

HARVARD LAW REVIEW

THE ORIGINAL UNDERSTANDING
AND THE SEGREGATION DECISION†*Alexander M. Bickel* *

BEFORE setting out on the direct and noble march to the Court's conclusion in the *Segregation Cases*,¹ Chief Justice Warren took care to post a rear guard. The history of the adoption of the fourteenth amendment, to which reargument in these cases had been largely addressed, though casting some light, was, the Chief Justice said, "inconclusive" at best. "The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."² Three pages later, as befits a commander in mid-advance, the Chief Justice, having made his dispositions, had no further thought for the rear: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it

† The writer was one of two law clerks to Mr. Justice Frankfurter during the October Term, 1952. At that term, the Court heard the first argument in the *Segregation Cases* and handed down the order for reargument; the cases were reargued and decided at the following term. The writer's interest in pursuing an investigation into the original understanding of the fourteenth amendment was prompted by the events which took place during his service at the Court.

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¹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

² *Id.* at 489.

be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”³

The *Segregation Cases* were extensively briefed and argued at two terms of Court. Their importance, judged by every criterion relevant to the Court's work, is difficult to overestimate, and it is perfectly plain that the Court itself did not underestimate it. Yet the cases were disposed of in the end by a relatively brief opinion which hit only the high spots of issues necessarily involved.⁴ The Court knew, of course, that its judgment would have an unparalleled impact on the daily lives of a very substantial portion of the population, and that the response of many of those affected would be in varying degrees hostile. It was necessary, therefore, if ever it had been, to exert to the utmost the prestige, the oracular authority of the institution. To this end, it was desirable that the Court speak unanimously, with one voice from the deep. And the less said, the less chance of internal disagreement. By the same token, it was wise to present as small a target as possible to marksmen on the outside. In sum, without imputing to the Court aspirations to a form of art it does not profess to practice, one may be entitled to surmise that here was a decision which, like a poem, “should not mean / But be,” and that the Court saw this and acted on it. Considerations of this order, applicable only to so extraordinary a case, are sufficient, in any event, to explain the brevity of the reference to the history of the fourteenth amendment's adoption and the briskness of the transition from an apparent assumption of that history's relevance to the statement that the clock cannot be turned back.

Beneath the brevity and beneath the briskness lies the pervasive problem of the weight to be accorded in constitutional adjudications to evidence of the framers' original understanding.⁵ Reliance on such evidence is subject to caveats applicable to the use of legislative history as an aid in statutory construction.⁶ What is

³ *Id.* at 492-93.

⁴ The Court's deliberate approach to these cases, clearly reflecting its awareness of their unique importance, is indicated in Sacks, Foreword to *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96 (1954). For a survey of some of the issues necessarily involved, see Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377 (1954). This article was published in January, some four months before the decision came down.

⁵ See tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 287, 437, 664 (1938), 27 CALIF. L. REV. 157, 399 (1939).

⁶ See Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407

more important, it may raise a fundamental question concerning the Court's function in construing the Constitution. This difficulty is best posed by quotation of two extreme judicial utterances, both advocating meticulous adherence to original intent, so-called:

1. No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

2. The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. . . . As nearly as possible we should place ourselves in the condition of those who framed and adopted it.

Of course, such views, when they prevail, threaten disaster to government under a written constitution. No further proof need be adduced than that the first quotation — could anything contrast more strikingly with the opinion of the Court in the *Segregation Cases*? — comes from the judgment of Chief Justice Taney in *Dred Scott v. Sandford*,⁷ and the second from Mr. Justice Sutherland's dissent in 1934 in *Home Bldg. & Loan Ass'n v. Blaisdell*.⁸ But it is a long way from rejection of the Taney-Sutherland doctrine to the proposition that the original understanding is simply not relevant.⁹ For arguments based on that understanding

(1950); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947).

⁷ 60 U.S. (19 How.) 393, 426 (1856).

