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# Resolving the Original Sin of Bolling v. Sharpe

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# Resolving the Original Sin of *Bolling v. Sharpe*

*Gregory Dolin**

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## I. INTRODUCTION

On May 17, 1954 the Supreme Court handed down two decisions that for the first time categorically held that racial segregation in public schools was per se unlawful.[1] One of these decisions is known to nearly every American citizen from primary school up.[2] The other, though no less important, is merely an afterthought in the civics classes.[3] It is known mostly to lawyers, and

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[1] Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[2] *See* Ruth Bader Ginsburg, *Remarks at the Rededication Ceremony, University Of Illinois College Of Law*, 1995 U. ILL. L. REV. 11, 15–16 (1995) (noting that law students re-enacted the *Brown* argument "to teach junior high school students about that historic decision").

[3] *See, e.g.*, Phoebe Weaver Williams, *Reflections on Wisconsin's* Brown *Experience*, 89

even then, often simply by reference to the first one.[4] I am, of course, talking about *Brown v. Board of Education*[5] and *Bolling v. Sharpe*.[6] Ostensibly, both cases dealt with the same question—is racial segregation permissible in the context of public education?[7] Yet, the cases were not consolidated for oral argument.[8] Instead, the cases were argued on separate, though consecutive days.[9] The reason behind the lack of consolidation is that in *Brown* the entity accused of discrimination was a creature of the State of Kansas, while in *Bolling* the discrimination was practiced by the government of the District of Columbia—a federal enclave.[10] For those untrained in law, the distinction would seem to be of no consequence, yet lawyers know better. The Fourteenth Amendment's guarantee of "equal protection of the laws" applies, by its own terms only to the states and not to the federal government.[11] Whatever one thought at the time of the Equal Protection Clause's constraints on the behavior of the various states, one had to admit that, absent serious judicial and legal

MARQ. L. REV. 1, 1 (2005) (discussing how "[n]umerous academic, civic, legal, and media organizations designated the year 2004, the fiftieth anniversary of the Supreme Court's decision in *Brown v. Board of Education*," but not of *Bolling v. Sharpe*). The entire article refers to *Bolling* only once when stating that "[v]arious shorthand references to the Supreme Court's decision in *Brown* often obscure the reality that *Brown* consists of a collection of cases." *Id.* at 23.

[4] *See id.* at 23.

[5] 347 U.S. 483 (1954).

[6] 347 U.S. 497 (1954).

[7] *See* Brown v. Bd. of Educ., 345 U.S. 972 (1953) (order restoring cases to the docket and delineating the questions presented). Note that the questions presented were the same for *Brown* and for *Bolling*. *Id.* Indeed, in the order no difference between *Brown* and *Bolling* is cited and the Fifth Amendment is not even mentioned. *See also* Brown v. Board of Education, 344 U.S. 1, 2 (1953) ("[T]he nature of the issue posed in those appeals [*Brown* and consolidated cases] now before the Court involving the Fourteenth Amendment, and also the effect of any decision which it may render in those cases, are such that it would be well to consider, simultaneously, the constitutional issue posed in the case of Bolling v. Sharpe.").

[8] *See* Supreme Court of the United States, School Segregation Cases—Order of Argument (July 9, 1954), http://www.archives.gov/global-pages /larger-image.html?i=/education/lessons/brown-case-order/images /arguments-l.jpg&c=/education/lessons/brown-case -order/images/arguments.caption.html (noting separate arguments and different counsel for *Brown* and *Bolling*).

[9] Brown, 347 U.S. at 483 (stating the case was reargued December 8, 1953); Bolling, 347 U.S. at 497 (stating the case was reargued December 8–9, 1953).

[10] 347 U.S. at 498–99 ("The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.").

[11] U.S. CONST. amend. XIV, § 1 ("[N]or shall *any State* . . . deny to any person within its jurisdiction the equal protection of the laws.") (emphasis added).

gymnastics, the clause simply did not provide such constraints on the federal government.[12] The Supreme Court recognized as much in *Bolling*,[13] but ruled segregation illegal in the District of Columbia anyway.[14]

The *Bolling* decision is now universally recognized as reaching an unquestionably correct result as a policy and moral matter.[15] This recognition makes it all the harder for the adherents of originalism to defend their preferred approach to constitutional interpretation. Originalists are forced to concede that the Constitution, interpreted as originally understood, did not impose equal protection restraints on the federal government, and therefore *Bolling*, in imposing these norms where they were not meant to be, was wrongly decided.[16] Recognizing the political (and moral) problem with this approach, originalists have simply attempted to wave the problem away. Justice Scalia, for instance, said that he is willing to "stipulate that you can reach some results you like with the other [non-originalist] system. But that's not the test."[17] In other words, according to Justice Scalia,

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[12] *See* Detroit Bank v. United States, 317 U.S. 329, 337 (1943) ("Unlike the Fourteenth Amendment the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.").

[13] 347 U.S. at 498–99.

[14] *Id.* at 500 ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.").

[15] *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 83 (1990) (stating that a different result in *Bolling* "would be unthinkable, as a matter of morality and of politics."); JOHN HART ELY, DEMOCRACY AND DISTRUST 33 (1980) (stating that author "would have strained sorely to side with the Chief Justice [Earl Warren]," but criticizing the decision's rationale.); Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition*, 25 LOY. L.A. L. REV. 1159, 1162 n.14 (1992) ("As a matter of judicial statecraft, the imperative in *Bolling* was clear . . . ."); Michael J. Perry, Brown, Bolling, & *Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L. J. 53, 73 (1995) ("From the perspective of originalism, the Supreme Court made the right decision, it reached the correct result, in both *Brown v. Board of Education* and *Bolling v. Sharpe*."); Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 977 (2004) ("[T]he dominant approach has been to regard *Bolling* and reverse incorporation as justified by the force of sheer normative necessity.").

[16] *See* BORK, *supra* note 15 at 83–84; Randy Barnett & Cass Sunstein, *Constitution in Exile?*, LEGAL AFF., (May 4, 2005, 12:50 PM), http://legalaffairs.org/webexclusive/debateclub_cie0505.msp#Wednesday ("I do not have a fully worked-out opinion on this complex issue, but suppose that a commitment to originalism entails the reversal of *Bolling*." (comment of Randy Barnett)). *But see* Perry, *supra* note 15 (arguing that *Bolling* was correct in result, though incorrect in reasoning, from the originalist perspective).

[17] Adam Liptak, *From 19th-Century View, Desegregation Is a Test*, N.Y. TIMES, Nov. 10,

even if a faithful originalist approach results in permitting segregation, the approach itself remains sound. The problem is that, at least in the popular perception, "[a] theory of constitutional interpretation that cannot account for *Brown* [and *Bolling*] is suspect if not discredited."[18]

Some scholars, Robert Bork and Randy Barnett among them, have argued that although *Bolling* is indefensible as an originalist matter, this is not a real problem.[19] According to them, even if *Bolling* were overruled, no major problems would arise, simply because the federal government would be politically constrained from running segregated schools or otherwise discriminating on the basis of race.[20] This proposition is both dubious as a factual matter (or at the very least was so when *Bolling* was decided),[21] and is unsatisfactory as a political matter. While this approach may win adherents in the rarified intellectual circles of top law schools, the general public will be a much harder sell. The general public is simply unlikely to buy into a judicial theory that would permit the federal government to discriminate at will on the basis of race. The judicial confirmation process has become increasingly politicized,[22] and the general public's opinions on the role of the judiciary matter.[23] The public's support is needed if a theory of constitutional interpretation is to

2009, at A16 (quoting Justice Antonin Scalia's remarks at a debate with Justice Steven G. Breyer.)

[18] *Id.*

[19] *See supra* note 16 and accompanying text.

[20] *See supra* note 16 and accompanying text.

[21] *See infra* notes 141–151 and accompanying text.

[22] *See, e.g.*, Emery G. Lee III, The Federalist *in an Age of Faction: Rethinking* Federalist *No. 76 on the Senate's Role in the Judicial Confirmations Process*, 30 OHIO N.U. L. REV. 235, 266 (2004) ("The confirmations process for lower federal court judges has become increasingly politicized in recent years, and this trend will almost certainly continue given the importance of the federal judiciary in the political and policy battles of the two parties."); Arthur H. Rotstein, *Chief Justice Roberts Warns Against Politicized Confirmation Hearings*, HUFFINGTON POST (Feb. 5, 2009, 5:56 AM ), http://www.huffingtonpost.com/2009/02/05/chief-justice-roberts-war_n_164299.html.

[23] JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS 1 (2009) ("In the past, it was relatively rare for the mass public to play much of a role [in judicial confirmation battles]. Today, one of the crucial elements in confirmation strategies concerns how public opinion will be managed and manipulated."); Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 457 (2008) ("[S]haping public opinion and then persuading constituents to roar at their senators have become important elements of any judicial [confirmation] campaign." (quoting T.R. Goldman, *Lobby Groups Following Bork Playbook for Alito*, LEGAL TIMES, Dec. 13, 2005, *available at* http://www.alm.law.com /jsp/article.jsp?id=1134394504003&slreturn=20140304133013));

take hold not just at faculty workshops but in the courtrooms. If originalism is to be broadly accepted by the public without being undermined by the discussion of *Bolling* and *Brown*, one needs to come up with a plausible explanation of how the results (if not the rationale) in those two cases can be supported under an originalist approach to constitutional interpretation. This is the goal of this Article.

In this Article I will argue that *Bolling* is justifiable as an originalist matter if one properly interprets the Citizenship Clause of the Fourteenth Amendment. Properly understood, the clause is meant to protect not just a right to a passport or nationality, but a much broader right of equal participation in the civic life of the Nation. The term "citizen" was understood by the framers and ratifiers of the Fourteenth Amendment to encompass a wide scope of political rights, including a right to equality before the law. In Part II, I discuss the case itself and the Supreme Court's rationale for concluding that the Constitution mandated the same result in *Bolling* as it did in *Brown*. In Part III, I highlight the originalist criticism of Supreme Court's logic and methodology and will discuss how committed originalists have dealt with the issue thus far. In Part IV, I present my argument that the *Bolling* Court's legal acrobatics were unnecessary and that a more sound approach would have been to rely on the Citizenship Clause. I trace the history of that clause and the meaning of the word "citizen" as it was perceived by the framers of the Fourteenth Amendment. Part V is reserved for answering the objections to the argument presented in the preceding part. I will offer concluding observations in Part VI.

## II. THE ROAD TO *BOLLING* AND THE SUPREME COURT'S REASONING

### *A. The Legal Landscape*

*Bolling* and *Brown* were not the first cases where the Supreme Court has ruled against race-based classifications, and certainly not the first ones where it resolved the question one way or another. One of the first cases in which race-based classification was challenged was *Strauder v. West Virginia*,[24] heard merely twelve years after the adoption of the Fourteenth Amendment.[25] Strauder, a black man, challenged

[24] 100 U.S. 303 (1880).

[25] The Fourteenth Amendment was proposed on June 13, 1866 and ratified on July 9, 1868. THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED, H.R. Doc. No. 110–50, at 17 (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin

his murder conviction on the grounds that a West Virginia statute excluded non-whites from jury service.[26] The Court sided with the petitioner holding that West Virginia's statutory scheme deprived Mr. Strauder of "equal protection of the laws."[27] In 1886, the Court, in *Yik Wo v. Hopkins*,[28] held that a state violates the Fourteenth Amendment's guarantees if it enforces a facially neutral law in a racially discriminatory manner.[29] It was not until ten years later, a generation after the adoption of the Fourteenth Amendment, that the Court handed down *Plessy v. Ferguson*[30]—where it held that a state may promulgate laws that require races to be segregated. Even *Plessy*, however, was premised on the idea that the accommodations provided to each race would indeed be equal, though separate.[31] The "separate but equal" doctrine was then extended to the field of public education in the 1899 case of *Cumming v. Board of Education*.[32] This doctrine prevailed until *Brown*.[33] Notably, all of the seminal cases

/getdoc.cgi?dbname=110_cong_documents&docid=f:hd050.pdf. *Strauder* was heard on October 21, 1879 and decided on March 1, 1880. 100 U.S. at 303.

[26] *Strauder*, 100 U.S. at 304.

[27] *Id.* at 310 ("[T]he statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State . . . .").

[28] 118 U.S. 356 (1886).

[29] *Id.* at 373–74 ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

[30] 163 U.S. 537 (1896).

[31] *Id.* at 540 ("The first section of the statute enacts that all railway companies carrying passengers in their coaches in this state, shall provide *equal but separate* accommodations for the white, and colored races . . . ." (emphasis added) (internal quotations omitted)).

