advocated by Jack Balkin and others.[81] This is a move, however, that they and many other originalists refuse to make, largely because it opens the door to precisely the type of elasticity they had intended to prevent.[82]

Finally, it is significant that McGinnis and Rappaport address no African-American originalist sources. Their restorative originalism, even in its attempt to address the exclusionary critique, still manages to overlook the actual voices of excluded groups, preferring instead hypothetical arguments about an imagined founding.

In the end McGinnis and Rappaport's attempt to address the exclusionary problem fails for just the reason that Jamal Greene suggests: it treats the aspirational, redemptive moment of Reconstruction as a restoration. McGinnis and Rappaport try to back-fill constitutional history from the Amendments that corrected democratic errors. But this is just not possible. Time moves forward. Our notions of equality, justice, race, gender, and democracy all change and develop over time based on our collective experiences. The Constitution of 1868 was not simply the 1789 Constitution without slavery, and the 1789 Constitution was not the Constitution of 1970, but for slavery. Slavery and matters of race, gender, and social equality are complex historical processes that cannot be addressed by such back-filling. A restorative method cannot correct the original exclusions.

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79. *See* JACK M. BALKIN, LIVING ORIGINALISM 223–31 (2011).

80. 388 U.S. 1 (1967).

81. *See* Balkin, *supra* note 40. A different (and to my view deeply flawed) attempt to find originalist justification for *Loving* is presented by Steven Calabresi and Andrea Matthews, who suggest that Noah Webster's dictionary definition of words such as "equal" provides clear proof that the Fourteenth Amendment's original meaning was to invalidate laws banning interracial marriage, despite the fact that the public advocates for the Amendment repeatedly denied that interpretation and none—not a one—suggested otherwise. *See* Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 BYU L. REV. 1393. This is not the place to provide a full critique of their article. Suffice it that I find the article much less persuasive (and fundamentally different in tone and method) than the Calabresi and Rickert analysis of caste and gender discussed herein, and also less persuasive than Balkin's approach.

82. *See* McGinnis & Rappaport, *supra* note 44.

B. Synthetic Originalism? Calabresi and Rickert

Gender exclusion presents originalism with perhaps its toughest challenge. Half the population (including half of the then-privileged race and class) was excluded from constitutional ratification until the twentieth century. The passage of the Nineteenth Amendment did not expressly grant women legal equality and incorporate women into the protections of the Fourteenth Amendment. The Equal Rights Amendment, first introduced immediately after the ratification of the Nineteenth, failed to be ratified even fifty years later.[83] One would presume, then, that the originalist should conclude either that originalism lacks democratic legitimacy, or that the public meaning of the Constitution does not support women's equality. Both options are, of course, unpalatable, and originalists have generally addressed this problem much as they previously handled the Fourteenth Amendment: by not addressing it at all.

A recent article by Steven Calabresi and Julia Rickert seeks to change this.[84] Calabresi and Rickert reject expected application originalism. This move is critical, since there is strong evidence that the ratifying public did not mean to include women in the full protections of the Fourteenth Amendment.[85] Instead they adopt a version of general principle or framework originalism advocated by Jack Balkin. Applying this idea, they argue that Section 1 of the Amendment represents an anti-caste principle of equality, and they provide extensive support in the framing debates and general press during ratification to support that principle using original public meaning methods.

Establishing such a principle is not sufficient, however, because they acknowledge that women were expressly excluded from full citizenship in the suffrage provisions of Section 2 of the Amendment, and that the public statements at the time indicated the general public did not see women as a caste.[86] To complete their analysis, they therefore move to a form of synthetic interpretation, relying in part on the work of Reva Siegel.[87] With the ratification of the Nineteenth Amendment, they argue, women were fully incorporated into citizenship—particularly because political participation has long been the highest form of membership that included all civil rights protections—and so gained the anti-caste protections of the

83. Steven G. Calabresi and Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 67 n.314 (2011).

84. *Id.*

85. Farnsworth, *supra* note 7.

86. Calabresi & Rickert, *supra* note 83, *passim*.

87. *See id.* at 12–13; *see also* Siegel, *supra* note 37. They also draw a connection to Akhil Amar's idea of intertexualism. *See* Calabresi & Rickert, *supra* note 83, at 10 n.45; *see also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

Fourteenth Amendment.[88] And, while it took the Court another fifty to seventy-five years to fully embrace this idea, they argue that the modern equal protection decisions incorporating gender are fully consistent with originalist methods.

To some degree Calabresi and Rickert avoid problems that plague other originalists. By rejecting original expected applications, they are able to jettison the worst of the antidemocratic practices from originalism. By not focusing on purely legal meanings of the language of the Amendment, they are more open to social and political concepts from the ratifying period, such as anti-caste ideals. By employing synthetic interpretation of the Amendments, they are able to accept a broad reading of the Nineteenth Amendment and are receptive to the capacity of future social changes to reform past democratic failures. In this sense they are more open to a redemptive approach to the Fourteenth Amendment in which the equality is achieved and expanded over time.

Despite these advantages, Calabresi and Rickert hold on to core conceptual commitments that undermine their attempt to save originalism from the exclusionary critique. I will here highlight three: a commitment to a "public" meaning that presumes a single "public"; the belief that gender bias and paternalism are mistakes of fact rather than ideological structures; and the belief that legal equality exists separately from social equality.

Like other originalists who employ a public meaning method, Calabresi and Rickert assume that the "public" is reducible to a single, coherent entity.[89] It is not a multiplicity of overlapping publics and does not expressly recognize counterpublics forged by excluded groups. Perhaps because of this commitment, they reject what they call the sociohistorical view advanced by Reva Siegel.[90] Calabresi and Rickerts themselves do not see this as a problem; their approach is merely a parallel means of getting to the same place.[91] But by excluding from their frame the ideas and experiences of a substantial portion of the early women's movement, they also exclude the deeper structural problems embedded within the practice and ideology of equality and gender bias. It also means that Calabresi and Rickerts fail to grasp the full meaning expressed by the feminists they do cite. Constrained by their limited conception of "public" and public meaning, they ultimately settle on a flattened idea of equality that lacks the depth of the voices and experiences of excluded groups.

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88. Calabresi & Rickert, *supra* note 83, at 66–67.

89. *See* James W. Fox Jr., *Publics, Meanings, & the Privileges of Citizenship*, 30 CONST. COMMENT. 567 (2015) (reviewing LASH, *infra* note 158) (criticizing Kurt Lash for having a restrictive and singular view of the "public").

90. *See* Calabresi & Rickert, *supra* note 83, at 67. While they acknowledge the nineteenth-century women's movement, *see id*. at 49, it does not have unique valence in their analysis.

91. They believe their approach is more "grounded in law" than is Siegel's. *See id*. at 13.

Calabresi and Rickerts also err in assuming that the mistake made by the framers of the Fourteenth Amendment was one of fact, not ideology. The Fourteenth Amendment framers assumed that women lacked the capacity to be full citizens and engage in public life.[92] By 1920 people had come to understand that women did have such a capacity: "The definition of caste has not changed; rather, the capabilities of women and the truth of their status in society had come to be better understood . . . ."[93] To some degree this is true; one of the points of the public activities of the suffrage movement was to convince men that women could participate in public discourse and activity without causing the dissolution of society or family.[94] However, to see gender bias as stemming primarily from this mistake about women's capacity misses the ways in which gender and equality are deeply intertwined.

The issue of women's capacity did not spring from the earth in the decade prior to the Nineteenth Amendment. Feminists had been making these points for some time, and the antebellum women's movement emphasized the importance of women's engagement in public life and the injuries men imposed on women by barring them from civil society.[95] But their critique also revealed a fundamental connection between equal access to civil society and claims about the role of family obligation and the nature of citizenship itself. In particular, as citizenship was being structured around free labor ideology during the nineteenth century, it was specifically and consciously gendered.[96] Men achieved full citizenship by working and by military service. Equal citizenship, from the very beginnings of the Fourteenth Amendment, meant equal *male* citizenship, or, to use the trope common in public discourse, "manhood."[97]

This male-centric conception of citizenship presumed and depended upon an often unspoken but ever-present private sphere run by women. Women's citizenship was domestic.[98] It was not just that men were mistaken about what women could do; they constructed the very idea of equal citizenship around men. This meant (and still means) that women's access to equality was defined as access to what men do. Male citizenship

92. *Id.* at 52.

93. *Id.* at 10.

94. LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT TO ASSEMBLY 41–47 (1997).

95. *See, e.g.*, *The Declaration of Sentiments, Seneca Falls Conference, 1848, Modern History Sourcebook*, FORDHAM U. (Aug. 1997), http://www.fordham.edu/halsall/mod/senecafalls.asp.

96. *See* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 138–263 (1998).

97. *See* LAURA E. FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA 33–54 (2015); NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA 191–204 (1998).

98. *See* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 146–47(1998).

never involved doing what women did (quite the reverse: it was common for opponents of women's suffrage to depict the emasculation of male citizens by showing them doing household chores).[99] The Nineteenth Amendment did not usher in an equality of family responsibilities.

Moreover, the mere recognition of women's right to vote and the changed assumptions about women's capacity to be voters did not change the facts on the ground. Assumptions about women's role in the workplace, in education, in the professions, and about men's place in the home had not changed substantially. Calabresi and Rickerts employ an idealized but thin view of equality as meaning purely legal equality. This causes them to be confused about the relationship between *Lochner*-era libertarianism and the women's movement. For them, the *Lochner*[100] ideal of liberty to contract meant that women, to be fully equal, should not have protective legislation; that would be treating women as a separate caste. They therefore criticize *Muller v. Oregon*[101] for upholding protective legislation (and see the sociological brief by Louis Brandeis and Florence Kelley as part of the mistake), and they cheer *Ritchie v. People*[102] and *Adkins v. Children's Hospital*[103] for overturning protective legislation (and in the case of *Adkins*, for citing the Nineteenth Amendment).[104]

But women were not equal. Employment opportunities were severely limited. What jobs did exist paid less for women. Women were barred from advanced education and, when not barred, were strongly discouraged from pursuing it. The obligations of child bearing, rearing, and extended family care were visited entirely on women. In such a society, there could be no equality in contracting.

Indeed, the failure of the Nineteenth Amendment to change significantly other gender-based citizenship exclusions undercuts Calbresi and Rickert's argument. If the perception of women's capacities had shifted to the "true" state by 1920, women would not have needed to continue to fight for equal treatment. As Linda Kerber has so well documented, the continued unequal treatment of women's citizenship obligations—to serve on juries, to be drafted—reveals a structural inequality that runs well into

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99. A wonderful collection of these ads (although not sourced) can be found at http://www.sweetjuniperinspiration.com/2013/05/my-favorite-dads-from-anti-suffrage.html.

100. Lochner v. New York, 198 U.S. 45 (1905), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

101. 208 U.S. 412 (1908).

102. 40 N.E. 454 (Ill. 1895).

103. 261 U.S. 525 (1923), *overruled in part by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

104. *See* Calabresi & Rickert, *supra* note 83, at 63 (*Ritchie*), 93–94 (*Adkins*). Calabresi and Rickert follow Reva Siegel in noting that the Court in *Adkins* read the Nineteenth Amendment as a potentially powerful interpretive tool that reset the legal meaning of the Fourteenth Amendment. *See id.* at 86 (citing Siegel, *She the People*, *supra* note 9).

the latter half of the twentieth century.[105] Very little of this, however, was part of the "public" meaning of the people ratifying either the Fourteenth or the Nineteenth Amendment.

These are complicated issues that are not possible to address fully here. But the point is that Calabresi and Rickerts do not address any of this. Instead, they find it surprising that Florence Kelley, a major figure in the women's movement, supported and helped prepare the Brandeis brief to uphold protective legislation.[106] That is only surprising, however, if you exclude from your view of equality the "sociohistorical" background.