⁸ 290 U.S. 398, 453 (1934).

⁹ Chief Justice Hughes, for the majority in the *Blaisdell* case, made his rejection quite explicit: "If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement

have a strong pull. They have decided cases for judges who held the views represented by the passages quoted.¹⁰ But the Court has also employed them without intentionally connoting, indeed while disavowing, such views.¹¹ And they have been relied on by judges well aware that it was *a constitution* they were expounding.¹²

The original understanding forms the starting link in the chain

carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"we must never forget that it is *a constitution* we are expounding" (*McCulloch v. Maryland*, 4 Wheat. 316, 407)" 290 U.S. at 442-43.

¹⁰ See, e.g., *Dimick v. Schiedt*, 293 U.S. 474 (1935). This opinion, delivered over the dissent of Justice Stone in which Chief Justice Hughes and Justices Brandeis and Cardozo joined, was by Justice Sutherland. But the view expressed in this case and in the passages quoted in the text is very strong medicine, indeed, and truly steadfast adherence to it is more than can be asked of any judge. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (opinion by Justice Sutherland).

¹¹ See, e.g., *District of Columbia v. Clawans*, 300 U.S. 617 (1937). See also *United States v. Flores*, 289 U.S. 137 (1933); *Ex parte Grossman*, 267 U.S. 87 (1925).

¹² In *Weems v. United States*, 217 U.S. 349 (1910), the Court, per Justice McKenna, held that a punishment consisting of a fine plus lengthy imprisonment imposed under a Philippine statute for corruptly making false entries in public records was cruel and unusual within the meaning of the eighth amendment and hence also within the meaning of the Philippine Bill of Rights. Dealing with the argument that the Court was applying the eighth amendment in circumstances in which its framers might not have thought it applicable, Justice McKenna said, in a frequently quoted passage: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. at 373. Justice White dissented. He noted that local conditions might well have made appropriate the severity of this punishment. Then he proceeded at length to demonstrate that the original understanding of the phrase "cruel and unusual punishment" was grounded in the excesses of the Stuart reigns and was restricted to inhuman bodily punishments and arbitrary imprisonment without sanction of statute. Justice White argued that the original understanding should not be departed from. In this opinion he was joined by Justice Holmes. 217 U.S. at 382, 413.

In *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), Justice Frankfurter, in dissent, took a distinction between "great concepts" such as "Commerce . . . among the several States," "due process of law," "liberty," and "property," which, he said, "were purposely left to gather meaning from experience," and "explicit and specific" terms, such as the word "State" when used in article III in the grant of the diversity jurisdiction. That word, he stated, is governed by the original understanding and cannot be broadened to include the District of Columbia. 337 U.S. at 646. (Justice Reed joined in Justice Frankfurter's dissent. Chief Justice Vinson and Justice Douglas, dissenting separately, also agreed with this view. So did Justices Jackson, Black, and Burton of the majority, though they were of the opinion that Congress could, under its article I power, create federal jurisdiction in suits between a citizen of the District of Columbia and a citizen of one of the states.)

of continuity which is a source of the Court's authority, and it is not unnatural that appeals to it should recur as consistently as they do.¹³ Happily, finding the original understanding, like applying the Constitution itself, is, at best, "not a mechanical exercise but a function of statecraft" and of historical insight.¹⁴ And what

¹³ This is especially true as regards the fourteenth amendment. In *Maxwell v. Dow*, 176 U.S. 581, 601-02 (1900), counsel, taking as his text the speech by Senator Jacob Howard of Michigan which opened debate on the fourteenth amendment in the Senate, *CONG. GLOBE*, 39th Cong., 1st Sess. 2764-65 (1866), see note 98 *infra*, argued that the amendment made the entire Bill of Rights applicable to the states. Proceeding from Howard's speech without more, the argument is plausible. The Court dealt with it on the basis of the plain meaning rule and a general proposition to the effect that historical materials such as debates are always ambiguous and of dubious value. Twice subsequently the same argument was rejected, though without examination of historical materials. *Twining v. New Jersey*, 211 U.S. 78 (1908); *Palko v. Connecticut*, 302 U.S. 319 (1937). But Justice Black, speaking for a four-man minority, returned to the fray in *Adamson v. California*, 332 U.S. 46, 70 (1947). Finally, Professor Fairman demonstrated that the argument was based on a misreading and an incomplete reading of the original understanding. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5 (1949).

