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STRICT CONSTRUCTION AND JUDICIAL REVIEW OF RACIAL DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE: MEETING RAOUL BERGER ON INTERPRETIVIST GROUNDS

*Paul R. Dimond**

In *Government by the Judiciary*, Raoul Berger argues that the legislative debates on the Reconstruction amendments and their enforcement acts reveal that the equal protection clause was intended to prohibit only racially partial state legislation that affects specific civil rights concerning the security of person and property.¹ Berger urges that this narrow reading of the framers' intent should limit review under the fourteenth amendment of all claims of racial discrimination and that any broader judicial interpretation of the equal protection clause, as in the 1954 school desegregation ruling, usurps the policy-making functions vested in Congress or reserved to the states and to the people.² Berger's theses are not new,³ but their application would immunize much official racial discrimination from judicial scrutiny and challenge the legitimacy of many court decisions that protect racial minorities from majoritarian abuse or neglect.⁴

Berger's construction has been challenged elsewhere on a number of grounds. Some argue that its interpretivist theory of judi-

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1. See R. BERGER, *GOVERNMENT BY JUDICIARY* 18-36, 133, 169, 176, 191 (1977).

2. See, e.g., R. BERGER, *supra* note 1, at 133, 191-92, 249-50, 407-18.

3. See, e.g., L. HAND, *THE BILL OF RIGHTS* 54-55 (1958); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5 (1949). Cf. L. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932) (arguing *no* power of judicial review, rather than abuse of power).

4. See, e.g., R. BERGER, *supra* note 1, at 117-33. Cf. *id.* at 69-98 (reapportionment), 211-12, 258-82 (access to the courts, fair criminal procedures, privacy, and free speech as against the states). At this late date, however, Berger would limit rather than overrule decisions that have raised (or settled) "expectations," at least where "confirmed by every decent instinct." *Id.* at 413.

cial review fails to comprehend the Supreme Court's institutional mission, such as its role in articulating the contemporary meaning of sweeping phrases like equal protection⁵ and in policing our democratic system to ensure that the majority will neither exclude the minority from the political process nor systematically ignore its interests.⁶ Others argue that Berger's preoccupation with the legislative debates leads to a disabling myopia concerning the nature of the regional struggles and political battles joined during Reconstruction. These conflicts both complicate and enrich any analysis of the Reconstruction era's response to the problems of federalism, the economy, politics, and racism.⁷ In this Article, however, I will meet Berger's argument on his own interpretivist turf.⁸

There has been much scholarly controversy over the "original understanding" of the fourteenth amendment: Even Alexander Bickel's search for the elusive fundamental values that he thought the Court should strive to define began with a review of the framers' intent.⁹ Bickel argued that the contemporaneous debates show that Congress intended neither to outlaw dual schooling in 1866 nor to prevent Congress or the Court from outlawing it in the future, as the Court did in *Brown v. Board of Education*.¹⁰ He suggested that the lack of specific intent regarding such questions as school segregation can be attributed to the framers' desires to avoid immediate controversy and to permit future development.¹¹ To the bane of self-styled "strict constructionists" of every stripe, Bickel subsequently con-

5. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 100-10 (1962); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1039 (1981).

6. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 11-41 (1980); Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1 (1976); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

7. See, e.g., Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L.Q. 511 (1979); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979); Murphy, *Book Review*, 87 YALE L.J. 1752 (1978). Other reviewers have found Berger's historical account compelling. See, e.g., Abraham, *Reflections on Government by Judiciary*, 6 HASTINGS CONST. L.Q. 467 (1979); Perry, *Book Review*, 78 COLUM. L. REV. 685 (1978).

8. Cf. Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U. L. REV. 311, 361 (1979) (challenging critics of his view "to cite chapter and verse" from the historical record). This Article will lay out at least the chapters and cite to the verses supporting an alternative reading.

9. Compare A. BICKEL, *supra* note 5, and Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955), with A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970), and A. BICKEL, *THE MORALITY OF CONSENT* (1975).

10. A. BICKEL, *supra* note 5, at 100-05; Bickel, *supra* note 9, 69 HARV. L. REV. at 56-65.

11. A. BICKEL, *supra* note 5, at 102-03.

cluded that the legislative record concerning the broad constitutional phrases cannot produce "specific answers to specific present problems," and that to ask it to do so is "to ask the wrong question. With adequate scholarship, the answer that must emerge in the vast majority of cases is no answer . . . for the excellent reason that the Constitution was not framed to be a catalogue of answers to such questions."¹² Bickel's view has been endorsed by others: As Terrence Sandalow put this point, "To ask, in each instance, whether the framers 'intended' the specific or the general is to pose a question that almost invariably is unanswerable."¹³

In the face of this common understanding of the vagueness of much of the constitutional text,¹⁴ Berger bears the burden of proving that the equal protection clause was intended to enumerate specific, narrow protections against racial discrimination. This Article examines several contemporary sources to determine whether he has accomplished that task. It proceeds in six parts. Part I analyzes the text of the fourteenth amendment and contemporaneous congressional views on judicial review. Contrary to Berger's construction, the equal protection clause is not limited by its terms to the privileges or immunities clause or to the specific rights enumerated in the 1866 Civil Rights Act. Similarly, the Reconstruction Congress repeatedly acted to confirm and to expand the judiciary's power to review state conduct for compliance with the Civil War amendments and their enforcement acts. Part II examines the wide range of racial evils and official neglect that provided the backdrop for action by the framers shortly before and after passage of the fourteenth amendment. Part III then demonstrates that the language used by John Bingham in the key clauses of section 1 was not intended to invoke the narrow code meanings traced by Berger; rather, it referred to broader, albeit not specifically defined, antidiscrimination principles. Part IV shows that the limited debate in Congress on Bingham's final proposal supports rather than rebuts this open-ended interpretation of the equal protection clause. These materials, taken together, suggest that Berger's narrow reading denies the fourteenth amendment's actual role as a general protection against official caste discrimination.

12. *Id.* at 102-03.

13. Sandalow, *supra* note 5, at 1036.

14. Federalists, noninterpretivists, and so-called strict constructionists share this view. *See, e.g.,* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.); J. ELY, *supra* note 6, at 1-41, 185-204; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955).

This interpretation is supported by the way that the Reconstruction Congress dealt with one intractable aspect of racial discrimination — segregation in the schools. Part V demonstrates that the framers left this issue open for decision under the fourteenth amendment, and Part VI concludes the Article by comparing *Plessy v. Ferguson* and *Brown* on interpretivist grounds. Although Berger would argue that *Plessy* is the strict construction and *Brown* the result of judicial overreaching, in fact the evidence suggests that *Brown's* result was within the scope that the framers envisioned for the fourteenth amendment.¹⁵

I. THE TEXT: OF TERMS OF ART, RECEIVED MEANINGS, AND SHADOW MEANINGS

Section 1 of the fourteenth amendment provides:

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. No State shall make or enforce any law which shall abridge the privileges or immunities of the 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.¹⁶

Raoul Berger views the phrases "privileges or immunities," "due process," and "equal protection of the laws" as terms of art to which the framers attached "received meanings" virtually as specific as the provision in article II limiting the Presidency to "natural born citizens" who "have attained the age of thirty five years."¹⁷ Berger claims that section 1's phrases limit one another and incorporate *only* the meaning of the quite different phraseology of the 1866 Civil Rights Act.¹⁸ The three clauses of section 1, he argues, present "three facets of one and the same concern." All were designed to

15. Broader historical materials concerning, for example, the public controversy and legislative statements during ratification in the states, the private papers of the framers, and contemporaneous media coverage and commentary are beyond the scope of this Article.

16. U.S. CONST. amend. XIV, § 1.

17. See R. BERGER, *supra* note 1, at 18-21, 35, 46, 51, 103-04, 169, 176, 180, 191.

18. See notes 1 & 17 *supra*. In contrast, § 1 of the 1866 Civil Rights Act provides: [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, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey property, and to the 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. CONG. GLOBE, 39th Cong., 1st Sess., app. 315 (1866).

safeguard the freedmen from discrimination affecting a few basic rights. The substance of those rights is provided by the privileges or immunities clause, which was understood to refer to a narrow range of fundamental values — personal security, the freedom to travel, and the right to own property.¹⁹ Under Berger's view, "equal protection" bars only racially partial state statutes that provide one of these fundamental rights to whites but not to blacks, and the due process clause merely affords the freedmen and their white sympathizers access to whatever judicial procedures a state chooses to establish to hear claims arising under these rights.²⁰

Such propositions bear at least the same burden of persuasion that Berger imposes on their kin,²¹ the view that the phrases have broad "shadow meanings," also generally accepted by the framers, which derived from the language and natural rights philosophy pressed by some evangelical abolitionists of the Ohio Western Reserve. Where Jacobus tenBroek and Howard Jay Graham trace section 1's language back to those Western Reserve abolitionists who rejected the positive law of slavery and racial caste under a "higher law" theory,²² Berger follows a similarly tortured path back to the different "fundamental rights" of Blackstone.²³ In contrast to Berger's genealogy, however, section 1's language was actually used by the abolitionists, and their first principle — that a state must protect all of its citizens to secure their allegiance — arguably appears on its face.²⁴ This is not to suggest that section 1 has any generally agreed and precise antecedents, but that its text may have many, sometimes conflicting, sources. All of these sources played *some* part in the long-running drama leading to the Reconstruction amendments;

19. R. BERGER, *supra* note 1, at 36. These rights were supposedly enumerated in the 1866 Civil Rights Act and were "confiningly" defined by a single justice sitting in Circuit in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), some 45 years earlier. See R. BERGER, *supra* note 1, at 22, 30-32. But see J. ELY, *supra* note 6, at 23-30 nn.45, 58-59 & 64 (arguing that although the amendment's language does not compel that the provisions of the bill of rights were to be counted among the "privileges or immunities" of citizens, nothing in the language precludes such an interpretation); Soifer, *supra* note 7, at 670-75 (alleging that Berger's selective quotations from *Corfield* tend to mask the inconsistencies in his theory of limited fourteenth amendment rights).

20. R. BERGER, *supra* note 1, at 18.

21. See *id.* at 230-45.

22. See generally J. TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment* (pts. 1-2), 1950 WIS. L. REV. 479, 610; tenBroek, *Thirteenth Amendment to the Constitution of the United States — Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951).

23. See R. BERGER, *supra* note 1, at 21.

24. See J. TENBROEK, *supra* note 22, at 15-29, 39-40, 54-56, 72-85, 94-110.

none of them provided code words endorsed by a majority of either the framers or the ratifying legislatures.

Wholly apart from the serious questions concerning the origins and meaning of the privileges or immunities clause,²⁵ Berger's construction of section 1 is far from strict. First, it requires substantial revision of the syntax so that "due process" provides only a means of redress for state deprivations of "privileges or immunities." As written, however, the two clauses are not dependent unless, as Berger alleges, "life, liberty or property" is a proxy for "privileges or immunities." But this interpretation does not appear plausible on its face. Concerning Berger's view that due process could mean *no* process, moreover, the word "due" provides at least some hint that a minimum standard of procedural fairness is required before a state acts in any way to deprive a person of "life, liberty or property."

Second, the syntax suggests that the guarantee of "equal protection of the laws" is separate from, and *not* limited to, "privileges or immunities" and procedural fairness concerning "life, liberty or property." By its terms, the equal protection clause imposes *additional* duties on the states, apart from the privileges or immunities and due process clauses. The text does not limit the scope of "the laws" to which "equal protection" applies.²⁶ In addition, the phrase "*deny* to any person" provides a textual indication that section 1's final clause comprehends a state's failure to provide "equal protection of the laws," as well as a state's passage of racially discriminatory legislation or enforcement of a state-mandated caste system by administrative, judicial, or local governmental action.²⁷ Finally, the

25. See, e.g., J. TENBROEK, *supra* note 22, at 61-65, 72-85; Curtis, *supra* note 7, at 86-88; Soifer, *supra* note 7, at 670-81; text at notes 57-80, 119-57, 191-96, 208-16 *infra*. On its face, the privileges or immunities clause of the fourteenth amendment speaks to rights "of the citizens of the United States," *not* to rights "of citizens of each State" as defined by "the several States" in article IV, § 2. The fourteenth amendment, by its terms, thus provides a guarantee of national rights, *not* comity for interstate travelers to those rights given by any state to its own residents.

26. In an early brush with the reach of the equal protection clause of the fourteenth amendment, the Supreme Court noted:

Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. . . . The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible.

Strauder v. West Virginia, 100 U.S. 303, 310 (1879). To buttress this conclusion, the Court also (a) tied the official exclusion of blacks from juries to deprivation of "an immunity from inequality of legal protection, either for life, liberty, or property," 100 U.S. at 310, and (b) found a denial of the "equal civil rights" guaranteed by the 1866 Civil Rights Act, as reenacted in 1870, to "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens." 100 U.S. at 311-12.

27. The Court in 1880 struck down *practices*, as well as statutes, that excluded blacks from jury service:

equal protection and due process clauses protect "persons," while the privileges or immunities clause applies only to "citizens." The three clauses read as separate provisions; they do not limit one another to their narrowest common denominator.

On its face, then, Berger's reading of section 1 amounts to a transmogrification of the text. He asserts that section 1 only protects blacks against racially discriminatory statutes affecting a narrow range of personal and property rights. But this meaning does not easily fit the text of section 1, and can be sustained only if one concludes that the framers failed to express their intent in plain English.²⁸ Berger's reading is no more "strict" a construction than is the theory that the text incorporates the beliefs of the Western Reserve abolitionists.

At two points, Berger argues that the fourteenth amendment is somewhat broader than his restrictive reading might otherwise suggest. First, he claims that section 1, by providing both national and state citizenship to *all* persons in the United States, did more than inter *Dred Scott's* denial of national citizenship:

The Purpose of the Framers was to protect blacks from discrimination with respect to specified "fundamental rights," enumerated in the Civil Rights Act and epitomized in the . . . "privileges or immunities" clause. To achieve that purpose, they made the black *both* a citizen "of the United States and of the State in which he resides."²⁹

As a result, Berger criticizes Justice Miller's decision in the *Slaughterhouse Cases*³⁰ for suggesting that the dual citizenship provision left citizens at the states' mercy for protection of all "privileges or immunities," except for a list of national citizenship rights narrower than even Berger's reading of the framers' tastes.³¹ But if one

[N]o agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

Ex Parte Virginia, 100 U.S. 339, 347 (1880).

28. On the text alone, Berger's view is no more plausible than Roscoe Conkling's dubious claim that § 1 represented a conspiracy to protect corporations and big business from restraint by the states. See J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 194-97 (1958); Graham, *The Conspiracy Theory of the Fourteenth Amendment* (pts. 1-2), 47 *YALE L. J.* 371 (1937), and 48 *YALE L. J.* 171 (1938).