This may also be why Calabresi and Rickerts find themselves arguing that even the cases that helped embed gender inequality into the Fourteenth Amendment—*Bradwell*, *Minor*, and *Strauder*[107]—to be partly *supportive* of women's status under the Fourteenth Amendment. They argue that because none of the cases completely excluded women from the Amendment's ambit, women were in fact covered.[108] But that is just the problem. Citizenship itself was defined as being something that men do, whether practicing professions, voting, or serving on juries. Equality related to those things. Women were "covered" not by the Fourteenth Amendment directly but in the sense of a type of civic *coverture*: men had the equality to seek employment in the professions, vote, and serve on juries, which in turn better enabled women to engage in their own form of domestic citizenship.

It is conclusions such as these that demonstrate the ultimate ineffectiveness of Calabresi and Rickert's form of originalism. Their originalism is unquestionably more open than others, and their effort to engage directly the question of gender exclusions and the issues of women's history and equality greatly advances originalism discourse. But their failure to take the step of opening up to broader discourses and more complicated ideas of equality and their failure ultimately to take on fully the challenge to originalism presented by the work of Reva Siegel and others leave them with a rather thin Fourteenth Amendment that fails to adequately engage gender equality.

105. KERBER, *supra* note 98.

106. *See* Calabresi & Rickert, *supra* note 83, at 64.

107. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874); Strauder v. West Virginia, 100 U.S. 303 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

108. *See* Calabresi & Rickert, *supra* note 83, at 61–63.

III. SECOND AMENDMENT ORIGINALISM, PROGRESSIVE ORIGINALISM, AND THE NEW LOOK AT RECONSTRUCTION

Some of the most important work with counterpublic sources in originalism to date has come in the context of the Second Amendment. As part of the more general reconsideration of the individual rights aspects of the Second Amendment, scholars have explored the writings and speeches of African-Americans from the nineteenth century.[109] This scholarship on the Second Amendment guided the Court and Justice Thomas in their citations to the black press and black conventions in *McDonald*.[110] Surely, then, it is here where we can see originalism take an inclusive turn.

As we will see, however, even when originalism does explore African-American texts, it does so poorly, falling prey to the very same selection biases and de-contextualization that plagues most originalist endeavors.[111] And in doing so here, with black sources, Second Amendment originalism serves mostly to de-legitimate black sources by failing to engage the particular and distinctive meanings of those texts and their contexts, instead grafting onto the texts the meanings of either white Republicans of the time or, more problematically, of modern readers of the Second Amendment.

A. Second Amendment Originalism: Halbrook and Amar

Stephen Halbrook, whose work was relied on by the Court in *McDonald*,[112] has been one of the main proponents of focusing on the Reconstruction period as an important source for the individual rights interpretation of the Second Amendment, incorporated through the Fourteenth Amendment. Unlike many originalist arguments about the Second Amendment, which focus on the period surrounding the ratification of the Bill of Rights, a focus on Reconstruction has the potential to engage

109. STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

110. 561 U.S. 742, 771 n.18 (2010); *id*. at 847–50 (Thomas, J., concurring).

111. The writings of Roger Cottrell, Raymond Diamond, and Nicholas Johnson are an important exception to this point, since they each take the context of African-Americans from the period quite seriously. *See, e.g.*, NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991). Although this scholarship supports traditional originalist views of the Second Amendment, these scholars also focus on the Jim Crow era and beyond. As such they are better seen as historicists rather than originalists. I hope to consider their scholarship more fully in subsequent work on African-American historical perspectives on the Reconstruction Constitution. For present purposes I will just mention that I find they each overemphasize gun regulation's role as a tool for white supremacy and underestimate (or ignore totally) the role, for African-American leaders of Reconstruction, of gun regulation in biracial governments that provided actual protection to their citizens.

112. McDonald v. City of Chicago, 561 U.S. 742, 771 n.18 (2010).

precisely that aspect of constitutional history that critics of originalism have observed is either overlooked or ineffective in much originalism discourse.[113] From the title of one of Halbrook's main works, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876*, one would expect extensive coverage of African-American opinions and experiences to inform his study of the Second Amendment right. And while Halbrook does use African-American sources more than others have in exploring Reconstruction-era constitutionalism, *Freedmen* still serves as an object of Reconstruction thought and legal development rather than as an active agent. He discusses in detail the congressional debates on the Civil Rights Act of 1866, the Freedmen's Bureau Acts, and the Fourteenth Amendment, which while obviously central to the understanding of contemporaneous views of the Bill of Rights and the Second Amendment, were fundamentally discussions among whites.[114] And although he mentions a few African-American writings, including the South Carolina Convention of 1865 and the black newspaper, the *Loyal Georgian*, Halbrook is interested in how these texts assert the Second Amendment right, not in how they view freedom and rights more broadly.

To some degree this is understandable; Halbrook's project is focused on finding evidence of an individual right to arms in the Reconstruction period to show it was part of the Fourteenth Amendment and not to explore broader meanings of freedom and citizenship. But in another sense, this is precisely the problem, for it causes Halbrook to misread the history and omit fundamental connections with political rights and contexts that in fact require a more nuanced view of the very right he addresses.

For example, when Halbrook discusses the 1865 South Carolina Freedmen's Convention,[115] he chides Senator Sumner, who reported the convention's statement to the Senate, for "embellish[ing]" the convention by adding the First Amendment to the Second as part of the delegates' rights claims.[116] According to Halbrook, only the right to bear arms was mentioned explicitly.[117] Yet Halbrook's quote of the convention is itself acontextual, including only the portion about the right to bear arms and omitting the references to suffrage, jury service, labor rights, protection of law and government, and property ownership. More problematic, Halbrook also omits the references in the convention document to the right to peacefully assemble in convention and "to discuss the political questions of

113. *See* Greene, *supra* note 7.

114. *See* HALBROOK, *supra* note 109, at 1–87, 107–117.

115. Proceedings of the South Carolina Conventions (Charleston, 1865), *in* 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865, at 283 (Philip S. Foner & George E. Walker eds., 1980) [hereinafter SOUTH CAROLINA BLACK CONVENTION].

116. HALBROOK, *supra* note 109, at 9.

117. *Id.*

the day," rights plainly protected by the First Amendments and reasonably the basis for Sumner's representation in the Senate.[118] As is discussed more extensively below, such a context is crucial for understanding the nature of the right to bear arms as conceived in the black public sphere and also for understanding the full range of rights claims being made by the convention.

Halbrook similarly flattens context in his discussion of the Reconstruction state constitutional conventions in the South, which were called under the auspices of Congress's Reconstruction Act of 1867. That Act not only reimposed military control on the South; it also required the political participation of African-American men.[119] The recognition of wider political participation in these conventions actually helps Halbrook and other Second Amendment advocates' case, at least from the perspective of addressing the exclusionary problem, yet Halbrook does not mention black political participation in these conventions.

Moreover, his exclusive focus on gun rights causes him to miss important connections.[120] The Reconstruction constitutions were products of biracial conventions and were progressive documents that attempted to create activist state governments dedicated to developing full equality and citizenship. They established state-funded public education and asserted an

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118. SOUTH CAROLINA BLACK CONVENTION, *supra* note 115, at 302. Halbrook also cites a memorial to Congress written by Georgia's black elected state representatives who were, in 1868, forcibly removed from the state house by white representatives and the white governor. *See* HALBROOK, *supra* note 109, at 111–12. In that memorial, the authors quote the Georgia code that defines the rights of citizens as follows:

> Among the rights of citizens are the enjoyment of personal security, of personal liberty, private property and the disposition thereof, the elective franchise, the right to hold office, to appeal to the courts, to testify as a witness, to perform any civil function, and to keep and bear arms.

CONG. GLOBE, 40th Cong., 3d Sess. 3 (1868). While this certainly provides support for a right to bear arms as part of a public meaning of citizenship rights and privileges, it is far more important to place the mention of that right in the context, first, of the other rights claims they quoted from the statute, and, second, of the actual claim they were making at the time, which was the right to serve in the state government after being elected. Moreover, they stressed the obligation of the federal government to *protect* their right by congressional action and by force, as had been done through military reconstruction. *See* my discussion of this point *infra* Part V.C.2.

119. Reconstruction Act of 1867, ch. 153, §§ 1, 5, 14 Stat. 428, 428, 429.

120. For example, Halbrook notes that the 1867 Louisiana Convention did not include a right to bear arms in its constitution, focusing instead on racial equality. *See* HALBROOK, *supra* note 109, at 90–91. He concludes that this may have meant the participants believed the right was already protected by the federal Constitution. *Id.* I find this supposition strained. It is more plausible that the participants believed the right to bear arms was subordinate to issues of racial equality and justice that they did mention and that protection was the primary obligation of the government—a view I suggest was common in the black public sphere of the time. *See infra* Part V.C.2. If the right to arms was as critical to the daily lives of the freedmen as Halbrook repeatedly asserts, it is curious that the right did not garner any attention in this convention. This is especially true given that one of the most notorious incidents of violence against blacks and white Republicans from the period took place in New Orleans in 1866. FONER, *supra* note 69, at 262–63.

equality of rights consistent with the Fourteenth Amendment.[121] Furthermore, the conventions did not appear as enamored with an unrestricted right to bear arms as Halbrook would have us believe. The Louisiana Convention did not even include the right,[122] and the Georgia Convention significantly circumscribed it by adding to language lifted from the Second Amendment the qualification: "[B]ut the General Assembly shall have power to prescribe by law the manner in which arms may be borne."[123] The biracial Reconstruction constitutions were dynamic documents written in a time of significant reimagining of the role of government, the nature of rights, and the attributes of citizenship. And while recent Second Amendment scholars such as Halbrook deserve credit for focusing us on the period and these documents, the materials deserve a fuller engagement than has occurred in Second Amendment scholarship or in other aspects of constitutional law.

One might expect the work of Akhil Amar, which has also been relied on by the Supreme Court, to provide some of these connections to the broader ideals of Reconstruction and to the thoughts of nineteenth-century African-Americans. Not only is Amar often identified as a "liberal originalist,"[124] but more importantly he has paid significant attention to matters of race and gender justice in constitutional law.[125] Amar has also approached the Constitution as a document expressing general ideals as well as specific rights and powers, and so his Second Amendment analysis is more situated in a vision of the overall Constitution than is that of some other Second Amendment writers. One would therefore expect Amar to be more sensitive to the exclusionary problem. And to a certain extent that is true; Amar cites African-American sources in his work on Reconstruction, and he is attuned to the arguments and interests of African-Americans and women from the mid-nineteenth century and how they relate to constitutional understandings.[126] His theory of interpretation itself places much greater weight on Reconstruction as a foundational moment, thus

121. FONER, *supra* note 69, at 319–20; RICHARD L. HUME & JERRY B. GOUGH, BLACKS, CARPETBAGGERS, AND SCALAWAGS 2 (2008). On the elections and constitutional conventions, see generally FRANKLIN, *supra* note 71, at 84–126.

122. HALBROOK, *supra* note 109, at 90–91.

123. GA. CONST. of 1868, art. I, § 14.

124. *See, e.g.*, James Ryerson, *'America's Constitution': A Liberal Originalist*, N.Y. TIMES, Nov. 6, 2005, http://www.nytimes.com/2005/11/06/books/review/06ryerson.html.

125. *E.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 277–305 (2012) (discussing women and the Constitution); *id.* at 139–99 (defending Warren Court jurisprudence); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB POL'Y 37 (1990).

126. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 238–41 (1998) (discussing political activities and ideas of African-Americans and women during Reconstruction).

opening space for overcoming at least some of the exclusions that so readily undermine founding era originalism.

