

Roger Williams University Law Review

Volume 22

Issue 1 Vol. 22: No. 1 (Winter 2017)

Article 4

Winter 2017

Apple of Gold and Picture of Silver: How Abraham Lincoln Would Analyze the Fourteenth Amendment's Equal Protection Clause

Frank J. Williams

Rhode Island Supreme Court, Ret. Chief Justice

William D. Bader

Andrew Blais

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

 Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Law and Politics Commons](#), [Law and Race Commons](#), and the [Legal History Commons](#)

Recommended Citation

Williams, Frank J.; Bader, William D.; and Blais, Andrew (2017) "Apple of Gold and Picture of Silver: How Abraham Lincoln Would Analyze the Fourteenth Amendment's Equal Protection Clause," *Roger Williams University Law Review*: Vol. 22 : Iss. 1 , Article 4.
Available at: http://docs.rwu.edu/rwu_LR/vol22/iss1/4

This Article is brought to you for free and open access by the School of Law at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized editor of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Apple of Gold and Picture of Silver: How Abraham Lincoln Would Analyze the Fourteenth Amendment's Equal Protection Clause

Chief Justice Frank J. Williams (Ret.), William D. Bader, and
Andrew Blais*

The *expression* of that principle, in our Declaration of Independence, was most happy, and fortunate. *Without* this, as well as *with* it, we could have declared our independence of Great Britain; but *without* it, we could not, I think, have secured our free government, and consequent prosperity. No oppressed, people will *fight*, and *endure*, as our fathers did, without the promise of something better, than a mere change of masters.

The assertion of that *principle*, at *that time*, was *the* word, "*fitly spoken*" which has proved an "apple of gold" to us. The *Union*, and the *Constitution*, are the *picture of silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—not the

* Frank J. Williams, Retired Chief Justice of the Rhode Island Supreme Court, Roger Williams University School of Law Adjunct Professor, Founding Chair of The Lincoln Forum, and Chair of the Rhode Island Civil War Sesquicentennial Commission; William D. Bader, Esquire, Co-author of THE FIRST ONE HUNDRED EIGHT JUSTICES with Professor Roy M. Mersky and *David Davis: Lawyer, Judge, and Politician in the Age of Lincoln* with the Hon. Frank J. Williams; Andrew Blais, J.D., Roger Williams University School of Law.

apple for the picture.¹

INTRODUCTION

The Book of Proverbs says that “[a] word fitly spoken is like apples of gold in pictures of silver.”² Most likely before President Lincoln’s first inaugural, he borrowed that phrase from the Bible to describe the development of the United States’ system of government.³ Lincoln wrote that the Declaration of Independence expresses the principle of “liberty to all” and that principle became the “apple of gold,” an expression made at the most necessary and perfect time.⁴ The “picture of silver” was, according to Abraham Lincoln, comprised of the Union and the Constitution, which framed the Declaration of Independence to “*adorn, and preserve it.*”⁵

Ten days before his inauguration in Washington, D.C., on February 22, 1861, Lincoln made a speech in Independence Hall in Philadelphia, Pennsylvania.⁶ He spoke of his “deep emotion[s]” for being in the same place where the Founding Fathers had met and spoke with “wisdom,” “patriotism,” and “devotion to principle.”⁷ His presidency had not yet begun, and there had been serious threats to the maintenance of the Union, with seven states already seceding.⁸ In response to some prodding, Lincoln stated:

[A]ll the political sentiments I entertain have been drawn, so far as I have been able to draw them, from the sentiments which originated, and were given to the world from this hall in which we stand. I have never had a feeling politically that did not spring from the sentiments

1. Abraham Lincoln, Fragment on the Constitution and the Union (Jan. 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 168, 169 (Roy P. Basler et al., eds., 1953) [hereinafter Fragment on Constitution and Union].

2. *Proverbs* 25:11 (King James).

3. Fragment on Constitution and Union, *supra* note 1, at 169 n.1.

4. *Id.* at 169.

5. *Id.*

6. See Abraham Lincoln, Speech in Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 240, 240–41 (Roy P. Basler et al., eds., 1953) [hereinafter Speech at Independence Hall].

7. *Id.* at 240.

8. E.B. LONG, THE CIVIL WAR DAY BY DAY: AN ALMANAC, 1861–1865, at 31 (1971).

embodied in the Declaration of Independence.⁹

Throughout his life, Abraham Lincoln looked to the Declaration of Independence as the guiding force for his contention that “all men are created equal.”¹⁰ For example, prior to his presidency, he believed that if the government could exclude one group from the benefits of equality, then there was a dangerous precedent that could lead to equality applying only to the few.¹¹ During a speech on September 4, 1858,¹² Lincoln chastised those who believed that the Declaration of Independence only applied to white men:

And when you have stricken down the principles of the Declaration of Independence, and thereby consigned the negro to hopeless and eternal bondage, are you *quite* sure that the demon will not turn and rend you? Will not the people then be ready to go down beneath the tread of any tyrant who may wish to rule them?¹³

One thousand two hundred days after President Lincoln’s assassination, the Congress and the States passed the Fourteenth Amendment:¹⁴

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁵

Although President Lincoln did not live to encourage the passage of the Fourteenth Amendment, he had inspired politicians and the

9. Speech at Independence Hall, *supra* note 6, at 240.

10. DOUGLAS L. WILSON, LINCOLN BEFORE WASHINGTON: NEW PERSPECTIVES ON THE ILLINOIS YEARS 168 (1997).

11. See Abraham Lincoln, Speech at Bloomington, Illinois (Sept. 4, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 85, 89–90 (Roy P. Basler et al., eds., 1953) [hereinafter Speech at Bloomington].

12. *Id.* at 89.

13. *Id.* at 90.

14. Clark Evans, *Assassination of President Abraham Lincoln*, THE LIBR. OF CONG. AM. MEMORY, <http://memory.loc.gov/ammem/alhtml/alrtime.html> (last visited Oct. 2, 2016); *Primary Documents in American History: 14th Amendment to the U.S. Constitution*, THE LIBR. OF CONG., <https://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html> (last visited Oct. 2, 2016).

15. U.S. CONST. amend. XIV, § 1, cl. 2.

people to see equality in many ways.¹⁶ The Fourteenth Amendment, with language similar to the Declaration of Independence, has been said to codify the Declaration of Independence into the Constitution.¹⁷

What would Abraham Lincoln see in the Fourteenth Amendment and the Equal Protection Clause today? Has Supreme Court interpretation followed the path that President Lincoln set out? Do the tests of “strict scrutiny,” “rational basis,” and “intermediate scrutiny” promote Lincoln’s understanding of the Declaration of Independence, or do they go against his interpretation? Does the Fourteenth Amendment provide “so much liberty and equality” that “the humblest and poorest amongst us are held out the highest privileges and positions”?¹⁸

I. ABRAHAM LINCOLN’S INTERPRETATION OF THE CONSTITUTION
THROUGH THE DECLARATION OF INDEPENDENCE

A. *Equality of and Amongst Citizens*

[T]he plain unmistakable language of the Declaration. I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.”¹⁹

Abraham Lincoln saw the Declaration of Independence as the

16. See *Today in History—April 14: Lincoln Shot at Ford’s Theater*, THE LIBR. OF CONG., <http://memory.loc.gov/ammem/today/apr14.html> (last visited Oct. 3, 2016).

17. See David H. Gans, *Perfecting the Declaration: The Text and History of the Equal Protection Clause of the Fourteenth Amendment*, in CONST. ACCOUNTABILITY CTR. TEXT AND HISTORY NARRATIVE SERIES 1 (2011), <http://theconstitution.org/sites/default/files/briefs/Perfecting%20the%20Declaration.pdf>.