Perhaps the most famous appeal to the fourteenth amendment's history came in the course of Roscoe Conkling's devious argument in *San Mateo County v. Southern Pac. R.R.*, 116 U.S. 138 (1885). There is no doubt that Conkling overstated his case. See Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 *YALE L.J.* 371, 48 *YALE L.J.* 171 (1938). The "conspiracy theory" of the amendment, according to which Conkling, John A. Bingham, and perhaps Reverdy Johnson and others, operating in a smoke-filled room, secretly contrived to extend the protection of substantive due process to corporations, has been pretty well exploded, whatever the effect it may have had on the adjudications of the Court in this field. See McLaughlin, *The Court, The Corporation, and Conkling*, 46 *AM. HIST. REV.* 45 (1940). And in any event, it would be very questionable practice indeed, as Justice Black suggested, see *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (dissenting opinion), for the Court to deem itself bound by the uncommunicated, back-room purpose of a handful of men. One of the caveats applicable to the use of the legislative history of statutes is acutely relevant here. See *Shapiro v. United States*, 335 U.S. 1, 45-49 (1948) (Justice Frankfurter, dissenting); Curtis, *supra* note 6, at 411-12. But Justice Black, quoting some unguarded language from the opinion of the Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), went on to argue that it was inconsistent with the purpose of the fourteenth amendment, as revealed by its history and language, to extend the protection of the due process clause to corporations. *Connecticut Gen. Life Ins. Co. v. Johnson*, *supra*. See also *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949) (Justice Douglas, dissenting). The historical materials give no more warrant for this view than for the so-called conspiracy theory. See pp. 30-31, 44, 60-61 *infra*; Graham, *supra* at 171. But cf. Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 *N.Y.U.L.Q. REV.* 19, 67 (1938).

¹⁴ FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 76 (1938). For a shining and enduring demonstration, see the opinion of Justice Bradley in *Boyd v. United States*, 116 U.S. 616, 624-32 (1886). For a nonjudicial tour de force, see Thayer, *Legal Tender*, 1 *HARV. L. REV.* 73 (1887).

is relevant is not alone the origin of constitutional provisions, but also "the line of their growth," the further links in the chain of continuity.¹⁵ This being so and our law not being given to following hard and fast theoretical formulations on questions of the scope of this one, it is possible, in the Chief Justice's words, for historical materials to cast some light although they are inconclusive and although, in any event, the clock cannot be turned back. But only an examination in some detail of the relevant materials themselves can make clear just how this has proved possible in the *Segregation Cases*.

The Thirty-Ninth Congress and the Fourteenth Amendment

The discussion, by the parties and by the United States as amicus, of the fourteenth amendment's history, which took place in response to questions propounded by the Court in its order for reargument of the *Segregation Cases*,¹⁶ must surely have amounted to the most extensive presentation of historical materials ever made to the Court. The briefs and appendices are book-size and shelf-length. The heart of this mass of evidence is to be found in the reported debates of the first session of the 39th Congress, which convened on December 4, 1865,¹⁷ and sent the fourteenth amendment to the country on June 13, 1866,¹⁸ shortly before it adjourned to go home and face the electorate. Other materials have a bearing, of course. But the debates of the Congress which submitted, and the journals and documents of the legislatures which ratified, the amendment provide the most

¹⁵ Justice Holmes in *Gompers v. United States*, 233 U.S. 604, 610 (1914).