[32] 175 U.S. 528 (1899) (holding that uniform taxation for the purpose of maintaining segregated schools does not violate the Constitution). Georgia's Constitutional provision that was challenged in *Cumming* provided that there "be a thorough system of common schools for the education of children in the elementary branches of an English education only, *as nearly uniform as practicable* . . . . [B]ut separate schools shall be provided for the white and colored races." *Id.* at 543 (emphasis added) (internal quotation marks omitted).

[33] Although *Brown* was the first case that explicitly rejected the "separate but equal" doctrine, at least insofar as education was concerned, it was not, as often portrayed in the popular media, a bolt of lightning. The foundation for *Brown* began almost twenty years prior when the Supreme Court required that though a state may segregate the races, it may not deny minorities equal opportunities albeit in separate facilities. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938) ("It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether

involved challenges to *state* rather than federal laws and practices.[34] The Court did not get an opportunity to address the constitutional limits on racial classification by the federal government head-on until World War II. At that time, several challenges were brought against United States Executive Order 9066, which directed all persons of Japanese ancestry (irrespective of citizenship) to report to internment camps.[35] In the first case, *Hirabayashi v. United States*,[36] decided in 1943, the Court affirmed Mr. Hirabayashi's conviction for violating a military imposed curfew on persons of Japanese ancestry and for disregarding the order to report to authorities "to register for evacuation from the military area."[37] Hirabayashi was a natural-born American citizen[38] and contended that "Fourth, Fifth and Sixth Amendments [and] Article 4, Section 2, Clause 1 of the Constitution defeat the indictment."[39] The Supreme Court disagreed by first noting that "[t]he Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by

or not other negroes sought the same opportunity."). In 1950, the Court ruled that on the facts before them that the educational opportunities in the segregated facilities for graduate studies were not in fact equal and ordered the admission of black students to the white-only state graduate schools. McLaurin v. Oklahoma State Regents for Higher Ed., 339 U.S. 637, 642 (1950) ("We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. . . . Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races."); Sweatt v. Painter, 339 U.S. 629, 635 (1950) ("[P]etitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State.").

[34] The one notable exception was the 1898 case of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). There, a person born in the United States to Chinese immigrants challenged the decision of the San Francisco Collector of Customs to deny him readmission to the United States on the grounds that the Chinese Exclusion Act barred his entry. *Id.* at 649–50. The Court ultimately ruled for Wong, not because the Chinese Exclusion Act was contrary to any provision of the Constitution, but because Wong was born in the United States he was a citizen thereof, and thus not subject to the Act's strictures. *Id.* at 704–05 ("The fact . . . that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution: 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' . . . [A] child born in the United States . . . becomes at the time of his birth a citizen of the United States.").

[35] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942), *available at* http://www.ourdocuments.gov/doc.php?flash=false&doc=74&page=transcript.

[36] 320 U.S. 81 (1943).

[37] *Id.* at 84–85.

[38] United States v. Hirabayashi, 46 F. Supp. 657, 658 (W.D. Wash. 1942).

[39] *Id.* at 661.

Congress as amounts to a denial of due process . . . ."[40] At the same time, the Court declared that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[41] The two sentences, appearing next to each other, are somewhat incongruent. The first seems to permit the federal government to discriminate on any basis so long as it has a legitimate reason for doing so. The second sentence implies an almost categorical ban on such classifications (absent some very extraordinary circumstances). The Court, however, blithely ignored the tension between these two pronouncements and concluded that given the emergency and extraordinary circumstances of the war with Japan, the curfew and registration orders were proper.[42]

The Court followed up on *Hirabayashi* the next year when it decided a more famous case, *Korematsu v. United States*.[43] The facts were similar to *Hirabayashi* except that Fred Korematsu defied the evacuation order and not the curfew and registration orders.[44] Once again, the Supreme Court affirmed the conviction.[45] This time, though, the justices utilized rather novel language in their opinion. It opened with the admonition that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . It is to say that courts must subject them to the most rigid scrutiny."[46] No citations for this novel proposition (at least insofar as applied to the federal government) were offered. The Court opined that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions,"[47] but upheld the order nonetheless reasoning that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened

[40] *Hirabayashi*, 320 U.S. at 100.

[41] *Id.*

[42] *Id.* at 101 ("The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.").

[43] 323 U.S. 214 (1944).

[44] *Id.* at 215–16.

[45] *Id.* at 223–24.

[46] *Id.* at 216.

[47] *Id.* at 219–20.

danger."[48] Although the Court opened by emphasizing the impermissibility of racial distinctions absent some compelling reason, it closed by stating that excluding any "large groups of citizens from their homes," whether the exclusion is based on race or not, is highly suspect.[49] In other words, the Court's ultimate reasoning had little to do with race, and instead was grounded in the proposition that the government simply cannot act arbitrarily and irrationally with respect to any group of people.

Justice Murphy, in dissent, offered an even more novel idea. He contended that "[b]eing an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws *as guaranteed by the Fifth Amendment*."[50] He offered no citation for the proposition that the Fifth Amendment guarantees equal protection of the laws. Indeed, in *Hirabayashi*, he wrote in a concurring opinion that "the Fifth Amendment, unlike the Fourteenth, *contains no guarantee of equal protection of the laws*."[51] No explanation was given for this change in views.

The doctrine was thus fairly muddled. On one hand, States were allowed to segregate the races provided that the segregated facilities were indeed equal (though the latter requirement was honored only in breach).[52] On the other hand, the federal government was told that it was not bound by the equal protection strictures,[53] while at the same time was being warned that any racial classifications were "by their very nature odious to a free people,"[54] and would be "subject . . . to the most rigid scrutiny."[55] It is against this muddled legal background that *Bolling* was argued.

### *B. The Court's Opinion*

The Court issued a terse six paragraph opinion that avoided any discussion of the facts, save for the observation that "petitioners,

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[48] *Id.* at 220.

[49] *Korematsu*, 323 U.S. at 219–20 ("Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions."). Note the absence of any reference to race. *See also id.* at 223 ("Korematsu was not excluded from the Military Area because of hostility to him or his race.").

[50] *Id.* at 234–35 (Murphy, J., dissenting) (emphasis added).

[51] Hirabayashi v. United States, 320 U.S. 81, 112 (1943) (Murphy, J., concurring) (emphasis added).

[52] *See supra* notes 30–33 and accompanying text.

[53] *See supra* notes 12 & 51.

[54] *Hirabayashi*, 320 U.S. at 100.

[55] Korematsu v. United States, 323 U.S. 215, 216 (1944).

minors of the Negro race . . . . were refused admission to a public school attended by white children solely because of their race."[56] The reasoning was similarly brief. First, the Court recognized that "[t]he Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states."[57] Nonetheless, the Court concluded that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive,"[58] meaning that the two phrases may each independently proscribe the same conduct. The Court was quick to disavow the notion that the phrases are "always interchangeable," on the grounds that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' . . . ."[59] Nonetheless, the *Bolling* Court concluded its decision with the observation that "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the federal government."[60] Needless to say, the two phrases are highly inconsistent. If "[t]he 'equal protection of the laws' is a more explicit [and therefore presumably more exacting] safeguard of prohibited unfairness than 'due process of law,'"[61] then it should follow that the Constitution does in fact impose a greater burden on those entities (i.e., the states) to which the Equal Protection Clause applies, and a lesser burden on those entities (i.e., the federal government) to which the clause does not apply.[62] This contradiction did not seem to particularly bother the Court.

To be fair to the Court, politically there was no other option but to reach the decision the Court did in *Bolling*.[63] As it was, the Court's bombshell opinion in *Brown* was greeted with derision and resistance in the Southern states.[64] One could only imagine the reaction if the

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[56] *Bolling*, 347 U.S. at 498.

[57] *Id.* at 499.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 500.

[61] *Id.* at 499.

[62] In other words, if the duties are identical, then the guarantees of the Equal Protection Clause and the Due Process Clause must also be identical—contrary to the Court's assertion.

[63] *See* McConnell, *supra* note 15 at 1162 n.14 ("As a matter of judicial statecraft, the imperative in *Bolling* was clear . . . .").

[64] *See, e.g.*, BORK, *supra* note 15 at 77 ("Those of us of a certain age remember the intense, indeed hysterical, opposition that *Brown* aroused in parts of the South."); J.

Court had imposed what was viewed by the Southern politicians at the time as an odious requirement on their states[65] but freed the federal government from adhering to the same norms. However, the political realities should not obscure the Court's abdication of any intellectual effort to ground the decision in the actual text or history of the Constitution. One could attempt to justify *Bolling* by reference to one of its more unsung lines that "segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[66] Seemingly, this line expresses a rather uncontroversial idea (either then or now) that the government (state or federal) is prohibited from behaving in an arbitrary and capricious fashion. The idea of striking down government regulations that could not be justified as "reasonably related to any proper governmental objective"—the rational basis review—dates at least to 1938 and the Court's decision in *United States v. Carolene Products Co.*,[67] and perhaps as far back as the 1819 case of *McCulloch v. Maryland*.[68] If the *Bolling* Court were simply saying that racial segregation is not rational governance, the decision would still have been quite noteworthy and groundbreaking (after all, the D.C. public schools had been segregated for over 100 years by the time *Bolling* was decided),[69] but at the very least the opinion would not have strayed far from either precedent or the text and understanding of the Constitution.

There are two problems with viewing *Bolling* in the manner just

HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 61–127 (1979) (discussing the "massive resistance" to *Brown*); Michael J. Klarman, Brown *at 50*, 90 VA. L. REV. 1613, 1625 (2004) (noting that Southern politicians' "response to *Brown* involved a resort to extremism and highly inflammatory language").

[65] *See* 102 Cong. Rec. 4459–61 (1956).

[66] *Bolling*, 347 U.S. at 500.

[67] 304 U.S. 144, 152 (1938) ("[N]o pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.").

[68] 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[69] *See infra* note 114 and accompanying text (noting that the first statute providing for schools for colored children was passed in 1862).

described. First, it is inconsistent with the rest of the opinion. In the paragraph immediately preceding the allusion to rational basis review, the Court stated that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[70] The reference to "particular care," with the citation to *Korematsu v. United States*, is an invocation of strict scrutiny and not of rational basis review.[71] Second, this is simply not how *Bolling* came to be viewed, neither by the justices who handed down the original decision nor by their successors. Rather, *Bolling* was, and still is, viewed as standing for the proposition that the Due Process Clause of the Fifth Amendment requires the same level of scrutiny for any federal race-based classifications as the Equal Protection Clause of the Fourteenth Amendment for state race-based classifications.[72] In other words, *Bolling* came to mean that the Fifth Amendment has, its actual text notwithstanding, an equal protection component.[73] Indeed, the Solicitor General, representing the United States as *amicus curiae* in *Bolling*, did not dispute this proposition.[74] And so, an atextual and ahistoric approach carried the day and opened the door for scathing criticism of the opinion as doctrinally unsound, even if morally, politically, and policy-wise correct.[75]

## III. THE ORIGINALIST CRITIQUE AND INITIAL RESPONSE

There are two general types of critique leveled at *Bolling*. The first one (hereinafter the "broad critique") essentially argues that as

[70] *Bolling*, 347 U.S. at 499. The Court's assertion that "classifications based solely upon race . . . are contrary to our traditions," was also dubious as a factual matter. *Id.* After all, D.C. public schools had been segregated for over 100 years, and the Court itself gave its imprimatur to racial segregation in *Plessy v. Ferguson*. That is not to say that these traditions were in any way morally or legally just or justifiable. However, to suggest that segregation was contrary to American traditions as they existed in 1954 is to deny (the very sordid) history.

[71] *See* Korematsu v. United States, 323 U.S. 214, 216 (holding that racial classifications are subject "to the most rigid scrutiny," and not mere rational basis review).

[72] *See infra* note 233 and accompanying text.

[73] *See infra* note 233 and accompanying text.

[74] *See* Peter J. Rubin, *Taking its Proper Place in the Constitutional Canon:* Bolling v. Sharpe*,* Korematsu*, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1894–95 (2006) (describing the *amicus* brief of the United States and stating that "the federal government did not argue that the Equal Protection Clause was inapplicable to federal governmental action or that the measure of constitutionality under the Due Process Clause differed from that under the Equal Protection Clause").