This point can be seen in particular with Amar's approach to the Second Amendment. Amar disagrees with many gun-rights scholars and writers about the origins of an individualist right to bear arms. Contrary to the Court's opinions in *Heller* and *McDonald*, Amar argues that the *original* meaning of the Amendment in 1789 did *not* include an individual right to bear arms, but rather focused on the more civic right of participation in citizen militias.[127] But he then argues that the incorporation of the Amendment through the Fourteenth Amendment during Reconstruction replaced this meaning with an individualist understanding more compatible with modern gun-rights views, in large part because of the interests of African-Americans in battling white terrorist violence in the post-war South.[128]

This approach has significant potential for a more inclusionary originalism. First, it privileges Reconstruction as a moment of creative and generative force in constitutional law in which the very substance of the Bill of Rights is made anew by ratification of the Reconstruction Amendments. The old bottles of eighteenth-century conceptions of rights are filled with the newly fermented wine of a post-war, post-slavery, racially egalitarian America; meanings for constitutional language and ideas previously unknown become fundamental to the document. Second, by approaching the Reconstruction period as an important constitutionalizing period of its own, it becomes possible to consider the broader principles expressed during the period as having interpretive force. For example, Amar sees the Bill of Rights understood by the Reconstruction framers as implementing more general principles of freedom and equal citizenship.[129] For Amar, the evolving understandings of the Bill of Rights, including understandings of the First and Second Amendments that differed appreciably from eighteenth-century understandings, provided constitutional expression of these general Reconstruction ideals.[130] If both the interests of African-Americans and their voices have a part in this new constitutional-meaning creation—both in the substance of particular rights and in the more general principles—

127. *See id.* at 258 (discussing federalism principles); Akhil Reed Amar, *Second Thoughts*, NEW REPUBLIC, July 12, 1999, http://www.newrepublic.com/article/politics/second-thoughts (discussing civic or communitarian ideas).

128. *See* AMAR, *supra* note 126, at 259; *see also id*. at 266 ("[B]etween 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman.").

129. *See, e.g.*, *id.* at 254 (referring to the general principles of "liberty and equality"); *id.* at 294 (referring to "freedom" and "citizenship").

130. As we will see, there are strong connections to Amar's view of Reconstruction and those of his Yale colleague, Jack Balkin, although Balkin's originalism focuses more on the higher level principles and Amar's more on textualism. *See infra* Part III.B.

Reconstruction originalism could be seen as a time of significant constitutional and civic repair and a counterweight to the exclusionary problems of originalism. In these ways Amar's approach satisfies Jamal Greene's desire for a redemptive interpretive method for the Reconstruction Amendments.

Unfortunately, Amar's work does not reach out to embrace this possibility. Like Halbrook, Amar focuses on white Republicans as the voice of Reconstruction. White Republican discourse on the new constitutional rights of a reconstructed society becomes, by default, *the* public discourse. Interests of blacks are accounted for—notice that both Amar and Halbrook identify the interests of blacks in the South in having a claim to guns for protection against white terrorism[131]—but those interests are refracted through the white Republican prism. As participants in the discursive community that becomes the "public" for purposes of divining constitutional meanings, blacks speak only through the white members of Congress.

This causes Amar to depict the right to bear arms in the way common for white Republicans; the right to bear arms becomes yet another discrete individual right divorced from political or social rights and the rights and privileges of participation:

> At the Founding, the right of the people to keep and bear arms stood shoulder to shoulder with the right to vote; arms bearing in militias embodied a paradigmatic *political* right flanking the other main political rights of voting, office holding, and jury service. . . . But Reconstruction Republicans recast arms bearing as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities.[132]

Even if Amar is correct here when speaking of congressional Republicans, this view was not true for African-American speakers and writers who consistently linked suffrage and individual rights, including gun ownership, and whose discourse reflects a much more communal idea of rights than Amar believes at play among white Republicans.[133] By failing to focus on black public discourse as a counterpublic discourse with its own discrete exploration of constitutional meanings, Amar and others misread the range of meanings attached to the right to bear arms and

131. *See* AMAR, *supra* note 126, at 258; HALBROOK, *supra* note 109, at 26.

132. AMAR, *supra* note 126, at 258.

133. *See infra* Part V.B. Whether Amar's view correctly identifies the public meaning of all white Republicans may itself be debatable inasmuch as white and black meanings did intersect, at least for the more "radical" of Republicans.

undervalue the more communal visions of rights, including Second Amendment rights, available during Reconstruction.

Even on the particular point made above by Amar—that the right to bear arms related to militias in 1789 but not in 1868—the experiences of blacks run to the contrary, since for many blacks arms were necessary for *both* self-help in their homes *and* organized community protection in militia-style groups. Thus, Amar becomes bound to the moderate white Republican visions, limiting the scope of the Fourteenth Amendment to the crabbed meanings of the moderate Republicans who denied any connection between "civil" rights and political membership.[134] Ultimately, Amar's approach leans too far toward the lowest common denominator originalism identified above, where only the views of the conservative and moderate white Republicans gain official sanction.

Amar also makes the same textual error as Stephen Halbrook and the Court in *McDonald*. In citing the South Carolina Black Convention of 1865, Amar extracts the language regarding the right to bear arms out of a longer list of rights and privileges set forth by the convention.[135] This list included the right to personal security and governmental protection, labor rights, and the rights of suffrage.[136] As I will discuss more fully below, the right to bear arms was woven into a fabric of inclusive rights and privileges and, ultimately, into a civil-society view of citizenship that was simultaneously communal and individual.[137] By extracting the right to bear arms from its context, Amar, like the *McDonald* Court and other Second Amendment scholars and advocates, creates a false picture of black Reconstruction that appears to support a contemporary view of arms rights rather than the more contextualized and integrative idea of the rights and meanings of free and equal citizenship advanced in the black public sphere of the time.

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134. *See* AMAR, *supra* note 126, at 259 (asserting that absent such a separation "[t]he basic analytic framework holding together the Fourteenth Amendment . . . would have come unglued"). Amar of course recognizes that political rights were subsequently established by the Fifteenth Amendment. *See id*. at 273–74. But in bifurcating the rights in this way—by adopting the sequential parsing of rights in the way white Republicans added them to the constitution—Amar fails to accord the contextualized perspective of black citizens its full due. Notice, for instance, that in recognizing that political rights were added by the Fifteenth Amendment, Amar does not view the right to bear arms as having regained its former political and communal meanings. Those meanings are simply lost in transition, falling between the Fourteenth and Fifteenth Amendments as so much film on the cutting room floor (to use a now antiquated analogy). As this Article seeks to make clear, such parsing was *not* the meaning advocated by most black speakers at the time, who viewed arms rights as intimately connected with suffrage. *See infra* Part V.B.

135. *See* AMAR, *supra* note 126, at 264.

136. SOUTH CAROLINA BLACK CONVENTION, *supra* note 115, at 302.

137. *See infra* Part V.B.

B. Progressive Originalism: Jack Balkin

Of self-styled originalists, Jack Balkin is most likely to employ a method receptive to excluded voices. His theory of living originalism favors progressive constitutionalism and incorporates much of the inclusivity of modern constitutional law. For example, Balkin's theory of originalism relies on a high level of generalization about the basic principles supported by the framing generations. In that way he is able to argue that the Fourteenth Amendment at the time stood for an idea of equality that rejected "class legislation" and therefore the Amendment can support a modern application of the principle to bar discrimination against gays and lesbians.[138] His capacious originalism bridges the gap between an old text and an evolving society by channeling interpretation through generalized principles (what Balkin describes as a theory of "text and principles").

Moreover, Balkin advocates the use of non-originalist historical sources, or what he describes as nonadoption history.[139] Balkin would use such evidence for constitutional construction—the process of applying the general principles that are represented by constitutional text to the cases and issues that arise over time. Indeed, Balkin recognizes constitutional construction as essential for the democratic legitimacy of the Constitution; construction becomes Balkin's answer to the legitimacy critique.[140] And because Balkin is willing to have construction cover most of the ground of constitutional hermeneutics, his approach incorporates more nonadoption history than other originalists.

Balkin is also open to the conceptual framework that would engage counterpublics. First, he sees a substantial role for the history of social movements in constitutional construction.[141] Because many counterpublics formed movements advocating for social and political change, this aspect of Balkin's approach should welcome counterpublic discourse. Second, Balkin recognizes the importance of multiple overlapping meanings. As he says, a complex engagement with history in constitutional law recognizes that historical traditions are "multi-vocal" and include "counternarratives."[142]

This is an attractive version of originalism for anyone concerned about the basic exclusionary problems of originalism. Nonetheless, Balkin's originalism suffers some of the same flaws as other versions, flaws which

138. *See* JACK M. BALKIN, LIVING ORIGINALISM 267 (2011).

139. *See* Balkin, *supra* note 40, at 651–52.

140. Balkin suggests that "the delegation of constitutional construction to later generations is crucial to the Constitution's democratic legitimacy." BALKIN, *supra* note 138, at 69.

141. *See* Balkin, *supra* note 40, at 656.

142. *Id.* at 690.

may result in a decreased attentiveness to the counterpublic "narratives" that occur before or during constitutional amendments. The most troublesome aspect of his approach is his commitment to a distinction between constitutional interpretation and construction. For Balkin, as for some other originalists, interpretation is the act of discovering the linguistic meaning of text, and construction is the act of giving applied or legal meaning to text that is vague or general.[143] Interpretation permits the use of original-public-meaning evidence, but not much else.[144] Construction would permit the use of a range of non-originalist hermeneutic tools, including historical usages and traditions from before and after adoption of the text.[145] However, if linguistic interpretation provides a definite meaning, the tools of construction are not employed.

The problem is that there will be multiple meanings and understandings lurking in what originalists would see as "public" meaning. In that case the first step in this originalist two-step can be impossible to fix with precision. The heart of the argument will still be about public meaning in the first step, not about when or how to engage in "construction." While this concern is less of an issue with precise text (length of terms and minimum age for offices, for instance), for most clauses that actually need some level of interpretation or construction, the task is much less clear.

Ultimately the interpretation–construction rubric is indeterminate for important provisions; it may be impossible from the text itself to know if one need engage in interpretation or construction.[146] Take for instance the Privileges or Immunities Clause of the Fourteenth Amendment. Some originalists would surely say that such a text is sufficiently certain that we merely need to study concurrent meanings to interpret it. Others might admit that the text is vague or refers to general principles. Both would probably look to original public meaning to help them decide this point, and both will find what they are looking for; conservative originalists are likely to find the evidence of public meaning quite sufficient, and liberal originalists are likely to find it wanting and shift to "construction" with non-originalist methods. And this is precisely what happens as between Kurt Lash's approach and Jack Balkin's.[147] A similar point can be made with "equal protection," "citizenship," "commerce," and other key terms.

143. *See* BALKIN, *supra* note 138, at 3–6; Balkin, *supra* note 40, at 645–46; Solum, *supra* note 14, at 23–24; Whittington, *supra* note 17, at 605–10.

144. Balkin, *supra* note 40, at 648–49.

145. *Id.* at 650–55.

146. *Cf.* Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2043 (2012) (reviewing BALKIN, *supra* note 138 & DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)) (discussing the problem Balkin's theory has in determining what level of generality to apply to the original semantic meaning of the Free Exercise Clause).

147. *Compare* Lash, *supra* note 13, at 1461–71, *with* BALKIN, *supra* note 138, at 183–219.

