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THE FOURTEENTH AMENDMENT RECONSIDERED

THE SEGREGATION QUESTION

*Alfred H. Kelly**

SOME sixty years ago in *Plessy v. Ferguson*,¹ the Supreme Court of the United States adopted the now celebrated "separate but equal" doctrine as a constitutional guidepost for state segregation statutes. Justice Brown's opinion declared that state statutes imposing racial segregation did not violate the Fourteenth Amendment, provided only that the statute in question guaranteed equal facilities for the two races. Brown's argument rested on a historical theory of the intent, although he offered no evidence to support it. "The object of the amendment," he said, "was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."²

Justice Harlan alone attacked the majority's historical interpretation. The intent of the amendment, he insisted, was to "protect all the civil rights that pertain to freedom and citizenship," so that "in view of the Constitution, in the eye of the law, there is . . . no superior, dominant ruling class of citizens" and "Our Constitution is color-blind."³ So did the former slaveholder and opponent of abolition speak to the revolutionary intent of the amendment: its purpose had been, he thought, to destroy all caste and racial class legislation in the United States.⁴

* Ph.B. 1931, A.M. 1934, Ph.D. 1938, University of Chicago; Professor of History and Chairman of the Department of History, Wayne University; co-author (with W. A. Harbison) of *The American Constitution: Its Origins and Development* (1948, 1955). The author was responsible in large part for the historical research embodied in the appellants' brief on reargument of the school segregation cases prior to the decision of May 17, 1954.—Ed.

¹ 163 U.S. 537, 16 S.Ct. 1138 (1896).

² *Id.* at 544.

³ *Id.* at 555.

⁴ Harlan had clearly anticipated his *Plessy* position in his dissent in the Civil Rights

Whose history was correct, Brown's or Harlan's? Did the framers of the amendment intend to guarantee only certain Negro rights but preserve at the same time the legal base of the caste system in the several states, or did they intend to destroy entirely the constitutional foundation for all caste and racial class legislation under state law? In the context of our own day, did the framers intend to strike down "separate but equal" school legislation, Jim Crow laws, and the like, or did they not?

To be sure, the Supreme Court of late years has exhibited a decided tendency to consign Justice Brown's theory of intent to the limbo of dead and forgotten constitutional doctrines. In the *School Segregation Cases*,⁵ the Court raised the question of intent for reargument, but then cast the historical question aside as one impossible of solution and decided the cases instead upon a sociological theory of the meaning of equality in the twentieth century.⁶ Thus the Court buried Brown's theory without formally refuting it. But for the constitutional historian the question still has vast meaning: who was right, Brown or Harlan?

Historical problems seldom have the grace to resolve themselves precisely in terms of the issues which emerge a hundred or a thousand years later. The "separate but equal" controversy is no exception. The phrase "separate but equal" appears nowhere in the debates on the amendment, nor so far as I know in the popular discussions outside Congress or in the state legislatures. But this does not imply that the Brown-Harlan dispute is historically meaningless. "Separate but equal" legislation is caste legislation; it is statutory classification by race. Did the framers intend to destroy state racial class legislation and classification by race, or did they not?

Any examination of the meaning of the Fourteenth Amendment must begin by taking account of the important historical scholarship of Graham, tenBroek, and others, who have established

Cases, 109 U.S. 3 at 26, 3 S.Ct. 18 (1883), where he defended the constitutionality of the Civil Rights Act of 1875, 18 Stat. L. 335. This statute, among other things, guaranteed the "full and equal enjoyment" by all persons without regard to race of the facilities of inns, public conveyances, and the like. Harlan had asserted that the rights in question were "legal, not social rights" and properly fell within the purview of the Fourteenth Amendment. "The supreme law of the land," he had added, now provided that "no authority shall be exercised in this country upon the basis of discrimination . . . because of . . . race, color, or previous condition of servitude." *Civil Rights Cases*, 109 U.S. 3 at 59, 62, 3 S.Ct. 18 (1883).

⁵ *Brown v. Board of Education of Topeka*, 345 U.S. 972, 73 S.Ct. 1114 (1953).

⁶ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686 (1954).

quite conclusively that the Fourteenth Amendment both in general ideology and legal phrase was a product of radical pre-war anti-slavery theory.⁷ The antislavery idealists of the generation after 1830 were thoroughly convinced that the institution of slavery violated profoundly the premises of the Declaration of Independence, the doctrine of natural law and natural rights, and the "higher law" origins of all constitutional government. Orthodox constitutional theory as exemplified by Marshall, Taney, Story, Kent, and Webster, however, provided them with only limited means for a direct constitutional assault upon the institution of slavery, which stood safely within the protective folds of a federal constitutional system and limited national sovereignty. But the more radical antislavery idealists, with a fine disregard for orthodox constitutional law, proceeded to evolve a constitutional doctrine of their own, which if carried into practice would dispose decisively of the problem of slavery. The Fourteenth Amendment ultimately was a product of their theorizing.

The fundamental constitutional concept of the radical anti-slavery theorists was the doctrine of national citizenship, to which in turn were presumed to be attached a comprehensive body of natural rights and civil liberties. The doctrine of national citizenship was expounded by W. W. Ellsworth and Calvin Goddard as early as 1834 when they contended that the comity clause in Article IV guaranteeing the privileges and immunities of citizens in the several states actually conferred a national citizenship upon all Americans, white and Negro.⁸ Happily enough for the anti-slavery idealists, Justice Bushrod Washington in a federal circuit court case had set forth in some detail a long list of civil liberties guaranteed by this clause as a matter of interstate comity.⁹ For the antislavery idealist, the comity clause accordingly became thereafter a national bill of rights translating into positive law the injunctions of higher law doctrine.

Significantly, the immediate constitutional right most often invoked by antislavery theorists was that of "the equal protection

⁷Graham, "The Early Antislavery Backgrounds of the Fourteenth Amendment," 1950 *Wis. L. Rev.* 479, 610; TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

⁸*Crandall v. Connecticut*, 10 Conn. 339 at 348 (1836).

⁹*Corfield v. Coryell*, (C.C. Pa. 1823) 6 Fed. Cas. 546 at 551-552, No. 3230. This case, insignificant as it appears, is in reality of vast importance in determining the intent of the framers of the Fourteenth Amendment. They repeatedly cited Justice Washington's dictum on the meaning of "privileges and immunities" during the debates on the Civil Rights Act of 1866 and on the amendment itself.

of the laws," an idea that occurred again and again in antislavery literature.¹⁰ "Equal protection" had virtually no antecedent legal history; instead it grew out of the antislavery radicals' humanitarian emphasis upon absolute human equality according to their reading of the Declaration of Independence. Henry B. Stanton and Charles Olcott introduced the thought to abolitionist propaganda in the 1830's,¹¹ and Charles Sumner translated it into constitutional doctrine in the *Roberts* case,¹² where he derived the guarantee from the provision in the Massachusetts Constitution of 1780 that "All men are born free and equal. . . ."¹³ In the late 1850's, John A. Bingham of Ohio, the future principal author of the Fourteenth Amendment, repeatedly expounded the idea in debate on the floor of the House of Representatives. In a speech on the floor of the House of Representatives in January 1857, for example, he declared, "It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution . . ." as "universal and indestructible as the human race."¹⁴

In the due process clause of the Fifth Amendment and in similar provisions in the bills of rights of the several state constitutions the abolitionists found another legal weapon which they proceeded to shape to their own interests. It is common legal knowledge that "due process of law" as it came down through centuries of English and early American usage, had a purely procedural content; put simply, it meant justice in a criminal trial or civil case.¹⁵ However, long before the courts in *Wynehamer v. New York*¹⁶ and *Dred*

¹⁰ Frank and Munro, "The Original Understanding of 'Equal Protection of the Laws,'" 50 COL. L. REV. 131 (1950); TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 96 et seq. (1951).

¹¹ REMARKS OF HENRY B. STANTON IN THE REPRESENTATIVE HALL . . . BEFORE THE COMMITTEE OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS (1837); AMERICAN ANTI-SLAVERY SOCIETY, SIXTH ANNUAL REPORT 68 n. (1839); OLCOTT, LECTURES ON SLAVERY AND ABOLITION 18 (1838).

¹² *Roberts v. Boston*, 5 Cush. (59 Mass.) 198 (1850).

¹³ MASS. CONST., art. I, Part First (1780).

¹⁴ CONG. GLOBE, 34th Cong., 3d sess., appendix, 140 (1857).

¹⁵ The doctrine of vested rights with its restrictive substantive implications had already received specific recognition as early as the Federalist period, but before 1850 the courts rested it almost entirely upon the contracts clause or upon the fundamental nature of all constitutional government. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION (1938). On the early meaning of due process, see Corwin, "The Doctrine of Due Process of Law before the Civil War," 24 HARV. L. REV. 366, 460 (1911), reprinted in 1 SELECTED ESSAYS IN CONSTITUTIONAL LAW 203 (1938); Grant, "The Natural Law Background of Due Process," 31 COL. L. REV. 56 (1931); Howe, "The Meaning of 'Due Process of Law' Prior to the Adoption of the Fourteenth Amendment," 18 CALIF. L. REV. 583 (1930).

¹⁶ 13 N.Y. 378 (1856), where the court applied substantive due process to invalidate the state prohibition law.

*Scott v. Sandford*¹⁷ were to give due process a substantive content, the antagonists in the slavery controversy had seized upon the clause in the Fifth Amendment and endowed it with a substantive meaning to suit their respective propaganda purposes.

In 1836, the so-called Pinckney Report in the House of Representatives set forth the contention that due process acted as a substantive limitation upon the power of Congress to interfere with property in slaves in the District of Columbia.¹⁸ Here was a substantive reading of the Fifth Amendment coupling it to the doctrine of vested rights which directly anticipated Taney's similar resort to the clause in his *Dred Scott* opinion nearly a generation later.