18. Abraham Lincoln, Speech to One Hundred Forty-Eighth Ohio Regiment (Aug. 31, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 528, 528 (Roy P. Basler et al., eds., 1953) [hereinafter Speech to Ohio Regiment].

19. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 398, 405–06 (Roy P. Basler et al., eds., 1953) [hereinafter Speech at Springfield].

document that gave birth to our nation.²⁰ That “apple of gold”²¹ described our nation’s core and eternal values: equality in the eyes of life, liberty, and the pursuit of happiness.²² This view supports the interpretation that the Constitution frames the Declaration of Independence.

Wilson R. Huhn argued that Abraham Lincoln’s interpretations of equality have been strongly endorsed by the modern United States Supreme Court.²³ He contends that there are several aspects of President Lincoln’s “political philosophy” that the Court has adopted, which include his universal application of fundamental rights and his belief that the Constitution must be understood through a lens of transcendence.²⁴

Justice David Josiah Brewer wrote in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis* that “it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.”²⁵ What is the spirit of the Declaration of Independence? The most salient quotation, at least for Constitutional interpretation, is:

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. That to secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed.²⁶

Abraham Lincoln believed that the unalienable rights described in the Declaration of Independence were put there in order to ensure that these ideals would be the guideposts of the American experiment:

They erected a beacon to guide their children and their children’s children, and the countless myriads who should

20. Fragment on Constitution and Union, *supra* note 1, at 168–69.

21. *Proverbs* 25:11 (King James).

22. See Fragment on Constitution and Union, *supra* note 1, at 168–69.

23. Wilson R. Huhn, *Abraham Lincoln’s Influence on the Modern Supreme Court’s Understanding of Liberty and Equality*, 36 OKLA. CITY U. L. REV. 555, 560 (2011).

24. *Id.*

25. 165 U.S. 150, 160 (1897).

26. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

inhabit the earth in other ages. Wise statesmen as they were, they knew the tendency of prosperity to breed tyrants, and so they established these great self-evident truths, that when in the distant future some man, some faction, some interest, should set up the doctrine that none but rich men, or none but white men, were entitled to life, liberty and the pursuit of happiness, their posterity might look up again to the Declaration of Independence and take courage to renew the battle which their fathers began—so that truth, and justice, and mercy, and all the humane and Christian virtues might not be extinguished.²⁷

Above all things, President Lincoln believed “life, liberty[,] and the pursuit of happiness” were guaranteed to all men, and applied this interpretation to the Constitution.²⁸ Just before the Civil War, he wrote, “As a nation, we began by declaring that ‘all men are created equal.’ We now practically read it ‘all men are created equal, *except negroes.*’ When the Know-Nothings get control, it will read ‘all men are created equal, *except negroes, and foreigners, and Catholics.*’”²⁹ And during the Civil War, President Lincoln pressed for these values to be universal.³⁰

B. *State v. Federal Rights*

President Lincoln’s interpretation of the Declaration of Independence as a lens through which to interpret the Constitution also changed the landscape between those arguing for state rights and those arguing for a stronger federal government.³¹

Before the Gettysburg Address, the Constitution, according to Garry Wills, was an ideal as to the nation’s identity.³² The United States was referred by many as a plural noun: “The United States

27. See Abraham Lincoln, Speech at Lewistown, Illinois (Aug. 17, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 544, 546–47 (Roy P. Basler et al., eds., 1953) [hereinafter Speech at Lewistown].

28. Fragment on Constitution and Union, *supra* note 1, at 168–69.

29. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 375 (1993).

30. See, e.g., GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 145–47 (1992).

31. *Id.* at 146.

32. *Id.* at 145.

are a free government,” but after the declaration at Gettysburg, references to this country became singular.³³ In the Gettysburg Address, “[Lincoln said] that America is *a* people addressing its great assignment as that was accepted in the Declaration.”³⁴ According to Wills, Lincoln gave the language of the Declaration a place amongst our most sacred documents, which changed the way many thought about the Constitution.³⁵

Wills contends that President Lincoln weakened the argument for strong and independent state rights.³⁶ Yet there are many examples today of strong opinions favoring exclusive state rights.³⁷ Federalism may never—and should never—be completely extinguished. Nevertheless, President Lincoln seemed to favor a stronger federal government with his ostensible interpretation of the Constitution and Declaration.

II. THE FOURTEENTH AMENDMENT AS THE “CODIFICATION” OF THE DECLARATION OF INDEPENDENCE AND ABRAHAM LINCOLN’S POTENTIAL REACTION

A. *The History of the Adoption of the Fourteenth Amendment*

The Fourteenth Amendment to the United States Constitution, officially ratified on July 28, 1868, has been called the codification of the Declaration of Independence because it incorporated the spirit of the Declaration into the United States Constitution.³⁸ The most important of the clauses in the Fourteenth Amendment, Section One, states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

33. *Id.*

34. *Id.*

35. *Id.* at 146; see, e.g., Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 60 (1996) (Dr. Harry Jaffa of Claremont Institute defends that Constitution invokes natural law principles from Declaration of Independence).

36. WILLS, *supra* note 30, at 147.

37. See, e.g., *Sen. Ted Cruz Says Same-Sex Marriage Rulings Are ‘A Real Danger to Our Liberty’*, CHRISTIAN TODAY (Mar. 12, 2015), <http://www.christiantoday.com/article/sen.ted.cruz.says.same.sex.marriage.rulings.are.a.real.danger.to.our.liberty/49847.htm>; Lindsey M. Burke, *States Must Reject National Education Standards While There Is Still Time*, HERITAGE FOUNDATION BACKGROUNDER, 1, 6 (2012), http://thf_media.s3.amazonaws.com/2012/pdf/bg2680.pdf.

38. Gans, *supra* note 17, at 1.

United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³⁹

President Lincoln was not alive during the debate surrounding the formation of the Fourteenth Amendment.⁴⁰ In fact, Lincoln's successor, President Andrew Johnson, was a key detractor of its passage.⁴¹ Representative John Bingham, a Republican from Ohio, was the originator of Section One of the Fourteenth Amendment.⁴² Years later, in 1947, Supreme Court Justice Hugo L. Black wrote that "Congressman Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment."⁴³

Congressman Bingham proposed language that became Section One of the Fourteenth Amendment almost immediately after the first meeting of the Thirty-Ninth Congress, the first to meet after the end of the Civil War.⁴⁴ He proposed three amendments, one of which became the basic language for Section One. *The New York Times* wrote, "The third and last amendment declares that the Congress shall have power to make all laws necessary and proper to secure to all persons, without distinction, in every State of the Union, equal protection in their rights of life, liberty and property."⁴⁵

Congressman Bingham's proposal was not a new one. Years before, during the Thirty-Fifth Congress, Bingham had expressed these ideas:

By the end of the Thirty-Fifth Congress, John Bingham

39. U.S. CONST. amend. XIV, § 1.

40. Lincoln died on April 15, 1865; the Fourteenth Amendment was not formally adopted until July 28, 1868. See *This Day in History July 28, 1868: 14th Amendment Adopted*, HISTORY, <http://www.history.com/this-day-in-history/14th-amendment-adopted> (last visited Oct. 7, 2016).

41. GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT*, 124 (2013).

42. *Id.* at 108.

43. *Adamson v. California*, 332 U.S. 46, 73-74 (1947).