[75] *See supra* notes 16–20 and accompanying text.

an originalist matter, school desegregation decisions (both *Brown* and *Bolling*) were wrong.[76] The second one argues that while *Brown* can be justified on originalist grounds, *Bolling* cannot.[77] I will discuss the basic premise of the two critiques below, but will primarily focus on the latter for two reasons. First, others have engaged the broader critique, and second, the goal of the present Article is not to argue the relative merits of school desegregation cases (from the originalist perspective) but to present the argument that the Constitution, as originally understood, prohibits the federal government from discrimination on the basis of race. The reason I focus on the *Bolling* case is not because it decided the then-controversial issue of school segregation, but rather because it was the first case that explicitly held that though the Equal Protection Clause is textually inapplicable to the federal government, the Due Process Clause of the Fifth Amendment imposes identical requirements. With these caveats, I now turn to the originalist critique of *Bolling*.

### *A. The Broad Critique of Desegregation Cases*

The basic premise of the broad critique is fairly simple. The argument centers on the fact that the Congress that enacted the Fourteenth Amendment intended to keep schools segregated, and therefore, did not intend for "equal protection of the laws" to mean racial integration. Several facts are cited for this proposition. One of the most often cited is the fact that the Chairman of the House Judiciary Committee made the following statement in his defense of the Civil Rights Act of 1866:

> What do [the] terms ["civil rights and immunities"] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed . . . . Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools.[78]

Additionally, Representative Bingham, a chief proponent of the

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[76] *See, e.g.*, Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1915 (1995) (arguing that originalism is inconsistent with the result in *Brown*); Earl M. Maltz, *A Dissenting Opinion to Brown*, 20 S. ILL. U. L.J. 93, 93 (1995) (arguing that Brown conflicts with the original understanding and is therefore wrongly decided); *see also* LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958 55 (1958) ("I have never been able to understand on what basis [*Brown*] does or can rest except as a coup de main.").

[77] *See* BORK, *supra* note 15, at 83–84; ELY, *supra* note 15, at 32–33.

[78] CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson).

Civil Rights Act, actually fought for the deletion of the legislative language that required "no discrimination."[79] The fact that Congress permitted segregation in D.C. schools since 1862,[80] that is, since before the adoption of the Fourteenth Amendment, and did not believe it necessary to withdraw its approval for this arrangement post-1868, is also cited as proof that Congress did not view the Equal Protection Clause to require racial integration.[81] The prevalence of racial segregation in state schools (in both Northern and Southern states) is pointed to as additional evidence that segregation is fully consistent with the original understanding of the Fourteenth Amendment.[82] All of these considerations led Alexander Bickel, then a law clerk to Justice Frankfurter, to state in a memorandum to the Justice, "it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting."[83]

With this seemingly impressive array of evidence, it is easy to argue that originalism cannot be a pathway to judicially imposed racial desegregation, and that therefore it is not an acceptable interpretive methodology.[84] Yet, at closer look, the history is not all that one-sided,[85] nor is it ultimately determinative of the original

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[79] CONG. GLOBE, 39th Cong., 1st. Sess. 1290–91 (1866).

[80] *See* ch. 83, 12 Stat. 407 (1862) (providing for schools for colored children).

[81] For an overview of history of Congressional legislation dealing with D.C. public schools see Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950). *But see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 977–80 (1995) (arguing that Congress did not affirmatively create or support segregation in the District of Columbia, other than appropriating money for already-established segregated schools, and that little can be gleaned from such practice).

[82] McConnell, *supra* note 81, at 955–56.

[83] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 657 (2004); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

[84] To be sure, some proponents of originalism accept the proposition that *Brown* was wrongly decided as an originalist matter, and are willing to live with that result on the grounds that it is "the price we pay for having a constitution with determinate meaning that may not always coincide with our moral convictions . . . ." Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457, 457 (1996); *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 117–33, 241–45 (1977) (arguing that original understanding of the Fourteenth Amendment does not prohibit school segregation); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1463 n.295 (1992) ("I do not think that my theory of the 14th Amendment stands or falls with this question. Man is not the measure of all things, as Socrates replied to the Sophists, and neither is [*Brown*]. An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*.").

[85] *See generally* McConnell, *supra* note 81.

meaning of the Fourteenth Amendment.

There are statements from the sponsors of the Civil Rights Act of 1866,[86] the Civil Rights Act of 1875 (the "1875 Act"),[87] the Freedman's Bureau Acts,[88] and of course, the Fourteenth Amendment itself that paint a quite different picture of what the meaning the words of the Amendment had for its contemporaries. For instance, Representative Henry Raymond of New York stated that the Fourteenth Amendment "secures an equality of rights among all the citizens of the United States . . . ."[89] Representative William Windom of Minnesota stated in support of the Civil Rights Act of 1866 that it provides for "the *absolute equality* of rights of the whole people, high and low, rich and poor, white and black."[90] Senator Lyman Trumbull argued, in support of the same Act that it "declares that all persons in the United States shall be entitled to the *same* civil rights."[91] Senator Henry Smith Lane of Indiana spoke in favor of the 1866 Act and contended that the newly freed slaves are now "entitled to *all* the privileges and immunities of other free citizens of the United States."[92] Though these speakers did not explicitly state that equality extended to

[86] Ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (2011)).

[87] Ch. 114, 18 Stat. 335 (1875). While it is true that the Civil Rights Act of 1875, postdated the Fourteenth Amendment, and was passed by a different Congress, the 43rd Congress would seem to have been *more*, not less, hostile to equal rights for blacks. The 39th Congress had 39 Republican Senators (out of 54 total) and 136 Republican Representatives (out of 193 total). In contrast, the 43rd Congress had 47 Republican Senators (out of 74 total) and 199 Republican Representatives (out of 292 total). While in both Congresses Republicans maintained overwhelming majorities, in terms of percentage of their seats, their numbers slipped by the time the 43rd Congress was seated. Furthermore, the elections of 1874, which occurred several months before the lame-duck 43rd Congress passed the Act, "were a disaster for the Republican Party, which lost eighty-nine seats in the House." McConnell, *supra* note 81, at 1080.

[88] Ch. 90, 13 Stat. 507 (1865); ch. 200, 14 Stat. 176 (1866). Other legislative enactments that sought to secure civil rights for the newly emancipated blacks included the Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867), the Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870), and the Enforcement Act of 1871, ch. 99, 16 Stat. 433 (1871).

[89] CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866). Raymond "favored the policy of the Civil Rights Bill because he 'was in favor of securing an equality of rights to all citizens of the United States,' but voted to sustain the President's veto, because he doubted Congress' power to pass it. Raymond 'very cheerfully' supported the 14th Amendment because it would resolve those doubts." Harrison, *supra* note 84, at 1412 n.98 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866)).

[90] CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (emphasis added).

[91] *Id.* at 599 (emphasis added). Note that the Senator did not merely state that the rights are to be equal, but *same*.

[92] *Id.* at 602 (emphasis added).

schools—and may, for all we know, been privately of the view that this promise of equality did *not* cover education institutions—, their statements indicate the original public meaning of the Fourteenth Amendment's language.

The supporters of the 1875 Act were even more explicit in what they expected the Act to accomplish. First the Act itself spoke of the need to "recognize the equality of all men before the law,"[93] and accordingly directed that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement . . . ."[94] As Michael McConnell shows, many of the proponents of the 1875 Act were explicitly in favor of school desegregation, quite often for precisely the same reasons that Chief Justice Warren advanced in *Brown*.[95] For instance, Senator Frederick Frelinghuysen (quite presciently) argued that "'schools [for the colored children] will be inferior to those for the whites' because the whites are politically dominant and will favor their own."[96] Senator George "Edmunds presented extensive evidence of the actual inequality of the schools . . . ."[97] Representative Thomas Williams contended that segregation "teach[es] our little boys that they are too good to sit with these men's children in the public school-room, thereby nurturing a prejudice they never knew, and preparing these classes for mutual hatred hereafter . . . ."[98] Senator Charles Sumner, the chief architect of what would become the 1875 Act, retorted to the claim that separate can be equal: "Now let me ask the Senator whether in this world the personal respect that one receives is not an element of comfort? If a person is treated with indignity, can he be

[93] Ch. 114, 18 Stat. 335 (1875).

[94] *Id.* at 336.

[95] *Compare* McConnell, *supra* note 81, at 1012–13 ("Proponents of the bill denied that segregated facilities were or could be equal, in light of the message of inferiority conveyed by the arrangement.") and McConnell, *supra* note 84, at 462 ("Sumner [the sponsor of what would become the Civil Rights Act of 1875] called segregation an 'indignity, an insult, and a wrong.' There were endless speeches by supporters of the Act—not confined to radical Republicans—declaring that the only argument for segregation was 'prejudice,' and that segregation was 'caste' legislation.") (footnotes omitted) *with Brown*, 347 U.S. at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community . . .").

[96] McConnell, *supra* note 81, at 1013 (quoting 2 CONG. REC. 3452 (1874)).

[97] *Id.* at 1013.

[98] 3 CONG. REC. 1002 (1875).

comfortable?"[99]

The debate on the Fourteenth Amendment itself is not particularly illuminating, perhaps in part because the Amendment was viewed as simply constitutionalizing the 1866 Civil Rights Act.[100] For this reason, those who argue that the framers of the Amendment did not intend to abolish segregation point to the statements made ostensibly in defense of the 1866 Act that foreswear any such outcome.[101] Aside from the inconsistency of the statements between various proponents, there is another problem with this approach. Specifically, Congressman Wilson, who was the Chair of the House Judiciary Committee and a chief sponsor of the 1866 Act, and whose words[102] are often pointed to as proof that neither the Act nor, by

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[99] CONG. GLOBE, 42d Cong., 2d Sess. 243 (1872). Frelinghuysen echoed this statement, calling segregation "'an enactment of personal degradation and a form of 'legalized disability or inferiority . . . .'"). McConnell, *supra* note 81, at 1013 (quoting 2 CONG. REC. 3452 (1874)).

[100] Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 FORDHAM L. REV. 485, 495–96 (1991) ("Because the fourteenth amendment was intended to constitutionalize the 1866 Civil Rights Act, analyzing the aims and focus of the statute substantially reveals the original understanding of the amendment.") (footnote omitted); McConnell, *supra* note 81, at 960 ("[T]he principal purpose of the Fourteenth Amendment was to constitutionalize the 1866 Act, and speakers on both sides often spoke as if the substance of the two measures were identical."). Note that McConnell points out that "speakers on *both sides*" viewed the substance of the Fourteenth Amendment and the 1866 Civil Rights Act as identical. *Id.* (emphasis added). This suggests that not only was it the original intent of the Amendment's framers to constitutionalize the Act, but that that was the public understanding of the Amendment's purpose and scope.

[101] *See, e.g.*, Raoul Berger, *Ronald Dworkin's The Moral Reading of the Constitution: A Critique*, 72 IND. L.J. 1099, 1102–03 (1997) ("[T]here is the assurance by James Wilson, chairman of the House Judiciary Committee, that the Civil Rights Bill of 1866, which was inextricably linked with the Fourteenth Amendment, did not require that all children shall attend the same schools.") (footnotes omitted) (internal quotation marks omitted); Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 951 (1998) ("There was a widespread understanding that Section 1 [of the Fourteenth Amendment] simply constitutionalized the Civil Rights Act of 1866, and the legislative history of that Act suggests fairly clearly that Congress understood it to permit segregation."); Kevin F. Ryan, *Remembering and Forgetting Brown*, 30 VT. B.J. 5, 8 ("Indeed, the sponsors of the Civil Rights Act of 1866, which the fourteenth amendment was intended to constitutionalize, specifically disclaimed any intent to interfere with segregated education."); Cass R. Sunstein, *Black On Brown*, 90 VA. L. REV. 1649, 1658 (2004) ("The Fourteenth Amendment was meant to constitutionalize the Civil Rights Act of 1866, and the sponsors of that Act specifically disclaimed any intention to interfere with segregated education.").

[102] Representative Wilson claimed that the Act did not mean that black children "shall attend the same schools" as white children. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

implication, the Fourteenth Amendment prohibited segregation,[103] also opined that exclusion from jury service on account of race would not run afoul of the legislation (and again, by implication, of the Fourteenth Amendment).[104] But as I discussed *supra*, such a view was soundly rejected by the Supreme Court in *Strauder*. The *Strauder* Court was only a dozen years removed from the adoption of the Fourteenth Amendment, and thus was quite familiar with the climate surrounding its adoption. It held that:

> This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy . . . . At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected . . . . *The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied*, and by [the Fourteenth Amendment] such laws were forbidden. . . .
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> If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers . . . . What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? *The words of the amendment*, it is true, are prohibitory, but

[103] *See* Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 633 (1997) ("A Congress which refused to abolish segregation in the District of Columbia was altogether unlikely to compel the States to outlaw it. That was confirmed by the assurance of James Wilson that the Civil Rights Act of 1866 did not require that all children 'shall attend the same schools.'"); Berger, *supra* note 101, at 1102–03.