29. R. BERGER, *supra* note 1, at 46. See also C. BLACK, *STRUCTURE AND RELATIONSHIPS IN CONSTITUTIONAL LAW* 51-66 (1969).

30. 83 U.S. (16 Wall.) 36 (1873).

31. See R. BERGER, *supra* note 1, at 37-51. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 417-28 (1978). Some commentators have argued that the first sentence of § 1 provides a broad guarantee of equal citizenship that cannot be understood as narrow or closed. See, e.g., Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under The*

looks only at the text, Justice Miller's revision is no greater than Berger's. Miller reads the first sentence of section 1 to create state citizenship distinct from national citizenship; Berger reads the privileges or immunities clause of the second sentence to *limit* the meaning of the citizenship provided in the first. Berger's further limitation of equal protection to laws concerning privileges or immunities falls beyond even this textual pale.

Berger also permits a broad interpretation of section 5. Citing Laurent Frantz's reading of Reconstruction law,³² he argues that section 5's grant of enforcement power "gave Congress implied power to protect constitutional rights from interference by private individuals."³³ But Frantz's theory also broadly interprets the fourteenth amendment's substantive reach:

Where a racial group is discriminated against through a cultural pattern in which private acts play a part, the *constitutional* wrong, under the fourteenth amendment, is not the act of the individual, but the failure of the state to take adequate steps to prevent it, or to redress it.³⁴

Frantz's proposition is not confined to racially discriminatory legislation concerning several enumerated "civil rights." It extends to customary forms of discrimination that would subject blacks and their white allies to race-dependent majoritarian abuse or neglect, and it applies to state omissions and failures, as well as to state laws imposing racial caste distinctions. Since Frantz's theory requires a broad interpretation of the scope of rights protected under section 1, Berger cannot logically endorse only his interpretation of congressional power over private discrimination under section 5.

The inconsistency in Berger's position on section 5 is not explained by his argument that the Reconstruction Congress was dominated by a "States' Rights" mentality.³⁵ It is just as antithetical to state sovereignty for Congress to regulate individual actions upon state default as it is for Congress to act against any state's discriminatory legislation. Section 1's second sentence — particularly the equal protection clause — was intended by the framers to impose antidiscrimination *duties* directly on the states.³⁶ This represents a

Fourteenth Amendment, 91 HARV. L. REV. 1 (1977). But this reading offers too slippery a slope for Berger. R. BERGER, *supra* note 1, at 20-51.

32. See R. BERGER, *supra* note 1, at 226-27, 224 n.23; Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964). See also H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 136-39 (1908, 1965 reprint).

33. R. BERGER, *supra* note 1, at 226.

34. Frantz, *supra* note 32, at 1359.

35. See R. BERGER, *supra* note 1, at 16-18, 60-64, 120, 124, 153-55.

36. See text at notes 70-81, 120-70, 176-200, 210-18 *infra*.

considered view of federalism in which the states, in the first instance, must bear the responsibility to afford the equal protection of the laws to all of their citizens.

Nor can Berger's broad reading of section 5 be explained by arguing that the framers feared that judicial review would narrow constitutional rights, or that they believed that only Congress could make states respect their constitutional obligations. Section 1 imposed duties directly upon the states because the framers feared that otherwise future Congresses might be free to repeal federal antidiscrimination legislation.³⁷ The power of judicial review was respected: Although the Court's pre-Civil War decisions protecting the slave system still rankled, the Reconstruction Congress accepted the power of the federal judiciary to review the constitutionality of state conduct — a power that most thought inhered in the original constitutional scheme.³⁸ Indeed, some Reconstruction congressmen noted with irony that the heavy hand of a Court that had so firmly enforced slavery might now enforce just as firmly the states' new antidiscrimination duties.³⁹

The Reconstruction Congress, moreover, expanded federal court jurisdiction to decide, first, cases arising under the 1866 Civil Rights Act, then all civil rights claims, and, finally, all federal questions.⁴⁰ In successive acts to enforce the Civil War amendments, Congress granted the federal courts ever-wider jurisdiction to review discriminatory state action and default. With each new act, Congress expressed its increasing belief that state courts would not properly decide civil rights cases. The key provisions of the 1871 Act, for example, contained no substantive standards, but provided aggrieved persons with a cause of action in the federal courts for civil rights claims arising under other federal laws, including section 1 of the fourteenth amendment.⁴¹ Congressional intent to grant the federal

37. See text at notes 128-38, 150-55, 177-91, 209-18 *infra*.

38. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 439-70 (2d ed. 1973); *THE FEDERALIST* (A. Hamilton) No. 78; L. TRIBE, *supra* note 31, at 9-12 & 11 n.7.

39. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1118 (Rep. Wilson) & 1294 (Rep. Shel-labarger) (1867).

40. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (codified at 28 U.S.C. § 1343); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified at 28 U.S.C. § 1343); Act of Mar. 1, 1875, ch. 114, § 3, 18 Stat. 335 (codified at 28 U.S.C. § 1331). Section 10 of the 1866 Civil Rights Act also specifically provided "that upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States." CONG. GLOBE, 39th Cong., 1st Sess., app. 316.

41. See, e.g., *Great Am. Sav. & Loan Assn. v. Novotny*, 442 U.S. 366, 370-71 (1979); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-20 (1979).

courts power to interpret section 1 is also indicated by contemporaneous legislation designed to divest the Supreme Court of jurisdiction to review the constitutionality of the federally imposed military governments in the rebel states.⁴² Thus, the framers gave the federal judiciary extensive authority to police state compliance with section 1 and the ensuing enforcement acts.

This is not to suggest that the enforcement power vested in Congress by section 5 is mere surplusage. To the contrary, Laurent Frantz makes a compelling argument that section 5 empowers Congress to provide that antidiscrimination protection "which the state has failed to provide."⁴³ But the framers, whatever their misgivings, accepted and explicitly augmented the power of the federal judiciary to measure challenged state action and inaction against the duties imposed by the equal protection clause.⁴⁴ What emerges from the language and structure of sections 1 and 5 and the enforcement acts is a considered view of federalism, not unfettered respect for states' rights. The states bear primary responsibility for the amendment's implementation, but the extent of state compliance in specific cases is subject to federal judicial review, and state defaults may result in more sweeping congressional reform and regulation.

Section 1, however, leaves open the nature and reach of the states' antidiscrimination duties. On this issue, the section's language and structure provide no more support for Berger's restrictive "received meanings" than for the expansive "shadow meanings" that he condemns.⁴⁵ On the basis of the amendment's language alone,

42. See *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); 15 Stat. 44. See generally C. FAIRMAN, *RECONSTRUCTION AND REUNION 1864-88* (Pt. 1) (6 HISTORY OF THE SUPREME COURT) 433-514 (1971).

43. Frantz, *supra* note 32, at 1359:

But this power exists only when the state fails to do its duty . . . Congress may [also] provide in advance for a possible violation. But, if it does so, such legislation must be made conditional on the state's failure to act . . . Congressional legislation which impinges directly on the conduct of private individuals *and which operates uniformly regardless of the role played by the state* is unconstitutional. But this is not because "private acts" are beyond the limits of congressional power. Rather it is because: (a) Congress may not presume that states will fail to discharge their constitutional duties; [and] (b) Congress may not deprive the states, in advance of any default on their part, of the very function the amendment commands them to perform.

Id. (emphasis in original).

44. Berger accepts the power of judicial review by the Supreme Court — "policing the boundaries" of the Constitution — as the issue arises in cases or controversies in order to decide the "Supreme Law of the Land." See R. BERGER, *supra* note 1, at 351-62. Cf. R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969). But he argues against any "judicial enforcement of the [Fourteenth] Amendment." R. BERGER, *supra* note 1, at 229. The real issue, then, is not the propriety of judicial review under the amendment, but the nature and extent of the duties directly imposed on the states by § 1, which the Court must interpret whenever it reviews challenged state action and default.

45. See BERGER, *supra* note 1, at 230-45; J. ELY, *supra* note 6, at 198-200 n.66.

therefore, Berger cannot meet his burden of proof. Section 1, particularly the equal protection clause, does not appear calculated to provide literal, let alone restrictive, answers to any specific questions.⁴⁶ Its language does *not* "partake of the prolixity of the legal code,"⁴⁷ but is constitutional in its open-endedness and generality.⁴⁸ Unless the equal protection clause uses code words having precise meanings generally accepted by both the framers and the ratifying legislatures, therefore, it cannot fairly be interpreted as having a specific, narrow meaning in the 1860s, binding for all time.

II. THE OBJECTS OF RECONSTRUCTION REDRESS

"[T]he sorts of evils against which the provision was directed"⁴⁹ and its "important objects"⁵⁰ shed light on the purpose of Reconstruction law generally and the equal protection clause in particular. Contemporaneous conditions provide the context for Reconstruction redress and "may have shaped the purposes of the actual Framers."⁵¹ Decades or centuries after the fact, it is difficult to determine what current conditions closely resemble the historic wrongs that may have led to the passage of a given provision. And subsequent events, experiences, and values may further complicate current understanding of the nature of the important objects originally addressed.⁵² Nevertheless, the sorts of evils that the framers sought to redress after the Civil War provide another clue to the original understanding of the scope of Reconstruction law. A brief examination of the context in which the fourteenth amendment arose indicates that it was not directed solely at state legislation that was expressly

46. In contrast, Berger's argument that the framers did not intend § 1 to grant the suffrage to blacks does have support in the text and structure of the fourteenth amendment. Section 2 provides that representatives shall be apportioned according to their population, *except* when a state "denies or abridges" the right of any "male inhabitant" at least 21 years of age to vote. In that event, § 2 provides that the basis of representation of such state "shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age." Section 2 is literal, not vague; specific, not general. There is no need to resort to "terms of art," "received meanings," or "shadow meanings." In the context of contemporary black disenfranchisement in many (but not all) states, and the Republicans fear of Democratic control in many Southern states, its meaning can be inferred unless § 2 is to be read as senseless surplusage. (Whether this exclusion of black suffrage impliedly removed *all other* "voting" and apportionment issues from the reach of § 1 is beyond the scope of this Article, but the answer is not self-evident.)

47. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

48. See A. BICKEL, *supra* note 5, at 105-06.

49. J. ELY, *supra* note 6, at 13.

50. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); Sandalow, *supra* note 5, at 1036.

51. A. BICKEL, *supra* note 5, at 98.

52. See Sandalow, *supra* note 5, at 1064-68.

partial concerning certain limited rights; rather, it was also intended to strike at discriminatory implementation of facially neutral laws, and at the states' failure to protect blacks from pervasive private discrimination.

The passage of the thirteenth amendment, which outlawed the institution of slavery, and the end of the Civil War set the stage for the developments leading to the fourteenth amendment. It is undisputed that slavery was more than a formal legal status; it involved a complex system of state laws and local ordinances (or "Slave Codes"), executive and judicial enforcement, community custom, and private action.⁵³ The slave states also enforced a reciprocal system of discrimination to subjugate the "free blacks" in their midst, lest they serve as a festering symbol of freedom constantly threatening the slave regime.⁵⁴ Whether the legislative history shows that the framers intended "full freedom" as a necessary corollary of the abolition of slavery, for both historically "free blacks" and emancipated slaves alike, is still debated.⁵⁵ Many proponents of the thirteenth amendment argued (and many of its opponents feared) that it should be construed broadly.⁵⁶ Others declared that it outlawed only the status of slavery and left the rest, including the framework of customary caste subjugation of blacks, to the states for decision.⁵⁷ Under either view, there remained the problem of defining what acts of racial discrimination — whether public, customary, or private — amounted to such "badges and incidents of slavery"⁵⁸ that they perpetuated conditions of servitude under section 1 or supported legislation by Congress under section 2 to enforce the prohibition against

53. See, e.g., J. FRANKLIN, *FROM SLAVERY TO FREEDOM* (3d ed. 1967); L. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978).

54. See I. BERLIN, *SLAVES WITHOUT MASTERS* (1974). Many free states, of course, also imposed caste distinctions to exclude blacks altogether or to keep blacks in a second-class condition. See L. LITWACK, *NORTH OF SLAVERY* (1961).

55. Compare tenBroek, *supra* note 22, at 179-81, with C. FAIRMAN, *supra* note 42, at 1134-59.

56. For example, Senator Wilson, a proponent, declared:

If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it.

CONG. GLOBE, 38th Cong., 2d Sess. 1324 (1865). Rep. Rogers, an opponent, warned that traditional state subjects of marital and parental relations, suffrage, contracts, and the like would be "interfered with, abolished, and annulled." *Id.* at 151.

57. CONG. GLOBE, 38th Cong., 1st Sess. 1459-65 (1864) (remarks of Senator Henderson, a Democratic proponent of the thirteenth amendment).

58. See CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) ("With the destruction of slavery necessarily follows the destruction of the incidents to slavery . . . [and] all badges of servitude. . . ."); *id.* at 319-23, 474 (subsequent remarks of Senator Trumbull on the meaning of the thirteenth amendment).

slavery.⁵⁹ Unless the thirteenth amendment was intended by its framers to be a vain act, its object of redress must have included something more than the formal legal status of slavery and the Slave Codes.

Contemporary understanding of the thirteenth amendment thus may shed some light on the background leading to consideration of the fourteenth. Yet Berger barely addresses the relevance of the thirteenth amendment.⁶⁰ In contrast, Berger argues that the fourteenth amendment merely "constitutionalized" the 1866 Civil Rights Act.⁶¹ Therefore, the following discussion turns to the sorts of evils which that Act was intended to remedy.

At the end of the Civil War, the rebel states sought to preserve their racial caste systems. When restructuring their civil governments, these states formed legislatures dominated by conservatives. In the winter of 1865-1866, all but Texas enacted Black Codes to keep the "free" blacks in a second-class position, beneath both their former masters and poor whites. Many of the Codes expressly excluded blacks from voting, owning land, making contracts, securing access to the courts, working without a license, traveling without a pass, or engaging in certain trades.⁶²

Other provisions, however, made no reference to race; instead, their oppressive racial impact depended on selective enforcement, customary caste relations, and private discrimination against blacks.⁶³ The invidious quality of these laws lay in their *failure* to protect blacks from the white majority's efforts to maintain blacks as a servile class. Many of the vagrancy and apprenticeship laws, for example, applied on their face to blacks and whites alike, but none-

59. Compare, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976) (§ 1981 prohibits private, commercially operated school from denying admission for reasons of race), and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (§ 1982 prohibits racial discrimination in sales and rentals of property), with *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Civil Rights Cases*, 109 U.S. 3 (1883).

60. Whatever the meaning of the debates, even Fairman counsels that the thirteenth amendment did signal a profound revolution in the federal system. "It was not merely authority to disallow State action found to contravene the prohibition: it was a power actually to interfere in order to bar the proscribed relationship between persons. To State rights dogmatists, this shattered the premise which they regarded as fundamental to the Union." C. FAIRMAN, *supra* note 42, at 1156. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 2939 (Rep. Pruyn), 2991 (Rep. Randall) (1864).