44. MAGLIOCCA, *supra* note 41, at 114.

45. *Washington News: The Position of the Constitutional Amendment*, N.Y. TIMES, Dec. 11, 1865, at 1.

had articulated the ideas that would go into Section One of the Fourteenth Amendment. Protecting privileges and immunities of citizens, due process of law, and equal protection from state action was his constitutional calling card.⁴⁶

In Professor Robert J. Reinstein's 1993 article, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, there is an important illustration of the direct correlation between Section One of the Fourteenth Amendment and the Declaration of Independence:

Fourteenth Amendment, Section 1:	Declaration of Independence:
"All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside."	"[A]ll men are created equal . . ."
"No State shall . . . abridge the privileges or immunities of citizens of the United States."	"[and] are endowed by their Creator with certain unalienable Rights . . ."
"nor . . . deprive any person of life, liberty, or property, without due process of law . . ."	"among these are Life, Liberty, and the pursuit of Happiness . . ."
"nor deny . . . the equal protection of the laws."	"to secure these rights governments are instituted among men . . ." ⁴⁷

There is little history of a relationship between Congressman Bingham and President Lincoln;⁴⁸ however, it does seem evident that the two were similar in their regard for the Declaration of Independence.⁴⁹ President Lincoln cited the Declaration as the

46. MAGLIOCCA, *supra* note 41, at 65.

47. Reinstein, *supra* note 29, at 390.

48. Bingham did serve as assistant prosecutor at the Lincoln conspiracy trial along with Judge Advocate General Joseph Holt. EDWARD STEERS, JR., *BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN* 216 (2001).

49. "[T]here are only a few references to Bingham in Lincoln's papers." MAGLIOCCA, *supra* note 41, at 75; *see, e.g.*, Abraham Lincoln, To Simon Cameron (Nov. 10, 1861), in 5 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*

source of “all men created equal” and used that language and interpretive lens to argue against slavery.⁵⁰ During his presidency, Lincoln pressed hard for the Thirteenth Amendment, which prohibited “slavery” and “involuntary servitude” unless these punishments were for criminal convictions.⁵¹ Congressman Bingham recognized that the Thirteenth Amendment was meant to forbid the former southern slave states from prohibiting ex-slaves from pursuing life, liberty, property, or happiness, and thus introduced what is now Section One of the Fourteenth Amendment.⁵²

B. *Predicting President Lincoln’s Thoughts of the Fourteenth Amendment*

It is hard to anticipate an argument against President Lincoln’s theoretical support of the Fourteenth Amendment. The Declaration of Independence, as the “apple of gold,” was the most important document and was framed by the Constitution, the “picture of silver.”⁵³

Section One of the Fourteenth Amendment applies equality to all persons who are United States citizens.⁵⁴ The Declaration of Independence states that “all men are created equal” and President Lincoln interpreted the words of Thomas Jefferson to mean not only white property holders:

I have made it equally plain that I think the negro is included in the word “men” used in the Declaration of Independence.

I believe the declara[tion] that “all men are created equal” is the great fundamental principle upon which our free institutions rest; that negro slavery is violative of that

19, 19 (Roy P. Basler et al., eds., 1953) [hereinafter To Simon Cameron]; Abraham Lincoln, To Edward M. Stanton (Aug. 25, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 405, 405–06 (Roy P. Basler et al., eds., 1953) [hereinafter To Edward M. Stanton]; Abraham Lincoln, To the Senate of the United States (Jan. 27, 1865), in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 242, 242–43 [hereinafter To the U.S. Senate].

50. See Fragment on Constitution and Union, *supra* note 1, at 169.

51. U.S. CONST. amend. XIII, § 1.

52. U.S. CONST. amend. XIV, § 1.

53. Fragment on Constitution and Union, *supra* note 1, at 169.

54. U.S. CONST. amend. XIV, § 1, cl. 1.

principle.⁵⁵

President Lincoln would most certainly have supported the Fourteenth Amendment's demand that no state has the ability to change any privilege or immunity of a citizen of the United States. He believed that these privileges and immunities were granted from the "Creator," as the Declaration of Independence says.⁵⁶ In a speech in Lewistown, Illinois, Lincoln said:

This was their majestic interpretation of the economy of the Universe. This was their lofty, and wise, and noble understanding of the justice of the Creator to His creatures. [Applause.] Yes, gentlemen, to *all* His creatures, to the whole great family of man. In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by its fellows.⁵⁷

The reference to both the Declaration of Independence and the Fourteenth Amendment indicates that the important qualities of citizens not to be infringed by any government are life and liberty.⁵⁸ The Declaration of Independence states the third quality of the American people to be protected is "the pursuit of happiness," while the Fourteenth Amendment states "property."⁵⁹ Eighteenth century common law equated "the pursuit of happiness" with "property."⁶⁰

It is also important to note that Professor Reinstein does not provide a corollary for "due process of law" in his chart.⁶¹ But there is a part of the Declaration of Independence that laments the colonies' inability to gain a fair hearing of their complaints with the British monarch and parliament:

55. Abraham Lincoln, To James N. Brown (Oct. 18, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 327, 327 (Roy P. Basler et al., eds., 1953) [hereinafter To James N. Brown].

56. 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." (emphasis added)).

57. Speech at Lewistown, *supra* note 27, at 546.

58. See U.S. CONST. amend. XIV, § 1, cl. 2; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

59. See U.S. CONST. amend. XIV, § 1, cl. 2; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

60. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 157 (Everyman, 1993).

61. See Reinstein, *supra* note 29, at 390.

Nor have we been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.⁶²

This demonstrates that the colonists and the Founding Fathers of our nation wanted a fair hearing that would not fall on deaf ears. “Due Process of Law” found in the Fourteenth Amendment guarantees such a hearing from the government before a decision affecting any citizen’s fundamental rights is implemented.⁶³

The final comparable portion of Section One of the Fourteenth Amendment and the Declaration of Independence considers the Equal Protection Clause.⁶⁴ This comparison is more attenuated. The Declaration of Independence states, “That to secure [the] rights [to Life, Liberty and the pursuit of Happiness], Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁶⁵ Meanwhile, the Fourteenth Amendment says that the government shall guarantee “equal protection of the laws.”⁶⁶ This language, when read in its entirety with the Fourteenth Amendment, also illustrates the Declaration’s intent of the government securing the rights of men.

62. THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776).

63. See U.S. CONST. amend. XIV, § 1, cl. 2.

64. See MAGLIOCCA, *supra* note 41, at 108.

65. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

66. U.S. CONST. amend. XIV, § 1, cl. 2.

III. ABRAHAM LINCOLN AND THE HISTORIC JUDICIAL INTERPRETATION
OF THE FOURTEENTH AMENDMENT

A. *19th Century Interpretation of the Fourteenth Amendment*

1. Slaughter-House Cases

In 1872, the United States Supreme Court ruled on the pinnacle *Slaughter-House Cases*.⁶⁷ President Lincoln's influence could be felt on that Court, as he had appointed five of the sitting nine justices, including the Chief Justice, Salmon P. Chase, in 1864.⁶⁸ President Lincoln worked closely with Salmon P. Chase of Ohio throughout the war.⁶⁹ Their relationship was troubled, but on the question of slavery, Lincoln and Chase were quite alike.⁷⁰ When the position of chief justice became vacant upon Chief Justice Roger B. Taney's death, President Lincoln was forced to consider several members of his cabinet.⁷¹ Lincoln chose Chase, saying that "Chase is, on the whole, a pretty good fellow and a very able man. His only trouble is that he has 'the White House fever' a little too bad, but I hope this may cure him and that he will be satisfied."⁷²

President Lincoln not only appointed the Chief Justice of the Supreme Court that ruled on the *Slaughter-House Cases*, but he also appointed Justices Noah Haynes Swayne, Samuel Freeman Miller, David Davis, and Stephen Field.⁷³ Lincoln shared a warm friendship with Justice David Davis as they rode the judicial circuit together in Illinois: Davis as a Circuit Judge, and Lincoln as a lawyer.⁷⁴

The *Slaughter-House Cases* stated that the Fourteenth

67. 83 U.S. 36 (1872).

68. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 292–93 (5th ed. 2012).

69. *See generally*, DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005).