[104] CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

> they *contain a necessary implication of* a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—*exemption from legal discriminations, implying inferiority in civil society*, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[105]

This passage from *Strauder* undermines Chairman Wilson's claim on both the specific point about the jury service, and on the broader point that the Amendment was not meant to prohibit legislation that imposed special hardships on blacks as a class. And if Congressman Wilson was wrong about the jury service implication of the Amendment, his musings on the Amendment's effect on segregated schooling should, at the very least, be suspect.

In short, the views of the Fourteenth Amendment's framers vis-à-vis school segregation were far from uniform. Indeed, even John W. Davis, arguing (on behalf of South Carolina) in the companion case to *Brown* (and having every reason to stress 39th Congress' hostility to integration) told the Supreme Court that "perhaps there has never been a Congress in which the debates furnished less real pablum on which history might feed."[106] Given this contradictory history, the argument that the outcome in *Brown* cannot be squared with the original understanding of the Constitution is not nearly as forceful as it is often portrayed.

Ultimately, I do not intend to make my stand on the specific views of particular legislators. The individual views of the legislators cannot and do not change the public meaning of the words that were enacted into law. Even if the sponsors of the Fourteenth Amendment and the 1866 Act privately hoped to maintain all-white schools, it does not follow that the meaning of "citizenship" at the time of the Clause's enactment permitted such an arrangement.

Two additional observations should be made prior to proceeding to the next Part. First, the adherents to the broad critique of the desegregation cases, in addition to citing various statements in the Congressional record, point to the segregation in D.C. public schools as an almost incontrovertible proof that the

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[105] Strauder v. West Virginia, 100 U.S. 303, 306–08 (1879) (emphasis added) (internal quotation marks omitted).

[106] Argument of John W. Davis, Esq., on behalf of Appellees R.W. Elliott et al., Brown v. Board of Education, *in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 481 (Philip B. Kurland & Gerhard Casper eds., 1975).

framers of the Fourteenth Amendment did not mean to outlaw the practice. The critics argue that the people who crafted the Fourteenth Amendment did not view segregation as unconstitutional because the framers of the Amendment also provided for segregated schools.[107] However, there is less to this historical practice than meets the eye. The mere fact that segregation was practiced does not necessarily mean that it was consistent with the Fourteenth Amendment even as originally understood. It would not have been the first time in the history of the Republic that the framers of a very liberal (and remedial) Constitutional provision themselves behaved in very illiberal ways. Consider the Alien and Sedition Acts,[108] passed by the Fifth Congress and signed into law by John Adams.[109] The Acts were approved by many of the same congressmen that enacted the First Amendment.[110] Nonetheless, this fact did not save the Acts from being viewed as unconstitutional from the moment of enactment[111] to

[107] *See, e.g.*, Carr v. Corning, 182 F.2d 14, 17 (D.C. Cir. 1950) ("[T]he fact that . . . Congress . . . enacted legislation which specifically provided for separation of the races in the schools of the District of Columbia, conclusively support our view" that the Fourteenth Amendment does not prohibit segregation); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2155 n.433 (1996) ("It is noteworthy that one week after Congress enacted the Fourteenth Amendment, it adopted legislation providing for segregated schools in the District of Columbia. If the Supreme Court had applied in *Brown* the same sort of rigid originalist inquiry it later applied in *Marsh*, segregated schools could still be a staple of American life.") (citation omitted); Anthony Lewis, *Why the Courts*, 22 CARDOZO L. REV. 133, 136 (2000) ("When the Fourteenth Amendment was adopted in 1868, schools were segregated in the District of Columbia, a federal enclave under the jurisdiction of Congress. . . . So it is impossible to say that the Framers of the Equal Protection Clause intended it to outlaw segregation.").

[108] Chs. 58, 66, 74, 1 Stat. 570, 577, 596 (1798).

[109] Arthur R. Landever, *Suppressed History or Distorted History? A Review of Rosenfeld's* The American Aurora, 45 CLEV. ST. L. REV. 259, 260 (1997) (noting that Adams signed and enforced the Acts).

[110] *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 493 (1983) ("[T]he same generation that wrote the first amendment also wrote the Alien and Sedition Acts of 1798."); Kenneth D. Katkin, *The Second Amendment Today Historical & Contemporary Perspectives on the Constitutionality of Firearms Regulation*, 29 N. KY. L. REV. 643, 646 (2002) ("[J]ust seven years after drafting the First Amendment, the same generation of lawmakers also enacted the Alien and Sedition Acts, which made it a federal felony to criticize government policy.").

[111] Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1591 (2000) ("Thomas Jefferson, who believed that the Alien and Sedition Acts were unconstitutional, not only refused to enforce the laws but pardoned those already convicted under their authority."); Michael Scaperlanda, *Who is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587, 1602 (1997) ("Kentucky and Virginia, Jefferson and Madison viewed the Alien & Sedition Acts as unconstitutional on numerous grounds.").

the present day.[112] The fact that the people who wrote a given law engaged in, or condoned some behavior, does not ipso facto mean that the behavior was at any time legal.[113]

Lastly, in many ways the practice of segregation in the 1860s is not all that informative for those who had to judge the legality of that practice ninety years later. When the Reconstruction Congress first addressed the issue of public education for blacks in the District of Columbia it passed a rather curious statute.[114] Section 1 of the statute required the municipal authorities of the District to appropriate funds "for the purpose of initiating a system of primary schools for the education of colored children . . . ."[115] Read in isolation, this section suggests that Congress meant to establish segregated schools because it did not wish for black children to mix with white children. Yet, Section 4 of the very same statute reads:

> [A]ll persons of color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown, shall be subject and amenable to the same laws and ordinances to which free white persons are or may be subject or amenable; that they shall be tried for any offences against the laws in the same manner as free white persons are or may be tried for the same offences; and that upon being legally convicted of any crime or offence against any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offence; and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.[116]

Reading this section, it becomes clear that Congress indeed intended to provide equal legal treatment for all people irrespective of skin color. How, then, can such two contradictory sections be reconciled? As it turns out there is not much mystery. The Reconstruction Congress was concerned with providing opportunities for blacks where such opportunities had been previously denied

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[112] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) ("Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards.").

[113] I do not mean to say that historical practice should be accorded no weight in determining what was understood by legislative enactments contemporaneous with the practice in question. What I do argue is that the mere existence of the practice is not determinative.

[114] The Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392 (repealed 1976).

[115] *Id.* at § 1.

[116] *Id.* at § 4.

them. To that end, Congress passed bills that provided economic and educational opportunities exclusively to blacks.[117] The goal was not to discriminate against blacks, but to provide them with opportunities to become citizens on equal footing with the "free white persons." This necessitated special schools in the District. In other words, the "system of primary schools for the education of colored children" only was not created out of malice, but out of desire to help improve the lot of freedmen while recognizing that at the time they simply were not prepared (due to the recent and long-standing oppression of slavery) to compete in schooling or economic life on a nominally even playing field.[118]

However, the reasons for segregation markedly changed with the enactment of the ever more oppressive Jim Crow laws. By 1950s, segregation was "discrimination[] implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and . . . reducing [blacks] to the condition of a subject race."[119] In other words, by the 1950s, segregation was precisely the type of activity prohibited by the Court's decision in *Strauder*, and a type of activity that that Court viewed as inconsistent with the original understanding of the Fourteenth Amendment. It is important to point out that this observation is not a defense of *Brown* on the basis of something like the "evolving standards of decency" standard used in Eighth Amendment jurisprudence,[120] for such a defense is not originalist at all.[121] Rather, it is an argument that to the extent that the framers of the Fourteenth Amendment approved of segregation, they did so in large parts on the grounds that it was benign and perhaps beneficial *differentiation* based on the recognition that the recently freed slaves needed a separate set of measures in order to

[117] *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–83 (describing special assistance Congress provided to freed blacks). Indeed, the Freedmen Bureau's education programs often excluded white children by design. While the Freedmen Bureau Act provided for educational opportunities for blacks, "[t]he legislation before Congress . . . made no provision for educating white children, other than refugees, even on an integrated basis." *Id.* at 766.

[118] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. at 631–32 (1866) (statement of Rep. Moulton) ("The very object of the bill is to break down the discrimination between whites and blacks. . . . Therefore I repeat that the true object of this bill is the amelioration of the condition of the colored people.").

[119] Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

[120] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[121] *See* Roper v. Simmons, 543 U.S. 551, 607–08 (2005) (Scalia, J., dissenting) (contrasting original understanding with "evolving standards of decency").

ultimately integrate them into the fabric of American civic life.[122] When segregation became malignant *discrimination*, it fell within the zone proscribed by the Fourteenth Amendment.[123]

There have been other originalist theories advanced in defense of *Brown* from the broad critique. In *The Tempting of America*, Robert Bork opined that *Brown* is not problematic from the originalist perspective because it freed the courts from an endless factual inquiry of whether a given separate school for blacks was truly "equal" to a school for whites.[124] In other words, according to Bork, while segregation is constitutionally permissible in theory, it is only permissible if the facilities are indeed equal.[125] The problem from Bork's perspective is that in practice the facilities were never equal, and that the fact-intensive inquiries into the matter uniformly led to the same result.[126] Therefore, Bork argues, it was reasonable for the Court to promulgate a blanket rule rather than engage in ultimately pointless factual inquiries.[127] Alternatively, Justice Scalia (when he is

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[122] While this may have been patronizing and quite possibly racist attitude it is quite different from discriminatory laws "implying inferiority in civil society," which is what Jim Crow laws were. For further discussion *see infra* notes 252–254 and accompanying text.

[123] This argument is consistent with the originalist views on affirmative action. Though most originalists reject the practice as inconsistent with the Constitution, *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 346–95 (2003) (dissents by Rehnquist, C.J., Scalia, J., and Thomas, J.), even they find it permissible if it is meant to remedy past discrimination. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 582 (2009) ("[C]ertain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional. . . ."); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) ("[O]ur prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination."). The majority decisions in *Ricci* and *Parents Involved* were joined by Justices Thomas and Scalia—both of whom dissented in part in *Grutter*—and who are the leading judicial proponents of originalism. *Ricci*, 557 U.S. at 594, 596; *Parents Involved*, 551 U.S. at 708; *Grutter*, 539 U.S. at 346, 349.

[124] *See* BORK, *supra* note 15, at 82–83.

[125] *See* BORK, *supra* note 15, at 82.

[126] *Id.*

[127] *Id.* In some ways this is similar to a per se rule in antitrust analysis. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*. *Per se* treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.") (internal citations omitted) (internal quotation marks omitted). Similarly, the Court had enough experience with segregated schools to "to predict with confidence" that fact-intensive analysis would condemn them. *Id.* It was so because segregated schools had "predictable and pernicious . . . effect[s]" and therefore had to be held "unlawful *per se*." *Id.*

not dismissing *Brown* with a "so what"[128]) suggests that it is defensible on the grounds advanced by the first Justice Harlan in the *Plessy* dissent.[129] In short, *Brown* has its defenders among originalists and could be provided with a plausible originalist terra firma. What originalists have not come up with is a convincing answer to the more narrow criticism of *Bolling*.[130]

*B. The Narrow Critique of* Bolling

In addition to the general attack, along the lines just described, originalists have another avenue to question the soundness of *Bolling*. The argument is that even assuming the Equal Protection Clause forbids segregation as an originalist matter, the Federal Government is simply not subject to its strictures.[131] The argument certainly has textual appeal as the Clause reads: "nor shall *any State* . . . deny to any person within its jurisdiction the equal protection of the laws."[132] The text of the Clause specifies a limitation on state power, rather than a grant of a right to every person. In contrast, the Fifth Amendment is a grant of right to every person and reads "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[133] The fact that the Equal Protection Clause does not apply to the federal government is fatal, from some originalists' (Robert Bork premier among them) perspective, to *Bolling*'s legitimacy.[134] Bork levels his attack on *Bolling* in the passage below:

> Had the Court been guided by the Constitution, it would have had to rule that it had no power to strike down the District's laws. Instead, it seized upon the due process clause of the fifth amendment, which does apply to the federal government, and announced that this due process clause included the same equal protection of the laws concept as the equal protection clause of the fourteenth

[128] *See* Liptak, *supra* note 17, at A16 and accompanying text.

[129] Liptak, *supra* note 17, at A16; *see also Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J. dissenting).

[130] Some have tried to justify it on the basis of the Ninth Amendment—an argument I do not find entirely convincing. *See, e.g.*, Perry, *supra* note 15, at 70 ("The result in *Bolling* can be defended in originalist terms, on the basis of the Ninth Amendment . . . ."); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1039 (1993) ("[T]he Ninth Amendment . . . is a more likely source for the right to be free from discrimination by federal school authorities than the Fifth Amendment's Due Process Clause.").

