

III. Equal Citizenship: Which Groups?

Under an originalist interpretation of the Fourteenth Amendment, who is entitled to heightened protection under the Equal Protection Clause? Does the answer to this question matter for contemporary conceptions of equality?

In *The Slaughterhouse Cases*, Justice Miller observed for the Court that “on the most casual examination of the [Reconstruction] amendments, no one can fail to be impressed with the one pervading purpose found in them all . . . we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” In rejecting the equal protection claim brought by New Orleans butchers against a monopoly erected by the state of Louisiana, the Court emphasized that it “[doubted] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.” The Court arguably foreshadowed a two-tiered approach to review under the Fourteenth Amendment whereby state laws infringing on the rights of blacks, in particular, would be subject to greater scrutiny than laws not reflecting race-based discrimination.

Much of the history surrounding the adoption of the Fourteenth Amendment supports an interpretation of the Amendment as concerned primarily (if not exclusively) with policing race-related discrimination. Some Republicans in the Reconstruction Congress emphasized, for example, that section 1 of the Amendment constitutionalized the Civil Rights Act of 1866, which provided that there shall be no discrimination in civil rights or immunities on account of “race, color, or previous condition of servitude.” Section 2 of the Fourteenth Amendment famously referred to the right to vote of “male inhabitants,” despite vehement objection by first-wave feminists who called for clear protections for the rights of women, in addition to those of former slaves. Similarly, the Fifteenth Amendment focused exclusively on race-related discrimination, providing that “the right of citizens of the United States to vote shall not be denied . . . on account of race, color, or previous condition of servitude.”

What do the history of the Reconstruction Amendments and the Court’s early interpretation of the Equal Protection Clause mean for us today? Given this history, what is the justification for expanding heightened solicitude under the Clause to groups other than racial minorities? Must extensions of the Clause’s protection always be accomplished by reference or analogy to the paradigm case of race? Does this original context of the Fourteenth Amendment help explain why the expansion of the Clause to new groups has been limited, slow, and difficult to secure? In assessing whether the Equal Protection Clause could be used to invalidate state-supported segregation, Alexander Bickel argued that the search for original congressional purpose should be twofold: “One inquiry should be directed at the congressional understanding of the immediate effect of the enactment” and another “should aim to discover what if any thought was given to the long-range effect . . . of provisions necessarily intended for permanence.”¹ Is such a rationale available to justify expanding heightened protection under the Equal Protection Clause to categories such as gender, alienage, or sexual orientation?

¹ Bickel, *The Original Understanding and the Segregation Decisions*, 69 HARV. L. REV. 1, 56-63 (1955).