61. R. BERGER, *supra* note 1, at 22-23.

62. Howard, *Laws in Relation to the Freedmen*, 1 S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. 170-230 (1867).

63. See, e.g., 1 S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. 170-71 (Alabama — vagrancy), 180-81 (Georgia — apprentices), 181-83 (Louisiana — labor contracts for agricultural pursuits), 184-85 (Louisiana — vagrancy), 186 (Louisiana — apprentices and indentured servants), 218-19 (South Carolina — vagrancy), 229-30 (Virginia — vagrancy) (1867).

theless threatened to relegate blacks to virtual peonage. Whites refused to convey land to blacks or to employ "free" blacks at a living wage, and the laws imposed harsh penalties on those hapless victims, predominantly black, who could find neither land to till nor paying jobs at which to work.⁶⁴ Federal military commanders in Virginia, South Carolina, Alabama, and Mississippi quashed such facially race-neutral acts. In the face of "combinations by [white] employers" leading to inadequate wages for blacks throughout the states, these Reconstruction generals found that the laws would "reduce the freedmen to a condition of servitude worse than that from which they have been emancipated — a condition which will be slavery in all but its name."⁶⁵

Raoul Berger agrees that section 1 of the 1866 Civil Rights Act "was a studied response to a perceived evil, the Black Codes."⁶⁶ Yet by ignoring the significance of the Codes' facially neutral provisions, he fails to recognize the *sweep* of the evil that the 1866 Act addressed. When advocating the Act, Senator Wilson noted that the facially neutral Virginia vagrancy law had been "used to make slaves of men whom we have made free," and stated that it was "nearly as iniquitous as the old slave codes that darkened the legislation of other days."⁶⁷ Senator Trumbull recited with approval the military commanders' findings concerning the oppressive impact of the vagrancy laws.⁶⁸ And in the House debate over the Act, Representative Cook inveighed against the discriminatory effects of facially neutral laws:

The question is, shall we leave these men in this condition? It is idle to say we are not leaving them to a system of slavery. If it had not been for the acts of the military commanders, had not the laws which have already been enacted by the Legislatures of the rebel States been set aside, the Negroes would all have been slaves now under the operation of their vagrant acts or other laws.

I believe this bill is a proper remedy for these evils.⁶⁹

64. See, e.g., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. Pt. 2, 55, 83, 235-36, Part III, 9, 22, 36, 71, Part IV, 56, 69, 82 (1866); REPORT OF GENERAL CARL SCHURZ ON THE STATES OF SOUTH CAROLINA, GEORGIA, ALABAMA, MISSISSIPPI, AND LOUISIANA, 1 S. EXEC. DOC. No. 2, 39th Cong., 1st Sess. 22, 24-25, 82 (1865); J. TENBROEK, *supra* note 22, at 163-64.

65. Quoted in E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 42 (1871). See generally *id.* at 37.

66. R. BERGER, *supra* note 1, at 25.

67. CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866).

68. *Id.* at 1759. See *id.* at 474.

69. *Id.* at 1124. See *id.* at 1153 (Rep. Thayer), 1160 (Rep. Windom), 1263 (Rep. Broomall). Sections 7 and 8 of the contemporaneous Freedman's Bureau Bill, although falling initially to President Johnson's veto, had similar objects. See, e.g., *id.* at 322 (Sen. Trumbull), 365 (Sen. Fessenden), 588 (Sen. Donnelly) (1866).

If eliminating race-neutral but oppressive acts was one object of the 1866 Act, its goals were not as "limited" as Berger claims.⁷⁰ Based on the sorts of evil addressed, the Act can be understood as limited to "discriminatory legislation with respect to specified rights"⁷¹ only if (a) these rights included the terms and conditions of employment, the opportunity to lead a productive life in a chosen profession, and freedom from racially disparate punishments for conditions of racial inequality caused by the legacy of slavery and continuing prejudice, and (b) the discrimination included facially neutral laws that failed to redress private combinations and other customary discriminations.⁷² This sort of evil included a state's denial of protection to blacks by the passage of penal or regulatory laws that ignored customary discrimination and thus relegated blacks to second-class citizenship.⁷³

The 1866 Civil Rights Act dealt with the specific wrongs that Congress thought should be outlawed at that time. The underlying evil that Congress attacked was the legacy of slavery — invidious racial discrimination. The legislation was directed at the ways in which this evil was manifested most harshly in 1866.⁷⁴ Decades or centuries later, however, the manifestations of such discrimination might be quite different. Unless the framers believed that time would stand still, they might have foreseen that the future would bring such changes. Thus, even an amendment incorporating "only" the thrust of the 1866 Act could authorize different applications than those enumerated in the Act.⁷⁵

This brings us to the sorts of evils sought to be remedied by the

70. R. BERGER, *supra* note 1, at 27.

71. *Id.* at 47.

72. See also J. ELY, *supra* note 6, at 28-31, 198 n.64; Soifer, *supra* note 7, at 670-81.

73. This principle of the state's affirmative duty to provide protection to its citizens to secure their allegiance finds considerable support in the debates on the Civil Rights Act and the Freedmen's Bureau Bill. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 77 (Sen. Trumbull), 833 (Sen. Clark) (1865). It is also the first "fundamental principle" recognized by Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230), as a "privilege" of citizenship under the comity clause. See note 195 *infra*.

74. As a result, the 1866 Civil Rights Act partakes of the prolixity of a legal code; and the statements of its proponents (often in response to conservative charges) that segregation in schools, exclusion of blacks from juries and voting, and miscegenation were *not* intended to be covered are consistent with the particular objects enumerated in the Act and the deletion of a clause providing "no discrimination in civil rights." See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 322, 599, 606 (Sen. Trumbull), 1117 (Rep. Wilson) (1866). But cf. *id.* at 477-78 (Sen. Saulsbury), 457 (Rep. Kasson), app. 183 (Sen. Davis) (somewhat different reading by the conservative opponents). The nature of Bingham's reading of the phrase "civil rights" and his opposition to the 1866 Civil Rights Act are discussed in the text at notes 120-47 *infra*.

75. See Bickel, *supra* note 9, 69 HARV. L. REV. at 56-65; Sandalow, *supra* note 5, at 1036-37.

fourteenth amendment. For Raoul Berger, the answer is the *same* object as the 1866 Act, which he argues was aimed only at expressly racially discriminatory legislation affecting certain rights.⁷⁶ Yet the 1866 Act responded to evils extending beyond such express discrimination. The language of the fourteenth amendment, moreover, is markedly different from that of the Act: it is more general and open-ended. There can be no question that at least one object of the amendment was to constitutionalize the 1866 Act, both to prevent its repeal by a hostile future Congress and to resolve any doubts concerning Congress's power to pass the 1866 Act under the thirteenth amendment.⁷⁷ In so doing, however, the framers consciously used broad language that is not a mere substitute for the 1866 Act.⁷⁸

Part IV of this Article reviews the relatively sparse legislative debate on section 1 in light of Berger's claim that the fourteenth amendment's framers nevertheless intended just such a substitute. The inquiry here is limited to determining the evils that Congress sought to redress in the fourteenth amendment. The Black Codes and the system of racial subjugation that they symbolized again provide one starting point. The Joint Committee of Fifteen on Reconstruction that drafted the fourteenth amendment and presented it to Congress reported extensively on the evils of these Black Codes. The Report did not ignore facially neutral laws that operated in practice to oppress blacks.⁷⁹ In addition, the Report stressed the *failure* of the states to *protect* against continuing community bias and private intimidation:

The feeling in many portions of the country towards emancipated slaves, especially among the uneducated and ignorant, is one of vindictive and malicious hatred. This deep-seated prejudice against color is assiduously cultivated by the public journals, and leads to acts of cruelty, oppression and murder, which the local authorities are at no pains to prevent or punish.⁸⁰

Section 1 was designed to redress this denial by the states of the

76. See R. BERGER, *supra* note 1, at 25-27, 47, 168-92, 203, 213.

77. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2349 (Rep. Stevens), 2498-500 (Rep. Broomall), 2511-12 (Rep. Eliot) (1866).

78. The opponents of the fourteenth amendment complained at length about the risk of expansive "construction" of § 1 and its open-ended phrasing — save for the specific exclusion of Negro suffrage by § 2 — compared to the 1866 Civil Rights Act. See, *e.g.*, *id.* at 2466 (Rep. Boyer), 2530 (Rep. Randall), 3041 (Sen. Johnson), app. 240 (Sen. Davis). In contrast to the 1866 Act debates, the proponents responded only with generality, not enumeration of covered and omitted subjects or deletion of comprehensive coverage. See text at notes 186-91, 214-17 *infra*.

79. See note 64 *supra*.

80. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 2 H.R. REP. NO. 30, 39th Cong., 1st Sess. XVII (1866).

equal protection of their laws.⁸¹ How the duty to protect against this evil would be measured, policed, and enforced in the future could not be known in 1866.

Following the passage of the fourteenth amendment in Congress, a flood of remedial legislation was enacted to bring the rebel states up short and to protect blacks and their white (*i.e.*, Republican) sympathizers. In July 1866, Congress finally succeeded in passing the Freedmen's Bureau Bill over President Johnson's second veto.⁸² The Bill guaranteed civil rights (as defined in the 1866 Civil Rights Act) for all persons in the rebel states, extended military jurisdiction for their protection, and continued the affirmative relief efforts designed to uplift the freedmen from conditions of servitude, poverty, and ignorance. To remedy the continuing discrimination and violence directed at blacks and white Republicans, Congress then enacted the Military Reconstruction Act in March 1867. It substituted federal military rule for the recalcitrant civil governments in ten rebel states. The Act also compelled these states to ratify the fourteenth amendment and to adopt new constitutions guaranteeing suffrage to blacks as a condition of restoration to the Union.⁸³

In 1869, the Reconstruction Congress passed the fifteenth amendment to ensure that the right to vote could not be "denied or abridged on account of race, color, or previous condition of servitude" and to grant Congress the power to enforce this right by appropriate legislation. Thereafter, in 1870, 1871, and 1875, Congress passed ever more sweeping enforcement acts. In the face of the Southern states' failure to suppress Klan harassment, intimidation, and murder, the 1870 Act sought to eliminate such interference with the suffrage.⁸⁴ It also re-enacted the 1866 Civil Rights Act pursuant to the fourteenth amendment. The Force Act of 1871 supplemented

81. Sections 3 and 4 of the fourteenth amendment also established particular means to cement Union supremacy against the resurrection of many Confederate leaders in the newly reforming state governments of the South. Section 3 disabled these leaders of "insurrection or rebellion" from holding office. Section 4 declared void the Confederate debt and barred any state from paying it.

82. CONG. GLOBE, 39th Cong., 1st Sess., app. 366-67 (1866).

83. Ch. 153, 14 Stat. 428 (1867).

84. Act of May 31, 1870, ch. 114, 16 Stat. 140. This Act passed over conservative objections that the states retained the exclusive power to remedy any "private" abuses of the right to vote and that the fifteenth amendment gave Congress no authority to correct the "supposed shortcomings of the State." CONG. GLOBE, 41st Cong., 2d Sess., app. 473 (Sen. Casserly) (1870). The Reconstruction Congress was apparently convinced that a state could "deny" the right to vote by "acts of omission," including the failure to protect against Klan harassment, and that the "United States Government" had "the duty . . . to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the Amendment vitality there." *Id.* at 3611 (Sen. Pool).

this protection with federal supervision of all congressional elections throughout the country.⁸⁵

The Civil Rights Act of 1871 was dubbed the Ku Klux Klan Act: It authorized federal civil, criminal, and executive redress for the states' failure to protect the private lives and community affairs of Republicans and the freedmen from rule by Klan terror.⁸⁶ Representative Perry of Ohio described the evil at issue:

Where these gangs of [Klan] assassins show themselves the rest of the people look on, if not with sympathy, at least with forbearance. . . . Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not. . . . In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. . . . [The fourteenth amendment] means, then, that the people of a State, with more or less definite political and governmental relations, shall neither abridge nor permit to be abridged those rights, deny nor fail to afford the equal protection of the laws to any persons.⁸⁷

Ohio Representative Stevenson continued:

Unexecuted laws are no "protection." And this brings us to the very case: the States have laws providing for equal protection, but they do not, because either they will not or cannot, enforce them equally; and hence a class of citizens have not "the protection of the laws." Union men, white and black, are "denied" the protection of the laws as completely as if the laws excepted from their operation "all cases of outrage by Ku Klux upon Republicans, white or colored."⁸⁸

Senator Edmunds, floor manager of the Bill, concluded:

[I]t has been the recognized and bounden duty of all courts, and of all executive officers intrusted with the administration of justice and the law, to give that which the citizen was entitled to, to *execute* justice and *afford* protection against all forms of wrong and oppression. Why, sir, [that] has [always] blazed on the forehead of constitutional liberty.⁸⁹

In response to conservative charges that the 1871 Act would intrude

85. Ch. 99, 16 Stat. 433. Citing "Kuklux outrages" and "enormous frauds . . . perpetrated on the ballot box," Ohio Representative Lawrence remarked:

[W]e know that the State laws have not protected the citizens of the southern States against violence, and have not protected the citizens against fraud and force and wrong in more than one of the cities of the northern States. And if the States have failed to enact laws necessary to secure what we all, I trust, have so much at heart, to wit, the purity of the ballot-box, or have failed to execute those already enacted, then it is the highest duty of this Congress to intervene and protect the citizens of the United States.

CONG. GLOBE, 41st Cong., 3d Sess. 1276 (1871).

86. Ch. 22, 17 Stat. 13.

87. CONG. GLOBE, 42d Cong., 1st Sess., app. 78, 80 (1871).

88. *Id.* at 300. See also *id.* at 334 (Rep. Hoar), 367-68 (Rep. Sheldon), 375 (Rep. Lowe), 428-29 (Rep. Beatty), 459-60 (Rep. Coburn), 482 (Rep. Wilson), 514 (Rep. Poland), 608 (Rep. Pool), app. 68, 71, 116-17 (Rep. Shellabarger), app. 72 (Rep. Blair), app. 85 (Rep. Bingham), app. 147 (Rep. Shanks), app. 153 (Rep. Garfield), app. 182 (Rep. Mercur).