[131] *See supra* notes 12–13 and accompanying text.

[132] U.S. CONST. amend. XIV, § 1 (emphasis added).

[133] U.S. CONST. amend. V.

[134] *See supra* note 16 and accompanying text.

> amendment. This rested on no precedent or history. In fact, history compels the opposite conclusion. The framers of the fourteenth amendment adopted the due process clause of the fifth amendment but thought it necessary to add the equal protection clause, obviously understanding that due process, the requirement of fair procedures, did not include the requirement of equal protection in the substance of state laws.
>
> *Bolling*, then, was a clear rewriting of the Constitution by the Warren Court. *Bolling*, however much one likes the result, was a substantive due process decision in the same vein as *Dred Scott* and *Lochner*. The only justification offered in the opinion was that it would be unthinkable that the states should be forbidden to segregate and the federal government allowed to. Yes, it would be unthinkable, as a matter of morality and of politics. Most certainly, Congress would not and could not have permitted that ugly anomaly to persist, and would have had to repeal the District's segregation statutes. But there is no way to justify the Warren Court's revision of the Constitution to accomplish its reforms. This was not a revision for that case only, as some lawless decisions are. Lawyers and judges now regularly attack and scrutinize federal legislation under the Court-invented "equal protection component of the due process clause."[135]

John Hart Ely (who himself was hardly an originalist)[136] in his book *Democracy and Distrust* echoes Bork's criticism.[137] Ely calls *Bolling*'s holding "that the Due Process Clause of the Fifth Amendment incorporates the Equal Protection Clause of the Fourteenth Amendment. . . . gibberish both syntactically and historically . . . ."[138] Ely also agrees with Bork that there is nothing "unthinkable" (legally speaking) about the Constitution imposing more severe constraints on several states than on the national government.[139] Ely suggests that "the members of the Reconstruction Congress might well have trusted themselves and their successors in a way they didn't trust the existing and future legislatures of Southern

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[135] BORK, *supra* note 15 at 83–84.

[136] For Ely's take on proper mode of constitutional interpretation see generally ELY, *supra* note 15.

[137] *See* ELY, *supra* note 15, at 32–33.

[138] ELY, *supra* note 15, at 32.

[139] ELY, *supra* note 15, at 33.

states."[140] Ely is less sanguine than Bork or Hans Linde[141] about the prospect of Congress repealing D.C.'s segregation laws in the face of a split decision in *Brown* and *Bolling*.[142]

I am skeptical of Bork's certitude that Congress would have rushed to abolish segregation in D.C. schools even if the Supreme Court had not ordered it to do so. One needs just to consider the leadership of the Senate and its various committees at the time of *Brown* and the reaction the decision elicited. The signers of the 1956 Southern Manifesto[143]—a declaration which supported defying the Supreme Court's decision—included Sen. Harry F. Byrd, Sr. of Virginia (Chairman of the Finance Committee),[144] Sen. Richard B. Russell, Jr. and Walter F. George, both of Georgia (Chairman of the Armed Services Committee[145] and President pro tempore of the Senate respectively),[146] John L. McClellan of Arkansas (Chairman of the Government Operations Committee—the committee with jurisdiction over the D.C. matters),[147] and James O. Eastland of Mississippi (Chairman of the Judiciary Committee).[148] With the Old Bulls of the Senate being arrayed against integration, it is unlikely that Congress would have mustered enough votes to repeal (over a likely filibuster)[149] D.C.'s integration statutes at least in the near-

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[140] ELY, *supra* note 15, at 33.

[141] Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L. J. 227, 234 (1972) ("A President who had nothing to say about *Brown* could not well have remained silent about the federal District. With serious congressional work on civil rights legislation having been foreclosed for years only by Southern filibusters, the ultimate outcome could not have been seriously in doubt.").

[142] ELY, *supra* note 15, at 33.

[143] 102 Cong. Rec. 4459–61 (1956).

[144] *Byrd, Harry Flood*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001208 (last visited Apr. 19, 2010).

[145] *Russell, Richard Brevard, Jr.*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000536 (last visited Apr. 5, 2014).

[146] *George, Walter Franklin*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000131 (last visited Apr. 5, 2014).

[147] *McClellan, John Little*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000332 (last visited Apr. 5, 2014). For the jurisdiction of the Committee (now named Committee on Government Affairs) see Rule XXV(k)(1), *Rules of the U.S. Senate, Standing Committee*, U.S. SENATE COMMITTEE ON RULES AND ADMIN., http://rules.senate.gov/public/index.cfm?p=RuleXXV (last visited Apr. 5, 2014).

[148] *Eastland, James Oliver*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=E000018 (last visited Apr. 5, 2014). For a full list of signers see 102 Cong. Rec. 4460–61.

[149] Although prior to the 1954 elections Democrats were the Senate's minority

term.[150] As Professor LeRoy observed, "[c]ongress . . . was the last branch to do something to end segregation . . . . Throughout this pivotal decade, Congress was manifestly hostile to the concept of desegregation."[151] There is little reason to believe that a Congress so hostile to desegregation generally would be moved to abolish segregation in the discrete case of D.C. simply for the sake of consistency.

Additionally, however appealing the Bork proposal for a legislative solution may be to someone dedicated to pure theory and unencumbered by political realities, the fact of the matter remains that any theory of constitutional law that would permit the federal government to discriminate against one race in favor of another[152] would never win public acceptance.[153] To be sure, the fact that a

party, the Republican majority was paper-thin (49-47). With such a thin majority, it would have been nearly impossible to invoke cloture which at the time required an affirmative vote of 2/3 of the entire Senate. For a history of the filibuster and the cloture rule, see generally Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004). Six months after the *Brown* decision, Democrats reclaimed the Senate majority; *see* http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited April 23, 2014). Republicans controlled 48 seats + 1 independent (Wayne Morse) who caucused with them in the 83rd Congress (1953–55).

[150] Interestingly enough, the Executive Branch was much more sympathetic to the integration of the D.C.'s schools. Although President Eisenhower was not particularly enthusiastic about either plaintiffs' claims in *Brown* and *Bolling* or the outcome of the decisions, his Solicitor General actually argued as *amicus curiae* in support of the petitioners (mostly as a result of the Truman's Department of Justice involvement in the earlier stages of litigation) and Eisenhower famously sent troops to Little Rock, Arkansas in order to enforce the desegregation orders. Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 131–32 (1994).

[151] Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 287 (1996).

[152] Bork is openly advocating just such a system. He argues that absent the "illegitimate" *Bolling* decision, federal affirmative action programs would be invulnerable to an attack because federal government is not required to abide by the equal protection requirements. *See* BORK, *supra* note 15, at 74, 84. Bork sees this as the reason why the political liberals ought to oppose *Bolling*. *See* BORK, *supra* note 15, at 84. The problem is that under Bork's approach nothing would preclude Congress from instituting different naturalization, tax, national service, criminal, and other laws for different races. Bork and others see that as politically impossible, *see* BORK, *supra* note 15, at 83; Barnett & Sunstein, *supra* note 16 (and perhaps they are correct as of *today*), but that fails to account for the fact that *Bolling* is one of the major reasons why this is politically impossible. Given the American history of race relations, it is not particularly plausible to take Bork's assurances of a Congress committed to racial equality on faith alone.

[153] *See supra* note 22 and accompanying text. To be sure, the public may not care

particular interpretive methodology does not find much public support is not in and of itself proof that the methodology is wrong or that the public is right. However, any interpretive legal methodology has to be applied by judges, who are appointed by politicians responsible to the public. It is inconceivable that any politician would nominate or vote to confirm a person who would openly say that the federal government has an unfettered right to discriminate on the basis of race. For this reason, any theory of constitutional interpretation, if it is meant to survive outside the hallowed halls of academic institutions, must be acceptable to the body politic.[154]

Fortunately for the adherents of originalism (even for purists and not just "faint-hearted" Scalias),[155] Bork's insistence that "there is no way to justify"[156] *Bolling* on originalist grounds is wrong. Bork and Ely are correct that "reverse incorporation," as an originalist matter, is "gibberish."[157] But that is not the end of the inquiry, for the Fourteenth Amendment does not begin and end with the Equal Protection Clause. Indeed, the first part of the Fourteenth Amendment—the Citizenship Clause—binds both the states and the federal government equally. It is my contention that the Citizenship Clause, as originally understood, would bar race-based discrimination by the federal government. It is to this argument that I now turn.

## IV. THE CITIZENSHIP CLAUSE

The Citizenship Clause of the Fourteenth Amendment is the very first clause therein, preceding the Equal Protection and the Due Process Clauses.[158] Yet, it has been largely ignored in both the historiography and the jurisprudence of the Fourteenth Amendment. At most, the courts have held that the clause confers birthright citizenship.[159] But the court never explored what citizenship actually means. To the framers of the Fourteenth Amendment, on the other

about *theories* as such. The public's focus is likely to be *outcomes*. But a theory that permits outcomes repugnant to the public is not likely to be accepted as legitimate approach to reasoned judicial decision-making.

[154] *See supra* notes 22–24 and accompanying text.

[155] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.").

[156] BORK, *supra* note 15, at 84.

[157] *See* ELY, *supra* note 15, at 32; *supra* text accompanying note 16.

[158] U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[159] *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898).

hand, the clause was not a nullity or an insignificant appendage. Indeed, Senator Trumbull emphasized that citizenship "of the United States carries with it some rights . . . . They are those inherent, fundamental rights which belong to free citizens or free men in all countries . . . . The right of American citizenship means something."[160] In figuring out what that "something" is, one needs to consider the goals of the Amendment.

At its very basic level, the Fourteenth Amendment was meant to overrule *Dred Scott v. Sanford*.[161] In that decision, Chief Justice Taney opined that "[t]he negro race [was] a separate class of persons, and . . . that they were not . . . a portion of the people or citizens of the [United States] . . . ."[162] The holding applied not just to the blacks held in bondage, but to all black residents of the United States.[163] According to Taney:

> It [was] obvious that they [the slaves and their descendants, whether free or not] were not even in the minds of the framers of the Constitution when they were conferring *special rights and privileges* upon the citizens of a State in every other part of the Union. . . . Indeed, . . . it is impossible to believe that *these rights and privileges* were intended to be extended to them.[164]

Following the adoption of the Fourteenth Amendment, Justice

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[160] CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866). This sentiment was echoed in *The Slaughterhouse Cases*, 83 U.S. 36, 76–81 (1873) (discussing various rights that citizenship bestows). *See also* Sugarman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) ("In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence.").

[161] Dred Scott v. Sanford, 60 U.S. 393 (1857). *See* Saenz v. Roe, 526 U.S. 489, 502–03 & n.15 (1999) ("The Fourteenth Amendment overruled [the Dred Scott] decision."); Sugarman, 413 U.S. at 652 (Rehnquist, J., dissenting) ("The paramount reason was to amend the Constitution so as to overrule explicitly the Dred Scott decision."); *The Slaughterhouse Cases*, 83 U.S. at 73 ("[The 14th Amendment] declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt."); Robert J. Shulman, Comment, *Children of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 692 (1995) ("The main purpose for enacting the Fourteenth Amendment was to overrule one of the greatest inequities of American justice, the *Dred Scott* case.").

[162] *Dred Scott*, 60 U.S. at 411.

[163] *Id.* at 411–21 (explaining why both slaves and "free persons of color were not citizens, within the meaning of the Constitution and laws . . . .").

[164] *Id.* at 411–12 (emphasis added).

Bradley in his dissent to *The Slaughterhouse Cases* wrote that:

> [T]he citizens of each of the States and the citizens of the United States would be *entitled to certain privileges and immunities as citizens*, at the hands of their own government—privileges and immunities which their own governments respectively would be bound to respect and maintain. In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the States.[165]

Bradley's opinion suggests that at a minimum, all citizens of the United States were entitled to certain rights and immunities inherent in the traditions of a free country.[166] Whereas under *Dred Scott* these rights were available only to the white citizens,[167] post-adoption of the Fourteenth Amendment, and according to its text, the rights became available to "[a]ll persons born or naturalized in the United States."[168] The question then is what are the "rights and privileges" that accrue to those lucky enough to be accorded national citizenship?

One of the earliest cases discussing the rights of privileges of national citizenship was *Corfield v. Coryell*,[169] delivered by Justice Bushrod Washington in his capacity as Circuit Justice. Justice Washington asked "what are the privileges and immunities of citizens in the several states?"[170] He then answered that these refer to:

> privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental

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[165] *The Slaughterhouse Cases*, 83 U.S. at 114 (Bradley, J., dissenting).