Meanwhile, the enemies of slavery were engaged in formulating their doctrines of a substantive due process. In 1836 the Ohio abolitionist faction led by Theodore Dwight Weld and James G. Birney launched an attack upon the state's so-called Black Laws of 1807.¹⁹ These statutes virtually prohibited Negro migration into the state, banned Negroes from certain occupations, denied them the right to "be sworn or give evidence" in cases in which whites were parties, and excluded colored and mulatto children from the common schools. A report adopted at the Ohio Anti-Slavery Convention of 1835 first appealed to the familiar language and philosophy of the Declaration that "ALL men are born *free and independent*, and have certain natural inherent unalienable rights, among which are the enjoying and defending of life and liberty, *acquiring, possessing and protecting property*, and *pursuing and attaining happiness*. . .,"²⁰ and then blasted the obnoxious code as a violation of the due process clause of the state constitution.²¹

Thereafter, resort to due process as a guarantee incompatible with the institution of slavery or a hierarchical caste society was a common stock-in-trade of the antislavery radicals.²² The argument that the due process clause of the Fifth Amendment rightfully made slavery unlawful in all the western territories appeared in the Free Soil Party platforms of 1848 and 1852, and in the Republican Party platforms of 1856 and 1860.²³ And when Bingham took up the

¹⁷ 19 How. (60 U.S.) 393 (1857).

¹⁸ H. Rep. 691, 24th Cong., 1st sess. (1836).

¹⁹ 5 Ohio Laws, c. 8, p. 53 (1807).

²⁰ Proceedings of the Ohio Anti-Slavery Convention held at Putnam, 37 (1835).

²¹ Id. at 37-40.

²² Graham, "Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860," 40 CALIF. L. REV. 483 (1953).

²³ The Free Soil Party Platforms are reprinted in 1 STANWOOD, A HISTORY OF THE

cudgels in Congress as an enemy of slavery it was to the due process clause that he turned for support in his attack on slavery in the territories and for specific justification for the doctrine of equal protection of the laws as inherent in the Federal Constitution.²⁴

It is clear enough, then, that the pre-war antislavery radicals fixed the immediate content of the first section of the Fourteenth Amendment. It was they who promoted the idea of a primary national citizenship which included Negroes, and who attempted to clothe such citizenship with privilege and immunities, due process, and equal protection, whereby they sought to establish complete equality before the law for whites and Negroes alike. As of 1860, these doctrines were outside the pale of constitutional orthodoxy, but the political upheaval incident to the Civil War put a group of old antislavery enthusiasts in a position to control the Thirty-Ninth Congress and to write their radical reformism into the Constitution itself. The debates on the passage of the amendment reveal clearly enough how completely the constitutional ideology of the pre-war antislavery movement shaped the objectives of the Radical Republicans. There is nothing very surprising in all this, for the principal authors of the amendment as well as numbers of other Radicals had themselves been associated with the pre-war antislavery movement. John A. Bingham, principal author of the first section of the amendment, had been a leading congressional antislavery constitutional theorist.

However, a critical question remains: did the pre-war antislavery idealists conceive of equality before the law as enjoining

PRESIDENCY FROM 1788 to 1897, 239-241 and 253-256 (1928). The 1848 platform observed that "our fathers . . . expressly denied to the federal government . . . all constitutional power to deprive any person of life, liberty, or property without due legal process" and concluded as a consequence, "In the judgment of this convention, Congress has no more power to make a slave than to make a king" and "it is the duty of the federal government to relieve itself from all responsibility for the existence or continuance of slavery wherever the government possesses constitutional authority to legislate on that subject. . . ." The 1852 platform was substantially identical. The Republican platform of 1856 declared that "as our republican fathers . . . ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing slavery in any territory of the United States. . . ." Again, the 1860 plank was substantially the same. *Id.* at 271, 291.

²⁴ In his January 1857 speech, Bingham argued that the due process clause in the Fifth Amendment required Congress to enforce the "republican principle of *absolute equality*," in the western territories, and that under the due process clause Congress could permit "neither slave statutes nor slave constitutions" in the western territories. *CONG. GLOBE*, 34th Cong., 3d sess., 140 (1857). See also Bingham's speech incorporating the same argument in *CONG. GLOBE*, 35th Cong., 2d sess., 981-985 (1859).

all class legislation based upon race? If so, the way is opened for some plausibility for the argument that they carried this notion into the post-war era and that some of them saw it as implicit in the language of the amendment they drafted.

The answer is that the constitutional opponents of slavery were for the most part heavily preoccupied with the overwhelming curse of slavery itself, but that on occasion they did indeed extend their attack to all legalized class distinctions based upon race. The Weld-Birney attack upon the Ohio "Black Laws," with their school segregation provisions, has already been observed.²⁵ Animosity to racial segregation laws long remained a cardinal doctrine of Ohio enemies of slavery. In 1847, for example, an antislavery convention at Macedon resolved that "all monopolies, class legislation, and exclusive privileges are unequal, unjust, morally wrong, and subversive of the ends of civil government."²⁶

In Massachusetts, the abolitionists staged a long and successful legislative and judicial assault upon all class legislation by race. In 1843, they secured repeal of the state miscegenation statute, and they next won passage of a statute prohibiting "Jim Crow" cars.²⁷ They followed these victories with a concerted attack upon segregated schools, which existed on a local option basis without benefit of specific state sanction in Boston and a number of smaller towns. Salem, Lowell, New Bedford and Nantucket presently abolished segregated schools under abolitionist pressure.²⁸

In 1846, Wendell Phillips and his abolitionist fellows launched a bitter assault upon the long established segregated Negro primary school in Boston. However, the conservative majority on the Boston School Committee refused their petition, defending segregated schools not only as "legal and just but best adapted to promote the education of that class of our population," a position which *The Liberator* denounced as based on "flimsy yet venomous sophistries."²⁹ When three years of public pressure failed, the anti-slavery enthusiasts in 1849 attacked the constitutionality of Boston school segregation in the courts, retaining Charles Sumner as

²⁵ Notes 19, 20, 21 *supra*.

²⁶ Macedon Convention, Platform (1847). The platform also declared that "no civil government can either authorize or permit one individual or class of men to infringe the natural and equal rights of another individual or class of men. . . ."

²⁷ MASSACHUSETTS ANTI-SLAVERY SOCIETY, TWELFTH ANNUAL REPORT 5-7 (1844).

²⁸ Levy and Phillips, "The Roberts Case: Source of the 'Separate but Equal' Doctrine," 56 AM. HIST. REV. 510 (1951).

²⁹ THE LIBERATOR, August 21, 1846.

counsel to argue their case before the Massachusetts Supreme Court.³⁰

Sumner's argument in the resulting *Roberts* case stands even today as the classic argument for the incompatibility of "equal protection of the laws" and state-sanctioned caste institutions. Asserting that his animating principle of equal protection was derived properly from the language of the Massachusetts Constitution of 1780 declaring that "all men are born free and equal,"³¹ he asserted that segregated schools violated equal protection and the state constitution by imposing inconvenience upon Negro children and "by establishing a system of Caste [as] odious as that of the Hindoos." Cleverly anticipating a "separate but equal" dictum from the court, he argued that "the separate school is not an equivalent" for mixed schools, since it "brand[s] a whole race with the stigma of inferiority and degradation" in violation of "the equality of all men before the law."³² Sumner lost his case, and Chief Justice Shaw's opinion today is remembered principally as the source of the separate but equal doctrine.³³ But the case remains powerful evidence of the fact that certain radical antislavery idealists regarded legalized segregation as incompatible with constitutional government and equal protection.

The *Roberts* case does not stand alone; on the contrary, there are numerous indications in the courts of the northern states between 1840 and 1860 that antislavery idealists were backing judicial assault upon segregated schools. In *Van Camp v. Board of Education*,³⁴ for example, the Ohio Supreme Court rejected an abolitionist attempt to break down a literal interpretation of the state school segregation statute of 1853, which specifically required separate white and Negro schools. The majority justices would not listen to the argument, holding that the law's intent was clear and un-

³⁰ *Roberts v. Boston*, 5 Cush. (59 Mass.) 198 (1850).

³¹ MASS. CONST., art. I, Part First (1780).

³² Sumner's complete argument is reprinted in 3 CHARLES SUMNER: HIS COMPLETE WORKS 51-100 (1900).

³³ *Roberts v. Boston*, 5 Cush. (59 Mass.) 198 (1850).

³⁴ 9 Ohio 407 (1859). The *Van Camp* case was the latest of a long series of school segregation cases in Ohio before the Civil War. The Ohio Supreme Court for a long time followed a "pro-Negro" interpretation of the law, allowing suits to admit mulatto children to the public schools. *Williams v. School District*, Wright (Ohio) 578 (1834), and *Lane v. Baker*, 12 Ohio 237 (1843). In the *Van Camp* case, the court admitted that earlier decisions had in effect admitted colored children to the public schools, but held that the 1853 law had been enacted specifically to remedy judicial evasion of the earlier statutes.

In 1859, there was a hot political fight in San Francisco over the admission of Negroes to the public schools. See APTHEKER, A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 416-418 (1951).

mistakable and that it was not unconstitutional, in that it was "one of classification and not exclusion." But Justice Sutliff, dissenting, attacked the majority decision as a violation of the rights of man and proclaimed instead that "... caste legislation . . . is inconsistent with the theory and spirit of a free . . . government."³⁵

Another question now presents itself: did the post-war authors of the Fourteenth Amendment, who drew their constitutional doctrine from the old antislavery movement, also conceive of their constitutional ideas as reflecting the pre-war antislavery animus against caste and class legislation?

Any attempt to answer this question must begin with an analysis of the debates on the passage of the Civil Rights Act of 1866.³⁶ For it was in those debates that the Radical ideas as to how far federal guarantees of civil rights as against state action might properly extend, both by legislation and by constitutional amendment, were first clearly set down. The debates on the Civil Rights Act are also important because they reveal very clearly a direct linkage between the ideas of the Radical Republican majority in the Thirty-Ninth Congress, and because the Civil Rights Act bore an extremely close relationship to the passage of the Fourteenth Amendment itself.