89. *Id.* at 697 (emphasis added).

on the "sovereignty" reserved to the states, Edmunds cited the limitations and duties directly imposed on the states by the fourteenth amendment and scoffed: "Why, sir, if I were in any other place I should say — 'O Shame, where is thy blush?'"⁹⁰

In 1875, the Reconstruction Congress passed its last enforcement act.⁹¹ The subsequent legal controversy over the 1875 Act relates primarily to the *form* and *object* of its remedial sanctions. The Act imposed antidiscrimination duties and penalties directly on individuals, in the supposed absence of a clear state default,⁹² rather than on the public officials who failed to protect blacks against customary discrimination in facilities generally open to all comers.⁹³ Once again, the evil sought to be redressed was the states' *failure* to protect blacks against systematic private discrimination by refusing to enforce the common law concerning access to public accommodations, common carriers, and other community facilities for the benefit of blacks and whites alike — the states' failure to provide "equal protection of the laws."⁹⁴

Thus, in the years immediately after the adoption of the four-

90. *Id.*

91. Act of Mar. 1, 1875, ch. 114, pt. 3, 18 Stat. 336.

92. See Frantz, *supra* note 32, at 1359, 1379-84.

93. See Civil Rights Cases, 109 U.S. 3 (1883).

94. See, e.g., 2 CONG. REC. 340 (Rep. Butler), 383 (Rep. Ransier), 408 (Rep. Elliott), 412-14 (Rep. Lawrence), 416 (Rep. Walls), 455-57 (Rep. Butler), 940 (Rep. Butler). See generally H. FLACK, *supra* note 32, at 210-77, for another discussion of congressional interpretation of the amendment during Reconstruction. Berger's subsequent attempt to buttress *his* original understanding of the fourteenth amendment selects only certain parts of the mass of congressional action and argument during Reconstruction and ignores others. See Berger, *supra* note 8. Consider one example: Berger cites Representative Garfield's historical dispute with Representative Bingham as evidence that the scope of the privileges or immunities clause was limited to the rights enumerated in the 1866 Civil Rights Act rather than to H.R. 63. *Id.* at 341-42, & 345 n.217 (citing CONG. GLOBE, 42d Cong., 1st Sess., app. 151 (1871)). But Berger does not address Bingham's view of this dispute, see, e.g., text at notes 145, 161-64 *infra*, nor does he consider that, beneath the verbal dispute about H.R. 63, Bingham and Garfield may have had a fairly similar, balanced view of federalism, including affirmative state *duties* under the equal protection clause. See text at notes 106-68 *infra*. In particular, Berger omits discussion of the broad reading of the equal protection clause invoked by Garfield in the next breath to support passage of the 1871 Civil Rights Act. CONG. GLOBE, 42d Cong., 1st Sess., app. 153 (1871):

This thought [*i.e.*, the equal protection clause] was never before in the constitution, either in form or in substance. . . . It is a broad and comprehensive limitation on the power of the State governments, and, without doubt, Congress is empowered to enforce this limitation by any appropriate legislation. . . . [I]t restrains the States from making or enforcing laws which are not on their face and in their provisions of equal application to all the citizens of the State. . . . I think the provision that the States shall not "deny the equal protection of the laws" implies that they shall afford equal protection. . . . [E]ven where [state] laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.

See also note 88 *supra*, text at notes 180-82 *infra*.

teenth amendment, the Congressmen who framed its language acted with the understanding that it covered a broad range of state behavior. The evils addressed by the constitutional amendments and the acts of the Reconstruction Congress extended beyond racially discriminatory state statutes that affected limited rights concerning the security of person and property. Congress regulated state executive, judicial, and local governmental action to protect the freedmen and other citizens against a new form of white supremacy rooted in private conspiracy and intimidation, fueled by Democratic opposition to Republican Reconstruction and by community hostility to blacks, and condoned by state default, official blindness, and public disregard of minority interests. The Reconstruction Congress did not, of course, address every form of caste discrimination authorized, condoned, or neglected by the states in all of their branches and subdivisions. But it did serve notice, consistent with the text of the fourteenth amendment, that the states' affirmative duty to provide "equal protection of the laws" to the freedmen could be interpreted broadly, applied to a variety of state action and inaction, subjected to judicial review, and supplemented with remedial regulation by Congress. But this open-ended quality also left open both the ultimate status of the free blacks and the final fate of caste discrimination and race relations throughout the country.

III. JOHN BINGHAM AND THE FRAMING OF THE FOURTEENTH AMENDMENT: CODE WORDS OR GENERALITY?

All commentators credit John Bingham, a Republican Representative from Ohio and member of the Joint Committee on Reconstruction, with finally framing the fourteenth amendment after the Joint Committee rebuffed several of his earlier proposals. His hand (and seemingly indefatigable willingness to submit draft after draft) shaped the critical text and structure of sections 1 and 5. Beyond that, little is known about him. There are no published biographies and the one unpublished dissertation sketchily covers only his upbringing and political career before the Civil War.⁹⁵ Yet commentators credit Bingham with a variety of purposes. Graham and tenBroek see him as the vessel through which flowed the natural rights philosophy of the evangelical abolitionists.⁹⁶ Berger views Bingham as a Negrophobe whose objections to the "no discrimina-

95. C. Riggs, *The Ante-Bellum Career of John A. Bingham* (December 1958) (Unpublished Doctoral Dissertation, New York University).

96. See, e.g., J. TENBROEK, *supra* note 22, at 125-28; Graham, *supra* note 22, at 610; Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

tion in civil rights" clause of the 1866 Civil Rights Act confirm the narrowest reading of the fourteenth amendment.⁹⁷ Fairman calls Bingham an incurably muddle-headed thinker, an "ardent rhetorician, not a man of exact knowledge or clear conceptions or accurate language,"⁹⁸ whose "utterances cannot be accepted as serious propositions."⁹⁹ Such wide-ranging views of Bingham should provoke skepticism toward *any* claim that Bingham framed the fourteenth amendment as a code to be interpreted as a term of art.

Bingham grew up in Mercer, Pennsylvania, and Cadiz, Ohio, attended Franklin College in Athens, Ohio, and finally settled to apprenticeship and practice law and Whig politics, first in Cadiz and then in New Philadelphia, Ohio. From what little is known about his early life, it appears that he may have been exposed to the natural rights philosophy of the Western Reserve Abolitionists, who argued that the Constitution (despite the contrary decisions of the courts)¹⁰⁰ outlawed slavery, guaranteed citizenship to blacks, and prohibited caste discrimination against free blacks.¹⁰¹ But this ethic did not dominate these communities, and there is no direct evidence that Bingham either adopted the principles of the Western Reserve or rejected them in favor of the alternative abolitionist view that the Constitution was a pact with slavery whose only salvation was substantial rewriting or revolution. As a Whig party chairman and county prosecutor, however, Bingham probably supported the planks adopted in 1846 by Northern Ohio Whig leaders opposing the extension of slavery beyond the South and arguing for repeal of Ohio's Black Laws.¹⁰²

Bingham frequently displayed his ability to act as a politician by supporting result over principle and by bending his goals to suit his immediate needs. For example, despite his opposition to the expansion of slavery and his desire to repeal Ohio's Black Laws, Bingham supported the nomination of Zachary Taylor in 1848 over the protests of Whig abolitionists, and he opposed their formation of a Free Soil Party.¹⁰³ Shortly thereafter, Bingham moved to Cincinnati, a conservative stronghold on race issues, and urged compromise on

97. R. BERGER, *supra* note 1, at 119-23; Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527, 551 (1979).

98. C. FAIRMAN, *supra* note 42, at 462.

99. *Id.* at 1289.

100. See generally R. COVER, *supra* note 53 (discussing the judiciary's failure to outlaw slavery before the Civil War).

101. See J. TENBROEK, *supra* note 22, at 125-28; C. Riggs, *supra* note 95.

102. See C. Riggs, *supra* note 95, at 48-50.

103. See *id.* at 61-79.

the slavery issue and obedience to the congressional legislation of 1850, including the Fugitive Slave Act.¹⁰⁴ When he returned to his home in more liberal Northern Ohio, however, he again denounced slavery, opposed its expansion, and urged repeal of the Fugitive Slave Act.¹⁰⁵

In 1854, Bingham turned toward the Western Reserve philosophy. He joined a new "anti-Nebraska" party, which condemned slavery in general and the Kansas-Nebraska Act in particular, and won a seat in Congress on the rising tide of antislavery sentiment. He argued that slavery was contrary to the liberty and justice guaranteed by the Constitution and thus could not be extended by congressional act or local legislation into the territories.¹⁰⁶ Bingham soon joined the new Republican party and flayed "slavocracy" at every turn.¹⁰⁷ His mentor in the House became Joshua Giddings, a long-time abolitionist from the Western Reserve. Undaunted by contrary judicial interpretations, Bingham argued that slavery conflicted with natural law, the Declaration of Independence, the preamble to the Constitution, and the provisions guaranteeing a Republican form of government, liberty, and due process. He believed, therefore, that the territorial legislatures lacked authority to pass laws abridging these rights.¹⁰⁸ The "horrid crime of slavery" may have been written into the Constitution for the original thirteen states, but for Bingham the Constitution's implicit guarantees of "equal protection" and "liberty" to all persons, including blacks, were incompatible with the creation of *new* chattel systems elsewhere.¹⁰⁹

Chief Justice Taney responded to views like Bingham's in *Dred Scott v. Sandford*,¹¹⁰ where he declared that slaves were property, not persons. He interpreted the fifth amendment's "due process" clause to mean that Congress could not deprive masters of their slave property.¹¹¹ Bingham joined fellow Republicans in opposing the *Dred Scott* decision.¹¹² He challenged Taney's assertion that blacks were

104. *See id.* at 87-88.

105. *See id.* at 103.

106. *See id.* at 121-22.

107. *See id.* at 134-36.

108. CONG. GLOBE, 34th Cong., 1st Sess., app. 122-26 (1856), *discussed in* C. Riggs, *supra* note 95, at 154-59. *See* CONG. GLOBE, 34th Cong., 1st Sess. 222 (1856).

109. *See* CONG. GLOBE, 34th Cong., 3d Sess., app. 135-40 (1857), *discussed in* C. Riggs, *supra* note 95, at 195-207. Bingham's views were not unique; they were included in the Republican platform of 1856. 1 NATIONAL PARTY PLATFORMS 27 (D. Johnson, ed. 1978).

110. 60 U.S. 393 (1857).

111. 60 U.S. at 450-52.

112. *See* C. Riggs, *supra* note 95, at 218-20.

inferior beings without any rights or privileges under the Constitution,¹¹³ and he spoke against the proposed denial of the right of free blacks to live in Kansas.¹¹⁴

In 1859, Bingham opposed the admission of Oregon into the Union because of similar racial restrictions. He declared that limitations on travel, ownership of property, and access to the courts deprived blacks of the "privileges and immunities" of national citizenship. Taking aim at Taney's holding in *Dred Scott*, Bingham argued that "all free persons born and domiciled within the United States — not all free white persons, but all free persons" — are "citizens" of the United States.¹¹⁵ He cited the equal rights of free blacks in many states when the nation was first formed, and argued that Oregon had a *duty* to provide free blacks, like all other citizens, with "due protection" of all natural rights. Although Bingham stated at this time that the franchise was not a "natural right," he argued that the states should nevertheless extend political privileges — so far as consistent with the stability of good government — to the largest possible number of citizens.¹¹⁶

After President Lincoln's election, Bingham opposed any compromise with the South on slavery. He argued again for full constitutional rights for *all* citizens and persons and for the *duty* of all states to provide equal protection and due process.¹¹⁷ In 1862, when supporting a bill to emancipate slaves in the District of Columbia, Bingham repeated his claim that free blacks were citizens entitled to due process of law and state protection of their privileges or immunities, life, liberty, and property. Although he again conceded that suffrage was a matter for the states to decide, he did not defend his home state's denial of the vote.¹¹⁸ Instead, he noted that blacks had voted freely in many states in 1789, and praised Massachusetts for holding to her "ancient faith that rights, even political rights, are inseparable from manhood and citizenship, and in no wise dependent upon complexion or the accident of birth."¹¹⁹

The view of the Constitution that Bingham endorsed was not commonly accepted. It was rejected in *Dred Scott*, and was contrary to the view that the fifth amendment's due process clause (with the

113. CONG. GLOBE, 35th Cong., 1st Sess. 399-402 (1858).

114. *Id.* at 1864-66.

115. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

116. *Id.* at 981-85.

117. CONG. GLOBE, 36th Cong., 2d Sess., app. 82-84 (1861).

118. CONG. GLOBE, 37th Cong., 2d Sess. 1638-40 (1862).

119. *Id.* at 1639.

exception of slavery) applied to procedure, not substance, and limited Congress, not the states. Furthermore, the "privileges and immunities" mentioned in the comity clause of article IV, section 2, had not yet been defined nor enforced against the states under the supremacy clause. Bingham advocated a highly structured and broad view of what he believed the Constitution *ought* to mean, in a cause that by the beginning of the Civil War extended beyond abolition to the states' duty to provide equal protection for all citizens, including free blacks. But Bingham also recognized constitutional limits on congressional authority, and he respected the states' right to operate within the areas of sovereignty reserved to them by the Constitution. What emerges from this admittedly limited history of Bingham's roots prior to the framing of the fourteenth amendment is a man with complex views, who is not a plausible candidate for framing a constitutional amendment using code words with the narrow, precise meanings suggested by Berger.

Bingham's role in drafting and enforcing the fourteenth amendment confirms this conclusion. He did not win election to the 38th Congress and thus did not participate in the framing of the thirteenth amendment. Upon rejoining the 39th Congress in December 1865, he was appointed to the Joint Committee of Fifteen on Reconstruction and began to press for an amendment designed to protect the freedmen from discrimination and to permit restoration of the former Confederate states.

While the Joint Committee heard testimony on conditions in the rebel states and debated the terms of reconstruction, the Judiciary Committee's Chairman, Senator Trumbull, seized the initiative by proposing bills to enlarge the powers of the Freedmen's Bureau and to guarantee civil rights "so as to secure freedom to all persons within the United States."¹²⁰ In addition to expanding relief efforts, sections 7 and 8 of the Judiciary Committee's Freedmen's Bureau Bill relied on the War Power to allow the President's military commanders and the Bureau to protect blacks in rebel areas from racial discrimination in enumerated "civil rights or immunities belonging to white persons."¹²¹ By contrast, the Civil Rights Bill used the enforcement power vested in Congress by the thirteenth amendment to protect blacks throughout the country against such racial discrimination, but its enforcement was limited to criminal prosecutions in federal courts against violators acting "under color of law."¹²²

120. CONG. GLOBE, 39th Cong., 1st Sess. 77 (1865).

121. *Id.* at 209 (Sen. Johnson).

122. CONG. GLOBE, 39th Cong., 1st Sess. 211-12 (1866).

Bingham supported the Freedmen's Bureau Bill because it was enacted as a necessary but temporary War Power measure to protect all citizens in the states of insurrection,¹²³ but he opposed the Civil Rights Bill on constitutional and policy grounds.¹²⁴ Although Berger cites this opposition to the 1866 Act as evidence of Bingham's narrow view of the fourteenth amendment,¹²⁵ in fact Bingham hoped that a constitutional amendment would overcome his objections to the Act. Both before and after he opposed the Civil Rights Bill, Bingham tried to develop an amendment that would implement his view of federalism and his belief in the states' responsibility to provide equal protection.