70. *See id.* at 111.

71. *Id.* at 676.

72. *Id.* at 680.

73. EPSTEIN ET AL., *supra* note 68, at 292–93; *see generally* DAVID M. SILVER, *LINCOLN'S SUPREME COURT* (1956) (recapping extensive history surrounding Lincoln's appointments to the Supreme Court of the United States).

74. *See* GOODWIN, *supra* note 69, at 150; *see also* William D. Bader & Frank J. Williams, *David Davis: Lawyer, Judge, and Politician in the Age of Lincoln*, 14 *ROGER WILLIAMS U. L. REV.* 163 (2009).

Amendment granted United States citizenship to slaves, but not state-specific citizenship to slaves.⁷⁵ It narrowly interpreted proscribed state action as applying only to African Americans:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.⁷⁶

Of President Lincoln's appointees, Justice Miller wrote the opinion with which Justice Davis joined.⁷⁷ Justice Field dissented from the opinion, with Chief Justice Chase and Justice Swayne joining his dissent.⁷⁸ In his dissent, Justice Swayne wrote a passage that sounds similar to the thoughts of President Lincoln. Justice Swayne wrote:

Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity . . . "The equal protection of the laws' places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness."⁷⁹

75. 83 U.S. 36, 37 (1872); *see also* Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1054 (2009) (stating that the *Slaughter-House Cases* "consigned the fundamental freedoms that Americans rightfully regard as their birthright to the dubious protection of the States.").

76. *Slaughter-House Cases*, 83 U.S. at 81.

77. *Id.* at 57.

78. *Id.* at 83, 111.

79. *Slaughter-House Cases*, 83 U.S. at 127 (Swayne, J., dissenting); *see also* Huhn, *supra* note 75, at 1053.

Lincoln cared about an equal protection of life, liberty and the pursuit of happiness guaranteed by the Declaration of Independence and later by the Fourteenth Amendment.⁸⁰ Had Lincoln been alive when this decision was handed down it is doubtful that he would have endorsed it. He believed in a certain baseline of “natural” rights granted to all Americans.⁸¹ This decision, however, paved the road for “states’ rights” to continue overruling the federal government. As Lincoln had just finished a war that many attribute to disagreement over “states’ rights,” it is hard to believe that he would have been enthused to see different levels of citizen rights granted to former slaves or any other citizens.⁸²

2. Bradwell v. Illinois

Bradwell v. Illinois involved a female legal publisher who applied for admission to the bar in Lincoln’s home state of Illinois.⁸³ The case was decided on the same day as the *Slaughter-House Cases*, in which the Court failed to implicate equal protection at all.⁸⁴ Instead, the Court, through Justice Miller again,⁸⁵ cited the reasoning from the *Slaughter-House Cases*.⁸⁶

There was only one dissenter in the case, and that was Chief Justice Chase.⁸⁷ However, he did not file an opinion; the ruling simply stated that “[t]he CHIEF JUSTICE dissented from the

80. Fragment on Constitution and Union, *supra*, note 1, at 169.

81. Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1, 16 (Roy P. Basler et al., 1953) [hereinafter Debate at Ottawa].

82. Paul Finkelman, *States’ Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449, 451–52 (2012).

83. Huhn, *supra* note 75, at 1062.

84. *Id.*

85. *Bradwell v. Illinois*, 83 U.S. 130, 137 (1872).

86. Huhn, *supra* note 75, at 1062–63. The Court in the *Slaughter-House Cases* held that the Equal Protection Clause protected only African Americans, but no other group, from discrimination. *Id.* In *Bradwell*, the Court upheld the Illinois Supreme Court’s rejection of Bradwell’s application to be a lawyer, because she was a woman and that the Illinois statute governing admission to the bar was intended only to permit men, because she had no claim under the Privileges and Immunities Clause because the right to earn a living arose under state law, not national law, which the Court had just held in *Slaughter-House* as well. *Id.* at 1062.

87. Richard L. Aynes, *Bradwell v. Illinois: Chief Justice Chase’s Dissent and the “Sphere of Women’s Work”*, 59 LA. L. REV. 521, 526–27 (1999).

judgment of the court, and from all the opinions.”⁸⁸ Dean Richard L. Aynes wrote that Chase’s dissent was not forthcoming because of his failing health.⁸⁹ Chase wrote to an old abolitionist ally, “My opinions [and] feelings are in favor of Woman suffrage, but I would make haste slowly.”⁹⁰

How would Chief Justice Chase’s former rival and boss, President Lincoln, have felt about this? There is one mention of his beliefs regarding women’s rights, published in a letter to the editor of the *Sangamo Journal* in 1836, in which Lincoln wrote, “I go for all sharing the privileges of the government, who assist in bearing its burdens. Consequently I go for admitting all whites to the right of suffrage, who pay taxes or bear arms, (by no means excluding females).”⁹¹ Lincoln was clearly for some sort of women’s suffrage. Would President Lincoln have thought that the Fourteenth Amendment should have applied to this case? Perhaps, but it depends truly on whether the “all men created equal” clause of the Declaration of Independence, in President Lincoln’s view, was meant to apply only to men or as a looser interpretation, would include *all* people, men and women alike.

Obviously, this becomes an important issue as to what President Lincoln would think of the tiered analysis of the Equal Protection Clause. To determine the Framers’ intentions, it is helpful to see Congressman Bingham’s opinion on the issue with regard to the Fourteenth Amendment:

But, says the gentleman, if you adopt this amendment you give to Congress the power to enforce all the rights of married women in the several States. I beg the gentleman’s pardon. He need not be alarmed at the condition of married women. Those rights which are universal and independent of all local State legislation belong, by the gift of God, to every woman, whether married or single. The rights of life and liberty are theirs whatever States may enact. But the gentleman’s concern

88. *Bradwell*, 83 U.S. at 142.

89. *See Aynes*, *supra* note 87.

90. *Id.* at 529 (citing Letter from S. P. Chase, Chief Justice, United States Supreme Court, to G. Smith, former Representative to the House of Representatives (Feb. 13, 1873) (on file with the Library of Congress)).

91. Abraham Lincoln, To the Editor of the *Sangamo Journal* (June 13, 1836), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 49, 49 (Roy P. Blaser et al., eds., 1953) [hereinafter *Sangamo Journal*].

is as to the right of property in married women.

Although this word property has been in your bill of rights from the year 1789 until this hour who ever heard it intimated that anybody could have property protected in any State until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried thither? I undertake to say no one.⁹²

Congressman Bingham raised an important point—women, as Americans, were entitled to life and liberty, guaranteed through the Declaration of Independence. President Lincoln would have agreed with this because of its simple appeal in that it fits so closely with the Declaration of Independence. This also shows how these wrongly decided cases—the *Slaughter-House Cases* and *Bradwell*—intentionally ignored the primary framer of the Fourteenth Amendment’s statements on the House of Representatives’ floor.⁹³

3. Plessy v. Ferguson

One of the most infamous cases of the nineteenth century was *Plessy v. Ferguson*, decided in 1896. The state of Louisiana passed a law requiring that blacks and whites use separate rail cars.⁹⁴ There was a challenge to the law saying that it violated the Fourteenth Amendment’s Equal Protection Clause.⁹⁵

The Court annunciated what Justice Harlan, in dissent, called a “separate but equal” approach.⁹⁶ The Court further held

92. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

93. In Bingham’s last speech to the House before the House voted to ratify the 14th Amendment, he said that Section One’s intended purpose was to “protect by national law the privileges and immunities of all the citizens of the republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.” MAGLIOCCA, *supra* note 41, at 123. However, the holdings of *Slaughter-House* and *Bradwell* seem contrary to this intention of protecting the rights of every citizen since the Court held that one’s right to work is an issue of right arising under state law and that the Equal Protection Clause only protects African Americans from discrimination, but no others. Huhn, *supra* note 75, at 1062–63.