A major consideration in the confused situation facing the Thirty-Ninth Congress in December 1865 was the constitutional and legal status of the Negro. The Radical Republican bloc which was presently to take control of Congress and the process of Reconstruction itself was not yet coherent or strong enough to assert itself entirely; instead, for the moment the Radicals merely blocked the seating of delegates from the Johnson governments in the South, and then set up the Joint Committee of Fifteen, composed of nine representatives and six senators, to study the entire question of reconstruction and the Negro.³⁷ It was this committee which after several months of labor was to report the text of the Fourteenth Amendment to the floor of Congress. Significantly, the Joint Committee was firmly under the control of the Republican Radicals, several of whom, including John A. Bingham and Thaddeus Stevens, had been prominently associated with the radical pre-war antislavery movement.³⁸

³⁵ *Van Camp v. Board of Education*, 9 Ohio 407 at 416 (1859).

³⁶ 14 Stat. L. 27 (1866).

³⁷ CONG. GLOBE, 39th Cong., 1st sess. 3-24 (1866). [This volume of the Globe is hereinafter cited as "Globe."]

³⁸ KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 37ff. (1914). Committee members included Representatives Thaddeus Stevens of Pennsyl-

However, the Radicals were not willing to await the committee report before moving to protect the Negro. In particular, they were vastly alarmed by the so-called "Black Codes" then being enacted by the Johnson government legislatures. From a technical point of view, the Black Codes implied that the newly emancipated Negro occupied the status of an inferior non-citizen class, a sort of modern helot, with legal rights vastly inferior to those of the white man.³⁹ Significantly, several of the codes incorporated segregation provisions.⁴⁰ The Radicals soon made it clear in debate that they were determined to destroy the Black Codes and to guarantee the Negro instead full citizenship and a concomitant body of civil rights.

The difficulty was that the exact constitutional status of the Negro was a matter of great uncertainty. It was not at all clear whether any such thing as national citizenship existed; if it did exist, it was not clear whether Negroes were or could be citizens of the United States. Many of the more Radical Republicans, Charles Sumner among them, still maintained the old antislavery faith: that national citizenship existed by virtue of the old Constitution and that Negroes were citizens of the United States clothed with a

vania, Co-chairman, Elihu Washburne of Illinois, Justin Morrill of Vermont, Henry Grider of Kentucky, Roscoe Conkling of New York, John A. Bingham of Ohio, George Boutwell of Massachusetts, Henry T. Blow of Missouri, and Andrew J. Rogers of New Jersey. Senate members were William P. Fessenden of Maine, Co-Chairman, James W. Grimes of Iowa, Ira Harris of New York, Jacob Howard of Michigan, Reverdy Johnson of Maryland and George H. Williams of Oregon. All but Grider, Rogers and Johnson were Republicans; Stevens, Bingham, Conkling, Blow, and Morrill, were old Free Soil Whigs, as were Fessenden and Howard, while Williams, a former Democrat, was now an extreme Radical Republican. Stevens and Bingham, more than the others the actual authors of the forthcoming amendment, had been prominent in the pre-war radical antislavery movement.

³⁹ Several of the codes are abstracted in Senate Doc. No. 6, 39th Cong., 2d sess., 170-230 (1866); others are in 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312, (1906). Most of the codes contained labor contract provisions similar to those later outlawed by the Supreme Court as peonage agreements in violation of the Thirteenth Amendment.

⁴⁰ The Alabama and Mississippi codes prohibited miscegenation; Arkansas banned Negroes from the public schools, "except such schools as may be established exclusively for colored persons;" the Florida law set up a separately managed and separately taxed school system for Negroes; the Texas Constitution of 1866 carried a similar provision; the Mississippi statutes forbade Negroes to ride in any car set aside for white persons, and prohibited "unlawful assembly" of whites and Negroes.

Carl Schurz' report to President Johnson and Charles Sumner on conditions in the South strengthened the Radical conviction that the Black Codes were intended to thrust servile status upon the Negro. Senate Doc. No. 2, 39th Cong., 1st sess. (1865); also 1 BANCROFT, ed., SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 279-374 (1913). Schurz mentioned the hostility in the South to Negro education and to Negro schools, and remarked among other things that "the free colored element of Louisiana . . . pays a not inconsiderable proportion of the taxes, and contributes at the same time for the support of schools for whites, from which their children are excluded."

full body of civil rights. They insisted, indeed, that the Thirteenth Amendment was merely "declaratory" in that both freedom and citizenship were already inherent in the old Constitution.⁴¹ Others, among them Thaddeus Stevens of Pennsylvania and Lyman Trumbull of Illinois, thought the amendment had made Negroes citizens and endowed them with full constitutional rights.⁴² Still others were even more cautious; they admitted that emancipation did not necessarily make the Negro a citizen, but they argued that the amendment had paved the way for Congress to exercise its power under the naturalization clause in Article I, section 8, and so bestow full citizenship upon the Negro.

The more Radical Republicans also believed that all persons, white and Negro, were already clothed with a full body of civil rights as a necessary incident of national citizenship. This was the significance of the repeated references in debate on the Civil Rights bill to Justice Washington's opinion in the *Corfield* case,⁴³ where the rights incident to citizenship had been described in all-inclusive terms under the comity clause. It followed, they argued, that Congress already possessed comprehensive power to guarantee all civil rights whatsoever. More moderate Republicans, however, believed that Congress constitutionally could guarantee only those rights which were properly incident of the freedom guaranteed by the Thirteenth Amendment, and that a further amendment would be necessary to enable Congress to put all civil rights under federal guarantee. After some initial confusion, this was to be the position assumed both by Lyman Trumbull, author of the measure which became the Civil Rights Act of 1866⁴⁴ and by John A. Bingham, principal author of the Fourteenth Amendment.

Needless to say, nearly all Democrats and a few conservative Republicans looked upon these ideas as anathema. They conceded the Negro's freedom by virtue of the Thirteenth Amendment, but they denied that the Negro could be a citizen, distinguishing sharply between full citizenship and the status of a mere inhabitant without full membership in the body politic. Moreover, they

⁴¹ Sumner had argued during debates on the amendment that slavery was so repugnant to the Constitution that Congress could destroy it by a simple statute. CONG. GLOBE, 38th Cong., 1st sess., 1479ff. (1864). James Ashley of Ohio in January 1865 argued that both whites and Negroes, free and slave, already had citizenship by virtue of the comity clause. *Id.* at 1199ff. Senator Ben Wade of Ohio took the same position. *Id.* at 2768.

⁴² Stevens, contrary to Sumner and Ashley, argued that the Thirteenth Amendment had had a revolutionary effect on the constitutional system, and was not merely declaratory. CONG. GLOBE, 38th Cong., 2d sess., 265-266 (1865).

⁴³ *Corfield v. Coryell*, (C.C. Pa. 1823) 6 Fed. Cas. 546, No. 3230.

⁴⁴ 14 Stat. L. 27 (1866).

denied the very doctrine of national citizenship itself, in spite of the dictum of the *Dred Scott* case;⁴⁵ as a corollary, they denied also that the Congress could legislate to make citizens, either by virtue of the original Constitution, the Thirteenth Amendment or the naturalization clause, foreign immigrants excepted. For them the Negro was still an inferior non-citizen whose rights were a matter of the sovereign discretion of the several states. Indeed, all civil rights lay within the reserved powers of the states, and Congress was without power to legislate for the protection of civil rights, either for whites or Negroes.

The introduction of a number of civil rights bills by the Radicals soon brought divergent theories into sharp conflict. These measures marked out in bold relief the determination of the more enthusiastic Radicals to strike at the legal foundations of the entire caste system in the South, and indeed to work something of a revolution in the southern social order. With one important exception, all died early deaths and so were not subject to extended analysis in debate, so that it is not possible to state with any accuracy what their precise legal effect with respect to racial class legislation and segregation was intended to be, or what Congress would have thought of the matter had they been so analyzed. Indeed, their authors probably scarcely knew themselves, for at this stage the legal impact of a federal civil rights statute upon state racial class legislation simply had not been thought through carefully.

Yet it is significant that all the bills introduced resorted to sweeping and all-inclusive prohibitory language and not mere enumeration alone.⁴⁶ The mood of the Radicals was not one of

⁴⁵*Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857).

⁴⁶Worthy of some notice are Senate Bill 9, *GLOBE* 39, a temporary war measure introduced by Senator Henry Wilson of Massachusetts, and the civil rights sections in Senate Bill 60, *GLOBE* 318, to extend the powers of the Freedmen's Bureau, introduced by Senator Lyman Trumbull of Illinois. Wilson's bill, which was intended as a war measure applying only to the seceded states would have declared null and void all laws in those states which recognized "any inequality of civil rights and immunities" based on any distinction of race, color or previous condition of servitude. Speaking in defense of his measure, Wilson said that "we must see to it that the man made free by the Constitution . . . is a free-man indeed . . . that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he go into the schools and educate himself and his children; that the rights . . . of the good old common law are his, and that he walks the earth . . . protected by the just and equal laws of his country." *GLOBE* 111. Sumner in praising Wilson's bill, compared its probable effect to the Czar's proclamation of 1861 ending serfdom in Russia, which among other things, he said, had guaranteed "equality at schools and in education." He added, "I trust that this example is none the less worthy of imitation because it is that of an empire. . . ." *GLOBE* 91. Sumner's opposition to segregated schools was of course far more clear and decisive than that of his other colleagues.