But if one starts with the proposition that the exclusionary "public" is the only valid source for meaning at the first stage—at interpretation—one inevitably embraces the exclusionary view to at least some extent. Thus, while Balkin's theory would let in meanings from dissenting or excluded communities more quickly and more frequently (via construction) than would other originalists, he is unable to let go of the initial exclusionary approach to interpretation.[148]

This issue also infects Balkin's approach to democratic legitimacy. Although Balkin recognizes that the construction of constitutional text occurs over time, and especially that the engagement with constitutional reasoning in the political and democratic process is essential for democratic legitimacy, he also appears to grant the framers' Constitution a significant level of legitimacy, seeing its support for slavery not as a barrier to legitimacy but as a flaw in its ability to implement justice.[149] In this sense, he appears to follow Larry Solum's idea that the original constitution is legitimate now because it was relatively democratic *in its time*,[150] with the added emphasis that to retain legitimacy across time there needs to be some level of democratic constitutional construction.

The exclusionary critique rejects this attempt to "save" the legitimacy of the original Constitution by either the "good for its time" argument or the "good for its time plus properly construed later" argument. Instead, the exclusionary critique requires that greater weight be granted to the moments of expanded participation. When this point is connected to a focus on alternative meaning communities and their constitutional views prior to and during later expansion, one can arrive at a more encompassing view of "public" meaning than even Balkin seems willing to permit.

Finally, the problems caused by Balkin's limitation of multiple publics and multiple meanings to "nonadoption" analysis and to later-in-time constructions can be seen in how he treats the Reconstruction period. A significant portion of his book *Living Originalism* explores the meanings surrounding the key clauses of the Fourteenth Amendment.[151] His analysis is powerful and wide-ranging, looking at materials from the drafting debates, surrounding historical sources, judicial interpretations, structural reasoning, and other modes of analysis. Significantly, however, no African-American sources are cited. The historical meanings from the framing period that inform his analysis of the Reconstruction Amendments are those of white Republicans.

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148. Balkin attempts to blunt this criticism by arguing that most of the important constitutional clauses in the Constitution are vague or general and properly subject to construction. *See* Balkin, *supra* note 40, at 650–51.

149. *See* BALKIN, *supra* note 138, at 65.

150. Solum, *supra* note 14, at 43.

151. BALKIN, *supra* note 138, at 183–255.

Although it may well be that many ideas expressed by African-Americans during Reconstruction parallel ideas identified by Balkin for his higher level constitutional principles, that is not necessarily the case. For instance, Balkin embraces the originalist view of the Second Amendment, tracking the arguments of Amar, Halbrook, and to some degree, the Court.[152] Yet it is not clear that the African-American community had the same individualist notion of the right. As I discuss below, there is some evidence that the right was viewed more communally and that it was subordinated to a more general right to security and governmental protection. Were this perspective granted more weight and focus by Balkin, it might lead to a different view of even the originalist interpretive position.

Balkin avoids this limitation by deferring to his concept of construction; the answer on what the Amendment requires is not limited to original meanings from either 1791 or 1868 because Balkin views this text as general or vague and therefore requiring "construction" (and thus open to multiple meanings developed over time and best fitting contemporary society).[153] This is a move Balkin makes with some frequency. From the exclusionary perspective, however, this broad use of the concept of construction does not save his theory because even the range of construction is unnecessarily limited.

This is true for the Second Amendment, as mentioned above, where the views of the black counterpublic are not adequately engaged. It is also true for how Balkin reasons about the historical meanings of equality and citizenship. Balkin argues that the original understanding or meaning of equal protection was that it applied differently across three levels of rights.[154] This "tripartite theory of citizenship" held that equality sounded in three spheres: civil equality included basic rights (e.g., contract, property, access to courts), political equality included political rights (suffrage, office holding, jury and militia service), and social equality encompassed social relations (including marriage).[155] The Fourteenth Amendment was viewed by the framing generation as applying only to civil equality. Although Balkin admits this was a contested distinction, he still identifies it as key to understanding that generation's view of the Amendment and subsequent judicial interpretations that barred women from political rights and saw racial segregation, which addressed "social" rights, as beyond the protection of the Amendment.[156] For Balkin, this is an

152. *See id.* at 206–07, 410 n.111. Balkin agrees with Amar's analysis that is discussed above. *See supra* notes 126–128 and accompanying text.

153. *See* BALKIN, *supra* note 138, at 207. This seems to me to be an example of the indeterminacy of the interpretation–construction rubric.

154. *See id.* at 222–23.

155. *See id.* at 222 (emphasis omitted).

156. *See id.* at 221–26.

error of the framing generation's own construction of the more general language it adopted and the background principles it embraced (ideas opposing class and caste subordination). Thus, a better construction is possible for later generations as experiences change social views, such as about the tripartite idea of citizenship.

Yet, by making this move, Balkin has ignored the discourse about citizenship that was very active within the black community and the feminist community at the time of the framing. By saying that the meanings applied by the "public" included the tripartite view, he excludes meanings developed in counterpublics. There were different discussions taking place about the meaning of citizenship in the black public sphere: discussions that overlapped but did not parrot those in white publics, views that more fully engaged with how to implement equality across the full range of social institutions. By failing to account for such counter-discourse, Balkin unnecessarily limits the scope of his material in his "construction zone." He also unfairly "fixes" the original applications and constructions of the "framing generation."

Even though Balkin's theory is open to evidence from such counterspheres, in practice some of the more traditional habits of originalists seem to keep such concepts off the table; Balkin, like other originalists, is affected by the methodological error of assuming a unitary public sphere at the time of constitutional adoptions. Although originalists account for debates among viewpoints within that sphere, they still see a single sphere of discourse. Social theorists and historians have shown, however, that there are multiple overlapping spheres, usually consisting of a dominant sphere and several subaltern or counterspheres in which the particular concerns and interests of groups excluded from official discourse are stated and developed.[157] As I hope my discussion of African-American constitutional discourse from Reconstruction will illustrate, such counterpublic analysis provides alternative constitutional meanings that should have at least an equal status to historically dominant public meanings for modern interpreters.

C. Four Exclusionary Flaws of Originalism

Many originalists have tried recently to address the criticism of originalism as inherently exclusionary and lacking democratic legitimacy. Such attempts are welcome and many are impressive and interesting; nevertheless, each of them fails to accomplish the goal. Despite some fundamental differences among the versions of originalism discussed above, we can identify common flaws and open some paths for further

157. *See generally, e.g.*, Fraser, *supra* note 12, at 123–24.

analysis. Whether such analysis will lead to the full dismissal of originalism as a method or to a further reconsideration and reconfiguration, hopefully it will at least make the problems more apparent.

1. Originalism Presumes a Unitary "Public" and a Single "Public Meaning"

New originalism enthusiastically embraces the move from original intent originalism to some version of public meaning originalism. And this move has the potential to open the discourse to historically excluded groups. Yet originalists fail to achieve this because they search for a historical impossibility: a unitary public meaning. One of the key aspects of an exclusionary history is that groups were *excluded* from public decision-making and from structures of public discourse. It is not possible to be *inclusive* in looking at historical sources for constitutional meaning by looking primarily or exclusively at "legitimated" public discourse, especially as defined by legal and political writings and speeches. If originalism truly wants to find an inclusive path, it will need to reconsider what it means by "public."

2. Originalism Relies on Legal Sources

A corollary to the first point is that originalism, as sometimes practiced, privileges legal sources in finding the "meaning" of constitutional text.[158] The law, however, was a profoundly exclusionary profession well into the twentieth century. It is simply impossible to be inclusive or to gain democratic legitimacy by focusing on legal texts. Once originalists make the choice to focus on and privilege legal texts and meanings, they necessarily perpetuate the historical exclusions. While legal texts are important, the law's tendency to exclude concerns of disempowered groups and to adopt rhetoric that supports exclusion and control makes it a false friend historically in finding inclusive meanings for equality, liberty, and citizenship. Such ideas may well be found in counterpublic discourse when such discourse addresses law, but the context will change meanings.

3. Originalism Fails to Incorporate Historical Contexts

The problem of counterpublics identified in point one is related to originalists' tendency to ignore historical contexts for the ideas and

158. *See, e.g.*, KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 9–66 (2014).

meanings they highlight. Thus, for instance, even when African-American texts are used by Second Amendment originalists, isolated language is lifted from documents. The broader conceptual context within the document is lost, and the more fundamental context of the nature of the supposed right in the social and political context of the period is ignored. But meanings arise from and exist only in such contexts. One of the supposed advantages of originalism is to force us to think about historical-meaning contexts. But this is unfortunately not done when originalists take an "inclusive" turn.

4. Originalism Fails to Incorporate Structural Inequalities

Even originalists who acknowledge the possible role for some of the counterpublics seem to ignore the structural nature of the concerns and meanings advanced by those counterpublics. This is clearly seen in Calabresi and Rickert's work on sex discrimination, in which the social and economic inequalities were crucial aspects of the counterpublic movement. For early-twentieth-century feminists, the vote was simply one—albeit vital—tool to help establish social and economic equality. Law did not reflect equality simply by virtue of the Amendment but required deep conceptual and ideological changes, changes on the ground and in the culture. To open originalism to excluded groups and give it democratic legitimacy, it will need to account better for the full history of exclusions, which includes social and economic, not just legal, equality.

IV. TOWARD A COUNTERPUBLIC ORIGINALISM

As we saw in Sections II and III, the attempts by advocates of new originalism to address the exclusionary problem of democratic legitimacy fail to account adequately for the very voices whose exclusion the authors are trying to correct. As I have suggested, part of the reason for this is the inability of new originalists to incorporate the fact of a plural public. In this section, I will sketch some preliminary ideas for how one might conceive of multiple publics and multiple public meanings. I will do so first by borrowing the idea of counterpublics from scholars of social theory and history. I will then suggest some defining characteristics for what could be called "Counterpublic Originalism" and provide a concrete example of how it might work in practice.

A. General Theory of Counterpublics and Counterspheres

The concept of counterpublics originates as a response to the work of Jürgen Habermas. Habermas identified the public sphere as consisting of

the places in society where "something approaching public opinion can be formed," whether in the media, through elections, or in public fora.[159] Habermas focused on the ways in which bourgeois society developed modes of interaction, from the small-group interactions of salons and coffee houses to the later, larger institutional arenas such as the press.[160] The public sphere created in these arenas both opposed and informed the state, and the relationship between the public sphere and the state matured as modern industrial–democratic societies developed. In this sense the public sphere was an essential feature of modern democratic societies.

Despite its more democratizing character, the concept of the public sphere has been shown to itself be problematic. Habermas's early construction of a bourgeois public sphere that prized open debate among social equals was itself elitist; it did not help explain its own exclusions or subordinations, especially of women and racial minorities. And yet those groups were actively engaging in discourse and protest, perpetually challenging the status quo reflected by and within the "public" sphere. As Nancy Fraser and others have pointed out, there is a need for public-sphere theory to account for oppositional discourse and activity constructed within excluded or subordinated communities.[161] With more historical attention to the development of social movements and subordinated groups, these scholars have identified "counterpublics" or "enclaves" as a way to explain the oppositional discourses. This approach suggests the possibility of a plural public sphere, or what Robert Asen has described as a multiplicity of public spheres.[162] Under this vision, counterpublics are sites where excluded or subordinated groups can develop and refine counter-discourses, both to maintain and develop their own meanings and identities and to re-engage the dominant "public" sphere in a critical discourse. Within these counterpublics the democratizing value of the public sphere is reimagined, and out of them come claims to citizenship and equality that in fact reform or transform the concepts themselves.[163]

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159. Jürgen Habermas, *The Public Sphere: An Encyclopedia Article*, *in* CRITICAL THEORY AND SOCIETY 136, 136 (Stephen Eric Bronner & Douglas MacKay Kellner eds., 1989); *see also* JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 210–31 (1992); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Thomas Burger & Frederick Lawrence trans., 1989) [hereinafter STRUCTURAL TRANSFORMATION].