94. *Plessy v. Ferguson*, 163 U.S. 537, 540–41 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

95. *Plessy*, 163 U.S. at 542.

96. *Plessy*, 163 U.S. at 522 (Harlan, J., dissenting).

that there were no deprivations without due process of the ability to conduct commerce, abridge immunities or deny them equal protection of the laws.⁹⁷ The Court spoke further about the Fourteenth Amendment, saying:

[t]he object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.⁹⁸

This is another instance where projecting President Lincoln's thought is difficult. In an 1858 debate in Charleston, Illinois, Lincoln said:

I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races, [applause]—that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality.⁹⁹

Perhaps President Lincoln would support the decision's outcome, but would he support the judicial interpretation that allowed the Court to get to that outcome? The Court stated simply that equal protection did not apply because there were separate facilities that were equal.¹⁰⁰ President Lincoln may not have supported this decision because of its path to determination. Justice Harlan points out that President Lincoln's potential interpretation of the Fourteenth Amendment was an extension of the Declaration of Independence:

But I deny that any legislative body or judicial tribunal

97. *Id.* at 548–49.

98. *Id.* at 544.

99. Abraham Lincoln, Fourth Debate with Stephen A. Douglas at Charleston, Illinois (Sept. 18, 1858), in 3 *COLLECTED WORKS OF ABRAHAM LINCOLN* 145, 145–46 (Roy P. Basler et al., eds., 1953) [hereinafter *Debate at Charleston*].

100. *Plessy*, 163 U.S. at 544 (Harlan, J., dissenting).

may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.¹⁰¹

Justice Harlan mentions “personal liberty.”¹⁰² Above all, President Lincoln saw the Declaration of Independence as *the* political document.¹⁰³ And in that document are the most fundamental rights that he held dear: “life, liberty and the pursuit of happiness.”¹⁰⁴ There is evidence that Lincoln expected change to come and create a time in this country where race did not matter, and this came before his statement that blacks and whites could never be equal.¹⁰⁵ As he ended a speech in Chicago, Illinois, President Lincoln said to the crowd:

[L]et us discard all this quibbling about this man and the other man—this race and that race and the other race being inferior, and therefore they must be placed in an inferior position—discarding our standard that we have left us. Let us discard all these things, and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal.¹⁰⁶

What we do know is that President Lincoln highly valued the Declaration of Independence and that this case, as Justice Harlan put it, ignored the personal liberty of citizens of Louisiana.¹⁰⁷

B. *Evolution of the Interpretation of the Fourteenth Amendment Through Brown v. Board of Education*

After *Plessy*, there were many cases that were decided regarding the doctrine of “separate but equal.”¹⁰⁸ These cases, as

101. *Id.* at 554–55.

102. *Id.*

103. Fragment on Constitution and Union, *supra* note 1, at 168–69.

104. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

105. Abraham Lincoln, Speech at Chicago, Illinois (July 10, 1858), *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 2, 501 (Roy P. Basler et al., eds., 1953) [hereinafter Speech at Chicago].

106. *Id.*

107. *Plessy*, 163 U.S. at 554–55 (Harlan, J., dissenting).

108. See generally *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Shelley v. Kraemer*,

time passed and circumstances changed, led to *Brown v. Board of Education*, which prevented the total enforcement of separate but equal.¹⁰⁹ With a new chief justice—Earl Warren—the Supreme Court decided unanimously to overturn *Plessy*,¹¹⁰ at least with regard to public school access, holding that:

[T]he plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.¹¹¹

This was a sea change in constitutional jurisprudence. The Court had held that because the schools were not equal in terms of the education that they provided, there was no “equal” in “separate but equal.”¹¹²

President Lincoln would have been pleased, he wanted the United States to “unite as one people throughout this land” and furthered national unity by overruling the “separate but equal” mandate of *Plessy* a half century before.¹¹³ He once wrote to the tax commissioners appointed for South Carolina and demanded that they apply the taxes received equally for the education of black and white children:¹¹⁴

The lands so set apart you will let and lease for such terms not exceeding five years, and on such conditions as you may deem eligible, reserving the rents and issues thereof to yourselves and your successors in office, and you will take receive and collect such rents and issues and appropriate and apply the same to the education of colored youths, and of such poor white persons, being minors, as may by themselves, parents, guardians, or next friends, apply for the benefit thereof, and you are authorized to establish such schools, and to direct the

334 U.S. 1 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

109. 347 U.S. 483, 495 (1954).

110. *Id.* at 493.

111. *Id.* at 495.

112. *Id.*

113. Speech at Chicago, *supra* note 105, at 501.

114. Abraham Lincoln, Instructions to Tax Commissioners in South Carolina (Sept. 16, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 453, 456 (Roy P. Basler et al., eds., 1953) [hereinafter Instructions to Tax Commissioners].

tuition of such branches of learning as you in your judgment shall deem most eligible, subject nevertheless to the general direction and control of the Secretary of the Treasury.¹¹⁵

President Lincoln would have agreed with Chief Justice Warren and the unanimous Court in providing education. *Brown* marked a turning point in constitutional analysis, but the regime that we have today is markedly different than anything that the Warren Court considered.

III. ABRAHAM LINCOLN AND THE EQUAL PROTECTION “TIERED ANALYSIS”

Today, law schools across the country teach and test the equal protection analysis. This analysis is comprised of three tiers: rational basis, intermediate scrutiny, and strict scrutiny.¹¹⁶ These tests determine how best to protect a certain segment of the population or group.¹¹⁷

The first time that the Court suggested that there may be different criteria for different groups was made by Justice Harlan Stone in footnote four of *United States v. Carolene Products Co.*¹¹⁸ In that case, the Supreme Court stated that there may be a more exacting judicial scrutiny in cases that arise from discrimination of “discrete and insular minorities.”¹¹⁹ Although *Carolene Products* was a case from 1938, that footnote created the underlying thought for tiered analysis.¹²⁰ What developed were three distinct categories that the Court could use to define any group of people and then analyze their equal protection claim.

A. *The Tiers of Analysis of Equal Protection Claims*

1. *Rational Basis*

Rational basis requires that, when a law is passed, it be “rationally related to a legitimate government interest.”¹²¹ In

115. *Id.*

116. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–57 (2011).

117. *Id.* at 756–57.

118. *See* 304 U.S. 144, 152 n.4 (1938).

119. *Id.*

120. *See id.*

121. *Rational Basis*, LEGAL INFORMATION INSTITUTE, <https://www.law>.

terms of equal protection, if a law is related in a reasonable way to an appropriate governmental interest then the law shall stand.¹²² Justice Oliver Wendell Holmes made the first mention of what would become the rational basis test in his dissent in *Lochner v. New York*.¹²³ He wrote:

I think that the word *liberty* in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.¹²⁴

Rational basis became an important concept in equal protection analysis. In *Williamson v. Lee Optical of Oklahoma, Inc.*, optometrists challenged an Oklahoma law that required that only optometrists frame prescription glasses.¹²⁵ There, the Court found that the law was not unconstitutional because there was a rational basis for the law, and not all parts of a law have to relate to that interest in order for it to be valid.¹²⁶

Justice Clarence Thomas succinctly described the rational basis test in the 1993 decision *Federal Communications Commission v. Beach Communications, Inc.*¹²⁷ He wrote:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are “plausible reasons” for Congress’ action,

cornell.edu /wex/rational_basis (last visited Aug. 8, 2016).

122. *Id.*

123. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

124. *Id.* (emphasis added).

125. 348 U.S. 483, 486 (1955).

126. *Id.* at 487–88.