Trumbull's bill to extend the powers of the Freedmen's Bureau guaranteed Negroes "all civil rights and immunities belonging to white persons," and "the full and equal benefit

caution and restraint; on the contrary it was "revolutionary" in the sense that they were not afraid to project changes in the southern social order going far beyond the mere destruction of slavery. Moreover, they were concerned remarkably little with the purely traditional conservative constitutional notions of the extent of federal power. This general "revolutionary" mood has long been recognized by historians.⁴⁷ It is important to understand it, for both the Civil Rights Act of 1866⁴⁸ and the Fourteenth Amendment were products of it.

By far the most important civil rights bill introduced was Senate Bill 61, which Senator Lyman Trumbull of Illinois, chairman of the Senate Judiciary Committee, reported to the floor of the upper house on January 5, 1866.⁴⁹ This measure, destined to become the Civil Rights Act of 1866,⁵⁰ in its most important sections as amended provided:

"All persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants 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 to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none

of all laws and proceedings for the security of person and estate." Section 6 of the bill empowered the bureau to acquire land for schools, although there was no suggestion that this was to involve mixed schools. The Freedmen's Bureau was already operating nearly a thousand Negro schools in the South, but it made no effort to make these mixed schools, although many enthusiastic northerners hoped that this would be the result. COULTER, *THE SOUTH DURING RECONSTRUCTION, 1865-1877* 80-88 (1947); PEIRCE, *THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* 83 (1904).

⁴⁷ See, for example, BEALE, *THE CRITICAL YEAR* 51 ff. (1930); RANDALL, *THE CIVIL WAR AND RECONSTRUCTION* 718-730 (1937). Wendell Phillips in 1865 led a successful movement to prevent dissolution of the American Antislavery Society, on the ground that the mere adoption of the Thirteenth Amendment would give "no assurance of full civil rights or equality" for the Negro. The Society, he insisted, must continue until racial lines were entirely obliterated. NYE, *WILLIAM LLOYD GARRISON 186-187* (1955).

⁴⁸ 14 Stat. L. 27 (1866).

⁴⁹ *GLOBE* 129.

⁵⁰ 14 Stat. L. 27 (1866).

other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."⁵¹

As originally introduced, the measure did not specifically guarantee citizenship, apparently because Trumbull took it for granted that Negroes were now citizens of the United States, but very shortly it was amended at Trumbull's instance to include the citizenship clause, apparently because not all the Radicals were certain that Negro citizenship was now self-evident.⁵²

In opening debate on his bill on January 29, Trumbull argued that the Thirteenth Amendment had made it both necessary and constitutional. National citizenship, he thought, existed by virtue of the naturalization clause—here he agreed with Taney's *Dred Scott*⁵³ opinion. The Thirteenth Amendment had endowed the Negro with citizenship as a necessary incident of freedom, and Congress now had both the power and duty to guarantee the rights incidental thereto. "[T]hey are entitled . . .," he said, ". . . to the great fundamental rights belonging to free citizens, and we have a right to protect them in the enjoyment of them."⁵⁴

Trumbull then passed to an attack on the Black Codes, which, he asserted, "although they do not make a man an absolute slave, yet deprive him of the rights of a free man." The object of the present bill, he continued, was ". . . to destroy all these discriminations, and to carry into effect the constitutional amendment."⁵⁵

Trumbull made it clear that his notion of the rights incidental to national citizenship was exceedingly comprehensive in character and followed closely pre-war antislavery constitutional doctrine. "Then, sir, I take it," he said, "that any statute which is not equal to all, and which deprives any citizen of the civil rights which are secured to other citizens, is an unjust . . . badge of servitude which, by the Constitution, is prohibited."⁵⁶ Citing the dictum of *Corfield v. Coryell*,⁵⁷ he argued that the rights of national citizenship included all "privileges and immunities which are in

⁵¹ Id. at 474, 498.

⁵² Id. at 474, 497, 498.

⁵³ *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857).

⁵⁴ GLOBE 475. There was evidently some inconsistency in Trumbull's position. In response to a question by Senator Van Winkle of West Virginia, he asserted that Congress possessed complete discretionary power over citizenship for Negroes by virtue of the naturalization clause, which implied that it might withhold citizenship from Negroes at its discretion. But he next insisted that Negroes already were full citizens by virtue of the Thirteenth Amendment. *Ibid.*

⁵⁵ GLOBE 474.

⁵⁶ *Ibid.*

⁵⁷ (C.C. Pa. 1823) 6 Fed. Cas. 546, No. 3230.

their nature fundamental; which belong . . . to the citizens of all free Governments. . . ."⁵⁸ In short, he nationalized the comity clause and turned it into a national bill of rights against the states, as the pre-war antislavery theorists had pretty generally done.

The spirited debate that followed centered upon three highly controversial constitutional questions: first, whether national citizenship existed and whether Congress could constitutionally confer such citizenship upon anyone, particularly upon Negroes; second, whether Congress constitutionally could define and guarantee the civil rights of so-called national citizens; and third, and most significant here, the scope of the civil rights which would be guaranteed by the present bill.

Briefly, the Conservatives, led by Willard Saulsbury of Delaware, Reverdy Johnson of Maryland, Garrett Davis of Kentucky, Thomas Hendricks of Indiana, Peter Van Winkle of West Virginia, and Edgar Cowan of Pennsylvania, denied that national citizenship existed, denied that Congress could define or confer citizenship under the naturalization clause, denied that the Thirteenth Amendment had made the Negro either a national or a state citizen, denied that the amendment had endowed the Negro with any rights other than simple freedom, and insisted that any guarantee of civil rights was still entirely a matter of the sovereign discretion of the several states. The Radicals, led by Trumbull of Illinois, Lot Morrill and W. P. Fessenden of Maine, Henry Wilson of Massachusetts, Timothy Howe of Wisconsin and Jacob Howard of Michigan, insisted that national citizenship existed, that Congress could define and confer it, that the Negro was already a citizen, and that Congress could legitimately protect civil rights incident thereto.

More significant here was the sharp controversy that developed over the question of the scope and inclusiveness of the guarantee of civil rights in the proposed bill. The Conservatives seized at once upon a broad and all-inclusive interpretation of the term "civil rights," which they insisted also was implicit in the language of the bill itself. They pointed to the clause stipulating that "there shall be no discrimination in civil rights and immunities . . . on account of race,"⁵⁹ and argued strenuously that this provision would destroy all state statutes whatsoever which made race the basis of any kind of discrimination or classification. The con-

⁵⁸ GLOBE 475, quoted *Corfield v. Coryell*, (C.C. Pa. 1823) 6 Fed. Cas. 546.

⁵⁹ GLOBE 129.

sequence would be, they insisted, that state laws forbidding racial intermarriage and providing for segregated schools, theatres, omnibusses, and the like would be struck down, a result they regarded as monstrous. Senator Cowan, a conservative Republican, in particular, struck at the probable effect of the law on school segregation:

"Now, as I understand the meaning and intent of this bill, it is that there shall be no discrimination made between the inhabitants of the several states of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me, it is monstrous."⁶⁰

Reverdy Johnson of Maryland, one of the best legal minds in the Senate, pointed out that a number of the states had laws prohibiting marriage between the races; the "no discrimination" clause, he said, would make miscegenation clauses unconstitutional whether or not this was Trumbull's intent. Not at all, said Trumbull and Fessenden; the bill would leave the two races under the same prohibition against marrying outside their own race; therefore it did not discriminate. But Johnson refused to accept this plea and continued to insist that under the proposed law state miscegenation statutes would be void.⁶¹ Garrett Davis of Kentucky observed that the criminal code of his own state drew a distinction between Negroes and whites in the punishment for rape of a white woman—for the former the punishment was death; for the latter a term of imprisonment. And he concluded: "Here the honorable senator in one short bill breaks down all the domestic

⁶⁰ Id. at 500.

⁶¹ Id. at 505-507.

systems of law that prevail in all the States . . . except so far as those laws shall be entirely uniform in their application.”⁶²

There were two possible answers to the Conservatives’ interpretation of the sweeping extent of the “no discrimination” clause. One was to admit the point and concede freely the revolutionary force of the bill, and some of the Radicals were inclined to adopt exactly this position. The reply tendered Davis by Senator Morrill was characteristic of this position:

“The Senator from Kentucky tells us that the proposition is revolutionary, and he thinks that is an objection. I freely concede that it is revolutionary. I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of revolution? Is the Senator from Kentucky utterly oblivious to the grand results of four years of war? . . .

“I accept, then, what the Senator from Kentucky thinks so obnoxious. We are in the midst of revolution.”⁶³

Another answer consisted in offering vague assurances that the bill would not violate states rights, without attempting to answer specifically precise questions about the scope of the bill or its impact upon particular instances of racial class legislation. Thus, Senator Howard, attempting to reassure moderate Republicans showing some concern, observed,

“. . . I do not understand the bill which is now before us to contemplate anything else than this, that in respect to all civil rights . . . there is to be . . . no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else. . . .” There is no invasion of the legitimate rights of the States.”⁶⁴

The trouble with reassurance of this sort, however, was that it simply did not meet the Conservative charge as to the scope of civil rights involved. The Radicals doubtless realized this well enough, which was one reason why they continued to deal in generalities. It must be observed also, that the projected measure was so novel and the term “civil rights” itself so devoid of antecedent legal history that a definition of very precise legal consequences was a difficult or impossible matter.

⁶² Id. at 598.

⁶³ Id. at 570.

⁶⁴ Id. at 504.

The Senate on February 2 passed the Trumbull bill, 33 to 12, with the "no discrimination" clause intact.⁶⁵ It was clear, however, that the Conservatives' broad interpretation of this clause and of the bill generally had raised many doubts which would have to be resolved before the measure became law.