160. *See generally* STRUCTURAL TRANSFORMATION, *supra* note 159.

161. *See generally* Fraser, *supra* note 12.

162. *See* Robert Asen & Daniel C. Brouwer, *Introduction: Reconfigurations of the Public* Sphere, *in* COUNTERPUBLICS AND THE STATE 1, 6–10 (Robert Asen & Daniel C. Brouwer eds., 2001).

163. *See, e.g.*, Geoff Eley, *Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century*, *in* HABERMAS AND THE PUBLIC SPHERE, *supra* note 12, at 289; Carol C. Gould, *Diversity and Democracy: Representing Differences*, *in* DEMOCRACY AND DIFFERENCE 171, 172–76 (Seyla Benhabib ed., 1996); Mary P. Ryan, *Gender and Public Access: Women's Politics in Nineteenth-Century America*, *in* HABERMAS AND THE PUBLIC SPHERE, *supra* note 12, at 259; Catherine R. Squires,

Still, there is a danger that a focus on counterspheres as such will miss the interaction between the countersphere and the primary public sphere, the sphere that engages the state. As Jeffery Alexander argues, counterpublics "are oriented not simply toward gaining resources and power vis-à-vis the civil sphere but to securing a respected place within it."[164] A study of counterspheres therefore requires a recurrent effort at seeing the interactions, not just the internal experiences, of the spheres, and in particular at seeing the interaction as part of the ongoing re-creation of ideas of equality and democracy.

B. Counterpublics and Mid-Nineteenth-Century America

To understand the structure of civil and political society in mid-nineteenth-century America, it is critical to consider the concepts of spheres and counterspheres. It is well known that politics was legally restricted to white men. These restrictions were found not only in the legal structure of voting and office-holding; they pervaded the entire public sphere. Those parts of civil society that formed and performed public opinion—the press, the pulpit, and the professions (e.g., law, higher education)—were each restricted to white men. Thus the "public" sphere was precisely that exclusionary and subordinating place that critics of Habermas have identified as problematic.

Despite this, excluded groups—particularly women and African-Americans—engaged in forms of public discourse to forge and empower their own identities and communities. This allowed these groups to engage, prod, and question the dominant sphere. This was especially important when a receptive audience could be found in the dominant sphere, such as white abolitionists. This period witnessed extensive writings, conventioneering, and other public discourses by the excluded groups. It was a time of vibrant counterpublics. The products of these counterpublics—whether discursive, as in writings, or performative, as in boycotts and civil actions—characterized nineteenth-century protest and civil rights.

It is also critical to see how the discussions about equality and citizenship were and were not affected by these counterpublics. A focus limited to how the dominant public sphere—even one as fractured and antagonistic as was antebellum America—addressed and developed issues of equality, rights, and membership tells only part of the story. This is especially true for suffrage, about which excluded groups persistently

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Rethinking the Black Public Sphere: An Alternative Vocabulary for Multiple Public Spheres, 12 COMM. THEORY 446, 466 (2002).

164. JEFFREY C. ALEXANDER, THE CIVIL SPHERE 276 (2006).

pressed members of Congress and the public. The role of suffrage in mid-nineteenth-century America cannot be accurately understood from the perspective of the dominant public, but must also consider the appeals, arguments, and actions of African-Americans and feminists. In this way, the views of what Jamal Greene has called "dissenting normative communities" can play a critical role in helping us think about the historical meanings available for constitutional text and principles.[165]

C. Counterpublic Meaning and Inclusive Originalism

This brief discussion of the concept of counterpublics helps us see the theoretical frame for the problem identified in the earlier discussion of originalism. Originalism's focus on public meaning from the mid-nineteenth century (and before) necessarily implements the exclusion of counterspheres. Although originalists wish us to believe (and likely believe themselves) that they are identifying overlapping publics and public meanings and so divining the one "true" or "accepted" or "ratified" meaning, given the actual social and political structure of nineteenth-century America, this is an impossibility. The only way to be inclusive and accurate when looking at historical "public" meanings from a pervasively exclusionary past is to investigate a range of public and counterpublic discourses and activities. Once democratic legitimacy is recognized as a critical purpose and goal of the originalist method, that method should include exploration of counterspheres' discourse.

This presents originalism with a fundamental quandary: how can meaning be identified in any usable way if we have to explore multiple publics with often conflicting ideas and meanings? And how can any claim of legitimacy attach to meanings that were not agreed upon through the formal ratification process?

To answer these questions, originalism would have to forego its attachment to two of its common desires: formalist conceptions of popular sovereignty and the fixation thesis. As the discussion of popular sovereignty above makes clear, because of the original exclusions originalism cannot make claims to democratic legitimacy in ways that can be considered valid today. So long as originalism requires formal ratification as the only source of democratic legitimacy and adheres to a restricted "public" comprised of those formally able to ratify (by suffrage), its claims to legitimacy for constitutional meanings prior to 1920 are embarrassingly weak. Some method for including the views of dissenting publics becomes necessary for originalists to claim legitimacy based on later-in-time expansions of "the People" who are sovereign. The idea of

165. *See* Greene, *supra* note 7, at 522.

popular sovereignty must include the capacity to consider people across time; the expansion of suffrage to women and minorities must do something other than revalidate prior exclusionary meanings. Ratification in this sense is a cross-temporal process whereby the dissenting counterpublic meanings gain validity and priority through subsequent inclusive ratifications.

As we have seen, some originalists have recently attempted this process, and this is a welcome development.[166] In my view they fail, however, because they do not bring into their scope the meanings of the excluded communities *when they were excluded*. The counterpublic meanings are ignored. The later-in-time expansions of suffrage serve in these conceptions only to varnish the prior constitutional meanings with a clear patina of legitimacy; they do not change the central meanings of either the text or the principles.

By contrast, Counterpublic Originalism would prioritize such counterpublic meanings. Rather than focusing on the texts and arguments of the dominant public, Counterpublic Originalism would seek evidence of the counterpublic discourse and activities to determine possible historical meanings for constitutional text and principles. This does not mean that Counterpublic Originalism would ignore dominant meanings. Rather, it would seek to understand better both the counterpublic ideas *and* the dialogue between the dominant public and the counterpublics.

In addition to this move away from formalist notions of popular sovereignty, Counterpublic Originalism also tests the traditional originalist notion of what Larry Solum describes as the "fixation thesis"[167]—the idea that the meaning of the Constitution is fixed at the time it was ratified. Once we accept that counterpublics existed *and* that counterpublics are a valid source of meaning, we also accept an understanding that meanings are not fixed.[168] Meanings, especially meanings of concepts such as freedom, citizenship, and equality, are fluid and contingent. They are the source of political and social discursive contest. Meanings are not fixed at the time of ratification, especially not in nondemocratic ratifications that exclude counterpublics.[169] A subordinated meaning in 1866 may well be that strand of meaning that evolves into culturally validated meanings over time. And if that strand originates in a subordinated community that is

166. *See supra* Part II.

167. Solum, *supra* note 14, at 4.

168. *See* MARTHA S. JONES, ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830–1900, at 5 (2007) (African-American and women's public culture "encompassed a realm of ideas, a community of interpretation, and a collective understanding of the issues of the day."); *id.* at 210 n.8 (Communal interpretations develop through "dialogical negotiation.").

169. The very exclusion of groups from suffrage and participation in ratification is a large part of what makes those groups "counter"-publics.

subsequently incorporated into the polity, its meaning becomes a critical part of the plausible and democratically valid meanings going forward.

This is why the debate about the meanings of Section 1 of the Fourteenth Amendment is so critical. If, as some originalists argue, the only valid meanings are those of the drafting and ratifying public—or, in its most restrictive incarnation, the single meaning that can be said to have been agreeable to a majority of that minority, including conservative white Republicans[170]—then we are invalidating a range of meanings advanced in counterpublic communities that were subsequently understood (both culturally and formally through law) to be essential participants in a legitimate democracy. This lowest common denominator form of originalism produces an inherently exclusionary hermeneutics and is particularly problematic when applied to transformative moments such as Reconstruction.

If instead we contrast the meanings advanced by official publics with those advocated by counterpublics, we may well see aspects of meanings that better comport with the democratic inclusivity and validity that we value about the period. For instance, counterpublic understandings of the Fourteenth Amendment generally contemplated a substantial shift in the role of the federal government and its basic relationship to its citizens, whereas the moderate and conservative white Republican view from the same period generally limited expansions of federal power.[171] And feminist readings of the Amendment supported a quite different view in which women could claim a right to vote.[172] On this and most other significant points, there is no single, true public meaning, but rather contested meanings across public and counterpublic discourses.

The theoretical possibility for a Counterpublic Originalism may be apparent, but the actual implementation may be hard to fathom. To the extent that the concern is based on the availability of source materials, this is not necessarily a problem because historians have been excavating materials for several decades. To the extent the problem lies in how to read the texts, the answer may require a more capacious view of text and meaning. Recall that one characteristic of originalism is that it operates legalistically; meaning as worked out in legal texts (cases, statutes, treatises) tends to be privileged. Those texts are then read narrowly in a legalistic manner. So, for example, the privileges of citizenship are those

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170. This appears to be the approach taken by one of the foremost originalist scholars of the Fourteenth Amendment. *See* LASH, *supra* note 158, at 227 (arguing that the Amendment was a moderate proposal and embodied moderate Republican meanings).

171. *See generally* Fox, *supra* note 89 (discussing differing views on congressional enforcement powers).

172. *E.g.*, Susan B. Anthony, Is It a Crime for a Citizen of the United States to Vote? (1872), http://law2.umkc.edu/faculty/projects/ftrials/anthony/anthonyaddress.html.

that are specifically listed after the writer or speaker says "the privileges of citizenship are."[173] But counterpublics were not legal communities. Exclusion from law is one of the things that made them *counter*. Instead, counterpublics engaged with political and social discourse explicitly, attempting to influence political actors. To look for precise legal meanings in counterpublic texts is to look for the wrong thing. The documents need to be read for what they are and what they do, not for what they would be if they were legal texts.

Fortunately this political–social reading of text is also consistent with the constitutional text to which the meanings would refer. In a sense this is true of all constitutional language because constitutions are texts of political and social self-creation. But whether one adopts this view of all constitutional text is less important here than the fact that the texts that are relevant are those that end exclusions and incorporate subordinated classes into the body politic. The language used to do that is general: "citizenship," "privileges or immunities," "equal protection." If one is willing to take the step to some level of abstraction in meaning (which many originalists today are),[174] then the fact that counterpublic discourse itself involves general principles rather than legal precision should not be a barrier to its consideration.

Yet there remains an irony or tension within Counterpublic Originalism, for while it may engage text in a general manner, it is simultaneously a study of particulars. Counterpublic, inclusive originalism focuses on the particular relationship between the specific counterpublic and the constitutional principles and text. Because of this, the ways of thinking about the Constitution may vary depending on the particular counterspheres at issue. This will cause some critics to complain that Counterpublic Originalism can provide no guidance since it deals only in partial perspectives. Of course one response to that point is that a "universal" perspective is impossible; what has been masquerading in originalism as the "public" is itself partial, and the very claim to not being partial masks its exclusionary character. Counterpublic Originalism, on the other hand, embraces this plurality of perspectives and seeks to explore the particularity. Perhaps one can gain a more generalized perspective from such particularity, perhaps not. But the point is that any attempt to generalize or universalize a "public" from an exclusionary past is inherently misplaced.

173. *See* Fox, *supra* note 89, at 570.

174. *E.g.*, Solum, *supra* note 14, at 22–25.