127. Andrew Ward, *The Rational-Basis Test Violates Due Process*, 8 N.Y.U. J.L. & LIBERTY 714, 717 (2014) (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993)).

“our inquiry is at an end.” This standard of review is a paradigm of judicial restraint. “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”¹²⁸

Rational basis tests are currently applied when neither “fundamental rights [n]or suspect classifications” are involved in the challenges.¹²⁹

2. *Strict Scrutiny*

Strict scrutiny requires that the government prove it made a law with regard to a “compelling government interest” that is “narrowly tailored . . . to achieve that interest.”¹³⁰ Many have written that strict scrutiny challenges are “strict’ in theory and fatal in fact.”¹³¹ In the seminal case *Korematsu v. United States*, the Court wrote about the need to deal with equal protection challenges based on race.¹³² There, a Japanese-American challenged his imprisonment in a Japanese-American internment camp during World War II.¹³³ The Court began its analysis by explaining its standard of review:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.¹³⁴

128. *Beach Commc'ns*, 508 U.S. at 313–14 (1993) (citations omitted).

129. *Rational Basis*, *supra* note 121.

130. *Strict Scrutiny*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/strict_scrutiny (last visited Aug. 8, 2016).

131. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also Strict Scrutiny*, WEX LEGAL DICTIONARY & ENCYCLOPEDIA (2016) (defining “strict scrutiny”).

132. 323 U.S. 214, 216 (1944).

133. *Id.* at 215–18.

134. *Id.* at 216.

Despite the heightened scrutiny, the Court sided with the federal government.¹³⁵ Strict scrutiny has developed further through case law to include not only race, but also, alienage, poverty, religion, and national origin.¹³⁶

3. *Intermediate Scrutiny*

Intermediate scrutiny, the third tier, was first announced in *Craig v. Boren*, a 1976 Supreme Court case.¹³⁷ *Craig* dealt with a law that prohibited males between the ages of 18 and 21 from purchasing beer with 3.2 percent alcohol content, while women could purchase that same beer after turning 18.¹³⁸ The Court held that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹³⁹

Recently, in the landmark decision of *Obergefell v. Hodges*, the Court ruled that same sex marriage was legal.¹⁴⁰ In oral arguments, Chief Justice Roberts asked the Michigan Special Assistant Attorney General if the case was really about a gender classification in equal protection:

Counsel, I’m—I’m not sure it’s necessary to get into sexual orientation to resolve the case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?¹⁴¹

Legal commentators believed that this line of reasoning might swing Chief Justice Roberts—seen as a jurist who believes in using the intricacies of a case to bring a broad coalition—to vote in favor of striking down laws banning same-sex marriage.¹⁴² In the

135. *Id.* at 223–24.

136. *Strict Scrutiny*, WEX LEGAL DICTIONARY & ENCYCLOPEDIA (2016).

137. Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 *FORDHAM L. REV.* 2339, 2339 (2006) (citing *Craig v. Boren*, 429 U.S. 190 (1976)).

138. *Craig*, 429 U.S. at 190.

139. *Id.* at 197.

140. 135 S. Ct. 2584 (2015).

141. Transcript of Oral Argument at 61, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) [hereinafter Transcript of Oral Argument, *Obergefell v. Hodges*].

142. See Stephen Menendian, *Obergefell v. Hodges: A Dead-End for*

end, Justice Roberts did not use *Obergefell* for such a broad coalition, but the case is a strong example of how intermediate scrutiny is used for gender classification cases.

B. *Criticism of the Three-Tiered Equal Protection Analysis*

Tiered scrutiny has always had a somewhat artificial air of precision to it, because the criteria for sorting classifications and liberties into the appropriate bins has been flexible (to put it charitably), or so amorphous as to approach the illusory (to phrase it cynically). In any case, the supposed criteria have never been applied consistently. Yet, tiered scrutiny has survived. Perhaps tiered scrutiny resembles Winston Churchill's characterization of democracy as the worst form of government except for all the others, but neither democracy nor tiered scrutiny is invulnerable to attack from without or to collapse from within.¹⁴³

There are several criticisms of the tiered analysis of equal protection. One large criticism deals with classifications.¹⁴⁴ Whenever there is a challenge on equal protection grounds, an argument arises from the standard analysis of whether someone should be classified.¹⁴⁵ The determination of what level of scrutiny to apply, imposing costs on various groups including racial majorities, homosexuals, and the mentally ill, are often based on a judge's worldviews.¹⁴⁶ On the other hand, equal protection, is meant to prevent the denial of "any person within [the government's] jurisdiction the equal protection of the laws."¹⁴⁷

Another criticism of the tiered equal protection analysis is that it is a structure that is too rigid—that where sometimes the standard is set too high, others times the standard is set too low.¹⁴⁸ Suzanne B. Goldberg wrote, "the extent that the tiered framework requires identical treatment of every use of a suspect

LGBT Civil Rights?, THE BERKELEY BLOG (May 13, 2015), http://blogs.berkeley.edu/2015/05/13/obergefell-v-hodges-a-dead-end-for-lgbt-civil-rights/#_ftn2.

143. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 980 (2004).

144. Siegel, *supra* note 137, at 2343.

145. *Id.*

146. *Id.*

147. *Id.*

148. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 509–10 (2004).

classification, its rigidity runs contrary to the Equal Protection Clause's core values."¹⁴⁹

Andrew M. Siegel noted that the tiered analysis system also created a disconnect between the courts considering the Equal Protection Clause and the challenge to it.¹⁵⁰ He wrote:

By framing and persistently applying complicated doctrinal tests, courts interpose mediating concepts between the case at hand and the relevant constitutional provision. Instead of asking whether a particular legislative scheme denies "equal protection of the laws" and meditating on that question, courts ask whether legislation aimed at a particular group should be treated as a "suspect classification" or whether a specified governmental purpose is "compelling," "important," or only "legitimate."¹⁵¹

C. *The Potential View of Abraham Lincoln on the Three-Tiered Analysis of Equal Protection*

What would Abraham Lincoln think about the current doctrinal scheme used for the interpretation of the Fourteenth Amendment? Lincoln spoke in Lewistown, Illinois, in 1858, and told the crowd gathered the following:

Yes, gentlemen, to *all* His creatures, to the whole great family of man. In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by its fellows. They grasped not only the whole race of man then living, but they reached forward and seized upon the farthest posterity. They erected a beacon to guide their children and their children's children, and the countless myriads who should inhabit the earth in other ages. Wise statesmen as they were, they knew the tendency of prosperity to breed tyrants, and so they established these great self-evident truths, that when in the distant future some man, some faction, some interest, should set up the doctrine that none but rich men, or

149. *Id.* at 510.

150. Siegel, *supra* note 137, at 2345.

151. *Id.*

none but white men, were entitled to life, liberty and the pursuit of happiness, their posterity might look up again to the Declaration of Independence and take courage to renew the battle which their fathers began—so that truth, and justice, and mercy, and all the humane and Christian virtues might not be extinguished.¹⁵²

President Lincoln believed—citing the founding fathers—that all men “stamped with the Divine image and likeness” were to be free from oppression.¹⁵³ He feared most the return of tyrants and the establishment of doctrine that would allow only “rich men” or “white men,” to inherit the “life, liberty and the pursuit of happiness” guaranteed to all Americans by the Declaration of Independence.¹⁵⁴

1. *The Tiered Analysis’ Use of Classifications*

The Equal Protection Clause analysis requires determining what group a person is in, depending on the claim that they are making.¹⁵⁵ The analysis requires a categorization of each person.¹⁵⁶ Laws that discriminate based on race, poverty, alienage, religion or national origin must be viewed with the highest level of scrutiny.¹⁵⁷ Laws that discriminate based on gender are viewed with a high level of scrutiny.¹⁵⁸ Other groups, when classified by a law, are to be judged on a rational basis review, meaning that there simply needs to be a logical connection between the law and its intended consequences.¹⁵⁹ The doctrine requires that groups of people be categorized in order to apply “equal protection” to the laws affecting them.¹⁶⁰

Abraham Lincoln wrote about his fear of classifications, which he believed would break the country apart.¹⁶¹ He wrote:

152. Speech at Lewistown, *supra* note 27, at 546–47.

153. *Id.* at 546.