[166] *Id.* Though Bradley was in dissent on the ultimate conclusion that the challenged statutes violated the Fourteenth Amendment, his point that citizenship entitled people to certain rights *qua* citizens was not disputed. The only dispute centered on what those rights were. *See, e.g.*, *id.* at 75–76 (citing Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230)).

[167] *See supra* notes 162–164 and accompanying text.

[168] *See The Slaughterhouse Cases*, 83 U.S. at 73.

[169] Corfield, 6 F. Cas. at 546.

[170] *Id.* at 551.

> principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.[171]

While Justice Washington did not expound on what he meant by "protection of the government," the above passage had a clear legal meaning by the time the Fourteenth Amendment was drafted. The *Corfield* case was cited with some regularity in the debates.[172] For instance, the Civil Rights Act of 1866, enacted by the same Congress that enacted the Fourteenth Amendment, provided that:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . . shall have the same right, in every State and Territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws and proceedings* for the security of person and property, as is enjoyed by white citizens, *and shall be subject to like punishment, pains, and penalties, and to none other*, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[173]

John Bingham, though he fought for the deletion of references to segregated schools in the Civil Rights Act,[174] argued that the rights of citizenship included the notion "that all men, before the law, are equal in respect of those rights of person which God gives and no

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[171] *Id.* at 551–52.

[172] *See* Saenz v. Roe, 526 U.S. 489, 526 (Thomas, J., dissenting) ("*Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment. When Congress gathered to debate the Fourteenth Amendment, Members frequently, if not as a matter of course, appealed to *Corfield*, arguing that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified in his opinion."); David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 918 (2007) ("*Corfield v. Coryell* [was] invoked time and again during debates over the Fourteenth Amendment . . . ."); Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 467 (2001) ("*Corfield* was used throughout the Reconstruction debates in Congress . . . .").

[173] Ch. 31, §1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (2011)).

[174] *See supra* note 79 and accompanying text.

man or state may rightfully take away . . . ."[175] Bingham argued that the Constitution is a "great charter of our rights, almost divine in its conception and in its spirit of equality," and should not be tarnished "by the interpolation into it of any word of caste, such as white, or black, male or female . . . ."[176] Senator Trumbull, in arguing for the Civil Rights Act, stated that it was "a bill providing that all people shall have equal rights," that the bill would "declare[] that all persons in the United States shall be entitled to the same civil rights . . . [including the right to] enjoy liberty and happiness," and that it "protects a white man as much as a black man[.]"[177] According to Trumbull, citizenship conferred upon individuals "those inherent, fundamental rights which belong to free citizens or free men in all countries . . . ."[178] Perhaps the most explicit statement by Trumbull was his quotation from Blackstone's maxim that "the law should be *equal to all*, or as much so as the nature of things will admit,"[179] and that "any statute which is not equal to all . . . is, in fact, a badge of servitude which, by the Constitution, is prohibited."[180] Similarly, Senator Jacob Howard, in introducing the Fourteenth Amendment, stated that it "establishes *equality before the law*, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[181] Representative Martin Thayer added that:

> The sole purpose of the bill is to secure to [blacks] the fundamental rights of citizenship; those rights which constitute the essence of freedom, and which are common to the citizens of all civilized States; those rights which secure life, liberty, and property, and which make all men equal before the law . . . ."[182]

The common thread in all of these statements is that the framers of the Civil Rights Act and the Fourteenth Amendment viewed citizenship as bestowing a right to equality before the law irrespective of race.

Charles Sumner, whose views were admittedly to the far end of the spectrum, but who was highly influential in drafting and

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[175] CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).
[176] *Id.*
[177] CONG. GLOBE, 39th Cong., 1st Sess. 599 (1859).
[178] *Id.* at 1757.
[179] *Id.*
[180] *Id.* at 474.
[181] *Id.* at 2766 (emphasis added).
[182] *Id.* at 1152.

shepherding the Civil Rights Acts and the Reconstruction Amendments through Congress spoke of the Citizenship Clause thusly:

> No longer an African, [the emancipated slave] is an American; no longer a slave, he is a common part of the Republic, *owing to it patriotic allegiance in return for the protection of equal laws*. By incorporation with the body-politic he becomes a partner in that transcendent unity, so that there can be no injury to him without injury to all. Insult to him is insult to an American citizen. Dishonor to him is dishonor to the Republic itself. . . . Our rights are his rights; *our equality is his equality*; our privileges and immunities are his great freehold.[183]

Although Sumner in his absolutist position may have been an outlier, his description of citizenship as an exchange of "patriotic allegiance . . . for the protection of equal laws," was a fair representation of what citizenship was viewed to mean.[184] John Locke's theory of social compact, which was influential both during the framing of the original Constitution and the Reconstruction Amendments,[185] posited that people submit to a lawful authority of the government in return for the government's protection.[186] Justice Joseph Story, in his famous Commentaries on the Constitution, published shortly after the adoption of the Fourteenth Amendment, opined that the constitutional meaning of the term "citizen" is "a person owing allegiance to the government, and entitled to protection from it."[187]

Given the understanding of the framers and ratifiers of the Fourteenth Amendment that citizenship conferred "a status in and

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[183] 14 CHARLES SUMNER, THE WORKS OF CHARLES SUMNER 407 (Boston, Lee & Shepard, 1883) (emphasis added).

[184] *Id.*

[185] Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 696, 700 (1997) ("The concept of citizenship that serves as a foundation of the Fourteenth Amendment originates in the social compact theories of John Locke and other natural law theorists. . . . The relevance of Lockean social compact theory to understanding the meaning of Section 1 of the Fourteenth Amendment is clear from the tenor of the debates in Congress."); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 312 (2000) ("The 'social compact' theory of John Locke, who believed that people submit to the authority of the government in return for its protection, was very influential at the time of the framing of the Fourteenth Amendment.").

[186] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 370 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); Zietlow, *supra* note 185, at 312.

[187] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 683 (Melville M. Bigelow ed., Little, Brown, & Co., 1891).

relationship with a society which is continuing and more basic than mere presence or residence,"[188] and required the government to provide "protection" to the bearer of the title, the only question that truly remains is whether such protection could be provided on racially unequal terms. In my view, the Citizenship Clause does not permit such discrimination even if Charles Sumner's views are to be discounted as not representative of Congressmen and state legislators of the time (who ratified the Amendment).

It is worth noting that in talking about the rights and privileges of citizenship, both before and after the adoption of the Fourteenth Amendment, the judges, legislators, and commentators consistently referred to "traditionary rights and privileges" or "privileges and immunities which are, in their nature, fundamental."[189] It is especially noteworthy that *Corfield*, in grappling with the question of which rights are fundamental, essentially paraphrased the Declaration of Independence.[190] It can be said that the approach of the Declaration was adopted by the *Corfield* Court in describing what rights accrue to those possessing American citizenship. And if that is true, then it would follow that the Declaration's exhortations that "all men are created equal" and that the government was instituted "to secure these rights"[191] of equality figured into *Corfield* Court's analysis of the scope of citizenship's privileges and immunities.

Furthermore, as I have already mentioned, the framers and the ratifiers of the Fourteenth Amendment drew heavily on Locke's ideas about the proper role of government and interrelationship between the citizen and the State.[192] Locke, in turn, held that "as a citizen—that is, as an individual consenting to the formation of government—[a] man [is] 'by Nature, all free, equal, and independent.'"[193] In

[188] Sugarman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting).

[189] Corfield v. Coryell, 6 F. Cas. 546, 551–552 (C.C.E.D. Pa. 1823) (No. 3230); *supra* notes 173–182 and accompanying text.

[190] *Compare* Corfield, 6 F. Cas. at 551–52 ("Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . ."), *with* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

[191] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . That to secure these rights, Governments are instituted among Men . . . .").

[192] *See supra* notes 185–187 and accompanying text.

[193] Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT'L L. 689, 739–40 (1998) (quoting LOCKE, *supra* note

other words, Locke argued that "all citizens have equal intrinsic worth for purposes of government. . . . [and] the interests of all citizens count equally in government . . . ."[194]

Moreover, as Douglas Smith points out in his work:

[A]n equality-based or nondiscrimination guarantee also flows from the textual language. As many commentators have recognized, a substantive guarantee of absolute rights implies an equality of rights because all citizens enjoy the same substantive guarantee. As I have argued elsewhere, however, an equality-based guarantee concerning regulation also flows from the text. One of the privileges and immunities of citizens was understood to be a guarantee of equality in regulation of the fundamental rights of citizens.[195]

In other words, since the Citizenship Clause guarantees every citizen certain privileges and immunities, all citizens receive at least these rights on equal basis. As Akhil Amar puts it, "[a]ll are declared citizens, and thus all are *equal* citizens."[196] Since one of the rights of citizenship is government protection, it follows that the protection must be extended on equal basis. An objection may be made that public schooling is not a right or privilege of citizenship,[197] and that therefore the government is not required to protect the provision of this service on equal basis. That would be error. While it is true that schooling was not considered to be part of the panoply of "fundamental" or "traditionary" rights of citizenship,[198] the Citizenship Clause goes not to the specific question of schooling, but to broader question of discriminatory treatment by the government of its citizens. The prohibited conduct is not the non-provision of schooling, but rather creating various classes of citizenship and the provision of services based on such classifications.[199] Whether or not schooling in and of itself is a fundamental right of citizenship, thus, is

186, at 348).

[194] Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1225 (1994).

[195] Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1157 (2002) (footnote omitted).

[196] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 768 (1999); *see also* Gibson v. Mississippi, 162 U.S. 565, 591 (1896) (Harlan, J.) ("All citizens are equal before the law.").

[197] Schooling is not mentioned in *Corfield*, and indeed the Supreme Court rejected the argument that schooling is a right of citizenship. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[198] *See id.* at 37. *But see* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006) (arguing that education is a right inherent in "national citizenship").

[199] *See supra* notes 180–183 and accompanying text.

not the issue. The only issue is whether the federal government is required to offer protection on an equal basis to all citizens seeking to avail themselves of various government programs.

This approach is consistent with the common law as explicated by William Blackstone, which, after all, forms the basis for the understanding of legal terminology of the original Constitution and the amendments thereto.[200] Blackstone opined that laws that treated a gentleman and a commoner differently "savoured of oppression," and was thus repugnant to English liberties.[201] According to Blackstone, "the laws of England, [are] peculiarly adapted to the preservation of this inestimable blessing [of liberty] *even in the meanest subject*."[202] Indeed, the "spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman,"[203] who would be entitled to all of the "absolute rights of individuals" that Blackstone describes.[204] From this exposition on the laws of England it is evident that under common law, all subjects were equal before the law, even the lowliest ones (including those of different skin color and former slaves). These precepts of common law informed the citizenship concepts embedded in the original Constitution.[205] The Fourteenth Amendment extended those concepts to "[a]ll persons born or naturalized in the United States,"[206] including former slaves and their descendants. It follows then that the rights of equality before the law inherent in the concept of citizenship now extended to blacks in exactly the same manner as they extended to other freemen.[207]

Finally, when interpreting the meaning of the Citizenship

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[200] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 261–68 (1998) (discussing the centrality of Blackstone to the American Constitution and on the Reconstruction Congress specifically); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 661 n.71 (1999) (stating that Framers' understanding of the law was influenced by Blackstone); Yoo, *supra* note 130, at 982 ("William Blackstone's Commentaries provided the Framers with a model of how the law could protect such natural rights. The Framers held Blackstone in high regard for his attempt to rationalize the English common law.").

[201] 1 WILLIAM BLACKSTONE, COMMENTARIES *122.

[202] *Id.* at *123.

[203] *Id.*

[204] *Id.* at *117.

[205] *See supra* note 200.

[206] U.S. CONST. amend. XIV, § 1.

[207] *See* Slaughter-House Cases, 83 U.S. 36, 73 (1872).

Clause, it helps to read it in the context of the times and of related Reconstruction Era enactments. One of the major creations of the Reconstruction Era Congresses was the Bureau of Refugees, Freedmen and Abandoned Lands, commonly known as the Freedman's Bureau.[208] As Professor Lester observes, Congress enacted the Freedman's Bureau Act "to make clear that black citizens had the right not just to be free from bondage, *but to participate as equal citizens* in all aspects of American life."[209] The Freedman's Bureau Act was enacted by the Thirty-Ninth Congress, as were the Fourteenth Amendment and the Civil Rights Act of 1866. Much like the Civil Rights Acts, the Freedman's Bureau Act provided that rights "shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery."[210] The goal of the Freedman's Bureau was to elevate blacks formerly oppressed by slavery to a place where they could enjoy the benefits of citizenship on equal footing with whites.[211] The Freedman Bureau Acts sought to "integrate these new citizens into American politics,"[212] and to "induct them, as it were, into the great temple of American civilization."[213] In arguing for the bill, Congressman Ignatius Donnelly said that "[i]f you give the negro an equal opportunity with the white man he becomes perforce a property-holder and a law-maker, and he is interested with you in preserving the peace of the country."[214] He argued that in order to erase the vestiges of slavery "we must make all the citizens of the country equal before the law; that we must break down all walls of caste; that we must offer equal opportunities to all men."[215] Donnelly's argument essentially is that in order to expect loyalty from the freed blacks (a duty of citizenship), one must provide them with rights equal to those of other citizens.