V. COUNTERPUBLIC ORIGINALISM APPLIED: GUN RIGHTS AND AFRICAN-AMERICAN SOURCES

A fully developed theory of Counterpublic Originalism lies beyond the scope of this Article. However, to demonstrate how Counterpublic Originalism can potentially operate, I will explore here a few sources and ideas from the African-American public sphere from Reconstruction. I hope to show how Counterpublic Originalism can challenge some of the methods and conclusions advanced by originalists regarding aspects of the Fourteenth Amendment. I will focus here on three conventions, including the South Carolina black state convention used by the Court in *McDonald*.[175] I will consider how to reread the documents in the context of the black public sphere and look at possible applications and ideas that these sources may reflect. As we will see, not only will we find ideas different from those stated by the current Supreme Court, we will also see understandings of constitutionalism different from mainstream constitutional consciousness.

From the 1830s through the 1890s, African-Americans held a remarkable number of public conventions. The Black Convention Movement began among African-Americans in the North seeking ways to oppose slavery and was closely tied to interracial abolitionist culture.[176] But the conventions were by no means solely about abolitionism; they also provided forums for the exploration of African-American ideas about the meaning of freedom. At the end of the Civil War, the conventions grew into a full-blown social movement; national conventions formed national organizations with local and state memberships, which in turn supported and inspired state and local conventions.[177] The conventions also allowed for expressions of principles and concerns of particular import for black Americans, and we can identify recurrent themes addressing the possible content of the newly constitutionalized freedom and citizenship, some of which overlap with principles alive within the dominant (primarily white Republican) public sphere while others shifted emphasis toward ideas more central to African-Americans. And while the Court's use of the convention in *McDonald* fails to engage this range of meaning, the prospect of

175. 561 U.S. 742, 771 n.18 (2010). The black conventions are merely one part of a rich black public sphere. There was a vibrant black press, legislative and state constitutional activity in the Reconstruction South, legal actions, and public activities such as boycotts and protest meetings. All of these are potential sources for the black countersphere during this period. On the black public sphere of the nineteenth and twentieth centuries, see essays collected in THE BLACK PUBLIC SPHERE (The Black Pub. Sphere Collective ed., 1995); see also JONES, *supra* note 168, at 12–22.

176. *See* 1 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865, at xi–xvii (Philip S. Foner & George E. Walker eds., 1979); Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 865–66 (1987).

177. DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION 185–210 (2014).

incorporating such materials into modern constitutional discussions deserves both commendation and deeper attention.

A. National Convention (Syracuse)

Although antebellum conventions of free blacks in the North addressed issues that would come to the fore after the war, the National Convention of the Colored Citizens of the United States held in Syracuse in October 1864 can aptly be described as the first of the Reconstruction-era black conventions. In addition to the fact that the convention took place with a hopeful eye toward the end of the war, it also set up a national organization, the Equal Rights League, through which African-Americans could implement freedom on the ground level in a nationally coordinated structure. These leagues, along with Union Leagues, were critical focal points for early Reconstruction black activism and community building.[178]

Following the format common to abolitionist and other conventions of the period, the Syracuse Convention produced a set of written public statements, including a general statement authored by Frederick Douglass and a Declaration of Wrongs and Rights. At the time of the convention (October 1864), many members still seriously doubted either President Lincoln's or the Republican Party's commitment to freedom and equality.[179]

In part because of this political uncertainty, the delegates were free to express a fundamental conception of the ongoing and likely persistence of racialized slavery:

> We have spoken of the existence of powerful re-actionary forces arrayed against us, and of the objects to which they tend. What are these mighty forces? . . . The first and most powerful is slavery; and the second, which may be said to be the shadow of slavery, is prejudice against men on account of their color. The one controls the South, and the other controls the North. Both are original sources of power, and generate peculiar sentiments, ideas, and laws concerning us. The agents of these two evil influences are various: but the chief are, first, the Democratic party; and, second, the

178. On Union Leagues, see MICHAEL W. FITZGERALD, THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH (1989).

179. A substantial portion of the address was devoted to a response to a recent speech by Secretary of State Seward in which he advanced the idea that if the South surrendered the Union would not pursue the end of slavery by force of arms. The convention forcefully rejected the idea that a war fought to eliminate slavery and fought by former slaves could properly end without the end of slavery. *See* PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN 52–54 (Syracuse 1864), http://coloredconventions.org/files/original/91057571556d503505e8e86e8474d923.pdf [hereinafter SYRACUSE CONVENTION].

> Republican party. The Democratic party belongs to slavery; and the Republican party is largely under the power of prejudice against color. While gratefully recognizing a vast difference in our favor in the character and composition of the Republican party, and regarding the accession to power of the Democratic party as the heaviest calamity that could befall us in the present juncture of affairs, it cannot be disguised, that, while that party is our bitterest enemy, and is positively and actively re-actionary, the Republican party is negatively and passively so in its tendency. What we have to fear from these two parties,—looking to the future, and especially to the settlement of our present national troubles,—is, alas! only too obvious.[180]

For the convention's delegates in 1864, it was plain that racial prejudice was part and parcel of slavery; it was, they said, slavery's shadow. Importantly, the convention was not speaking only about the remnants of slavery in law, such as facially oppressive laws like the Black Codes of the South or Jim Crow laws of the North. The point extended to private prejudice, which they believed to be just as much an extension of slavery and an obstacle to freedom as were Jim Crow laws. And it was not just private actions and private discriminations that were the problem, but the very sentiment of prejudice itself, a sentiment which was so hard to change precisely because it supported a racialized power structure.[181]

This point, while obvious to people of color throughout American history, is potentially radical for constitutional law even in the modern era, for it suggests that doctrines that ignore or circumscribe remedies for private prejudice fail in the basic constitutional requirement to end slavery. The Warren Court accepted this argument in *Jones v. Alfred H. Mayer Co.*,[182] which upheld the application of a Reconstruction-era civil rights statute against private discrimination in the sale of real property. This decision is reviled by some conservative scholars[183] and currently in a precarious position given the present Court's dim view of the Enforcement Powers under the Fourteenth and Fifteenth Amendments.[184] Progressive

180. *Id.* at 48–49.

181. On nineteenth-century conceptions of sentiments, see GLENN HENDLER, PUBLIC SENTIMENTS (2001).

182. 392 U.S. 409 (1968).

183. *E.g.*, Gail Heriot & Alison Schmauch Somin, *Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation, and Academia's Favorite New Vehicle for the Expansion of Federal Power*, ENGAGE, Oct. 2012, at 31, 33 (*Jones* "was not just a mistake, but an egregious misreading of history.").

184. *See, e.g.*, Shelby County, Ala. v. Holder, 133 S. Ct. 2612 (2013) (Fifteenth Amendment); City of Boerne v. Flores, 521 U.S. 507 (1997) (Fourteenth Amendment); *see also* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne V.

scholars, on the other hand, have advocated a more expansive application of the principle behind *Jones* and the Thirteenth Amendment generally.[185] Evidence from these Counterpublic Originalist sources found in the Reconstruction-era black public sphere suggest that fighting the effects of private prejudice, especially when those effects included denial of full access to basic goods, such as property and education, is precisely what the Thirteenth Amendment supported.

Moreover, this approach also suggests, with its focus on prejudice rather than discrimination, that the root causes of unfreedom, the sentiments of the white community, had to be changed. In many ways this reflects a particularly nineteenth-century conception of how moral feeling and public collective emotion ("sentiment" as the term was then used) affected and could be affected by public discourse, a conception that was part of the Abolitionist Movement.[186] But we see here specifically how the concept of racism-as-sentiment informed the convention's view of the problems inherent in the pursuit of full post-slavery freedom. We also see in this passage a clear identification of prejudice, along with slavery, as "original sources of power." This point, combined with the idea of racism-as-sentiment, shows an understanding that white racism was both deeply ingrained and intimately tied to white legal and cultural dominance. The passage also reveals a hard political pragmatism that stressed the complexity of racial party allegiance, a point that is obscured by a focus on white Republican representations of the problems of race and freedom.

The convention also emphasized the primacy of suffrage:

> We are asked, even by some Abolitionists, why we cannot be satisfied, for the present at least, with personal freedom; the right to testify in courts of law; the right to own, buy, and sell real estate; the right to sue and be sued. We answer, Because in a republican country, where general suffrage is the rule, personal liberty, the right to testify in courts of law, the right to hold, buy, and sell

Flores, 88 WASH. U. L. REV. 77 (2010) (arguing in favor of a limitation of *Jones* along the lines of modern Court doctrine).

185. *See, e.g.*, THE PROMISES OF LIBERTY (Alexander Tsesis ed., 2010); MICHAEL VORENBERG, FINAL FREEDOM (2001); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459 (2012); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012); James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189 (2011); Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337 (2009); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393 (2012).

186. HENDLER, *supra* note 181, at 53–81 (discussing sentiment as a target for abolitionist literature, include Harriet Beecher Stowe's writings). For an interesting analysis of the role of sentiment and public emotions in antebellum constitutionalism, see Doni Gewirtzman, *"Vital Tissues of the Spirit": Constitutional Emotions in the Antebellum United States*, *in* THE ASHGATE RESEARCH COMPANION TO LAW AND THE HUMANITIES IN NINETEENTH-CENTURY AMERICA (Nan Goodman & Simon Stern eds., 2015).

> property, and all other rights, become mere privileges, held at the option of others, where we are excepted from the general political liberty.[187]

This point was critical in the black public sphere and marked a stark contrast to the discourse on rights in the dominant sphere. Most white Republicans in Congress considered suffrage a higher order privilege rather than a natural right; only a handful of radical Republicans were ready to grant it broadly.[188] Lincoln, who came late to supporting black suffrage, spoke only of suffrage for educated and propertied blacks, a restriction he did not apply to whites.[189] White Republicans generally believed that freedom and citizenship required only common civil rights, and this was reflected in the Civil Rights Act of 1866, which protected contract, property, and court access rights but not suffrage.[190] For black speakers and writers, however, civil rights were seen as being of little value precisely because they depended in a democratic system on the will of the voting majority. The history of state and local restrictions on civil rights for blacks made African-Americans all too aware of the importance of practical politics as security for rights implementation, and suffrage was, for Frederick Douglass, John Mercer Langston, and others, always the most important right for post-war citizenship.[191]

Moreover, when the convention did list rights other than suffrage, it presented them differently than the common trope of contract, property, and access to courts cited by whites:

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187. SYRACUSE CONVENTION, *supra* note 179, at 59.

188. ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 222–23 (2010) (discussing lack of support for black suffrage within Republican party in 1865).

189. Lincoln's initial Reconstruction plan at the end of 1863 failed to support black suffrage. *Id.* at 271–73. Fredrick Douglass and other black leaders sharply criticized this omission. JAMES OAKES, THE RADICAL AND THE REPUBLICAN 223 (2007). In what was to be his final speech on April 11, 1865, Lincoln tentatively supported what "'the colored man . . . desires[,]' the right to vote," but he favored limiting it to "the very intelligent" and veterans. FONER, *supra* note 188, at 330–31 (first alteration in original).

190. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981 (2012)).

191. *See, e.g.*, Frederick Douglass, What the Black Man Wants, (Apr. 1865), *in* 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 157 (Philip S. Foner, ed., 1975) ("I am for the 'immediate, unconditional, and universal' enfranchisement of the black man, in every State in the Union. Without this, his liberty is a mockery; without this, you might as well almost retain the old name of slavery for his condition; for in fact, if he is not the slave of the individual master, he is the slave of society, and holds his liberty as a privilege, not as a right. He is at the mercy of the mob, and has no means of protecting himself."); John Mercer Langston LL.D., U.S. Minister Resident at Haiti, Citizenship and the Ballot (Oct. 25, 1865), *in* FREEDOM AND CITIZENSHIP 99 (1883); Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, ATLANTIC MONTHLY, Jan. 1867, http://www.theatlantic.com/magazine/archive/1867/01/an-appeal-to-congress-for-impartial-suffrage/306547/; *see also* FRANKLIN, *supra* note 71, at 56 (explaining that suffrage was consistent theme among the 1865 black conventions).