On January 12, 1866, in the Joint Committee on Reconstruction, Bingham proposed the following amendment: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property."¹²⁶ Thaddeus Stevens countered with: "All laws, state or national, shall operate impartially and equally on all persons without regard to race or color." Both were submitted to a subcommittee of five, which included Bingham. On January 20, this subcommittee proposed: "Congress shall have the power . . . to secure to all citizens of the U.S., in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property." On January 24, the Joint Committee referred this draft to a subcommittee of three, again including Bingham, which emerged with: "Congress shall have power . . . to secure to all persons in every State full protection in the enjoyment of life, liberty, and property; and to citizens of the United States in every State the same immunities, and

123. *Id.* at 1292.

124. Bingham objected to the Bill on two grounds. First, he thought that the thirteenth amendment did not give Congress the power to legislate generally on civil rights and other areas of responsibility regarding the protection of citizens, since these areas were historically reserved to the states. Second, he argued that it would be unjust to impose criminal sanctions on state officers acting in good faith reliance on long-standing state laws and customs of discrimination. *Id.* at 1291-93. See text at notes 139-47 *infra*. Bingham's opposition is consistent with his structured view of federalism and state responsibilities, but Berger exaggerates when he characterizes it as a "State's Rights manifesto." See R. BERGER, *supra* note 1, at 119-21.

125. R. BERGER, *supra* note 1, at 120.

126. JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46 (B. Kendrick ed. 1914) [hereinafter cited as JOURNAL OF THE JOINT COMMITTEE]. The precise meaning, if any, that Bingham intended by use of the phrase "life, liberty or property" is unclear. Absent additional biographical research, there is no basis for concluding that he borrowed the phrase as a code word either for the broad "natural rights" theories of the Western Reserve Abolitionists traced by tenBroek and Graham or for the restrictive version of "fundamental rights" traced by Berger.

equal political rights and privileges.”¹²⁷

When the full Committee could not agree to this language, Bingham offered yet another substitute:

The Congress shall have power . . . to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).¹²⁸

The Joint Committee adopted this text, and at Bingham’s urging the House considered the resolution, H.R. 63, between February 26 and February 28.

Although Democratic and Republican opponents argued that the proposed amendment would vest in Congress the power to legislate generally in areas reserved to the states,¹²⁹ Bingham saw it somewhat differently:

Every word of the proposed amendment is today in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States.¹³⁰

After explaining the roots of the proposal in the language of section 2 of article IV and the fifth amendment, Bingham continued:

Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution. . . .

. . . [T]he proposed amendment does not impose upon any State of the Union, or any citizen of the Union, any obligation which is not now enjoined upon them.¹³¹

Bingham believed that the states *ought* to respect the Bill of Rights, as well as the more amorphous “privileges and immunities.”¹³² He added that “the word immunity . . . means [e]xemption from unequal burdens,” such as the racial restrictions imposed by Oregon

127. *Id.* at 60.

128. *Id.* at 61.

129. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1063-64 (1866) (Rep. Hale).

130. *Id.* at 103. The fifth amendment refers, however, to “due process,” not the “equal protection” framed by Bingham in H.R. 63. *Cf.* note 152 *infra* (Bingham clarifying scope, object, and form of proposed amendment as finally reworked).

131. *Id.* See *id.* at 1088 (arguing that the amendment merely enables Congress to enforce the bill of rights “as it stands in the Constitution today”). Bingham’s position, that the supremacy clause and/or the oath in article VI obliged state officials to respect the Bill of Rights limitations, was a clever attempt to rework the abolitionists’ effort to read a broad natural rights philosophy into the Constitution. This effort had proved unavailing in the Supreme Court. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the fifth amendment’s provision prohibiting public takings of private property without just compensation does not apply to the states).

132. See CONG. GLOBE, 39th Cong., 1st Sess. 1088-89 (1866); note 134 *infra*.

against free blacks, which he had opposed in 1859.¹³³ Bingham, therefore, did not limit "privileges and immunities," "life, liberty or property," and "equal protection" to Berger's "fundamental rights" concerning the security of person and property.

Bingham conceded that "the citizens must rely upon the State for their protection [of the Bill of Rights] . . . under the Constitution as it now stands."¹³⁴ He nevertheless claimed that H.R. 63 would not alter his view of federalism, but would only enable Congress to enforce the protection that state officials ought always to have provided, pursuant to their article VI oath, to all persons — including "[t]he loyal minority of white citizens and the disfranchised colored citizens" whom the states were seeking to render "powerless."¹³⁵

But Bingham had *no* answer to another objection to the proposed amendment. Republican Representative Hotchkiss explained that he would prefer an amendment that imposed duties on the states directly, rather than leaving enforcement to the discretion of Congress:

Now, if the gentlemen's object is, as I have no doubt it is, to provide against a discrimination to the injury or exclusion of any class of citizens in any State from the privileges which other classes enjoy, the right should be a constitutional right that cannot be wrestled from any class of citizens, or from the citizens of any State by mere legislation.

133. CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866). Rep. Rogers, a conservative opponent of all such antidiscrimination measures, charged:

In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under [H.R. 63], Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States.

Id. at app. 134. In contrast to the debates on the 1866 Civil Rights Act, *see* note 74 *supra*, neither John Bingham nor any other supporter disagreed with Rogers's interpretation of the broad scope of H.R. 63.

134. *Id.* at 1093. *See* note 162 *infra*.

135. *Id.* at 1094. That oath reads as follows: "The Senators and Representatives before mentioned, and the Members of the several State legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . ." U.S. CONST. art. VI. During the ensuing debates on the Civil Rights Bill, Bingham characterized his view of federalism with the motto "centralized government, decentralized administration." He continued to argue that H.R. 63 adhered to this creed:

[T]he care of the property, the liberty, the life of the citizen . . . is in the States, and not in the federal government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment [H.R. 63] which would arm Congress with the power to compel obedience to the oath [of the supremacy clause], and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them.

Id. at 1292.

But this amendment proposes to leave it to the caprice of Congress. . . .

I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of those rights, I will go with him.¹³⁶

Here, of course, was the very form that sections 1 and 5 of the fourteenth amendment would eventually take. Hotchkiss continued:

Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here today, and the next Congress may wipe them out. Where is your guarantee then?¹³⁷

With that, Bingham joined Hotchkiss, first, in defeating the conservatives' motion to table "the whole subject," and then in postponing consideration of the proposed amendment until it could be reworked.¹³⁸

While the Joint Committee was considering alternative language for the amendment, Congress debated and passed Trumbull's Civil Rights Bill over President Johnson's veto. During the debate on that Bill, Bingham attempted to minimize the damage to his view of federalism and state responsibility by proposing that Congress delete the sentence providing for "no discrimination in civil rights" (thereby limiting the Bill to the enumerated rights), and remove all penal sanctions.¹³⁹ This deletion incident, however, does not support Berger's assertions that Bingham favored most racial discrimination, and that he propounded a "States' Rights manifesto."¹⁴⁰ Instead, Bingham argued that the phrase "civil rights" could not be narrowly limited, as suggested by House floor manager Wilson, to the rights enumerated in the remainder of the Bill, but comprehended all "social" or "political" rights, like Negro suffrage and the right to testify in court.¹⁴¹ Bingham believed that the thirteenth amendment did not authorize the legislation, and he disapproved of the Act's mode of enforcement: It would strike down almost every state constitution by imposing penal sanctions on state officers who had relied in good faith on established state laws and customs of discrimination.¹⁴²

136. *Id.* at 1095.

137. *Id.*

138. *Id.*

139. *Id.* at 1291.

140. See R. BERGER, *supra* note 1, at 120-22; Berger, *supra* note 97, at 551.

141. CONG. GLOBE, 39th Cong., 1st Sess. 1291, 1293 (1866).

142. See *id.* at 1292.

This lack of congressional power was, of course, precisely what Bingham designed his proposed amendment, H.R. 63, to remedy. Read in the context of his other antidiscrimination statements, therefore, his objections to the "no discrimination" clause should not be read to approve of most state discrimination. Bingham specifically denied such intent, claiming that, "I make no captious objection to any legislation in favor of the rights of all before the law."¹⁴³ He also added that the terms of the proposed Civil Rights Bill

should be the law of every State, by the voluntary act of every State. The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many States of the Union. I should remedy that not by an arbitrary assumption of power [by Congress] but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.¹⁴⁴

These are not the words of a person who believed in the states' right to discriminate.¹⁴⁵

Although Bingham's initial proposal to delete both the "no discrimination" clause and the criminal sanctions was defeated, the Civil Rights Bill was sent back to Committee for deletion of the "no discrimination" clause alone. When the Bill emerged without this clause, Bingham voted against it¹⁴⁶ and against overriding Johnson's veto.¹⁴⁷ Bingham's statements opposing the Act are not free from ambiguity, but the full context confirms that he objected not to the substance of a broadly conceived "no discrimination" guarantee, but to the form and methods used in the Act. This understanding of the "deletion incident" is consistent with Bingham's structured view of federalism.

With President Johnson's call for immediate readmission of the rebel states and opposition to the Civil Rights Act, the fate of the Republican party in the upcoming fall elections was tied to prompt formulation of an alternative Reconstruction policy. The Joint Committee was under the gun.¹⁴⁸ Senator Stewart proposed "uni-

143. *Id.* at 1291.

144. *Id.*

145. *But see* R. BERGER, *supra* note 1, at 120. Indeed, if the phrase "privileges or immunities" is supposed to be a term of art for "civil rights," *cf. id.* at 30, 30-32, then John Bingham unequivocally expressed his understanding that the phrase embraced all "social" and "political rights," unless expressly excluded. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1291-93 (1866); text at note 141, *supra*.

146. CONG. GLOBE, 39th Cong., 1st Sess 1367 (1866).

147. *See id.* at 1861. Bingham did not actually vote. Instead, he agreed to "pair" his vote with those of two representatives who wanted to vote for the override, but who could not attend the voting.

148. *See* C. FAIRMAN, *supra* note 42, at 1281.

versal amnesty" for former Confederates and an amendment guaranteeing "universal suffrage."¹⁴⁹ Representative Stevens offered an alternative amendment in five sections:

1. No racial discrimination in civil rights;
2. After July 4, 1876, no racial discrimination in the suffrage;
3. Until July 4, 1876, a racial class discriminated against in the suffrage would not be counted for the basis of representation;
4. Rebel debts and claims would not be paid;
5. Congress would have the power to enforce.¹⁵⁰

Once the amendment became law, any ratifying rebel state that conformed its laws to section 1 would be readmitted to representation in Congress.

Bingham repeatedly proposed changes in the section prohibiting racial discrimination in civil rights: He suggested the use of more general language, or the addition of the privileges or immunities, due process, and equal protection clauses. Despite several committee votes to reject this approach, Bingham finally prevailed.¹⁵¹ Sections 1 and 5 as proposed by the Joint Committee to Congress on April 30 read:

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 its laws.

...

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.¹⁵²

Sections 2, 3, and 4 compromised the remaining issues by limiting the basis for representation in states that excluded any male over twenty-one from the vote, by preventing supporters of the rebellion from voting in federal elections for four years, and by disclaiming the Confederate debt. The Committee also proposed two bills. The first provided for readmission of rebel states that ratified the amendment and conformed their laws to section 1; the second disqualified Confederate leaders from holding office.

149. *See id.* at 1282.

150. *See id.*; JOURNAL OF THE JOINT COMMITTEE, *supra* note 126, at 83-84.

151. *See generally* H. FLACK, *supra* note 32, at 56-68; JOURNAL OF THE JOINT COMMITTEE, *supra* note 126, at 83-120.

152. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). In contrast to H.R. 63, *see* text at note 128, Bingham's final proposal (1) imposed duties directly on the states but gave Congress the power to enforce these duties, (2) made clear that the privileges or immunities clause provided for national rights rather than just comity within any state for interstate travelers, (3) tied "due process" to "life, liberty and property," and (4) applied "equal protection" to "laws" without any limitation.

On May 10, 1866, Bingham explained his proposal for Reconstruction to the House:

The want of the Republic today is not a Democratic Party, is not a Republican party, is not any party save a party for the Union, for the Constitution, for the supremacy of the laws, for the restoration of all the States to their political rights and powers under such irrevocable guarantees as will forevermore secure the safety of the Republic, the equality of the States, and the equal rights of all the people under the sanctions of inviolable law.¹⁵³

Section 1 would "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 wherever the same shall be abridged or denied by the unconstitutional acts of any State."¹⁵⁴ Bingham repeated his claim that the states had always been obligated to protect all of their citizens:

No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.¹⁵⁵

Bingham agreed that section 2 "excludes the conclusion that by the first section suffrage is subjected to congressional law,"¹⁵⁶ but he offered no other limitation on the scope of "privileges or immunities" or on the sweep of the equal protection clause. Consistent with the language that he drafted, Bingham nowhere suggested that equal protection should be limited to state statutes or tied only to "privileges or immunities" and "life, liberty or property." Moreover, he did not suggest that section 1 incorporated only the quite different language of the 1866 Civil Rights Act; nor did he recant his view that the term "civil rights" included all "social" and "political" rights, except when expressly excluded, as section 2 excluded the franchise.

Thereafter, Bingham repeatedly confirmed his broad view of state responsibilities under section 1 and Congress's enforcement power under section 5. On June 5, 1866, after the House had passed the fourteenth amendment, the Speaker announced that the next order would be H.R. 63, Bingham's original proposal to empower Congress to pass civil rights and antidiscrimination legislation. Bingham responded: "I move that this joint resolution be indefinitely postponed for the reason that the constitutional amendment already

153. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

154. *Id.*

155. *Id.*

156. *Id.*

passed by the House covers the whole subject matter."¹⁵⁷ The motion promptly passed. Bingham later argued that whenever a state failed to protect its citizens, Congress should legislate directly on the subject.¹⁵⁸ He introduced such a bill, the Enforcement Act of 1870, to remedy the failure of state officials to halt Ku Klux Klan violence that kept blacks and Republican loyalists from the polls.¹⁵⁹

Bingham also supported the Civil Rights Act of 1871, which invoked section 1 of the fourteenth amendment to redress the states' failure to protect blacks and their sympathizers from Klan intimidation and violence.¹⁶⁰ In the face of opposition charges that the defeat of H.R. 63 showed that Congress lacked the power to legislate concerning such state defaults, Bingham responded that he had merely placed H.R. 63 in "another form . . . in a better form."¹⁶¹ For Bingham, the fourteenth amendment "differs [from H.R. 63] in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February 1866. It embraces all and more than did the February proposition."¹⁶² He then argued at length that section 1 authorized Congress to legislate against state failures,¹⁶³ noting that it required the states to protect fully and equally citizens' civil rights, while section 5 expressly granted Congress the power to remedy "all . . . abuses and denials of right . . . in States and by States, or combinations of persons."¹⁶⁴

157. *Id.* at 2980.