The debate over the Freedman's Bureau Act shows that the paramount goal of the Thirty-Ninth Congress in enacting this (and

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[208] Ch. 90, 13 Stat. 507 (1865); ch. 200, 14 Stat. 176 (1866).

[209] Toni Lester, *Contention, Context and the Constitution: Riding the Waves of the Affirmative Action Debate*, 39 SUFFOLK U. L. REV. 67, 90 (2005) (emphasis added).

[210] Freedman's Bureau Act, ch. 200, 14 Stat. 173, 176-77 (1866).

[211] *See* James W. Fox, Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 TEMP. POL. & CIV. RTS. L. REV. 453, 467 (2004) ("[T]he Freedman's Bureau *developed* citizenship.").

[212] William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1250–51 (2009).

[213] 7 GREAT DEBATES IN AMERICAN HISTORY: CIVIL RIGHTS, PART ONE 171 (Marion Mills Miller ed., 1913) (quoting Rep. William D. Kelley).

[214] CONG. GLOBE, 39th Cong., 1st Sess. 589 (1865).

[215] *Id.*

other) legislation was to provide opportunity for the newly-made black citizens so that they could participate in all aspects of American civil life. It seemed preposterous to the proponents that this full participation could be achieved without requiring equal legal treatment of all of the citizens.[216]

The history of the Citizenship Clause strongly suggests that the original understanding of that provision required the federal government to extend equal protection of laws to all its citizens and prohibited discrimination on the basis of race. This requirement stems from the understanding of what it means to be a citizen and the rights, privileges, and immunities that citizenship conferred. In other words, to be a citizen means now and meant then to be "presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant."[217]

## V. CRITICISM OF THE APPROACH, AND A RESPONSE THERETO

In my view there are three major criticisms of my argument that could be made. While perhaps not an exhaustive list of possible objections, in my view, these are the most preeminent and the ones that deserve a detailed response. I will discuss each of them in turn, and offer a rebuttal.

### *A. Redundancy*

One of the main charges leveled against the reasoning in *Bolling* is that the Court conflated the Equal Protection Clause and the Due Process Clause, rendering them redundant. According to the Court, "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive,"[218] and are apparently often (though not "always") "interchangeable phrases."[219] This reading of the constitutional text readily opens itself up to criticism as it violates the "the sound and wise rule of constitutional construction early announced and often applied . . .—that in expounding the Constitution of the United States no word in it can be rejected as superfluous or unmeaning . . . ."[220] But if that

[216] *See id.*

[217] KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 3 (1989).

[218] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[219] *Id.*

[220] National Prohibition Cases, 253 U.S. 350, 407 (1920) (Clark, J., dissenting); *see*

criticism is fair, then the same criticism could be leveled at the interpretive approach proposed in this Article. After all, the Citizenship Clause binds both the federal and state governments, and if the clause mandates equal treatment, then it would seem that the Equal Protection Clause is surplassage.

On the surface, this is an appealing argument. However, upon the closer examination of the text and history of the Fourteenth Amendment, the objection can be rebutted. First, the language of the Citizenship Clause and the Equal Protection Clause do not cover the same group of people. Whereas the Citizenship Clause applies only to the "born or naturalized in the United States,"[221] the Equal Protection Clause, by its terms applies to "to any person within its jurisdiction."[222] The Equal Protection Clause, then, sweeps within its ambit a broader swath of people. In other words, states may not be permitted to refuse protection of their laws to non-citizen residents or visitors. The federal government, on the other hand, following the original understanding of the Citizenship Clause and recognizing that the Equal Protection Clause is not binding upon it, is permitted to deny equal protection of federal laws to non-citizens.[223]

As a number of scholars have written, the framers of the Fourteenth Amendment viewed national citizenship as primary over state citizenship.[224] The Equal Protection Clause can thus be read as precluding states from abridging the rights of national citizenship[225] irrespective of whether the national citizen is a resident——and therefore a citizen—of the State in question. This was consistent with

*also* Knowlton v. Moore, 178 U.S. 41, 87 (1900) ("[An] elementary canon of construction . . . requires that effect be given to each word of the Constitution.").

[221] U.S. CONST. amend. XIV, § 1.

[222] *Id.*

[223] *See generally* Sugarman v. Dougall, 413 U.S. 634, 649–64 (1973) (Rehnquist, J., dissenting) (arguing that "people" referred to in the Equal Protection Clause is a group different from "citizens" referred to in the Citizenship Clause).

[224] *See, e.g.*, Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77, 113 (2009) ("[T]he citizenship clause indicates a change: that instead of national citizenship being derivative from state citizenship, and state citizenship being primary, the framers made national citizenship primary."); Wilson R. Huhn, *The Legacy of* Slaughterhouse, Bradwell, *and* Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1054 (2009) ("The Framers of the 14th Amendment made state citizenship secondary to national citizenship.").

[225] *See* Saenz v. Roe, 526 U.S. 489, 502 n.15 (1999) ("The Amendment's Privileges or Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship.").

the Reconstruction Era vision of reunifying the country as truly national as opposed to a mere confederation of sovereign states.[226] The Equal Protection Clause thus permitted free travel and migration and encouraged a national economy because it precluded states from refusing to provide equal protection of the laws to those who were not citizens of the relevant state, yet were citizens of the United States.[227]

Second, it should be pointed out that there were different views as to which rights sprung from national and which from state citizenship.[228] Although it is now widely agreed that *The Slaughterhouse Cases* were incorrectly decided,[229] they are useful in pointing out that the view that most of the rights of citizenship sprung from state rather than national citizenship was widely—though not predominantly—held.[230] Indeed, as the majority in *The Slaughterhouse Cases* held, "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."[231] If Justice Miller was right in his assertion and also right in that the rights of the federal citizenship are limited,[232] then the Equal Protection Clause would not be at all redundant. Rather, the Equal Protection Clause serves to cabin states' discretion in treatment

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[226] *See* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1957 (2000) (noting "[t]he Radical Republicans' vision of a strong national government").

[227] Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 74 (2001) ("[T]he Fourteenth Amendment provided direct protection and authority for Congress to protect national rights of travel and migration.").

[228] *See generally* Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congresses*, 34 LAW & SOC'Y REV. 315 (2000) (discussing the views of Northern Democrats and Republicans on the concept of citizenship and how those views found their audience in *The Slaughterhouse Cases* majority and dissenting opinions, respectively). It bears repeating that the individual views of the framers are not determinative in deciphering the meaning of the Fourteenth Amendment. However, their statements (together with the underlying political philosophy of the time) serve as evidence as to what the ratifiers understood the legal language to mean.

[229] *See, e.g.*, Saenz, 526 U.S. at 522 n.1 (Thomas, J., dissenting) ("Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873 [in *The Slaughterhouse Cases*].").

[230] *See* Brandwein, *supra* note 228, at 354–55 (stating that Northern Democrats subscribed to this view).

[231] The Slaughter-House, 83 U.S. 36, 74 (1872).

[232] I am not suggesting that he was indeed right. Rather, what I am suggesting is that many people subscribed to *Slaughterhouse's* majority view. And if so, then from the perspective of those people, the Equal Protection Clause would not be redundant because it would protect things other than the Citizenship Clause would protect.

of individuals with respect to those rights that do not flow from national citizenship.

To be sure, this Article's conception of the Citizenship Clause and the Equal Protection Clause are somewhat overlapping. The Equal Protection Clause alone would require states to treat all of its citizens equally whether or not the Citizenship Clause were binding on the states. However, what makes the present approach different from that in *Bolling* is that under my approach the clauses are not duplicative.[233] The Equal Protection Clause covers a broader segment of the population and restricts the power of individual states more so than the Citizenship Clause alone would. As a result, under my approach, the Equal Protection Clause precludes states from imposing residency length requirements for full state citizenship and thereafter discriminating on that basis.

*B. Women as Citizens*

The second objection to my approach is the question of the rights of women. On one hand, women could certainly be "born or naturalized in the United States," thus making them citizens by the terms of the Fourteenth Amendment. On the other hand, and just as certainly, women were not treated equally to men in a number of areas. Consequently, the argument goes, the original understanding of the Citizenship Clause could not have included equal treatment of all citizens. And if so, then even if *Bolling* could be sustained on originalist grounds, as previously described, a number of other decisions recognizing unlawfulness of gender-based discrimination could not.[234] This would in turn bring us right back to square one in

[233] Although the *Bolling* Court stated that it did not hold that the Due Process Clause and Equal Protection Clause were co-extensive, in practice, there is no difference between the two. *See* notes 218–219 and accompanying discussion. Indeed, judges and commentators casually refer to the "equal protection component of the Fifth Amendment's Due Process Clause." Davis v. FEC, 554 U.S. 724, 744 n.9 (2008); Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 105 (2001); United States v. Armstrong, 517 U.S. 456, 464 (1996); Adarand Constructors v. Pena, 515 U.S. 200, 204 (1995); *see also, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 325 n.90 (1993); Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in Federal Habeas Corpus*, 59 FORDHAM L. REV. 737, 738 n.15 (1991); James T. Lang, Note, *Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters*, 39 CASE W. RES. L. Rev. 165, 199 n.186 (1989); Amy K. Posner, Note, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOK. L. REV. 301, 316 n.89 (1984).

[234] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (striking down a male-only admission policy to a state-run military academy); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (striking down a female-only admission policy to a state-

terms of convincing the public that originalism is a sustainable and desirable judicial philosophy.

I will admit upfront that this is a tough objection to get around. However, it is not insurmountable. As an initial matter, it should be pointed out that women were not nearly as rights-less as often portrayed. As Professor Amar points out, "[a]lthough . . . women could not vote, hold office, sit on juries, or serve in militias, they could worship, speak, print, assemble, petition, sue, contract, own property and bring diversity cases in federal courts."[235] Additionally, by the time of the Fourteenth Amendment's ratification, a majority of states[236] enacted some version of the Married Women's Property Act,[237] which permitted married women to hold, enjoy, and dispose of property on par with men and did away with the common-law rule that places the male in charge of all marital property.[238] Similarly, the 1862 Homestead Act,[239] enacted just a few years prior to the Fourteenth Amendment, did not differentiate between citizens seeking to avail themselves of the Act's provisions on the basis of gender.[240] At the same time, some states also began to treat women

run nursing school); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (holding unconstitutional a state statute that discriminated between widowers and widows in distribution of death benefits); Califano v. Goldfarb, 430 U.S. 199 (1977) (holding unconstitutional and discriminatory against women a policy that provided lower Social Security survivor benefits to widowers than widows); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (same); Reed v. Reed, 404 U.S. 71 (1971) (holding unconstitutional a statute that discriminated on the bases of gender in assignment of estate executors).

[235] AMAR, *supra* note 200, at 260.

[236] Married Women's Property Laws, Law Library of Congress, http://memory.loc.gov/ammem/awhhtml/awlaw3/property_law.html (last visited Apr. 24, 2014) ("During the nineteenth century, states began enacting common law principles affecting the property rights of married women. Married women's property acts differ in language, and their dates of passage span many years. One of the first was enacted by Connecticut in 1809, allowing women to write wills. The majority of states passed similar statutes in the 1850s.").

[237] *See* Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2022 (2000) (stating that states began to pass such laws in the 1840s).

[238] *See* Nicole M. Quester, Note, *Refusing to Remove an Obstacle to the Remedy: The Supreme Court's Decision in* Town of Castle Rock v. Gonzales *Continues to Deny Domestic Violence Victims Meaningful Recourse*, 40 AKRON L. REV. 391, 395–98 (2007) (describing the effect of Married Women's Property Acts); *see also* 1848 N.Y. Laws 307. The New York Act was a model for other states. *See Married Women's Property Laws*, LAW LIBRARY OF CONGRESS, http://lcweb2.loc.gov/ammem/awhhtml/awlaw3/property_law.html (last visited Apr. 7, 2014) (containing the text of the New York statute of 1848).

[239] The Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392 (repealed 1976).