> [A]s citizens of the Republic, we claim the rights of other citizens. We claim that we are, by right, entitled to respect; that due attention should be given to our needs; that proper rewards should be given for our services, and that the immunities and privileges of all other citizens and defenders of the nation's honor should be conceded to us. We claim the right to be heard in the halls of Congress; and we claim our fair share of the public domain, whether acquired by purchase, treaty, confiscation, or military conquest.[192]

This passage reveals a far different vision of basic citizenship rights than was sketched by the Reconstruction Congress. First, it focuses on *respect* as the first right. This was a claim to recognition, to a level of broad equality, both in law and in society, which was consistent with the emphasis discussed earlier on the social aspects of prejudice, and it places the concept of equal respect and dignity, which some modern constitutional scholars have emphasized,[193] at the center of the meaning of freedom and citizenship. Second, the passage follows the right of respect with the claim to address *needs*. As other parts of the convention documents point out, education was a commonly identified need and would have certainly been implicated by this statement. But the very use of the term *needs* emphasizes that access to freedom implied some obligation to address basic needs of citizens.[194]

When the statement does address contract and property, it does so with a particular focus. Contract rights were seen primarily as labor rights, and in this way the right to respect included the right to proper payment for services, or the right to proper payment for freely sold labor. Similarly, the claim to a right to property meant not simply the legal right to purchase and own but the right to actually have property, including property obtained by the federal government across the South as part of the Union's wartime conquests. The convention here was stressing the principle of forty acres and a mule, or "the land question," that was debated (and rejected) in the white Republican public sphere but was beyond argument for members of the black public sphere.[195]

Many of the themes reflected in the Syracuse Convention documents also appeared in the series of state and local conventions that followed it,

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192. SYRACUSE CONVENTION, *supra* note 179, at 42.

193. *See generally* KENNETH L. KARST, BELONGING TO AMERICA (1989); DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1867–77 (2001).

194. On needs as a component of equal citizenship, see Forbath, *The Distributive Constitution*, *supra* note 10.

195. On the variety of views and practices of land redistribution, see EGERTON, *supra* note 177, at 93–133.

although there was also some variety in the ideas and focuses across the different meetings. The energy and organizational structure created by the National Convention in Syracuse inspired African-Americans in both the North and South to meet in several conventions in 1865 and 1866. Although a full exploration of these conventions is beyond the scope of this Article, one of the most important of the conventions—and the one used recently by the Supreme Court and scholars of the Second Amendment—took place in South Carolina in 1865 and will be worth a close reading that highlights the differences of a counterpublic approach.

B. South Carolina Convention

One of the most prominent of the state conventions was held in Charleston, South Carolina in November of 1865. This convention has received some attention by originalists already, having been one of the sources cited by scholars looking at the meaning of the Second Amendment during Reconstruction and by the Court in *McDonald*.[196] Certainly the convention deserves such attention. It boasted a membership that included several of the men who would become leading political and legal figures in Reconstruction South Carolina, which had, along with Mississippi, the largest African-American political participation of any state.[197] And the products of the convention are among the more extensive and detailed of the state conventions from the period.

The convention documents reflect many themes common in the national movement, including the embrace of suffrage as the predominant fundamental right and a focus on liberal self-sufficiency. To some degree, the members of the convention stressed a more conservative approach to citizenship-claiming than did the members of similar conventions, in particular by emphasizing openness to white citizens of the state, calls for black citizens to focus on education, industry, and economy, and an emphasis on being "law-abiding."[198] Importantly, though, this convention, more than others, also articulated a vision of equal citizenship in the context of a broadly conceived civil society.

The convention opened its Address of the Colored State Convention to the People of the State of South Carolina by stating:

> Heretofore we have had no avenues opened to us or our children—we have had no firesides that we could call our own; none of those incentives to work for the development of our minds and the

196. McDonald v. City of Chicago, 561 U.S. 742, 771 n.18 (2010).

197. SOUTH CAROLINA BLACK CONVENTION, *supra* note 115, at 284.

198. *Id.* at 292, 294.

> aggrandizement of our race in common with other people. The measures which have been adopted for the development of white men's children have been denied to us and ours. The laws which have made white men great, have degraded us, because we were colored, and because we were reduced to chattel slavery.[199]

Here the convention highlighted the stark social and economic disadvantages forced on African-Americans and the concomitant advantages gained by whites through the law and policy of racial slavery. Unfreedom is defined not just by the lack of physical liberty but by the separation from all "avenues" of citizen development.

The convention members pursued this idea in its Declaration of Rights and Wrongs, stating:

> We have been deprived of the free exercise of political rights, of natural, civil, and political liberty.
> The avenues of wealth and education have been closed to us.
> The strong wall of prejudice, on the part of the dominant race, has obstructed our pursuit of happiness.[200]

The convention continued this idea in its Memorial to the Senate and House of Representatives of the United States, arguing for "the right to enter upon all avenues of agriculture, commerce, trade; to amass wealth by thrift and industry; the right to develop[] our whole being by all the appliances that belong to civilized society."[201]

With each of these statements, we see a racial-elevation ideology also evident in the other conventions, but with a greater focus on how such a vision interacts with civil society. This view looks a bit like modern equal opportunity ideology, with its stress on education and access to industry, property, and wealth creation. It is a view of freedom as being exercised across a range of societal institutions, with interplay among the institutions necessary for realization of full citizenship. Importantly, we also see the idea that white prejudice as both a legal *and* a social barrier prevents access to this equal citizenship. The end of slavery does not mean the end of unfreedom, precisely because race prejudice—the social sentiment of race bias—operates as a powerful and encompassing force of oppression.

Most notable from the perspective of the Supreme Court's reliance on this document in *McDonald* and the use of the convention by Second Amendment originalists is how the convention raised the question of a right to arms. In the Declaration of Rights and Wrongs, the authors listed the

199. SOUTH CAROLINA BLACK CONVENTION, *supra* note 115, at 298–99.
200. *Id.* at 301.
201. *Id.* at 302.

denial of suffrage, the denial of access to wealth (both through property ownership and labor), the denial of education, the existence of racial prejudice, and personal violence as the primary wrongs.[202] The denial of guns is not included. Were the right to bear arms one of the most important rights, one would expect it to appear here. The fact that it does not suggests it may have had a subordinated status for the members of the convention, something not explored at all by those who cite the convention for its support of gun rights.

Instead, the convention members chose to assert their claim to the right to bear arms in a letter to Congress. This portion of the letter includes a list that begins with a demand that "the strong arm of law and order be placed alike over the entire people of this State; that life and property be secured, and the laborer as free to sell his labor as the merchant his goods."[203] Shortly after comes the demand for suffrage: "We ask for equal suffrage as a protection for the hostility evoked by our known faithfulness to our country's flag under all circumstances."[204] The list then demands full access to the courts and juries.[205] Only after these and other demands does the convention assert the right to bear arms and the right for black former soldiers to be able to keep the arms they purchased from the federal government.[206]

The *McDonald* Court, following the lead of scholars such as Steven Halbrook and Akhil Amar, extracted the portion about the Second Amendment out of this listing. This is a mistake. The basic textual context situates the right to arms within the right to governmental protection and access to laws and voting. Indeed, the convention identified voting as the main force with which they will battle violence. The members of the convention were not advancing the right to arms as the primary means of resistance to white violence but rather were placing it in context of a call for full recognition of rights to governmental protection, access to courts, and suffrage. The document reveals not the simple invocation of an age-old right to self-defense, but the integrated understanding of the right of citizens to actual protection. The right to bear arms stood as one of the many ways in which blacks could achieve equal status and respect and claim the right to have all aspects of the state protect them as they engaged in citizen activities.[207]

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202. *See id.* at 301.

203. *Id.* at 302.

204. *Id*.

205. *Id.*

206. *See id.*

207. A similar contextualization of the Second Amendment right appears in the extended statement of the National Convention, which mentions the right in a long list of oppressions, connecting the right to African-American military service and to suffrage. SYRACUSE CONVENTION, *supra* note

Furthermore, the right to bear arms expressed here is not so clearly one of individual self-protection. The entire document speaks in a collective voice. The pronouns are plural: "we," "our," "us." The conventioners knew that they spoke for the African-American community and that the claims to civil and political rights, to education, and to protection were made simultaneously as individuals and as members of the black community. This is why Akhil Amar errs when he suggests that African-American invocations of the right to bear arms during Reconstruction had shifted the right from a collective to an individualist understanding.[208] For black Americans in the Reconstruction South, protection was both communal and individual. African-Americans often relied on firearms in order to act collectively to ensure their rights to assemble, worship, receive education, and vote.[209] So while a right to bear arms was important, the right was more closely connected with the full panoply of rights, government duties, and civic membership than originalists have allowed for.

C. Counterpublic Originalism Applied: Principles from the Black Public Sphere

The conventions' emphasis on locating individual rights, including the right to bear arms, in the broader context of citizenship rights of protection, suffrage, and access to "avenues" of prosperity reflects a consistent theme from the black public sphere. While particular wrongs were identified and specific rights were listed, the overall thrust of the documents, with the exception of suffrage, was less a claim to a specific right or rights and more a claim to inclusion in equal citizenship, with citizenship understood as access to the full range of civil society. As we can see even within these convention documents, there was some differentiation in the scope and boldness of the claims and arguments of the conventions. Indeed, as the Black Convention Movement expanded after 1865 and began including more people recently freed from slavery and a greater socioeconomic cross-section of the black communities in some states, there was an

179, at 47. The right to bear arms was certainly recognized—Second Amendment scholars and the Court are right about that—but it was contextualized and subordinated to more general claims of equal citizenship, full freedom across society, and suffrage as the primary means to secure and protect other rights.

208. *See supra* Part III.

209. *E.g.*, Elsa Barkley Brown, *Negotiating and Transforming the Public Sphere: African American Political Life in the Transition from Slavery to Freedom*, *in* JUMPIN' JIM CROW 28, 39 (Jane Dailey, Glenda Elizabeth Gilmore & Bryant Simon eds., 2000) (discussing the women's militia in Richmond, Virginia, in the 1870s); EGERTON, *supra* note 177, at 112–13 (discussing black former soldiers protecting rights to land).

increasing radical theme to some conventions.[210] But these differences in emphasis and breadth still operated within a range of common ideas and principles, from which we can begin to assemble a set of foundational principles within the Reconstruction black public sphere. We should necessarily do so with caution, as differences in views within the African-American counterpublic may well require changes to any statement of principles. Nonetheless, we can at least preliminarily identify five grounding principles evident in these convention materials and reflected in other materials from the period. They are: prejudice-as-slavery-continued; race consciousness as a means of securing de-racialized equality; rights interrelatedness (secured by suffrage); equal citizenship—equal protection; and national citizenship as membership in civil society.

1. Prejudice-as-Slavery-Continued

Both the National Convention and the South Carolina Convention stressed the overwhelming impact of racial prejudice ("strong wall of prejudice" in the South Carolina version) and how prejudice was a critical barrier to full freedom and citizenship. This may well seem a point too obvious to mention. Yet because it is so easily obscured by claims that the law should be colorblind, it bears refocusing on how these conventions assert that racial prejudice was a sentiment and social condition, not simply race-conscious legal discriminations evident in in the Black Codes or Jim Crow laws. Freedom was blocked as much by sentiment as by law.[211] To take this point seriously across time would be to acknowledge equal citizenship as consisting of both civil and social rights. Moreover, to the extent that the convention participants spoke of something we would today think of as colorblind equality—a point which itself must be conditioned by the discussion below—it was a concept that depended on not merely the changes in law but also on the changes in fact of the implementation of prejudice in daily life, and especially in the range of social and economic activities that constitute civil society.