158. See CONG. GLOBE, 40th Cong., 3d Sess. 727 (1869). Senator Sumner expressed a somewhat more radical view:

Nobody can vindicate Caste, whether civil or political, the direct offspring of slavery, as beyond the reach of national prohibition. . . . I have warred with Slavery too long not to be aroused where this old enemy shows its head under another alias. It was once Slavery; it is now Caste; and the same excuse is assigned now as then . . . State Rights. . . . [A] State transcends its proper function when it interferes with those equal rights, whether civil or political, which by the Declaration of Independence, and repeated texts of the national constitution, are under the safeguard of the nation.

Id. at 707. See generally Frantz, *supra* note 32.

159. In the Senate, the bill was amended to substitute the actions of "any person" for "any officer." Senators Stewart and Pool apparently prevailed with their thesis that when a state failed in its affirmative duty under § 1 to protect the freedmen's right to vote, Congress may provide plenary protection by legislating directly against private intimidation, as well as official neglect, under the enforcement power of § 5. See CONG. GLOBE, 41st Cong., 2d Sess. 3611, 3613, 3662-63 (Sen. Pool) (1870). See generally Frantz, *supra* note 32.

160. See text at notes 86-90 *supra*.

161. CONG. GLOBE, 42d Cong., 1st Sess., app. 115 (1871).

162. *Id.* at app. 83. Bingham added that he came to understand that *Barron v. Baltimore* held that the guarantees of the Bill of Rights did not bind the states; thus, in Bingham's view § 1 filled this gap and § 5 gave Congress the power to enforce § 1's direct limitation on the states. See *id.* at app. 84. Representative Hale, an opponent of H.R. 63, confirmed Bingham's understanding during debate on the 1875 Civil Rights Act. See 3 CONG. RECORD, 979-80 (1875); text at notes 129-37, 157 *supra*.

163. See CONG. GLOBE, 42d Cong. 1st Sess., app. 83 (1871)

164. *Id.* at app. 85 (1871).

There is thus extensive evidence that John Bingham did not intend the fourteenth amendment to contain narrow code words of limited reach.¹⁶⁵ In his mind, the phrases "privileges or immunities," "due process," "life, liberty or property," "equal protection of the laws," and "no State shall deny" were not limited to racially partial legislation providing some narrowly enumerated rights to whites but not to blacks. To the contrary, he argued in broad, sometimes rambling terms that states had always borne an affirmative responsibility to "enforce the rights of the people under the Constitution."¹⁶⁶ In the fourteenth amendment, the people imposed these duties directly on the states and gave Congress the power and the responsibility to enforce these state duties and to remedy any state defaults. Bingham's understanding of section 5 is summed up in his rhetorical question: "Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?"¹⁶⁷ In these statements, we see Bingham's creed for federalism — "[c]entralized power, decentralized administration."¹⁶⁸

Bingham may sometimes have obscured his vision in the flood of his rhetoric and extended discourse. But his framing of the fourteenth amendment provides additional evidence that the phrases of section 1 were intended to be broad, not narrow; general, not specific; open-ended, not limited. Unless Bingham is to be entirely discounted,¹⁶⁹ his framing also counsels that the text of the fourteenth amendment is constitutional in scope, not statutory in precision.¹⁷⁰ The significance of Bingham's views, of course, lies in part in the extent to which Congress endorsed them when voting on the fourteenth amendment. The following section therefore turns to the evidence offered by Congress's consideration of the amendment.

IV. THE DEBATES ON THE FOURTEENTH AMENDMENT: CODE WORDS OR GENERALITY?

After the false start with H.R. 63, the Joint Committee intro-

165. *But see* R. BERGER, *supra* note 1, at 120-22; Berger, *supra* note 97, at 551.

166. CONG. GLOBE, 42d Cong., 1st Sess., app. 85 (1871).

167. *Id.*

168. *Id.*

169. *See* C. FAIRMAN, *supra* note 42, at 1289.

170. This does not mean that Bingham adopted verbatim the code words of the Western Reserve Abolitionists. Although their natural rights philosophy may provide one source for understanding Bingham's views on the states' duties to their citizens, the limited evidence does not prove that he intended § 1 to incorporate Western Reserve phraseology.

duced the fourteenth amendment in both Houses on April 30, 1866.¹⁷¹ Because of the political power struggle between Republicans and Democrats, the debates focused primarily on the terms for Reconstruction — including disqualifying rebel leaders from office and reducing the representation of any state that denied freedmen the vote. In the limited debate concerning sections 1 and 5, “declamation abounded where hard analysis was wanting.”¹⁷² The amount of evidence that supports an open-ended reading of the amendment makes it difficult to see how such general debate could prove Berger’s claims that the fourteenth amendment dealt solely with the rights enumerated in the 1866 Act, and that “equal protection of the laws” was limited to statutes concerning “privileges or immunities.” The discussion of the amendment’s language also casts doubt on Berger’s assertion that it was constructed of narrow code words with generally accepted meanings.

Thaddeus Stevens opened the debate in the House with a call to recognize the difficulties involved in developing “a plan for rebuilding a shattered nation.” He pointed out that the amendment was shaped by the unfortunate but real need to compromise some of the most radical reconstruction programs to ensure ratification. Stevens, however, referred specifically to only two such compromises. The first was the amendment’s omission of black suffrage and the resulting compromise calling for reduction of the basis for representation in states that denied freedmen the vote. The second was the “too lenient” provision for keeping Confederates from public office.¹⁷³

Stevens spoke only briefly and in general terms about sections 1 and 5. He noted that while section 1’s provisions “are all asserted, in some form or other, in our DECLARATION or organic law,” the Constitution as it then stood limited only the Congress, and not the states.¹⁷⁴ The amendment remedies “that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.”¹⁷⁵

Stevens did not limit the scope of the equal protection clause to “privileges or immunities” and the rights enumerated in the 1866 Civil Rights Act. In fact, he pushed the equality principle to its limits:

171. H.R. J. Res. 127, CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866); S.J. Res. 78, CONG. GLOBE, 39th Cong., 1st Sess. 2265 (1866).

172. C. FAIRMAN, *supra* note 42, at 1283.

173. CONG. GLOBE, 39th Cong., 1st Sess. 2459-60 (1869).

174. *Id.* at 2459 (emphasis in original).

175. *Id.* (emphasis in original).

Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all.¹⁷⁶

After giving some examples of existing racial discrimination, Stevens added, "I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen."¹⁷⁷ To the suggestion that Trumbull's 1866 Civil Rights Act "secures the same things," Stevens replied, "[t]hat is partly true." He added that "a law is repealable by a majority," but "[t]his amendment once adopted cannot be annulled without two thirds of Congress. That [its opponents] will hardly get."¹⁷⁸ In sum, Stevens seemed to say that although section 1 would constitutionalize the 1866 Act, it was not necessarily limited to that purpose.¹⁷⁹

Representative Garfield also supported the proposed amendment. He regretted that the right to vote — a right "equal to natural rights" — could not yet be included in the Constitution, but stated his willingness "to take what I can get."¹⁸⁰ In particular, Garfield was "glad to see this first section here which proposes to hold over every American citizen, without regard to color, the protecting shield of law."¹⁸¹ Garfield followed this broad definition of equal protection by countering the conservative charge that the adoption of the fourteenth amendment would prove that Congress lacked the power to enact the 1866 Civil Rights Act under the thirteenth amendment: Section 1 would "lift" the Act above legislative repeal by the Democrats if they ever regained control of Congress. "For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here."¹⁸²

Comments about "constitutionalizing" the 1866 Civil Rights Act are not free from ambiguity,¹⁸³ but they do not prove that was the

176. *Id.*

177. *Id.*

178. *Id.*

179. Such vagueness about the reach of § 1 also served to blunt the continuing conservative charge that Congress lacked the authority to enact the 1866 Civil Rights Act under the thirteenth amendment. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2461 (1866) (Rep. Finck).

180. *Id.* at 2462.

181. *Id.* *See* note 94 *supra*.

182. *Id.*

183. *See id.* at 2498 (Rep. Broomall), 2512-13, 2560 (Rep. Raymond), 2505 (Rep. Wilson), 2511 (Rep. Eliot).

only purpose of section 1. The general, broad-brush descriptions of section 1's reach,¹⁸⁴ the different roads to framing section 1 and the 1866 Civil Rights Act, and their contrasting texts and structures all suggest otherwise. In addition, conservative opponents, who had previously argued that the 1866 Civil Rights Act broadly intruded on the power reserved to the states,¹⁸⁵ claimed that the clauses of section 1 possessed no precise or agreed meaning¹⁸⁶ but embraced "all the rights we have under the laws of the country."¹⁸⁷ Joint Committee member Rogers, for example, opposed the fourteenth amendment by charging that such conditions as marriage, jury service, and office-holding were covered by the broad and undefined phrases.¹⁸⁸ Although exaggerating the scope of pending legislation to make it appear more unattractive is a classic opposition technique, the proponents did not dispute these broad interpretations of section 1 of the fourteenth amendment, as they had so vigorously in the prior debate on the Civil Rights Bill. Rather than delete broad phrases or enumerate specific rights, the House passed the general text of the fourteenth amendment intact.¹⁸⁹ In conjunction with Bingham's reading of section 1,¹⁹⁰ the House debates on the fourteenth amendment provide additional evidence of the broad sweep of its language.¹⁹¹

Senator Howard opened the Senate debate on the Joint Committee's proposed amendment. Concerning section 1, he first noted the three *separate* clauses.¹⁹² Howard then addressed the difficulty in defining the term "citizen" and expressed puzzlement over the precise meaning, if any, of the privileges or immunities clause.¹⁹³ He

184. *See, e.g., id.* at 2510 (Rep. Miller), 2511 (Rep. Eliot), 2512 (Rep. Wilson), 2539 (Rep. Farnsworth).

185. *See, e.g., id.* at 2500 (Rep. Shanklin), 2530 (Rep. Randall).

186. *E.g., id.* at 2467 (Rep. Boyer).

187. *Id.* at 2538 (Rep. Rogers).

188. *Id.*

189. *See* note 133 *supra*, for the proponents' similarly silent reaction to Rogers's charge that H.R. 63 authorized Congress to prohibit racially dual schooling. In the House debates on the fourteenth amendment, however, segregation was not mentioned.

190. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2541-44 (1866); text at notes 153-56 *supra*. Whether Bingham's discourse is understood as vague, *see* C. FAIRMAN, *supra* note 42, at 1287-90, or broad, *see* text at notes 153-56 *supra*, his remarks provide no evidence that § 1 was intended to have only a narrow scope or specific meaning limited to the most restrictive reading of the 1866 Civil Rights Act.

191. The House approved the Joint Committee's proposals without amendment on May 10, 1866, by a vote of 128 to 37, with 19 members not voting. CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

192. *See id.* at 2765-66.

193. *Id.* at 2765.

quoted at length from Circuit Judge Washington's opinion in *Corfield v. Coryell*,¹⁹⁴ which discussed the possible meaning of the phrase in section 2 of article IV.¹⁹⁵ Howard added: "[T]hese privileges and immunities, whatever they may be — *for they are not and cannot be fully defined in their entire extent and precise nature* — to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution."¹⁹⁶ He continued, "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."¹⁹⁷ Nowhere did Howard suggest that "these privileges or immunities" were limited to the rights enumerated in the 1866 Civil Rights Act.

194. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

195. *Id.* The portion quoted by Howard reads as follows:

The next question is whether this act infringes that section of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States?" The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those 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 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. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned *as some* of the particular privileges and immunities of citizens which are clearly embraced by the *general* description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. *These, and many others which might be mentioned*, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union."

6 F. Cas. at 551-52 (emphasis added). As Ely cogently comments: "Berger . . . emphasizes the word 'confining' that appears in the [third] sentence of the quotation, apparently without noticing that read in context what Washington says, in essence, is that he feels 'no hesitation in confining' privileges and immunities to everything but the kitchen sink." J. ELY, *supra* note 6, at 198 n.64 (quoting R. BERGER, *supra* note 1, at 22, 31) (citations omitted). With the exception of black suffrage, Senator Howard proceeded to throw in the sink. *See* text at note 196 *infra*.

196. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (emphasis added). The point is not that the framers specifically intended to incorporate the Bill of Rights, but that the phrase "privileges or immunities" was *not* generally understood by most proponents and opponents as a precise code word for the narrowest reading of the rights enumerated in the 1866 Civil Rights Act. *But cf.* note 94 *supra* (Rep. Garfield arguing in 1871 that "privileges or immunities" originated in the 1866 Civil Rights Act, not H.R. 63).

197. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

As for the equal protection clause, Howard said that it "abolishes *all* class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another."¹⁹⁸ The only limitation that Howard expressly placed on section 1 related to black voting: it was, despite Howard's wishes, not covered.¹⁹⁹ He concluded:

[Section 1] 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. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining.²⁰⁰

Several Senators immediately proposed changes in the wording of sections 2 and 3.²⁰¹ On May 29, the Senate, at Howard's urging, agreed to strike the section 3 proposed by the Joint Committee and to consider modifying other sections.²⁰² On May 30, following an agreement hammered out in the Republican caucus, the Senate took up Howard's suggestions. The first added a provision to section 1 to clarify what "persons" are citizens and to bury the contrary conclusion of *Dred Scott* forever: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."²⁰³ After a desultory debate about "Indians not taxed,"²⁰⁴ gypsies, Mongolians, Chinese, and Mexicans,²⁰⁵ the Senate added the citizenship clause to section 1.²⁰⁶ Howard then advanced modifications of sections 2 and 3.²⁰⁷ These inspired more debate and a series of additional proposals. The Republican majority finally passed the Joint Committee's proposed amendment and program of Reconstruction with Howard's modifications, which reflected the ultimate form of the fourteenth

198. *Id.* (emphasis added).

199. *See id.* at 2766-67.

200. *Id.* at 2766.

201. *See id.* at 2767-70.

202. *Id.* at 2869.

203. *Id.* at 2890.

204. This phrase was used in the 1866 Civil Rights Act to limit citizenship. *See* note 18 *supra*.

205. CONG. GLOBE, 39th Cong., 1st Sess. 2890-97 (1866).

206. *Id.* at 2897.