The Trumbull bill now went to the House, where on March 2 it was reported out on the floor by James Wilson of Iowa, Chairman of the House Judiciary Committee. Wilson's defense of the bill's constitutionality was substantially the same as that of Trumbull, but on the question of the force and effect of the "no discrimination" clause he declared for a narrow interpretation of the measure in unequivocal terms:

"This part of the bill [he said, in reference to the no discrimination clause] will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of civil rights and immunities. What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? . . . No. . . . Nor do they mean that all citizens shall sit on the same juries, or that their children shall attend the same schools. These are not civil rights or immunities."⁶⁶

He then went on to assert vaguely that civil rights were only the "natural rights of man," while immunities, he said, merely secure to citizens of the United States equality in the exemptions of the law.⁶⁷

In other words, Wilson attempted to reassure the more moderate Republicans and Conservatives by adopting a restrictive interpretation of the "no discrimination" clause. But the Conservatives in the House also refused to be reassured. Representative Rogers of New Jersey, a die-hard conservative Democrat and a member of the Joint Committee of Fifteen, replied to Wilson in a lengthy speech in which he argued, as had Johnson, Hendricks, and Davis in the Senate, that the "no discrimination" clause would break down all state statutes which classified on the basis of race. He cited once more the Kentucky statute for the unequal punishment of rape, the anti-miscegenation acts, an Indiana statute for-

⁶⁵ Id. at 606, 607.

⁶⁶ Id. at 1117.

⁶⁷ Ibid.

bidding Negroes to acquire real estate, and the Pennsylvania statute segregating white and Negro school children. Civil rights, he insisted, in fact included "all the rights that we enjoy." "What broader words than privileges and immunities," he inquired, "are to be found in the dictionary?"⁶⁸ Representative Delano, of Ohio, another conservative, citing the old Ohio school segregation law, observed that the statute "did not, of course, place the black population on an equal footing with the whites, and would, therefore, under the terms of this bill be void."⁶⁹ Michael Kerr of Indiana, challenging the constitutionality of the bill under the Thirteenth Amendment, asked rhetorically whether it was slavery or involuntary servitude ". . . to deny to children of free negroes or mulattoes . . . the privilege of attending the common schools of a State with the children of white men?"⁷⁰ Representative Henry Raymond, a moderate New York Republican and editor of the *New York Times*, warned that in his understanding the term "civil rights" covered the whole range of commonly understood liberties and immunities, and that he therefore entertained grave doubts as to the measure's constitutionality.⁷¹

These arguments carried the day. On March 9, John A. Bingham of Ohio, then a member of the Joint Committee on Reconstruction which presently was to report the substance of the first section of the Fourteenth Amendment to the Congress, rose in the House to demand that the "no discrimination" clause be struck out of the bill. Accepting the "broad" or Conservative interpretation of the "no discrimination" clause, Bingham argued that civil rights included the entire range of civil privileges and immunities within organized society, excepting only political rights, and then insisted that Congress had no power to enact such legislation merely by benefit of the constitutional powers it derived from the Thirteenth Amendment. The result of the present language, Bingham said, would be to strike down every state law that set up any kind of discrimination against Negroes:

"If civil rights has this extent, what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. I might say here, without the least fear

⁶⁸ Id. at 1122.

⁶⁹ Id., appendix at 158.

⁷⁰ Id. at 1268.

⁷¹ Id. at 1267.

of contradiction, that there is scarcely a State in this Union which does not, by its constitution or its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights."⁷²

Bingham then insisted that he believed that all discriminatory legislation ought to be wiped out. But the proper way to achieve this result, he thought, was "not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future."⁷³

Wilson at first refused to accept Bingham's "broad interpretations," and tried to defend the language of the Trumbull bill as it stood:

"The gentleman from Ohio tells the House that civil rights involve all the rights that citizens have under the

⁷² Id. at 1291. Bingham had offered a motion the previous day to recommit the bill with instructions to strike out the "no discrimination" clause. Id. at 1266.

⁷³ Id. at 1291. The precise character of Bingham's argument has become a matter of some controversy. Bickel, in "The Original Understanding and Segregation Decision," 69 HARV. L. REV. 1 (1955), argues that Bingham objected to the "no discrimination" clause as a matter of policy as well as a matter of constitutional law and that he was "endeavoring merely to make the bill 'less offensive, less unjust.'" He does not think that Bingham implied that he would approve the "no discrimination" clause were the constitutional difficulty removed. He points out that Bingham's words, "I say with all my heart, that this should be the law of every State," and advocating a constitutional amendment instead of "an arbitrary assumption of power" by Congress were spoken immediately after Bingham had quoted the enumerated guarantees of the bill, not the "no discrimination" clause. Thus he concludes that Bingham did not mean to lend any support in policy, even by constitutional amendment, for the "no discrimination" clause.

To the present writer this seems a very doubtful reading of Bingham's position. It ignores his extensive extremist antislavery background as well as his position in Congress as one of the strong Radical Republicans; it ignores, also, the latitudinarian defense of the force and scope of his own constitutional amendment with respect to civil rights which Bingham had presented to the House a few days earlier. It ignores also the following words of Bingham later in the same speech: "Now what does this bill propose? To reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws. I humbly bow before the majesty of justice, as I bow before the majesty of that God whose attribute it is, and therefore declare there should be no such inequality or discrimination even in the penalties for crime; but what power have you to correct it? That is the question . . . whence do you derive power to cure it by congressional enactment?" GLOBE 1293. It appears probable that while Bingham entertained grave doubts as to the bill's constitutionality, he had no objection to the discrimination clause as a matter of policy, and on the contrary he looked forward to curing the constitutional difficulty by amendment. Frank and Munro, "The Original Understanding of 'Equal Protection of the Laws,'" 50 COL. L. REV. 131 (1950) agrees with this conclusion, as do Graham, "Our 'Declaratory' Fourteenth Amendment," 7 STAN. L. REV. 3 (1954), and FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 35 (1908). The vital objection to Bickel's interpretation, which, if valid, destroys the argument that Bingham ever sought anything more than a restricted scope of civil rights for the Negro, is that it is contradicted by Bingham's entire career and by his latitudinarian position during the debates on the Fourteenth Amendment.

government; that in the term are embraced those rights which belong to a citizen of the United States as such: . . . and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. . . . He knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as the result of which this bill can only relate to matters within the control of Congress.”⁷⁴

Here was a restrictive interpretation which actually anticipated the dual citizenship doctrine of the “privileges and immunities” clause of the Fourteenth Amendment in the *Slaughterhouse* cases.⁷⁵ And here again was a denial that the “no discrimination” clause would strike down state racial statutes classifying by race.

After some maneuvering, Bingham carried the day. His amendment to strike out the “no discrimination” clause was first voted down 113 to 37, but the bill was nonetheless returned to the Judiciary Committee for restudy.⁷⁶ On March 13, Wilson himself, reporting the bill to the floor once more, moved to strike out the “no discrimination” clause on the grounds that the words in question “might give warrant for a latitudinarian construction not intended.”⁷⁷ The House immediately concurred unanimously and without debate—obviously Bingham’s argument had ceased to be a matter of controversy. Immediately thereafter, the House passed the bill, 111 to 38.⁷⁸ The Senate concurred in the Bingham amendment,⁷⁹ and the bill went to the President, to become law over Johnson’s veto.

It seems highly probable, then, that the Civil Rights Act, as finally passed, was not intended to ban state racial segregation and classification laws. The main force of the Conservatives’ attack on the “no discrimination” clause was that it would indeed destroy

⁷⁴ GLOBE 1294.

⁷⁵ 16 Wall. (83 U.S.) 36 (1873).

⁷⁶ GLOBE 1296. The motion to recommit carried 82 to 72, with Bingham and a considerable number of the Republicans voting with the Democrats.

⁷⁷ GLOBE 1366.

⁷⁸ Id. at 1367.

⁷⁹ Id. at 1416.

all race classification laws. The supporters of the bill at first insisted that this interpretation was erroneous, but when John A. Bingham dramatically defended the Conservative interpretation in the face of James Wilson's declaration of narrow intent, the House finally resolved the element of doubt by striking out the "no discrimination" clause entirely.

It must be observed, however, that some element of doubt remained as to the scope of the bill, even at the time. Several Conservatives, among them Rogers, Cowan, Davis and Grimes, even in the hour of final passage, continued to insist that the bill would destroy all racial segregation laws. The phrase "the inhabitants of every race . . . shall have the same right . . . to . . . full and equal benefit of all laws and proceedings for the security of persons and property"⁸⁰ still stood in the bill, and was susceptible of possible broad interpretation, although it had not been stressed during the debates on the measure. Garrett Davis, for example, in a speech following Johnson's veto, cited various state laws imposing segregation in churches, omnibusses, steamboats, railroads, and the like, and asserted, "All these discriminations in the entire society of the United States are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them away, and to consummate their destruction, and bring the two races upon the same great plane of perfect equality. . . ."⁸¹

Numerous newspapers in both the North and South also thought that the bill would destroy entirely segregation in schools, theatres, churches, and public vehicles.⁸² A number of suits were filed in the state and district federal courts in the next year or so attacking local segregation laws banning Negroes from omnibusses, theatres, and churches.⁸³ However, President Johnson in his veto message did not adopt the broad interpretation of the bill. Assuming instead that it protected merely those rights inherent in citizenship and freedom, he argued merely that if Congress could constitutionally go this far in the protection of civil rights, there was

⁸⁰ Id. at 474, 498.

⁸¹ Id., appendix at 183.

⁸² NEW YORK HERALD, March 29, 1866; Id., April 10, 1866; CINCINNATI COMMERCIAL, March 30, 1866; NATIONAL INTELLIGENCER, April 16, 1866; Id., May 16, 1866.

⁸³ FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 49-54 (1908) gives a summary of cases. In *United States v. Rhodes*, (C.C. Ky. 1866) 27 Fed. Cas. 785, No. 16, 151, Justice Swayne held the Civil Rights Act constitutional under the Thirteenth Amendment, but observed that the law also "gives only certain civil rights." Id. at 794. The case dealt with the right of a Negro to testify against whites in the Kentucky courts, a right Swayne affirmed under the law.

no logical reason why it could not make segregation and inter-marriage a matter of congressional regulation.⁸⁴

A new question now occurs: what was the relationship of the Civil Rights Act to the Fourteenth Amendment itself? Was the first section of the amendment intended merely to remove doubt as to the constitutional status of the Civil Rights Act, or was it the intent of the framers of the amendment and of Congress to go beyond the restrictive and enumerative scope of the Civil Rights Act, and to place all civil rights, in the Bingham sense, under the protection of the amendment?