2. Equal Protection, Equal Citizenship, and the Contextualized Right to Bear Arms

As several scholars have recently argued, the very fact that the Fourteenth Amendment begins with the concept of national citizenship demonstrates that equal citizenship stood as fundamental to Reconstruction

210. *E.g.*, Proceedings of the Virginia Conventions (Alexandria, 1865), *in* 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, *supra* note 115, at 255, 256–57.

211. *See* SYRACUSE CONVENTION, *supra* note 179.

constitutionalism.[212] The records of the black public sphere also reflect this. What is added from African-American texts, however, is the idea that the claim for equality in citizenship was also a pairing of citizenship and governmental protection. By asserting a claim to full citizenship, African-Americans were invoking an obligation of the government, an obligation to provide protection to them precisely because they were citizens. They were invoking a pairing of citizen allegiance and government protection that was a common conception of citizenship at the time.

Indeed, this was the very heart of democratic government; the government was instituted to protect the lives, property, and rights of its citizens. The interdependency of rights and particularly the foundational importance of suffrage required the protection of government and law. Likewise, the protections of the state and law were only feasible if African-Americans held full civil and political rights. Each was considered essential for any to flourish.

This suggests that black originalism would support a far more robust understanding of equal protection law, one much closer to that advocated in the modern context by, for example, Robin West.[213] This form of equal protection analysis would emphasize actual protection, both physically and legally. This idea is particularly evident in the South Carolina Convention materials, which include as one of the basic wrongs of slavery and inequality that blacks "have been subjected to cruel proscription, and our bodies have been outraged with impunity,"[214] and listed as the first claim of right "the strong arm of law and order be placed alike over the entire people of this State; [and] that life and property be secured."[215] Affirmative governmental security, in force and through courts, was essential for postbellum African-Americans.

The principles of interrelated rights, combined with the state's duty of equal protection, puts in strong relief the claim made by the Court in *McDonald* and by many Second Amendment originalists that nineteenth-century African-American public culture advocated an individual right to bear arms. Certainly it was true that the right to bear arms was mentioned in a few key documents. But for black Americans in the 1860s and '70s, the right to bear arms *by itself* only continued to support the long history of white slave "militias," transformed after the war into the Ku Klux Klan and related terror groups. African-Americans recognized that while their own right to own and use arms was a necessary part of resistance to terror, it

212. *See* BALKIN, *supra* note 138, at 185; REBECCA E. ZIETLOW, ENFORCING EQUALITY 51–53 (2006).

213. *See generally* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM (1994).

214. SOUTH CAROLINA BLACK CONVENTION, *supra* note 115, at 301.

215. *Id.* at 302.

was by no means sufficient, and it was not likely to produce long-term solutions. Instead, it was the full protection of the government—national, state, and local—that would produce real change. And this is exactly what experience showed; the federal prosecution of the Ku Klux Klan in South Carolina in the 1870s in fact weakened such terrorism in the state, at least temporarily.[216]

Interestingly, the very divergence of white and black communities from the time on the issue of right to bear arms reveals the need for us today to think in terms not of a single public meaning but of multiple publics and multiple meanings. For Southern whites the right to bear arms was a right to attack and terrorize and secure white supremacy—it was a right to use violence to maintain power (and, notably, this was also a *collective* conception of the right). For blacks, on the other hand, the right to arms was a necessary proxy for the higher right to protection by the government in which one had citizenship. Arms-bearing allowed for opposition to unjust government (white militias), but it was not a substitute for *just* government. As government increased its role of providing actual protection to black citizens, the need for private gun possession and use would decrease. African-Americans preferred federal military or state protection of suffrage and other rights to reliance on individual gun ownership and black militias, but absent adequate state supports, access to firearms was necessary.

This history has particular significance for how we might conceive of gun rights today. For white supremacists in the 1860s, the only regulation of arms they would want would be race-based. Modern conservatism simply removes the express race-based ban to guns, leaving in place the white supremacist vision that guns and a culture of private violence were themselves constitutional rights. For African-Americans in the 1860s, however, the regulation of arms, if equally applied *and* accompanied with actual protection by the government, would have made sense. The culture of violence was the *opposite* of freedom and equality, not its expression. What offended the members of the South Carolina Convention was that blacks were selectively regulated, in terms of arms possession as well as in every other aspect of life. The proper question today is not so much whether there is a right to arms but how that right is regulated. To see the right as presumptively unregulable would be to side with a modernized version of white supremacy; to see the right as interconnected with and even inversely proportional to effective government and legal protection

216. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876, at 93–94 (1985) (detailing the success of Justice Department prosecutions in curtailing Klan violence); Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 CHI.-KENT L. REV. 1013, 1018–20 (1995) (explaining the relationship between extensive Klan violence and congressional enactments to enforce voting rights).

would be to side with a different kind of originalism, one based in and accounting for African-American history. Robin West has recently suggested that the problem today is how to construct a theory of gun control as an implementation of equal protection and the Fourteenth Amendment;[217] by exploring the discourse of the Reconstruction-era black public sphere, we can see better how this might take place.

3. Equal Respect and Civil Society

We see evidence of this in the South Carolina Convention's assertion of "the right to develop[] our whole being by all the appliances that belong to civilized society" and to have access to agriculture, commerce, and wealth.[218] We also see it in discussions of the right to affirmative government supports, especially public education and public welfare. The Syracuse Convention listed in its discussion of rights "that due attention should be given to our needs" and the right to be "entitled to respect."[219] The Alabama Convention of 1867, for instance, called for public education and public welfare for the aged and homeless.[220] The educational supports provided by the Freedmen's Bureau, which were its longest lasting operation, were strongly supported by speakers in the black public sphere. Moreover, when African-Americans had political power in some of the Reconstruction South, public education and public works were common legislative and administrative actions. Although many African-Americans appear to have agreed with the statements of several of the black conventions that self-reliance was a basic principle of freedom, they also recognized that self-reliance could only occur with sufficient support from the community and the government and in the context of a full and fair access to all aspects of civil society.

Although this more proactive view of government focused, when possible, on local and state governments, there was also a simultaneous recognition in the black community that the federal government had a fundamental role in ensuring this development. This connection was seen most prominently in the advocacy of African-American members of Congress in favor of the Civil Rights Bills that would eventually become

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217. *See* Robin West, *Genderless Marriages, Neutral Constitutions, Bloodless Persons and the Unbearable Lightness of the Good*, CONCURRING OPINIONS, Oct. 23, 2012, http://www.concurringopinions.com/archives/2012/10/genderless-marriages-neutral-constitutions-bloodless-persons-and-the-unbearable-lightness-of-the-good.html.

218. SOUTH CAROLINA BLACK CONVENTION, *supra* note 115, at 302.

219. SYRACUSE CONVENTION, *supra* note 179, at 42.

220. 1 Proceedings of the Black National and State Conventions, 1865–1900, at 301 (Philip S. Foner & George E. Walker eds., 1986).

the Civil Rights Act of 1875.[221] Several African-Americans spoke in favor of the bills.[222] The protection of access to public theaters, inns, transportation, and education was wholly consonant with principles of equal citizenship and access to civil society seen in the earlier documents. Interestingly, when Representative Robert Browne Elliott from South Carolina spoke in in favor of the Bill in 1874, he opened with the following quote from Francis Leiber, who was arguably the preeminent American political theorist of the mid-nineteenth century:

> By civil liberty is meant, not only the absence of individual restraint, but liberty within the social system and political organism—a combination of principles and laws which acknowledge, protect, and favor the dignity of man. . . . Civil liberty is the result of man's two-fold character as an individual and social being, so soon as both are equally respected.[223]

By placing this quote at the beginning of his speech, Elliott framed a theory of constitutional liberty and in a subtle but important way rejected the then common division of rights into the tripartite civil–political–social schema. If civil liberty is necessarily liberty in a social context, it can only be achieved and protected if social structures are supported, open, and viable. It highlights the positive social conditions for liberty. This ultimately centers the Civil Rights Bill as a fundamental aspect of protecting classically liberal rights and liberties because it ensures an open and equal civil society.

This idea—that government at all levels has an obligation to ensure an open and vibrant civil society as part of ensuring the rights and privileges of citizenship—could potentially reorient modern principles of affirmative governmental obligations. On the one hand, the work done by the civil rights legislation of the 1960s can be seen as implementing at least the equal access portion of this principle. The need for civil society to also provide meaningful engagement and for citizens to have the capacities to engage in it would, on the other hand, extend the duties of government into areas such as educational and subsistence rights that are currently beyond the boundaries of constitutional obligation. Just how this plays out today, and what guidance can be found in the statements and activities from the nineteenth-century black public sphere to help with particular modern

221. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

222. *E.g.*, 3 CONG. REC. 1001 (1875) (statement of Rep. Rapier); 2 CONG. REC. 1311 (1874) (statement of Rep. Ransier).

223. 2 CONG. REC. 407 (1874) (statement of Rep. Elliott).

applications of these principles is hard to say.[224] But at the very least, the focus on the principles may provide new avenues for seeing the questions as relevant in a constitutional discourse of the twenty-first century.

CONCLUSION

Originalism has long suffered from an inherently exclusionary hermeneutics. When originalists insist on privileging sources from the Founding, or sources from a later amendment period when people of color and women were excluded from participation, they adopt an inherently exclusionary interpretive position. Some originalists have recognized this deficiency and have begun addressing it, often through a greater emphasis on the public meaning of constitutional texts (and not just the meaning of a limited set of drafters or ratifiers).

This effort has, so far, been unsuccessful and resulted in a continued failure to incorporate excluded voices from the interpretive method. As this Article has shown, in order to fully take on the exclusionary critique, originalists will need to consider that the "public" in key historical moments, such as Reconstruction, in fact consisted of a set of multiple publics, from dominant publics to various overlapping counterpublics, such as African-Americans (men and women) and women (black and white). This Counterpublic Originalism allows us to see better the range of meanings available at the time (such as Reconstruction) and to think more richly about what meanings are available to us today.

Inevitably, any exploration of Counterpublic Originalism will need to confront fundamental questions that are beyond the scope of this initial exploration. Counterpublics themselves contain competing discourses; for example, the mid-century black public sphere contained important debates between emigrationists and integrationists. Since one of the points of Counterpublic Originalism is the opportunity to air debates of central importance to those in dissenting or excluded communities, care must be taken to acknowledge such dynamics and identify themes and commonalities across those dynamics, and to admit when there are no commonalities.

Also, there are boundary problems in any attempt to identify and define counterpublics and counterpublic discourse. Does the antebellum black public sphere include enslaved blacks, and if so, how? In what ways does it include black women? White abolitionists? Moreover, one needs to be

224. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995) (discussing state action and the ways in which government directly and indirectly facilitates private forms of racial discrimination).

attentive to the competing and overlapping nature of counterspheres. For instance, the antebellum black public sphere paralleled not only the dominant white public sphere but also the feminist public sphere. And each sphere contained elements of the dominant exclusions—black men held gendered conceptions of citizenship, white women held racist ideas of suffrage and citizenship—and this makes the area of overlap between those spheres complex and contested. Each of these points will require careful work and elaboration in any project of Counterpublic Originalism, and may ultimately prove that the project is unworkable. Whether that pessimism is deserved, however, will depend on the working-out.

Despite its potential difficulties, Counterpublic Originalism offers a chance to engage in a more inclusive approach to constitutional interpretation and history. Whether such an approach ultimately sounds in a key familiar to originalism or rather takes on the tenor of traditionalism, historicism, or some related interpretive approach matters less than the opportunities it enables for recovering previously excluded voices.