[240] The Act read:

> [A]ny person who is the head of a family, or who has arrived at the age

equally when it came to entering into contracts.[241] In short, around the time of the Fourteenth Amendment's adoption, both state and federal governments began to recognize that at least in some spheres women were indeed entitled to equal rights by virtue of their citizenship. That is not to say that women were indeed treated equally to men in all respects, but rather to recognize the significant, though far from complete, movement in the direction of equal citizenship for men and women that was occurring in the middle of the nineteenth century.[242]

Beyond this move towards equality of citizenship, one must also consider the reasons for the discrimination between men and women. Unlike the post-Civil War Black Codes in the Southern states, which had as its purpose the perpetuation of subservient status of freedmen,[243] the laws dealing with women's rights were predicated on the notion of "protecting" women from the vicissitudes and cruelty of the everyday world.[244] "[W]omen were seen as weak and needing protection, not only for themselves, but also for the survival of society."[245] This sentiment was clearly expressed in Justice Bradley's

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> of twenty-one years, and is a citizen of the United States, . . . shall, from, and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said *person* may have filed a preemption claim, or which may, at the time the application is made, be subject to preemption at one dollar and twenty-five cents, or less, per acre; . . . .
>
> Sec. 2: And be it further enacted. . . . upon application to the register of the land office in which *he or she* is about to make such entry, make affidavit before the said register or receiver that *he or she* is the head of a family. . . .

*Id.* (emphasis added).

[241] *See, e.g.*, 1860 N.Y. Laws 157 ("An Act Concerning the Rights and Liabilities of Husband and Wife"), *available at* http://www.nytimes.com/1860/03/21/news/rights-married-women-act-concerning-rights-liabilities-husband-wife.html (last visited Apr. 7, 2014).

[242] *See* Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill*, 36 AM. U. L. REV. 11, 12 (1986) (noting that Married Women's Property Acts improved the legal status of women, but in many instances only marginally).

[243] *See, e.g.*, Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 AKRON L. REV. 473, 480 (2003) ("These so-called 'Black codes' were designed to restore slavery under a different guise and represented the South's reluctance to accept the free status of African Americans."); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 11–12 (1995) ("[S]outhern states enacted Black Code laws, which were intended to perpetuate African American slavery.").

[244] *See* BLACKSTONE, *supra* note 202, at *433 (stating that "the disabilities, which the wife lies under, are for the most part intended for her protection and benefit.").

[245] Bela August Walker, *Fractured Bonds: Policing Whiteness and Womanhood Through*

concurrence in *Bradwell v. State*[246]—a case that upheld Illinois' rule prohibiting women from being admitted to the bar. Justice Bradley opined that:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. . . .
>
> The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. . . . [I]t is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.[247]

It is evident from this passage that the legislators and judges of the time perceived restrictions upon women's rights not as special burdens to be carried by women, but as a protective barrier against the rough-and-tumble of the encounters with the "sterner sex."[248] As misguided and patronizing as this approach may have been (and it certainly was that) the position of the Fourteenth Amendment framers seems to have been that women were indeed equal citizens, but that laws needed to be made in order to "protect[] women

*Race-Based Marriage Annulments*, 58 DEPAUL L. REV. 1, 33 (2008).

[246] 83 U.S. 130 (1872).

[247] *Id.* at 141–42 (Bradley, J., concurring).

[248] *Id.* at 142. This idea of protecting women survived for quite a while. Indeed much of beneficent legislation in areas such as workers' rights and occupational health and safety was crafted (and upheld) on the grounds that women deserved special protection. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394 (1937) (upholding a minimum wage statute on the grounds that the State has an interest in "protecting women against oppression . . . ."); Muller v. Oregon, 208 U.S. 412, 422–23 (1908) (upholding a statute limiting women's workday in laundries to ten hours on the grounds that the "difference [in the sexes' structure of body, in the functions to be performed by each, in the amount of physical strength] justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon [women]."). *See also* Bosley v. McLaughlin, 236 U.S. 385 (1915) (upholding special rules about women's employment in hospitals); Miller v. Wilson, 236 U.S. 373 (1915) (upholding special rules about women's employment in hotels); Riley v. Massachusetts, 232 U.S. 671 (1914) (upholding special rules about women's employment in factories).

against oppression."[249] In the eyes of the framers of the Fourteenth Amendment, only through such "protection," and perhaps incremental exposure to the brutality of the world outside the home,[250] would women be able to actually enjoy their rights of citizenship.

In some ways this attitude towards women is reminiscent of the approach that was taken towards freedmen. As alluded to *supra*,[251] the Reconstruction Congress adopted a number of statutes that sought to better the lot of freedmen and "raise them up" to a point where they could be equal citizens.[252] The Freedman's Bureau, for instance, was meant to "protect" the ability of freedmen to work and get properly compensated for that work.[253] The Reconstruction Congress was not convinced that the newly freed blacks could achieve on their own without the Bureau's help in entering and enforcing contracts.[254] When one looks at the legislation affecting women through this lens, one can acknowledge that the framers and contemporaries of the Fourteenth Amendment were wrong, but ultimately driven by the good intention of protecting a woman's ability to enjoy her "noble and benign offices"[255] in society and to enjoy her rights of citizenship accordingly. From this perspective then, it is quite plausible to believe that the Fourteenth Amendment was indeed understood to

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[249] *West Coast Hotel*, 300 U.S. at 394.

[250] *See supra* note 247 and accompanying text.

[251] *See supra* notes 208–216 and accompanying text.

[252] *See* James W. Fox, Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 125 (2006) ("Moreover, Congress continued to flesh out its understanding of citizenship through its support for the Freedman's Bureau, which provided legal, medical, educational, welfare, and other forms of support to the freed slaves, with the understanding that such provision was central to helping former slaves become full citizens.").

[253] *See, e.g.*, Lester, *supra* note 209, at 90 (stating that the Reconstruction Congress created "the Bureau of Freedmen's Affairs, whose purpose was to help blacks enforce lease and work contracts negotiated with whites, and to help rent blacks land that the Union Army had confiscated during the Civil War.").

[254] This held true despite much evidence that some of the Bureau's work was actually detrimental to blacks' ability to achieve independence and equal status. *See, e.g.*, AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 36–38 (1998); Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 104 (1996) ("[T]he Freedman's Bureau was as concerned about ensuring a labor supply for employers as about protecting the freedmen."); Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1091 n.190 (2005) ("Labor contracts administered by the Freedman's Bureau made 'free' black labor conditional upon behavior that precisely echoed the social roles of slavery: laborers were to be 'quiet' and 'respectable' and 'well-behaved.'").

[255] Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

confer equality of citizenship upon women as well as men. It was just that the contemporaries of the Amendment believed, due to their erroneous view about biological capabilities of women, that the equality is best achieved by "protecting" women. When the predicate about biological and natural capabilities fell (as a result of acquired knowledge), so did the justification for "protective" laws. The requirement of the equality of citizenship, however, remained.[256]

*C. Voting Rights*

The final objection I will address goes to the question of voting rights. Today, we consider voting as an indispensable privilege and right of citizenship. Accordingly, it is natural to object to my interpretation of the Citizenship Clause on the grounds that it makes Section 2 of the Fourteenth Amendment,[257] as well as Fifteenth[258] and Nineteenth Amendments,[259] redundant. In other words, if citizenship implied equal treatment under the law, then perforce it required that all citizens were to be given equal access to the ballot box. The argument essentially is that since that was not how the Citizenship Clause was understood, as evidenced by the inclusion of Section 2 of the Fourteenth Amendment and the later drafting of the Fifteenth Amendment, the Clause could not have required equal treatment of all citizens.

Again, this objection is alluring on its face, but is ultimately erroneous. The reason is that, though it seems strange to us, in the 1860s, citizenship did not imply the right of political participation, but was merely a necessary condition.[260] Citizenship was concerned with civil not political rights.[261] The fact that elective franchise was

[256] This is similar to Bork's *Brown* argument. Even if the Reconstruction Congress thought that segregated schools could be equal, the requirement of equality was always present. As the factual predicate was proven time and again to be false (i.e., segregated schools were never equal in fact) all that remained was the requirement of equality. *See supra* notes 124–130 and accompanying text. So too with gender-based legislation. The requirement of equality in civil rights between sexes was always present and understood by those who drafted and ratified the Fourteenth Amendment, but it was implemented based on the erroneous factual premise. When a more correct factual premise was recognized, the requirement of equality had to be implemented according to that premise.

[257] U.S. CONST. amend. XIV, § 2 (providing for penalties for any state that denies the right to vote to any male citizen, but not prohibiting such an action).

[258] U.S. CONST. amend. XV (prohibiting discrimination in voting on account of race or previous condition of servitude).

[259] U.S. CONST. amend. XIX (prohibiting discrimination in voting on account of sex).

[260] *See infra* notes 265–267 and accompanying text.

[261] *See* Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John*

held not to be part of the bundle of rights inherent in citizenship is evident from the *Corfield* case.[262] According to Justice Washington, "the elective franchise" could only be exercised by citizens "as regulated and established by the laws or constitution of the state in which it is to be exercised."[263] This was the prevalent view at the time of the Fourteenth Amendment's drafting and ratification.[264] For instance, Senator Jacob Howard stated that "[t]he right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law . . . ."[265] Senator Lyman Trumbull was equally adamant. According to him, "the granting of civil rights does not, and never did in this country, carry with it rights, or, more properly speaking, political privileges. A man may be a citizen in this country without a right to vote or without a right to hold office."[266] On the House side, Representative Martin Russell Thayer stated that "nobody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right."[267]

In short, the Fourteenth Amendment was not actually meant to provide equality of *political* rights such as the right to vote and hold office. For the exercise of those rights, citizenship was a necessary but not sufficient condition. Because the concept of citizenship was

*Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 742 (2003) (Framers of the Fourteenth Amendment "differentiated 'civil rights,' centering on the right to participate in the legal system in such basic means as entering into contracts and owning real property, from 'political' rights like the right to vote. Only the former 'civil' rights were considered to adhere to federal citizenship").

[262] *See* David R. Upham, Note, Corfield v. Coryell *and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1524–25 (2005) ("[*Corfield*] does not clearly designate the right to vote as a 'fundamental' right of citizenship—and with good reason: it never belonged to all citizens as citizens.").

[263] Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

[264] *See* Henry L. Chambers, Jr., Dred Scott*: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 221 (2007) ("[A]t the time of its passage, the Fourteenth Amendment demanded equality only with respect to a narrow set of rights defined as legal and civil rights, not wholesale equality with respect to social and political rights."); Douglas G. Smith, *Originalism And The Affirmative Action Decisions*, 55 CASE W. RES. L. REV. 1, 28 (2004) ("[T]he framers of the amendment specifically stated that it would not guarantee the right to vote or to hold office. This was part of a broader conceptual framework that viewed such 'political' rights as not being inherent in the concept of citizenship.") (footnote omitted); Upham, *supra* note 262 at 1524–25 (stating that the right to vote "never belonged to all citizens as citizens").

[265] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

[266] *Id.* at 1757.

[267] *Id.* at 1151.

not meant to include political rights, it does not seem strange at all that the Fifteenth and the Nineteenth Amendments were needed to extend the right to vote to blacks and women, respectively. Nor does the lack of equal access to the ballot box for all citizens undermine the contention that the Citizenship Clause was understood to bestow the right to be treated equally by the government. To be sure, the right of equal treatment promised by the Citizenship Clause was narrower than the present society would likely adopt, but that does not mean that the right did not exist at all.

## VI. CONCLUSION

The assertion that *Bolling v. Sharpe* "was a clear rewriting of the Constitution by the Warren Court" are flatly wrong.[268] *Bolling v. Sharpe* is quite consistent with the Fourteenth Amendment as understood by those that drafted and ratified it. The problem was not the Constitution (as Bork asserts) but a poorly reasoned (though unquestionably correct in result) opinion in *Bolling*. To be fair to the Warren Court, the fault lies not just with it, but with previous courts and with the lack of scholarship on the history and the meaning of the Citizenship Clause (and for that matter, the Fourteenth Amendment as a whole). A careful analysis of that history leads one to the conclusion that the Fourteenth Amendment imposes a duty on the federal government to protect the civil rights of its citizens on equal basis and without regard to skin color. It is that understanding that allows a committed originalist to justify not just *Brown* but also *Bolling* and its progeny. *Bolling* then is not the "silver bullet" that the philosophical opponents of originalism hoped it would be. And so, although Judge Bork is wrong in his view of *Bolling*, originalism—the originalism that takes into account all of the clauses of the Fourteenth Amendment—is not.

[268] BORK, *supra* note 15, at 83.