The evidence on this critical point is somewhat contradictory, but careful analysis appears to establish the following tentative conclusions: First, the principal Radical leaders concerned with the amendment, notably Bingham, Stevens, Morrill, Fessenden, and Howard, deliberately sought to go far beyond the guarantees of the Civil Rights Act and to place all civil rights, in the expansive Bingham definition, under federal guarantees of equality against state law. Second, for strategic political reasons, the first section of the amendment was in part, at least, represented on the floor of both houses as intended merely to constitutionalize the Civil Rights Act and to put its guarantees beyond assault by possible future conservative Congresses. Third, and perhaps most important, the very phrases used in the first section of the amendment were, by virtue of their history and derivation, somewhat vague and amorphous, and not subject to precise legal delineation in debate, and it was not altogether to the Radical interest to attempt such definition.

The intent of certain Radical leaders to go beyond the restrictive enumeration of the Civil Rights Act and to incorporate a series of expansive guarantees in the Constitution is quite clear. In a general sense, the best evidence of this is the language of the guarantees which Bingham and the other authors of the Fourteenth Amendment incorporated in the first section. The guarantees they finally adopted—privileges and immunities, due process and equal protection—were not at all derived from the Civil Rights Act, which, with the exception of one vague phrase in its final form, had used the restrictive enumerative device. Instead, the authors derived their guarantees deliberately from the pre-war Radical antislavery movement. If we recall Bingham's prominent pre-war association with the formulation of these guarantees in

⁸⁴ RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 3065 (1913).

antislavery ideology, we may conclude reasonably enough that the resort to this language was no accident.

Now it cannot be emphasized too strongly that these phrases, as used in the antislavery movement, had a radical expansive, humanitarian, equalitarian quality. As already observed, the pre-war antislavery idealists had endowed due process of law with a substantive spirit (very different, indeed, from that which it had acquired in the *Dred Scott* and *Wynehamer* cases) which in effect made it a legislative injunction to maintain a casteless equalitarian social order. So, likewise, "privileges and immunities," derived from the comity clause of the old Constitution, had been seized upon, given the expansive content of Justice Washington's all-inclusive description in the *Corfield* case, and translated into a national Bill of Rights against state action. And as for equal protection—it was straight-out antislavery equalitarian ideology with virtually no antecedent legal history at all. In was these phrases, with their expansive implications, which now went into the amendment, and not the restrictive phraseology of the Civil Rights Act. The Radicals were now amending the Constitution, not writing a statute. The debates show that they were well aware of the fact.

This first became evident in February, when Bingham, on the instructions of the Joint Committee, introduced the following draft of a constitutional amendment in the House (H. R. 63):

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States [Article IV, Section 2]; and to all persons in the several States equal protection in the rights of life, liberty, and property [Fifth Amendment]."⁸⁵

Here was the old antislavery theory that the comity clause properly constituted a national bill of rights, hitherto without direct federal sanctions, which would now be supported with a grant of specific congressional legislative power, and that at least the due process clause of the federal Bill of Rights should be made a guarantee against state action. This was what Bingham meant when he

⁸⁵GLOBE 813. This proposal had been evolved after several days of discussion in the Joint Committee, which had voted, 9 to 5, to report the amendment to the House. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 61 (1914). (See note 38 supra.) The proposal had its beginnings in resolutions introduced in the House in December by Bingham and Stevens and referred to the Joint Committee. *Id.* at 14. The final form of the proposal was Bingham's.

said, in explaining his amendment to the House, "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."⁸⁶

Bingham and Stevens presently made it clear that they intended the amendment to place all civil rights under a federal guarantee of equality against state action, a proposal going far beyond the scope of the Civil Rights bill as presently amended. At the same time they repelled emphatically the contention that the amendment would effect a general transfer of the area of sovereignty over civil rights from states to the national government. What they proposed was a congressional guarantee of equality with respect to all state legislation, subject only to reasonable classification; subject to this guarantee, the states' right to legislate was to remain unimpaired.

These points became clear when the amendment came up for debate at the end of February. Representative Robert S. Hale of New York, a respected Republican and competent lawyer, made a carefully considered attack upon the proposal, insisting at some length that its language was such that it would effect a total transfer of sovereignty over civil rights from the states to the federal government. Thaddeus Stevens challenged this sharply at once, insisting that the amendment would merely impose a very general and inclusive guarantee of equality upon the states. In support of his contention he drew an illustration of "reasonable classification" in state legislation to show how the states would retain jurisdiction subject to the federal guarantees.⁸⁷

The following day Bingham also undertook to answer Hale. Denying that the amendment would invade the powers of the states other than with respect to the guarantee of equality, he insisted that it was "a proposition to arm the Congress . . . to enforce the bill of rights, as it stands in the Constitution . . . [and] no more."⁸⁸ Hale then asked Bingham "as an able constitutional lawyer" whether in his opinion the amendment did not secure to Congress a "general power of legislation" to protect civil rights. Bingham immediately admitted, "I believe it does with respect to

⁸⁶ GLOBE 1063-1064.

⁸⁷ Ibid. Stevens' argument was a direct anticipation of the "reasonable classification" doctrines developed later under the Fourteenth Amendment.

⁸⁸ Id. at 1088. The speech makes it clear that by "bill of rights" Bingham meant both the guarantees of the comity clause and the guarantees of due process in the Fifth Amendment.

life, liberty, and property as I have heretofore stated it." Not satisfied, Hale put again the question of whether the amendment would confer "general powers of legislation upon Congress." Bingham replied: "It certainly does this: it confers upon Congress the power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." And when Hale asked where this "doctrine" was to be found in the amendment, Bingham replied, "The words 'equal protection' contain it, and nothing else."⁸⁹ In other words, the amendment was to impose a very general requirement of equality on all state legislation of the most inclusive kind; at the same time it would not affect the capacity of the states to legislate otherwise.⁹⁰

It will be recalled that early in March, a few days after this exchange with Hale, Bingham was to rise in the House to attack the constitutionality of the "no discrimination" clause of the Civil Rights bill, explaining emphatically that the term "civil rights" properly included the entire range of natural, organic, and social rights in organized society, that a federal guarantee of such rights was altogether laudable but beyond the powers of Congress, and that it ought properly to be sought by constitutional amendment. This speech properly should be read together with Bingham's defense of H.R. 63 as a revelation of his fundamental intentions. It leaves little doubt that his objective was to place all civil rights under federal guarantee, but he believed strongly that this must be accomplished by constitutional amendment.

Bingham's amendment was not acted upon; instead the House by a vote of 110 to 37 postponed further consideration until early April.⁹¹ In this form the proposal was not heard from again. It is sometimes assumed that the shelving of H.R. 63 meant that the House had rejected the idea of congressional power to legislate in support of a federal guarantee of equality. This conclusion, the

⁸⁹ *Id.* at 1094.

⁹⁰ Rogers' main complaint was that Bingham's amendment, if adopted, would destroy all state caste legislation entirely, including miscegenation acts, laws imposing special punishments for crime, and school segregation laws. The latter point he emphasized particularly, as follows: "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 this amendment, Congress would have the 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." *GLOBE*, appendix, 134.

⁹¹ *GLOBE* 1095.

present writer believes, is incorrect. The members of the House may well have concluded that Hale's argument—that the amendment would result in a general transfer of sovereignty over all civil rights from the states to the federal government—was correct, although Bingham and Stevens had emphatically denied any such purpose. However, this must not be confused with a rejection by the House of the fundamental idea of congressional power to impose a guarantee of equality. On the contrary, several Radicals, Gilbert Hotchkiss and Roscoe Conkling of New York among them, expressed a very different objection to Bingham's amendment: it did not, Hotchkiss pointed out, result in "permanently securing those rights," but left them at the mercy of future congressional discretion.⁹² The answer might be, Conkling suggested, a categorical guarantee of equality which Congress could implement but not impair.⁹³ In fact, this was to be the solution embodied in the amendment reported out in late April, when once more, however, the Radicals were to lay heavy emphasis in debate upon congressional legislative power.

For about six weeks after the shelving of Bingham's amendment, the Joint Committee appears to have been inactive. However, on April 21, Stevens introduced to the committee a proposed comprehensive amendment which contained a first section similar to the "no discrimination" clause early struck out of the Civil Rights Act as far too comprehensive for congressional power. In other words, Stevens here sought to incorporate legal language which it had already been generally agreed would have the effect of destroying all class and caste legislation, including segregation laws, a fairly decisive indication that Steven's notions as to the comprehensive force that any amendment ought to have were in the same class as Bingham's. Significantly, the "no discrimination" guarantee in Steven's proposal was now mandatory, and not subject to congressional discretion, although a separate section (5) now gave Congress comprehensive power to enforce the guarantees of the amendment.⁹⁴

⁹² Id. at 1094-1095.

⁹³ Id. at 1096. Bickel, in "The Original Understanding and the Segregation Decision," 69 HARV. L. REV. 1 at 37-40 (1955), thinks Hale's argument prevailed with the House, while Fairman, in "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 STAN. L. REV. 5 at 24ff. (1949), thinks Bingham was unable to defend clearly the possible legal implications of the amendment. Both propositions may well be true, although there is no specific evidence available at all as to why the House failed to act later.