207. *Id.* Section 2 reduced the basis for representation by the same proportion as the suffrage was denied or abridged to males over 21 years of age. Section 3 excluded from office Confederate leaders who had violated oaths to the United States Constitution; the disability could only be lifted by a two-thirds vote of each House of Congress.

amendment.²⁰⁸

Debate on the merits of section 1 was scanty, and went into little detail. Senator Poland, a supporter, argued that the proposed privileges or immunities clause merely incorporated the words from section 2 of article IV with all of their ambiguity.²⁰⁹ His reference to the equal protection clause was just as summary:

It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this we know that State laws exist, and *some* of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy *all* such partial state legislation in the passage of what is called the civil rights bill. . . . It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States²¹⁰

Apparently, Poland either thought that the 1866 Civil Rights Act applied to *all* racially partial legislation, or recognized that the equal protection clause did not merely prohibit the Black Codes. Consistent with this reading, he did not suggest that the equal protection clause was limited to laws affecting "privileges or immunities."²¹¹ The only limitation on section 1 that Poland noted was its failure to guarantee black suffrage; like several of his brethren in the House, Poland criticized this limitation.²¹² Such general statements about the sweep of section 1 and the extent to which it constitutionalized the Civil Rights Act are similar to those offered in the House, and do not support Berger's restrictive reading of the section.²¹³

208. See CONG. GLOBE, 39th Cong., 1st Sess. 2897-902, 2914-21, 2938-44, 2986-93, 3010-11, 3027-42 (1866).

209. *Id.* at 2961. But the text of the privileges or immunities clause of the fourteenth amendment provided for national rights for United States citizens, see notes 25 & 152 *supra*, not comity by any state to persons visiting from another state, as some read § 2 of article IV. *E.g.*, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 422-23 (1857). Although some Republicans argued that the comity clause and *Corfield* provided for *national* rights, see Curtis, *supra* note 7, at 77, 86-87, the rephrasing of the privileges or immunities clause in the fourteenth amendment to provide *expressly* for *national* rights removed all doubts.

210. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (emphasis added).

211. See also *id.* at 2896 (Sen. Fessenden, Chairman of Joint Committee, arguing that the addition of the citizenship clause had "no reference to the civil rights bill").

212. *Id.* at 2963-64.

213. Thereafter, Senator Stewart acquiesced in the Joint Committee's proposed amendment as modified by the Senate Republican caucus: "I recognize the obligation of full protection for all men. . . ." He hoped that the proposal might lead in time to "universal amnesty and impartial suffrage." *Id.* at 2964. See also the similar comments of Senators Johnson, Yates, and Howe, *id.* at 3035, 3037, app. 219-20. The fifteenth amendment sought to answer their express hope within three years.

Senator Howe followed with a rambling discourse arguing that § 1 was aimed generally at

On the final day of the debate, Senator Hendricks, a Democratic opponent, complained that the phrases of section 1 — including “privileges or immunities,” “abridge,” and “deny,” — were “vague,” “of uncertain legal meaning,” and “doubtful sentences.”²¹⁴ Shortly thereafter, Reverdy Johnson, another conservative opponent, moved to strike the privileges or immunities clause entirely “because I do not understand what will be the effect of that.”²¹⁵ The Republican majority, however, made no attempt to limit section 1’s reach and passed the fourteenth amendment intact by a vote of thirty-three to eleven, with five absent.²¹⁶ Unlike the supporters of the earlier Civil Rights Act, the amendment’s Senate proponents did not limit, particularize, or enumerate the rights covered by the fourteenth amendment. With virtually no debate, the House on June 13 acquiesced in the Senate’s modifications by a vote of 120 to thirty-two, with thirty-two not voting, and the proposed amendment passed to the states for ratification.²¹⁷

Although debate on section 1 was relatively meager and is subject to conflicting interpretations, the evidence that is there does not show that the privileges or immunities clause was intended to have a precisely limited scope or that it incorporates only the rights enumerated in the 1866 Civil Rights Act. There is even less evidence that the framers intended to restrict the equal protection clause to the terms of the Civil Rights Act, to the Black Codes, or to “privileges or immunities,” however they might be defined. In fact, the only consistently mentioned limit on the amendment was that it did not give black citizens the right to vote. Consistent with the text, the evils addressed, and John Bingham’s drafting, the congressional debates

unequal laws, such as (not limited to) the Black Codes. *Id.* at app. 218-19. Among the discriminatory codes cited is one purporting to provide a fund for colored schools. Howe mocked this code as a “crime” providing virtually *no* funds for the education of black children. This is the only reference, oblique at that, to segregated schools in the Senate debate. It provides additional evidence that the framers did not intend to limit the reach of the equal protection clause to rights relating to the security of person and property as defined by Berger.

214. CONG. GLOBE, 39th Cong., 1st Sess. 3039-40 (1866).

215. *Id.* at 3041.

216. *Id.* at 3042.

217. *Id.* at 3149. In the final debate, Stevens repeated his refrain that the amendment provided less than he hoped but as much as he expected. *Id.* at 3148. Concerning § 1, Rep. Defrees stated:

[I]t indisputably fixes the character of those who are entitled to be regarded as citizens of the United States or citizens of the several States, and secures to all life, liberty and property, and places all persons upon an equality, regardless of their condition or color, so far as equal protection of the law is concerned. Certainly none can take exception to the provisions of this section.

Id. at app. 227. Conservative Democrats inveighed against the broad sweep of the amendment on procedural, substantive, textual, and racial grounds. *See, e.g., id.* at 3145-46 (Rep. Finck), 3147 (Rep. Harding), app. 230 (Rep. Rogers), app. 242-43 (Rep. Davis).

suggest that section 1 — particularly the equal protection clause — was framed in general terms and did not have a generally accepted and narrowly limited meaning.²¹⁸

V. THE RECONSTRUCTION CONGRESS AND SCHOOL
SEGREGATION: CONDONED, CONDEMNED, OR LEFT
OPEN FOR DECISION UNDER THE EQUAL
PROTECTION CLAUSE?

This interpretation of the fourteenth amendment is supported by an examination of the Reconstruction Congress's handling of a particular form of racial discrimination that even then attracted attention: segregation in the schools. Berger notes that Congress repeatedly rejected legislation providing for integrated schools, and he concludes that the framers did not intend the fourteenth amendment to authorize desegregation. Berger's conclusion, however, does not necessarily follow: It proves nothing to say that the framers had no present intent to outlaw school segregation by specific statute; the question is whether they could have intended that future Congresses or the Court be free to do so under the authority of the more general fourteenth amendment.

Berger's conclusion apparently rests on two grounds: first, that school segregation does not implicate any of the fundamental rights to which he limits the amendment; and second, that the pervasiveness of segregation at that time indicates that equal protection was not intended to prohibit racially dual schooling and, at most, guaranteed only "separate but equal" facilities. The materials discussed in the preceding sections of this Article do not support Berger's assertion that the fourteenth amendment protects only a narrow range of rights affecting the security of person and property; the subsequent legislative proposals regarding schools do not suggest a different conclusion. Proponents of contemporary legislation to prohibit segregation asserted that schools were covered by the fourteenth amendment. These proposals necessarily suggest that some Congressmen believed that school segregation was unconstitutional. The proposals were not rejected because Congress considered segregation in general or in public schools in particular to be beyond the scope of

218. That politics, racism, and Reconstruction further cloud the brief debate only lends credence to Bickel's understanding of the process of framing a constitution — the tendency to use "such generalities as could command general assent," and to avoid specifics that would fuel controversy wherever possible. A. BICKEL, *supra* note 5, at 105. That does not necessarily mean, however, that § 1 had no *core* focus with respect to racial discrimination, even if evolving over time to comprehend new circumstances, experience, and insight. Sandalow, *supra* note 5, at 1064-68.

the fourteenth amendment, but because passage was politically impossible at that time.

Before we examine the debates on legislation regarding the schools, one point regarding segregation in general should be noted. Segregation was not uncommon when the fourteenth amendment was ratified. Schools were segregated in many areas, including by local action in the District of Columbia, and some states prohibited publicly supported education for blacks.²¹⁹ Some other public facilities, including the galleries of the House and Senate, were segregated. Similar racial restrictions were imposed in some areas with respect to the rights that Berger argues were specifically intended by the framers for protection under the 1866 Civil Rights Act and section 1 of the fourteenth amendment. But even congressional refusal to pass statutes specifically outlawing all segregation in the enjoyment of these protected rights would not imply that the framers intended the fourteenth amendment to condone segregation for all time. It would only suggest that the Reconstruction Congress was then unable to perceive segregation as imposing caste or unwilling to legislate against such discriminatory practices in every instance.

Concerning public schools, the record of Congress indicates just such a reluctance to legislate. Senator Charles Sumner led the frontal assault on separate schools in Congress, as he had earlier in Massachusetts. He opened his campaign on March 16, 1867, after Congress had passed both the fourteenth amendment and the Military Reconstruction Act, by introducing a rider requiring the rebel states to establish "public schools open to all, without distinction of race or color."²²⁰ The lack of popular support for mixed schools generally frustrated Sumner's eight-year campaign in Congress to legislate specifically against separate schools.²²¹ But Congress also repeatedly refused to declare that it would be unconstitutional to pass such legislation.

Congress did prohibit some states from mandating segregated schools. When Virginia elected a governor who promised to impose segregated schools, Congress passed a rider readmitting Virginia to congressional representation on the "condition-subsequent" that

219. See generally M. WEINBERG, *A CHANCE TO LEARN* (1977).

220. CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867). The Senate twice rejected the proposal. *Id.* at 165-70, 580-81.

221. See Kelly, *The Congressional Controversy Over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537 (1959). Sumner's earlier political success on the issue in his home state, however, was matched by the state constitutions prohibiting racial segregation in schools adopted in 1868 by radical conventions in South Carolina and Louisiana. See, e.g., *id.* at 540-42; S.C. CONST. art. X, § 10 (1868).

"the Constitution of Virginia shall never be so amended as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."²²² Similar, arguably antisegregation conditions were added to the bills readmitting Mississippi and Texas.

Proposals to establish national subsidies to support the infant systems of common schooling became the next battleground. In the House, conservatives were able to delete a "mixed school" requirement from one such bill when forty-three Republicans, including Bingham and many of the central figures in the Republican Reconstruction, refused to vote on the question. Emboldened by these "silent Republican defections,"²²³ conservatives sought to suspend the House rules to vote on a resolution proclaiming "that it would be contrary to the Constitution and a tyrannical usurpation of power for Congress to force mixed schools upon the States, and equally unconstitutional and tyrannical for Congress to pass any law interfering with churches, public carriers or innkeepers, such subjects of legislation belonging of right to the States respectively." But Bingham and many of his Republican colleagues emerged to defeat this proposal.²²⁴ Similar equivocation marked Congress's attempts to eliminate segregated schools in the District of Columbia.²²⁵

From 1870 until his death in 1874, Senator Sumner repeatedly proposed legislation to prohibit racial discrimination in schools, accommodations, carriers, and other facilities open to the public.²²⁶ The history of this proposal indicates the extent to which political expediency, rather than concern about constitutionality, governed votes in Congress. When added as a rider to President Grant's proposal of amnesty for Confederate leaders, this sweeping guarantee rekindled the debate over whether nondiscriminatory access to such facilities was a "civil right" under the 1866 Act, a "privilege or immunity of citizenship" under the fourteenth amendment, or a "social right" beyond the reach of either.²²⁷ Sumner's view of the fourteenth amendment prevailed when the Vice-President settled a tie vote in

222. An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. X, 16 Stat. 62 (1870); CONG. GLOBE, 41st Cong., 2d Sess. 643-44, 720. These "conditions subsequent" were of dubious constitutionality; and Bingham, ever the "strict constructionist" within his own structured view of federalism and belief in full readmission of the Southern states, objected on *that* ground to such provisions. *Id.* at 493-95.

223. Kelly, *supra* note 221, at 544.

224. CONG. GLOBE, 42d Cong., 2d Sess. 1582 (1872).

225. Kelly, *supra* note 221, at 545-46; Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 157-58 (1950).

226. *E.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870).

227. *See* CONG. GLOBE, 42d Cong., 2d Sess. 381, 495, 526, 767, 843-44, 3189 (1872).

the Senate. This broad antidiscrimination rider, however, made amnesty unpalatable to the conservatives who wanted it most, and the bill died from lack of their support. Shortly thereafter, when amnesty suited the Republicans' political needs, the civil rights rider was watered down so that an amnesty bill could sail through.²²⁸

Undaunted, Sumner again introduced his antisegregation bill in December 1873 as an amendment to the 1866 Civil Rights Act.²²⁹ House Judiciary Committee Chairman Butler introduced a similar bill, and President Grant's annual message urged Congress to act "to better secure the civil rights" of blacks.²³⁰ The debates in the House and Senate raged on the impact of the Supreme Court's recent decision in the *Slaughterhouse Cases* on the protection afforded blacks under the privileges or immunities clause, on the scope of the equal protection clause, on whether public schools were covered under either, and on whether "separate but equal" schools could guarantee "equal protection" to blacks and whites alike.²³¹

The Senate passed Sumner's bill two months after his death with the "mixed school" provision intact. Section 1 provided that "all citizens and other persons . . . 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; and also of common schools and public institutions of learning or benevolence supported, in whole or in part, by general taxation."²³² In the House, however, this anti-segregation bill languished, largely because many conservatives and moderates charged that the "mixed school" provision would destroy the newly forming systems of public schooling (in many places, but by no means everywhere, separate) for blacks and whites alike.²³³

Throughout the debates on the new Civil Rights Bill, proponents stressed the states' failure to protect blacks against customs of segregation and their refusal to give blacks the benefit of common-law guarantees of nondiscriminatory access to public facilities.²³⁴ For

228. See Kelly, *supra* note 221, at 545-46.

229. 2 CONG. REC. 2 (1873).

230. Quoted in Kelly, *supra* note 221, at 552.

231. Compare, e.g., 2 CONG. REC. 342, 376, 380-81, 383, 384, 405, 419, 420, 429, 454, 4084-85 (1873-1874) (opponents), with *id.* at 383, 408-09, 412-14, 416, 455-59, 3451, 3454, 4116 (proponents). The point is merely that there was debate; this is sufficient to counter Berger's assertion that all of these issues were settled.

232. 2 CONG. REC. 4175 (1874).