154. *Id.*

155. Goldberg, *supra* note 148, at 494.

156. Yoshino, *supra* note 116, at 748–49.

157. *Strict Scrutiny*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/strict_scrutiny (last visited Oct. 10, 2016).

158. *Intermediate Scrutiny*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Aug. 8, 2016).

159. *Rational Basis*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/rational_basis (last visited Aug. 8, 2016).

160. Yoshino, *supra* note 116, at 748–49.

161. Abraham Lincoln, *To Henry L. Pierce and Others* (Apr. 6, 1859), in 3

These expressions, differing in form, are identical in object and effect—the supplanting the principles of free government, and restoring those of classification, caste, and legitimacy. They would delight a convocation of crowned heads, plotting against the people. They are the van-guard—the miners, and sappers—of returning despotism. We must repulse them, or they will subjugate us.¹⁶²

Abraham Lincoln feared that by describing different groups and placing them in classifications, there may be a creation of a caste system.¹⁶³ When the government classifies Americans according to groups that they identify with, then despots will gain control.¹⁶⁴ Our court system creates a judicial caste system, where laws based on race are judged strictly, while laws based on other categorizations determined by the court are judged less harshly.

The current analysis to determine what categorization a group falls under has been prescribed by the Supreme Court.¹⁶⁵ To determine whether a group is a suspect class, a court must determine if the group is “saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹⁶⁶ But, this analysis is not an analysis that comports with Abraham Lincoln’s philosophy. The Declaration of Independence, codified in spirit and law by the Fourteenth Amendment, states that “all men are created equal.”¹⁶⁷ It is likely that Abraham Lincoln would believe that classifying groups as “more vulnerable” and “less vulnerable” to majoritarian rule is antithetical to the Declaration of Independence.¹⁶⁸ A government that classifies its citizens according to demographics in order to afford some groups more protections than others threatens every

THE COLLECTED WORKS OF ABRAHAM LINCOLN 374, 375 (Roy P. Basler et al., ed., 1953) [hereinafter To Henry L. Pierce].

162. *Id.*

163. *Id.*

164. *Id.*

165. 12B TEX. JUR. 3D *Constitutional Law* § 313 (2016).

166. *Id.*

167. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); U.S. CONST. amend. XIV.

168. See ERIC FONER, THE FIERY TRIAL 104 (2010).

man.¹⁶⁹

The Declaration was made with the knowledge that absolute power corrupts, that at any point the government, if not successfully checked, can and will persecute some citizens.¹⁷⁰ The current tiered analysis is based on the assumptions that some groups are more susceptible than others. President Lincoln would want there to be equal protections for all people, regardless of their group classification.¹⁷¹ By making some laws that discriminate based on “x” easier to uphold as constitutional because they are judged via rational basis, while laws that discriminate based on “y” are much more difficult for a court to uphold because they must pass strict scrutiny creates a caste system.¹⁷² Thus, discrimination against majority groups may be easier to prove than discrimination against minority groups. President Lincoln would simply say that by creating classifications you miss the point of the Declaration of Independence: that all men are created equal.¹⁷³

This judicially created caste system also does not allow for judicial interpretation to reflect society and its changes. President Lincoln himself changed his feelings on the best way to solve the issue of slavery throughout his life, such as when he commandeered the passage of the Thirteenth Amendment, which banned slavery.¹⁷⁴ Eric Foner once said that before Lincoln became president, he walked in the path of two of his political heroes, Henry Clay and Thomas Jefferson, who thought that slaves should be relocated to Liberia, in a belief that was known as colonization.¹⁷⁵ Lincoln also believed in gradual emancipation, which had happened previously during the 19th century in states like New York.¹⁷⁶ New York took thirty years to emancipate all of the slaves within its borders, finally completing the task in

169. *See id.*

170. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1941, 1994 (1939).

171. *See* FONER, *supra* note 168, at 103.

172. *See id.*

173. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

174. *See* FONER, *supra* note 168, at 103.

175. Terry Gross, *Lincoln's Evolving Thoughts on Slavery, and Freedom*, N.P.R. (Oct. 11, 2010), <http://www.npr.org/templates/transcript/transcript.php?storyId=130489804> (interview with Eric Foner, author of *THE FIERY TRIAL*).

176. *Id.*

1827.¹⁷⁷ These beliefs informed his policies until he saw that there was no way to facilitate this necessary change other than through a different avenue.

The Emancipation Proclamation was a recognition that the previous way of fighting the war had failed, the previous policy on dealing with slavery had failed, and if there's one element of greatness in Lincoln, it's this willingness to change, this ability to grow, this not being, you know, wedded to a policy once it is proven to have failed.

And Lincoln has this tremendous open-mindedness, this willingness to listen to criticism and this, you know, ability to change his course when he sees that the old policy is just not working.¹⁷⁸

President Lincoln made the Emancipation Proclamation, which was a wartime military order that freed the slaves in several states.¹⁷⁹ This was a large step forward, but still President Lincoln kept his idea of colonization alive. He gathered several freed slaves to the White House in August 14, 1862, to discuss and garner support for the Emancipation Proclamation.¹⁸⁰ At that meeting, he tried convincing them to support colonization, saying “[i]t is better for us both, therefore, to be separated.”¹⁸¹ Despite advocating for colonization to coincide with the Emancipation Proclamation, President Lincoln developed his mind further when he worked hard for the passage of the Thirteenth Amendment banning slavery.¹⁸² President Lincoln's ideas of how to put an end to the unjust policy of slavery had evolved over the past two decades: from gradual emancipation to a constitutional amendment, prohibiting it.¹⁸³

The classification system that the tiered analysis has created does not allow for change and development of opinion and

177. *Id.*

178. *Id.*

179. *Id.*

180. GOODWIN, *supra* note 69, at 469.

181. *Id.*; Abraham Lincoln, Address on Colonization to a Deputation of Negroes (Aug. 14, 1862), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 370, 372 (Roy P. Basler et al., eds., 1953) [hereinafter Address on Colonization].

182. *See* GOODWIN, *supra* note 69, at 686–90.

183. *See id.* at 686.

analysis. Kenji Yoshino wrote that “[o]ver the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress’s capacity to protect groups through civil rights legislation.”¹⁸⁴ Yoshino believes that President Lincoln would be concerned that there is no flexibility and no way to change the judicial interpretation once a category has been classified as a suspect, quasi suspect, or non-suspect class.¹⁸⁵

If a classification is considered a non-suspect class, then there is a very thin protection from laws that impede its equal protection.¹⁸⁶ Once a classification has been deemed a suspect class, it usually stays that way.¹⁸⁷ President Lincoln adapted his views as they changed over time organically in order to fit the times.¹⁸⁸ These locked-in classifications have been criticized in the past. For instance, Justice Marshall wrote:

The Court’s second assertion—that the standard of review must be fixed with reference to the number of classifications to which a characteristic would validly be relevant—is similarly flawed. Certainly the assertion is not a logical one; that a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not.¹⁸⁹

Susannah W. Pollygot argues that, instead of using a one-size-fits-all approach, the Court actually sought to “preserve (1) an ethos of self-determination based on individual merit and, in connection with this, (2) a modicum of social mobility in which individuals can express that merit.”¹⁹⁰ She adds: “Where a law or other government action relies on a facial classification of persons, the burden is on the government to prove an affirmative connection between the trait that defines the targeted group and

184. Yoshino, *supra* note 116, at 748.

185. See Susannah W. Pollygot, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 802 (2014).

186. See *id.* at 778.

187. See *id.* at 802.

188. See Gross, *supra* note 175.

189. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 468 (1985) (Marshall, J., concurring in part and dissenting in part).