⁹⁴ Section 5, which the committee obviously regarded as of great importance, read as follows: "Congress shall have power to enforce by appropriate legislation, the provisions

After some uncertainty, the Joint Committee a week later replaced Steven's proposal with a new first section drafted and introduced by Bingham, modelled upon Bingham's February amendment, but incorporating certain critical changes:

"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 the equal protection of the laws."⁹⁵

The new proposal incorporated essentially the same guarantees as the February amendment—"privileges and immunities," "due process," and "equal protection," but in certain technical respects it differed vitally. Most important, it created rights which would be enforceable at law through the judicial process. The rights in question would be beyond the power of Congress to impair or destroy by withholding legislative action, as would have been the case with the February proposal.

More difficult of analysis is the contrast between the two provisions with respect to the capacity of Congress to legislate in the area of civil rights generally. The language of the new section made it clear that there was to be no transfer of plenary legislative sovereignty over civil rights to Congress but only a congressional

of this article." KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 83-84 (1914).

Section one of the proposed amendment provided: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." *Ibid.* Section 2 would have forbidden racial discrimination in political rights after July 4, 1876; section 3 would have excluded from the basis of state representation persons denied the suffrage because of race before July 4, 1876; section 4 invalidated the Confederate debts. Sections 2, 3, and 4 were subjected to extensive changes before and after the amendment reached the floor. Section 5 alone remained unchanged as the amendment was finally adopted.

⁹⁵This new first section, which with the addition of the citizenship clause was to win adoption as the first section of the Fourteenth Amendment, was the result of several complex changes in the Joint Committee which revealed great uncertainty on the members' part as to precisely how it wished to accomplish its purpose. On April 21, Bingham first moved to add to Stevens' original section 1 the words: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." The committee voted this down 6 to 5, with only Johnson, Stevens, Bingham, Blow and Rogers supporting it. A few moments later, however, Bingham introduced as a proposed new section 5, the provision guaranteeing privileges and immunities, due process, and equal protection, as set forth in the text above. The committee first voted 10 to 2 to accept this proposal; however, four days later the members, on Williams' motion, struck the section out, 7 to 5, and a proposal by Bingham to submit the deleted section to Congress as a separate amendment also failed, 8 to 4. But on April 28, Bingham moved to strike out section 1 (Stevens' "no discrimination" provision), and to substitute Bingham's section in its place, and the Committee finally did so, 10 to 3. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 82-107 (1914).

power to enforce the guarantees in the amendment. This met successfully the principal change which Hale and others had raised in February against H.R. 63. However, this did not mean, as was later asserted, that Congress was to be without power to enforce the guarantees in section one by appropriate legislation. Both the journal of the Joint Committee and the debates make it clear that section one was to be read in connection with section five, so that Congress would have the power to enforce its provisions by appropriate legislation.

Here still another possible legal distinction appears. The February proposal would have given Congress the power in so many words to enforce the rights of citizens; section one of the later amendment created rights only as against state action. Did this mean that the committee now recognized that Congress would not be able to legislate to enforce equality as against individual infringement, as it later attempted to do in the Civil Rights Act of 1875? No certain answer is probable; the distinction simply was not drawn clearly in committee or debate at the time. All that remains certain is that Bingham and the committee did not intend to withdraw congressional power to enforce the rights guaranteed in the amendment; instead it merely sought to withdraw from legislative discretion any power to impair or diminish the rights in question, a change Hotchkiss, Conkling, and other Radicals had insisted upon as important.

When the new amendment reached the floor of Congress on April 30,⁹⁶ a curious ambiguity developed in the Radicals' advocacy of the measure. On one hand, the Radical leaders, especially in the House, presented the first section as primarily an attempt to constitutionalize the Civil Rights Act and so either to remove doubts as to its validity or to place the guarantees of the act beyond the assault of future hostile Congresses. At the same time, however, they met the Conservative charges as to the broad and revolutionary scope of the rights to be placed under federal protection neither with affirmation nor denial; instead, Bingham, Stevens, and their associates used the technique of lofty, expansive, and highly generalized language to describe the amendment's potential consequences. It was as though the Radical leaders were avoiding a precise delineation of legal consequences.

⁹⁶ GLOBE 2286. As reported, section 1 was exactly as Bingham had introduced it to the Joint Committee. The citizenship clause presently to become the first sentence of section 1 was added later in the Senate, principally because of doubts about the constitutionality of the guarantee in the Civil Rights Act. GLOBE 2869.

This ambiguity was present in Stevens' speech of May 8 opening debate on the amendment in the House. He first reiterated the old antislavery theory that these guarantees were already in the Declaration of Independence or the "organic law." "But the Constitution," he went on, "limits only the action of Congress, and is not a limitation on the States. This amendment supplies 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. . . . Whatever law protects the white man shall afford 'equal' protection to the black man."⁹⁷ It is worth observing here that Stevens is assuming a comprehensive congressional *legislative* power to enforce the amendment against state law.

Stevens then went on to avow that a principal purpose of the amendment was to place the remedies of the Civil Rights Act beyond assault by future unfriendly Congresses:

"Some answer, 'Your Civil Rights Bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed. . . . This amendment once adopted cannot be amended without two-thirds of Congress. That they will hardly get."⁹⁸

Subsequent speakers on both sides of the House fell in line with this theory that the first section was in part at least declaratory of the Civil Rights Act, and was intended either to remove doubts as to the constitutionality of the law or to place its guarantees beyond congressional discretion. Thus Democrat William Finck of Ohio twitted the Radicals with the observation that "all I have to say about this section is, that if it is necessary to adopt it . . . then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional."⁹⁹ The response of James A. Garfield of Ohio was characteristic of the Radical position: "The civil rights bill is now a part of the law of this land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's

⁹⁷ GLOBE 2459.

⁹⁸ Ibid.

⁹⁹ Id. at 2461. Rep. Charles Eldridge of Wisconsin asked ironically, "What necessity is there, then, for this amendment . . . if that bill was constitutional at the time of passage?" Id. at 2506.

party comes into power. . . . For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.”¹⁰⁰ And Henry J. Raymond of New York, pointing out that he had voted against the Civil Rights Act because of very grave doubts as to its constitutionality, assured the House that he had at all times been “heartily in favor” of the law’s objective of “securing an equality of rights for all citizens of the United States;” accordingly, he said, he would “vote very cheerfully” for the present section.¹⁰¹

All this might well imply that the first section of the proposed amendment was intended to be merely declaratory of the Civil Rights Act, and would not go beyond its rather restrictive guarantees. But a second theme was present in the House debates—the argument that the phraseology of the first section was expansive and “revolutionary” in character, so that its precise future meaning was susceptible to indefinitely broad interpretation. Benjamin Boyer of Pennsylvania, speaking for the Democrats, warned that section one “. . . is objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions.”¹⁰² Democrat Samuel J. Randall of Pennsylvania went farther, and asserted, “The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has hitherto been exclusively exercised by the States. . . .”¹⁰³ Rogers of New Jersey, now a “bete noire” of the Radicals, charged that the term “privileges and immunities” was so comprehensive as to work a general revolution in the constitutional system:

“What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities. If a negro is refused the right to be a juror, that will take away from his privileges and

¹⁰⁰ Id. at 2462.

¹⁰¹ Id. at 2502.

¹⁰² Id. at 2467.

¹⁰³ Id. at 2530.

immunities as a citizen of the United States, and the Federal Government will step in and interfere. . . . It will result in a revolution worse than that through which we have just passed."¹⁰⁴

It will be observed that Rogers was adopting precisely the theory of "privileges and immunities" which Bingham had presented to the House two months earlier. Obviously, also, it was not possible for the Radicals to reply with any narrow construction doctrine, unless they wished to destroy the expansive force of the first section. The only possible reassurance to moderates, therefore, was the old antislavery argument that the guarantees in question were already in the Constitution, although hitherto without federal sanctions against the states, a position which if one recalls expansive doctrine of the *Corfield* case could hardly have reassured opponents of the amendment very greatly. It was in this vein that Bingham undertook a reply to Rogers:

"The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrible conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution, to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

"Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. 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. . . ."¹⁰⁵

¹⁰⁴ Id. at 2538.

¹⁰⁵ Id. at 2542. A few minutes after Bingham spoke the House passed the amendment, 128 to 37. Id. at 2545.

On May 10th, Senator Howard of Michigan, acting as co-chairman of the Joint Committee in Fessenden's absence, presented the proposed amendment to the upper house. Howard's speech, unlike Stevens', presented in no uncertain terms a powerful and convincing "broad construction" of the force and scope of the first section. Taking up the privileges and immunities clause, he first asserted that any attempt at a precise delineation of rights under the clause would be "a somewhat barren discussion" principally because the provision in Article IV of the old Constitution had never been subjected to analysis by the Supreme Court. However, he next cited Justice Washington's enumeration in the *Corfield* case and asserted that all these rights would now fall under federal protection. "To these," he said, "should be added the personal rights guaranteed and secured by the first eight amendments to the Constitution."¹⁰⁶ The rights in question, he said, were all in the present Constitution, but there was no means of enforcing them against the states. "The great object of the first section of this amendment," he said, "is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." This would be achieved, he said, through congressional action under section five, which was "a direct affirmative delegation of power . . . to carry out all the principles of all these guarantees. . . ."¹⁰⁷

Howard then presented an extremely latitudinarian interpretation of the due process clause, which he asserted would destroy all state class legislation entirely:

"The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty or property without due process of law. . . . This abolishes all class legislation in the States, and does away with

¹⁰⁶ *Id.* at 2765. It is worth observing that Howard, at least, assumed that the new amendment would embody the first eight amendments as a guarantee against the states. Five years later, in a lengthy speech in the House, Bingham claimed that in drafting section 1 of the amendment he had followed a suggestion of John Marshall in *Barron v. Baltimore*, and had sought deliberately to incorporate the guarantees of the first eight amendments. "These eight articles . . ." he said, "were never limitations upon the power of the States until made so by the fourteenth amendment." *CONG. GLOBE*, 42d Cong., 1st sess., appendix, 84ff (1871). *FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT*, (1908), asserted long ago that the Joint Committee intended to incorporate the Bill of Rights in the new amendment. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 *STAN. L. REV.* 5 (1949), however, argues the opposite conclusion, in the opinion of this writer against the weight of the evidence.