233. See Frank & Munro, *supra* note 225, at 161-62; Kelly, *supra* note 221, at 553-54.

234. See, e.g., 2 CONG. REC. 340 (Rep. Butler), 408 (Rep. Elliott), 412 (Rep. Lawrence) (1873-74).

example, Representative Elliott, a black from South Carolina, answered the dual citizenship holding of the *Slaughterhouse Cases* in precisely such terms:

[I]s not the denial of such [State] privileges [of nondiscriminatory access to "public conveniences of travel on public highways, of rest and refreshment at public inns, of education in public schools"] to me a denial to me of the equal protection of the laws? . . . All discrimination is forbidden . . . all denial of equality before the law, all denial of the equal protection of the laws, whether State or national laws, is forbidden.²³⁵

When Congress reconvened in December 1874, Butler developed a wide-ranging program to continue Republican control of Reconstruction in the face of the Democratic resurgence.²³⁶ The Civil Rights Bill became a cornerstone of his program, but its "mixed school" provision engendered sufficient controversy that Butler seemed willing to acquiesce in a conservative substitute that would specifically authorize "separate but equal" schools, apparently in a vain attempt to secure majority support for the rest of the package.²³⁷ Although some moderates, black and white, suggested that neither race had a burning desire or need for "mixed schools,"²³⁸ other blacks and many radical Republicans expressed their outrage at any "separate school" provision which would "run a color line through the schools."²³⁹ The House finally agreed to a compromise and passed the Civil Rights Bill with *no* mention of schools — mixed or separate.²⁴⁰

Representative Monroe discussed the nature of the opposition to the "separate but equal" schooling proposal:

[I]t introduces formally into the statute law a discrimination between different classes of citizens in regard to their privileges as citizens. . . . [I]f we once establish a discrimination of this kind we know not where it will end. It may be extended to all the different privileges of the citizen. Who knows what sort of discrimination will next be introduced into the statute law in reference to citizens of the country, in regard to the privileges they are to enjoy, if we begin with a discrimination of this kind?²⁴¹

Monroe then explained the basis for the compromise deleting all mention of schooling from the 1875 Civil Rights Act:

235. 2 CONG. REC. 409 (1874). *See also id.* at 412-14 (Rep. Lawrence), 416 (Rep. Walls), 457 (Rep. Butler); 3 CONG. REC. 940 (Rep. Butler) (1875).

236. *See Kelly, supra* note 221, at 558.

237. *Id.* at 558-59.

238. *See, e.g.,* 3 CONG. REC. 981-82 (Rep. Cain) (1875).

239. *Id.* at 1002 (Rep. Williams). *See also id.* at 999-1001 (Rep. Burrows) (advocating free schools for children of all races and nationalities).

240. *See* Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.

241. 3 CONG. REC. 997 (1875).

The representative men of the colored race tell me that they would rather have their people take their chances under the Constitution and its amendments; that they would rather fall back upon the original principles of constitutional law and take refuge under their shadow than to begin with this poor attempt to confer upon them the privileges of education connected with this discrimination [*i.e.*, the "separate but equal" proviso].²⁴²

Under Monroe's reading, Congress avoided all legislation concerning public schooling and left the issue open for decision under the equal protection clause.²⁴³ Monroe's view captures the apparent intent of the Reconstruction Congress on school segregation: It was more politically feasible to pass a general and open-ended constitutional amendment than to legislate specifically against a particular, intractable practice of discrimination.²⁴⁴

VI. IS *PLESSY* OR *BROWN* THE STRICT CONSTRUCTION?

According to Berger, *Brown v. Board of Education* is wrong for two reasons: schools are not within the limited scope of the fourteenth amendment, and the requirements of equal protection are satisfied by separate but equal facilities. Thus, the major surprise of Berger's book is not that it criticizes *Brown*, but that it never addresses the propriety of the Supreme Court's 1896 decision in *Plessy v. Ferguson*.²⁴⁵ Unlike public schooling, freedom of movement on a common carrier is arguably within the fundamental rights recognized by Berger, and is thus protected by the equal protection clause.²⁴⁶ Although Berger's materials on the separate but equal

242. *Id.* See *id.* at 981 (Rep. Cain); *id.* at 997 (Rep. Kellogg). In the end, Representative Butler also approved this compromise, *id.* at 1005, and it passed 128 to 48. *Id.* at 1010. For a discussion of the development and debates concerning the 1875 Act, see H. FLACK, *supra* note 32, at 250-79. These debates provide additional evidence that the framers intended § 1, particularly the equal protection clause, to extend beyond the narrow rights enumerated by Berger, to include as well the right of free access to inns, common carriers, theaters, public accommodations, and common schools. But see Avins, *De Facto and De Jure School Segregation*, 38 Miss. L.J. 179 (1967).

243. This congressional determination had the practical effect of leaving segregation in schools up to the states for decision in the first instance. See Kelly, *supra* note 221, at 563. Many Northern states responded by prohibiting school segregation, while several Southern and border states mandated or authorized separate schools. *Id.*

244. See A. BICKEL, *supra* note 5, at 100-05. The legislative debates from 1864 through 1875 concerning civil rights, antidiscrimination, and Reconstruction reveal much more passion, prejudice, and politics than can be conveyed in any summary of their contents. But these complicating factors merely add to the difficulty in divining any narrowly confined, but generally agreed-upon, intent of the framers.

245. 163 U.S. 537 (1896).

246. Locomotion (which presumably includes freedom of movement on a common carrier) is a fundamental right recognized by Blackstone; it is a "civil right relating to the security of person and property" guaranteed in the 1866 Civil Rights Act, and thereafter incorporated into the privileges or immunities clause, and protected by the equal protection clause from hostile racial statutes discriminating against blacks. See R. BERGER, *supra* note 1, at 20-22. In his

question imply that *Plessy* was nevertheless correctly decided, he does not forthrightly state that conclusion.

This Article undercuts Berger's assertion that the scope of the amendment is limited, and suggests that the framers left open the question whether state-mandated and state-condoned segregation denies equal protection. *Plessy* was the Court's response. It assumed that the fourteenth amendment applied to the case before it, treated the question whether separate is equal as one of fact to be decided by the Court, and found that state-mandated segregation in railroad cars was constitutionally permissible because it did not discriminate against blacks.²⁴⁷ On these terms, *Plessy* was wrongly decided.

Homer Plessy, an octaroon who could not be distinguished by his color from whites, argued that the evils of Louisiana's statute requiring separate coaches for blacks and whites lay in the compulsory nature of the segregation and its stigmatization of blacks as a servile class.²⁴⁸ But the majority rejected this charge of racial discrimination on *factual* grounds:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The plaintiff's argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior posi-

dissenting opinion, Justice Harlan quotes Blackstone when he notes that the power of locomotion is an important personal liberty. 163 U.S. at 557. See also Frank & Munro, *supra* note 225, at 150-53 (arguing that framers intended to prohibit segregation in common carriers).

247. The Court interpreted the equal protection clause as prohibiting laws passed "for the annoyance or oppression of a particular class." 163 U.S. at 550.

248. Plessy's brief argued:

[I]t is not of the smallest consequence that the car or compartment set apart for the Colored is "equal" in those incidents which affect physical comfort to that set apart for the Whites. These might even be superior without such consequence! Such considerations are not at all of the order of those now in question. Whatever legally disparages and whatever is incident to legal disparagement is offensive to a properly constitutional mind. The White Man's wooden railway benches, if the case were such, would be preferred to any velvet cushions in the Colored car. If Mr. Plessy be Colored, and has tasted the advantages of free American citizenship, and has responded to its inspirations, he abhorred the equal accommodations of the car to which he was compulsorily assigned!

Quoted in Fairman, The Supreme Court, 1955 Term — Foreword: The Attack on the Segregation Cases, 70 HARV. L. REV. 83, 88 (1956) (emphasis in original). The *Plessy* Court's finding also insulted the freedman's continuing plea for abolition of the color line as articulated by Frederick Douglas during Reconstruction:

We want mixed schools not because our colored schools are inferior — not because colored instructors are inferior to white instructors, but because we want to do away with a system that exalts one class and debases another.

Quoted in M. WEINBERG, supra note 219, at 51.

tion. We imagine that the white race, at least, would not acquiesce in this assumption.²⁴⁹

As Charles Black aptly characterized this view, "the curves of calousness and stupidity intersect at their respective maxima."²⁵⁰

The *Plessy* Court, however, cast doubt on its own finding of no discrimination. It implicitly acknowledged some discriminatory effect when it argued that, to the extent that Louisiana's statute produced inequality at all, it was "social" inequality, which could not be overcome by law, but only by "mutual appreciation of each other's merits."²⁵¹ Furthermore, the Court reserved decision on the propriety of the statute's prohibition of a claim for damages by a white person excluded from "the coach in which he properly belongs,"²⁵² implying that there could be some injury. And Justice Harlan's dissent clearly described the discriminatory purpose and effect of Jim Crow law:

Everyone knows that the statute in question had its origin in the purpose, not so much to exclude the white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodations for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which *in fact* proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of legislation as was enacted in Louisiana.²⁵³

From this perspective, the Court's long-delayed decision in *Brown*, to overrule *Plessy* on the ground that forced segregation

249. 163 U.S. at 551.

250. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 422 n.8 (1960).

251. 163 U.S. at 551. This conclusion, of course, begs the question even under the narrowest reading of the "fundamental" right of locomotion. The issue still remains whether forced segregation restricts access, on a racial basis, to common carriers and other modes of travel otherwise generally open to the public on a nondiscriminatory basis. Although there is a difference between barring blacks from coaches entirely and merely confining them to separate compartments, the factual issue of whether Jim Crow segregation amounts to a racial restriction on the freedom of locomotion cannot be bypassed. As a result, the Court in *Plessy* squarely addressed this issue.

252. See 163 U.S. at 548-49. Similarly, without addressing the question, the Court "conceded" that "the reputation of belonging to the dominant race, in this instance the white race, is *property*" for which a "white man . . . assigned to a colored coach . . . may have his action for damages . . ." 163 U.S. at 549 (emphasis in original).

253. 163 U.S. at 557, 560 (emphasis added). See generally W. DuBois, *THE SOULS OF BLACK FOLK* (1903); C. Woodward, *THE STRANGE CAREER OF JIM CROW* (1957).

amounts *in fact* to caste discrimination against blacks, is unimpeachable: "[T]he policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. . . . Any language in *Plessy v. Ferguson* contrary to this finding is rejected."²⁵⁴ The "separate-but-equal" rationale had always been an excuse for state-sanctioned racism.²⁵⁵ As Edmund Cahn so aptly put the point:

The moral factors involved in racial segregation are not new . . . but exceedingly ancient. What, after all, is the most elementary and conspicuous fact about a primitive community if not the physical proximity of human beings mingling together? . . . Hardly anyone has been hypocritical enough to contend that no stigma or loss of status attaches to . . . physical separation. Segregation does involve stigma; the community knows it does.²⁵⁶

On balance, then, the decision in *Brown* has a stronger claim than *Plessy* to being a "strict" construction of the meaning of the discrimination prohibited by the equal protection clause. The evidence indicates that the fourteenth amendment was not intended to protect only Berger's enumerated civil rights relating to the security of person and property. It also suggests that the issue of segregation, particularly in schools, was left open for decision under the equal protection clause.²⁵⁷ Chief Justice Warren's finding that the amend-

254. 347 U.S. at 494-95 (1954).

255. The post-Reconstruction era Court itself sometimes chose to recognize the caste nature of such racial restrictions. For example, in the jury exclusion cases of 1880, the Court held that the fourteenth amendment was intended to secure 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 toward reducing them to the condition of a subject race.

Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880). The Court continued:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

100 U.S. at 308.

256. Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 158 (1955). See *Brunson v. Board of Trustees*, 429 F.2d 820, 826 (4th Cir. 1970) (Sobeloff, J., concurring); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 872-73 (5th Cir. 1966); L. TRIBE, *supra* note 31, at 1019-32; Black, *supra* note 250, at 425; Pollak, *Racial Discrimination and Judicial Integrity*, 108 U. PA. L. REV. 1 (1959). As Cahn so convincingly demonstrated, however, this understanding of the constitutional wrong of segregation was not aided by Chief Justice Warren's passing reference in *Brown* to the "new" studies from the "science of social psychology," 347 U.S. at 494 n.11. See Cahn, *supra*, at 157-59. Cf. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (striking down dual schooling in the District of Columbia because "[s]egregation in public education is not reasonably related to any proper governmental objective," without reference to the "psychological impact" on particular students). Thus, the Court's opinion in *Brown* could have been more straightforward in detailing the reasons for overturning the contrary finding in *Plessy*.

257. Early Supreme Court decisions acted on this understanding in approving segregation in public facilities, including schools. They accepted the applicability of the equal protection

ment's history is "inconclusive . . . with respect to segregated schools"²⁵⁸ is not far off the mark. The conclusion in *Brown* that governmentally fostered or officially condoned segregation in fact imposes caste discrimination and thereby denies the equal protection of the laws represents a fair interpretivist construction of section 1 of the fourteenth amendment.

CONCLUSION

The weight of the interpretivist materials demonstrates that section 1 of the fourteenth amendment does not precisely define the general antidiscrimination obligations that it imposes on the states. Under settled principles of judicial review, repeatedly confirmed by the framers of the amendment, the Supreme Court is empowered to define those duties and to determine whether states are adequately discharging their responsibilities to all of their citizens. Whatever label is applied to this judicial review — interpretivist,²⁵⁹ structural,²⁶⁰ or fundamental value²⁶¹ — the substance of the Court's work is to interpret the amendment's core prohibition against caste and to apply it, as the Court did in *Brown*, to contemporary circumstances.²⁶² Under our federal system, such judicial vigilance will help the people, the Congress and the states meet their own constitutional responsibilities to grapple with the monumental task that the amendment's framers only began.

clause to a broad range of community institutions, but found no discrimination as long as the "separate" facilities were conceived as "equal." See, e.g., *Lum v. Rice*, 275 U.S. 78 (1927); *Chesapeake & Ohio Ry. v. Kentucky*, 179 U.S. 388 (1900); *Plessy v. Ferguson*, 163 U.S. 537 (1896). Subsequent decisions also applied the equal protection clause to schools, but found violations when segregated schools proved "unequal" in material and intangible quality. *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

258. 347 U.S. at 489. Whether the Chief and Associate Justices made this finding based primarily on a review of the historical materials is another matter. See generally R. KLUGER, *SIMPLE JUSTICE* 582-616, 653-56, 678-99, 703-13 (1975). But interpretivists may find some solace in the exhaustive brief and appendices filed by the United States as *amicus curiae* in the case. See 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 113-48, 853-1054 (P. Kurland & G. Caspar eds. 1975) [hereinafter cited as LANDMARK BRIEFS]; 49a LANDMARK BRIEFS, *supra*, at 3-398, 739-90. The Solicitor General concluded that the framers did not specifically address the issue of segregation (particularly in the infant systems of public schooling) in the fourteenth amendment but left that question open for decision by the Court under the equal protection clause. For Bickel's somewhat similar analysis for the *Brown* Court as a law clerk to Justice Frankfurter, see text at notes 9-12 *supra*.

259. See, e.g., J. TENBROEK, *supra* note 22; Bickel, *supra* note 9; Bork, *supra* note 14, at 13-15; .

260. See, e.g., C. BLACK, *supra* note 29; J. ELY, *supra* note 6.

261. See, e.g., A. BICKEL, *supra* note 5; R. DWORKIN, *supra* note 5, L. TRIBE *supra* note 31, at iii-iv, supp. 1-2; Brest, *supra* note 5; Sandalow, *supra* note 5, at 1068-72.

262. See generally P. DIMOND, A DILEMMA OF LOCAL GOVERNMENT 128-37 (1978); L. TRIBE, *supra* note 31, at 1041-42; Brest, *supra* note 5; Fiss, *supra* note 6, at 123-24, 136-70.