190. Pollygot, *supra* note 185, at 800.

the governmental and individual interests being regulated.”¹⁹¹ This type of test is a test that President Lincoln would support. Again, to Lincoln the Fourteenth Amendment would have been the incorporation of the Declaration of Independence into the Constitution, an incorporation which would have guaranteed the personal rights of “[l]ife, [l]iberty and the pursuit of [h]appiness.”¹⁹² This test would be at a more personal level; it avoids the pitfalls of a boilerplate three-tiered analysis.

2. *The Definition of Liberty*

Lincoln seems to have defined “liberty,” guaranteed by both the Declaration of Independence and the Fourteenth Amendment, as what we call “freedom” today.¹⁹³ In a letter to Erastus Corning and others, he wrote of the “liberty of the press” and “liberty of speech.”¹⁹⁴ Freedom was an important aspect to President Lincoln, but the equal protection analysis does not consider “liberty.”¹⁹⁵ There is no mention of equal access to liberty amongst the people in an analysis.¹⁹⁶ Instead, there are questions about suspect classifications and whether a law was “narrowly tailored.”¹⁹⁷ President Lincoln once spoke about his definition of liberty, and the problems with the contradiction, saying:

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other

191. *Id.* at 801.

192. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

193. *See generally*, Abraham Lincoln, Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 260, 260–69 (Roy P. Basler et al. eds., 1953) [hereinafter Letter to Erastus Corning].

194. *Id.* at 263.

195. *See* Pollvogt, *supra* note 185, at 755 (arguing that courts’ use of suspect classification as equal protection analysis does not consider the original intent of the Equal Protection Clause).

196. *See id.* at 757–58 (citing *Hernandez v. Texas*, 347 U.S. 475, 478 (1954)).

197. *See id.* at 744.

men's labor. Here are two, not only different, but incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny.

The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a *liberator*, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty; and precisely the same difference prevails to-day among us human creatures, even in the North, and all professing to love liberty. Hence we behold the processes by which thousands are daily passing from under the yoke of bondage, hailed by some as the advance of liberty, and bewailed by others as the destruction of all liberty.¹⁹⁸

Liberty is important, but it must be balanced with others' liberty. With the tiered analysis, there seems to be a balance between the liberty of one group versus another with a more stringent intermediate and strict scrutiny analysis. The rational basis test, though, does not afford those same balances. The low standard that if the law is "rationally related" to a "legitimate governmental interest" requires very little from the government to justify their law.¹⁹⁹ If a category is not "suspect" then that category can be legislated out of certain liberties.²⁰⁰ That does not help the balancing act that President Lincoln spoke of in Baltimore.

3. "Intent" to be Discriminatory

The Supreme Court has also read other important aspects into the equal protection analysis. One such aspect respects if a law is facially neutral, the plaintiff *must* make a showing that the law was made with the intent to cause discrimination against one

198. Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 301, 301–02 (Roy P. Basler, et al., eds., 1953) [hereinafter Address at Sanitary Fair].

199. *Rational Basis*, *supra* note 159.

200. *Id.*

group.²⁰¹ Intent is difficult to prove, and as a lawyer, President Lincoln would have understood this. Should a law not be struck down because it was not intended to have discriminatory impact?

This intent requirement is relatively new in the analysis of the Equal Protection Clause.²⁰² This analysis first appeared in the Supreme Court case *Washington v. Davis*.²⁰³ In that case, the Court decided that if a law is facially neutral as to race, then the court will not analyze the law under a strict scrutiny analysis unless it has discriminatory intent. If a law was made that had a discriminatory impact, President Lincoln would wonder if there was a better way to deal with the law's intent that did not put one group in a better position than another. The Court held that the policy in that case was not discriminatory because "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."²⁰⁴ The Court further defined discriminatory intent in *Personnel Administrator of Massachusetts v. Feeney*, where it stated that "[d]iscriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences."²⁰⁵

This additional test changes the Fourteenth Amendment's interpretation and the embodiment of the Declaration of Independence. President Lincoln would have questioned whether this takes a step too far. If a law has a discriminatory impact, then it is doing one thing: creating inequality. Perfect equality is an ideal worth striving for, but is an ideal that creates difficulty.

4. *The Declaration of Independence*

The Declaration of Independence and the Fourteenth Amendment do not mention "suspect classifications," "rational basis," or "neither intermediate nor strict scrutiny."²⁰⁶ Yet, these things somehow found their way into the judicial interpretation of

201. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*].

202. Carolina Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 302 (2015–2016).

203. *Id.* (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

204. *Id.*

205. *Id.* at 302–03 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

206. *Id.*

equal protection. President Lincoln would wonder why the Declaration of Independence is not cited more in equal protection cases. Why do we not consider the “apple of gold” when considering an equal protection challenge?

If the Declaration of Independence was considered in the creation of these tiered analyses, we would know that this becomes a hornet’s nest. As we have seen quite recently in *Obergefell v. Hodges*, there was no description of what level of scrutiny the majority applied to the classification of sexual orientation.²⁰⁷ The only mention of the tiered analysis was a passing reference to a Supreme Court of Hawaii ruling which stated that same-sex marriage would fall under the “strict scrutiny” category.²⁰⁸ Lincoln may have feared this case, as now it seems that the Court can, if it so desires, not address the standards of review for equal protection when challenged.²⁰⁹ Would President Lincoln have considered this a step towards his fear that free government would be supplanted by a government with the objective of restoring “classification, caste, and legitimacy?”²¹⁰

As stated above, Abraham Lincoln’s interpretation of the Declaration of Independence is encapsulated by the Fourteenth Amendment. The use of equal protection categories creates a more stringent protection for what the court considers to be more mistreated or maligned groups of individuals. The basic tenet of the Declaration of Independence is that “all men are created equal.”²¹¹ “All men” does not lend itself to classifications. When the government treats a group of people differently from another group without a legitimate purpose, that tenet is violated.²¹² However, when the courts began treating different classifications in different ways, the Fourteenth Amendment’s interpretation became different from Abraham Lincoln’s interpretation of the Declaration of Independence.²¹³ Despite the Equal Protection Clause’s textual similarities and meanings, the interpretation of the Fourteenth Amendment has changed the interpretation of the

207. 135 S. Ct. 2584, 2596–97 (2015).

208. *Id.*

209. *See id.*

210. *To Henry L. Pierce, supra* note 161, at 375.

211. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

212. *See Obergefell*, 135 S. Ct. at 2603.

213. *To Henry L. Pierce, supra* note 161, at 375.

amendment from the Declaration's most famous phrase "all men are created equal."²¹⁴

IV. CONCLUSION

Abraham Lincoln dedicated his life to see the Union resurrected while ensuring that the Declaration of Independence and the Constitution continued to guide our path as a nation. He is hailed as a hero and, through his efforts, many were inspired to pass the Fourteenth Amendment soon after his death. President Lincoln would surely be proud of that amendment, which ensured that the Declaration of Independence would always be an "apple of gold" and that the Constitution now, more than ever, was framed by a "picture of silver."

Today, he may look at the changes to the interpretation of the Fourteenth Amendment and wonder how it became so complicated. He would simply say that the equal protection is there to ensure that all men are treated equally in their pursuit of life, liberty and happiness. Perhaps that should be the only tier of equal protection interpretation that the courts should require. To mandate that some classes of people be accorded more "equality" than others makes the Equal Protection Clause an oxymoron.

214. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).