¹⁰⁷ *GLOBE* 2766.

the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. . . . I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable everyone of them from passing laws trenching on those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and 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."¹⁰⁸

In the debates which followed, there was a general assumption of the accuracy of Howard's latitudinarian interpretation. This meant in turn that there was less disposition in the Senate than there had been in the House to reassure the moderates that the first section of the amendment involved nothing more than a constitutionalization of the Civil Rights Act. In one significant exchange, indeed, with Senator Doolittle of Wisconsin, Fessenden, as co-chairman of the Joint Committee, undertook to deny categorically that the first section had been inspired by the Civil Rights Act or indeed had anything to do with it at all. Its contents, he pointed out, were entirely different, and it made "no reference" to the disputed law.¹⁰⁹ However, Howard broke in to concede

¹⁰⁸ *Ibid.*

¹⁰⁹ *Id.* at 2896. Senator Doolittle of Wisconsin had charged that the first section, which he said obviously had its origins in the Bingham amendment of February, had been inspired directly by Bingham's own doubts about the constitutionality of the civil rights bill, as expressed in debate in the House. Fessenden retorted indignantly that there was "not a particle, not a scintilla of truth" in this assertion. H. R. 63, he pointed out, had originated in the Joint Committee and had been reported out long before the Civil Rights bill came up for debate there. The Joint Committee, he insisted, had never mentioned the Civil Rights bill, either in drafting H. R. 63, or in its consideration of the present section. When Doolittle conceded that he thought the section had been brought forward because the committee had "doubts as to the constitutional power of Congress to pass the civil rights bill," Fessenden replied that "if they had doubts, no such doubts were stated in the committee of fifteen, and the matter was not put on that grounds at all. There was no question raised about the civil rights bill." And when Doolittle then asked, "if there are no doubts, why amend the Constitution on that subject?" Fessenden replied sharply, "That question the Senator may answer to suit himself. It has no reference to the civil rights bill."

that one purpose of the first section was to place the Civil Rights Act beyond possibility of attack by conservatives,¹¹⁰ while Senator Poland observed later that the constitutional power of Congress to "uproot and destroy all such partial State legislation" as violated "the spirit of the Declaration of Independence" had been "doubted and denied by persons entitled to high consideration;" hence the advisability, he said, of writing section one into the Constitution.¹¹¹

As in the House, however, both friends and opponents of the amendment spoke in terms of expansive generalizations and avoided any specific discussion of the immediate impact of section one on state racial caste legislation. Senator Hendricks of Indiana, for example, struck a characteristic Conservative note, when he charged that the section had such force that under it "Congress might invade the jurisdiction of the States, rob them of their reserved rights and crown the Federal Government with absolute and despotic power."¹¹² Garrett Davis in similar vein asserted that the "real purpose" of the section was to make Negroes citizens, "to prop the civil rights bill," and to "press . . . [Negroes] forward to a full community of civil and political rights with the white race."¹¹³ Senator Poland, a good Radical, thought on the other hand that section one expressed "the very spirit and inspiration of our system of government," as set forth in the Declaration of Independence and the Constitution.¹¹⁴ Timothy Howe of Wisconsin, another Radical, was almost the only man who became specific; he singled out for especial condemnation as a type of statute the section would kill a Florida school segregation law which provided a separate and inferior school for Negroes, subjected them to a separate school tax, and cut them off from regular state school funds.¹¹⁵ Richard Yates of Illinois, on the other hand, adopted an outright "declaratory" theory of the first section, insisting that the Thirteenth Amendment already made the Negro a citizen "entitled to be protected in all his rights and privileges as one of the citizens of the United States."¹¹⁶

The amendment presently passed both houses by large major-

¹¹⁰ GLOBE 2896.

¹¹¹ *Id.* at 2961.

¹¹² *Id.* at 2940.

¹¹³ *Id.*, appendix at 240.

¹¹⁴ *Id.* at 2961.

¹¹⁵ *Id.*, appendix at 219. Howe's speech can hardly be read as an attack on school segregation as such; rather it was the inferiority of the Negro school systems and the inequity of the tax system on which he centered his objections.

¹¹⁶ *Id.* at 3037.

ities without any resolution of the ambiguous contradiction of the Radicals' assurances that they proposed merely to constitutionalize the Civil Rights Act and their proposal to "abolish all class legislation" in the United States. It is probable that the Radicals in fact had no great desire to resolve that ambiguity, for which there was a highly plausible explanation in the politics of the moment. The political situation in Congress in the Spring of 1866 was not yet entirely clear. President Johnson's influence was rapidly being destroyed, but there was a substantial bloc of moderate Republicans who had not yet committed themselves entirely to the Radical position. Bingham, Stevens, Morrill, Poland, Howard, Howe and the other Radicals were clear enough about what they wanted to accomplish, but if they drove home too far the proposition on the floor that their amendment would undoubtedly consummate the destruction of all caste and class legislation in the states, an important element of moderate Republican support might be alienated and the requisite two-thirds majority necessary to the amendment's adoption might not be obtained. Political strategy called for ambiguity, not clarity.

This position was the easier to assume for the obvious reason that the legal phrases incorporated in the amendment could not be defined exactly as to their probable future legal force and effect. It was "somewhat barren" as Senator Howard remarked, to attempt this. This was true because, as observed above, the guarantees in question were derived principally from the pre-war antislavery movement, their meaning there was vague and expansive, and ideological rather than legal; even where the phrases in question had been in the courts, the Radicals had given them an expansive ideological content in their own thinking.

So the first section of the amendment had a philosophic and expansive character which the Radicals refused to define exactly. As Bingham observed significantly early in the session, "You do not prohibit murder in the Constitution; you guarantee life in the Constitution."¹¹⁷ There were vast advantages in this, for if the political and social currents of the nation consummated the revolutionary implications of the amendment they were writing, then subsequent judicial and congressional implementation and the overall dynamism of consequent constitutional growth would achieve their ultimate purposes. These men were hardly impressed with the idea of a static constitutional order. The atmosphere,

¹¹⁷ Id. at 432.

as Senator Morrill and Representative Rogers both observed at one time or another, was "revolutionary."

The same lack of certainty as to the precise scope of civil rights falling under federal protection by nature of the amendment as well as its precise effect upon state racial classification legislation appeared again and again throughout the remainder of the Reconstruction era in subsequent congressional attempts to deal with the question of civil rights and the Negro. Congressional support for segregated Negro schools in the District of Columbia and Sumner's long and unavailing fight to abolish segregated Negro schools in the District of Columbia has frequently been cited as evidence of congressional intent to apply "narrow construction" to state racial laws, although technically the parallel is not constitutionally precise or apposite.¹¹⁸ On the other hand, the Radicals were partially successful in their fight to impose "conditions subsequent" in the bills "readmitting" several Southern states, whereby anti-segregation provisions were guaranteed in the constitutions of the states in question.¹¹⁹ Again the willingness of Congress to impose such requirements on the South is not altogether apposite as an indication of its interpretation of the precise force of the amendment on the states generally. Perhaps the passage of the Civil Rights Act of 1875 ultimately is the most decisive indication of the conviction of a large majority of the Radicals that Congress might properly forbid state caste and segregation legislation under the amendment, but again this law implied congressional power and discretion, not necessarily the existence of prior mandatory rights enforceable under the amendment alone.¹²⁰ All this merely proves that the precise

¹¹⁸ See, for example, Judge Prettyman's opinion in *Carr v. Corning*, (D.C. Cir. 1950) 182 F. (2d) 14 at 17, where he argued that congressional support for segregated schools in the District of Columbia contemporaneously with the adoption of the amendment was conclusive evidence that Congress had not intended section 1 to invalidate state school segregation laws.

¹¹⁹ Thus an act to readmit Virginia to representation in Congress imposed on the state as a condition-subsequent the stipulation, "That the Constitution of Virginia shall never be so amended or changed 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." 16 Stat. L. 63 (1870). This provision was the result of a long fight in Congress and in Virginia to guarantee unsegregated schools in the state.

¹²⁰ It is important to realize that it was in an atmosphere of fairly severe reaction from the pro-Negro radicalism of 1866 that the "orthodox" interpretation of the Fourteenth Amendment developed, in the Slaughterhouse Cases, the Civil Rights Cases, and *Plessy v. Ferguson*. The new orthodoxy won such complete acceptance in both legal and political thinking that it became extremely difficult to recapture an understanding of either the spirit or the legal philosophy which gave birth to the amendment. See WOODWARD, *RE-UNION AND REACTION* (1951); Graham, "The Fourteenth Amendment and School Segregation," 3 *BUFFALO L. REV.* 1 (1953).

meaning of the amendment was an extremely fluid state throughout the Reconstruction era, as it was in the minds of so many men who voted for the amendment in 1866.

Perhaps the final comment on the entire problem of the amendment's meaning is the observation that the amendment was now a part of a living and dynamic constitutional system. Its meaning consequently was ultimately to reflect through the medium of the judicial process the evolution of democratic aspiration, will and myth in the American social order on the question of race and caste. The post-Reconstruction Conservative reaction was to create a body of constitutional doctrine which constricted the amendment into the narrowest possible confines of original intent and came near frustrating entirely the old Radical equalitarian and humanitarian ideal. In our own time, another Radical evolution of social-political ideology has undoubtedly brought the force and intent of the amendment with respect to race and caste far nearer to the old antislavery ideal out of which the language of the first section grew. There is nothing very surprising in this, for the notion of a static constitution is ultimately a fiction; the Court merely imposes a kind of stability and continuity upon the evolution of mass myth and social will as translated into constitutional law. Today, the meaning of the Constitution represents very nearly the fulfillment of the old Radical dream. The Constitution itself, however, has not been outraged; rather we still face the ancient and profound question of what constitutes intelligent race policy in a constitutional democracy.