¹⁶ 345 U.S. 972 (1953). The questions which concern us are as follows:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

¹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 1 (1865). The Globe for this session will hereinafter be cited GLOBE; its Appendix, GLOBE, App.

¹⁸ GLOBE 3149.

direct and unimpeachable indication of original purpose and understanding — to the extent, of course, that any such indication is to be found. Of these two sets of materials, the congressional debates are in this case the richer, and they rank, in any event, first in importance. It may perhaps be said that whatever they establish constitutes a rebuttable presumption. For it is not unrealistic, in the main, to assume notice of congressional purpose in the state legislatures. A showing of ratification on the basis of an understanding different from that revealed by congressional materials must carry the burden of proof. And, of course, the ratifying states are a chorus of voices; a discordant one among them proves little.

Very much the better part of the first session of the 39th Congress was devoted to discussing, in one connection or another, the subject matter of the fourteenth amendment: the governance of the South, readmission of the Southern states, loyalty to the Union, a place under the sun for the newly freed negro race, distribution of powers (in the context of these problems) between the states and the federal government. The bulk of this session-long debate may conveniently be analyzed as it related to four measures: The Freedmen's Bureau Bill, which President Johnson vetoed and which the Radicals failed to pass over his veto; the Civil Rights Act of 1866,¹⁹ enacted over a veto; an abortive proposal for a short constitutional amendment, whose sponsor was John A. Bingham of Ohio; and the fourteenth amendment itself.

To obtain a proper understanding of the relevant congressional purpose, it is necessary to concentrate not only on statements dealing specifically with public school education of the negro race, but also on remarks going to subjects which were deemed to be closely allied — though the relationship may not have survived as clearly to this day. It will become plain that the right, if any, to an unsegregated public school education resided for most men who spoke at this session in a fringe area, where its companions were, among other less well-defined rights, suffrage, jury service, and intermarriage. The first two debates to be reviewed — those on the Freedmen's Bureau Bill and on the Civil Rights Bill — were, of course, debates looking to legislation rather than to a constitutional amendment, and they dealt with an issue of constitutionality as well as one of policy. The former arose under the thirteenth amendment, which had gone into ef-

¹⁹ Act of April 9, 1866, c. 31, 14 STAT. 27.

fect not long before the 39th Congress convened. The two issues are not always easy to separate and must often be examined in tandem. Finally, it is important to form an impression of the political atmosphere of the session. The Democrats were a small and — with a few exceptions — cowed minority. The dominant Republicans consisted of three groups: Radicals, Moderates, and conservative supporters of President Andrew Johnson. The first two factions were to form an alliance which was to wage in 1866 a bitter and successful campaign against the President. That coming event cast an unmistakable and significant shadow over the session.

The Freedmen's Bureau Bill

The bill to enlarge the powers of the Freedmen's Bureau²⁰ provided in its section 7:

That whenever, in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police, or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold, and convey . . . property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . or wherein they . . . are subjected to any . . . different punishment . . . for the commission of any act . . . than are prescribed for white persons . . . it shall be the duty of the President . . . to extend military protection . . .”²¹

On the passage of this bill (on January 25 and February 8 in the Senate,²² and on February 6 and 9 in the House²³) the Republican Party, with one exception in the House,²⁴ and with the notable absence in the Senate of Edgar Cowan, the Pennsylvania Conservative, stood together. Senators Norton of Minnesota and Van Winkle of West Virginia, who, with Cowan, later voted against the Civil Rights Bill and against the fourteenth amendment, were recorded for this bill. So was Senator Doolittle of Wis-

²⁰ The Bureau had been created by Act of March 3, 1865, c. 90, 13 STAT. 507.

²¹ GLOBE 318.

²² GLOBE 421, 742, 748.

²³ GLOBE 688, 775.

²⁴ Lovell H. Rousseau of Kentucky.

consin, who was absent for the vote on the Civil Rights Bill but who voted against the fourteenth amendment. These votes for the Freedmen's Bureau Bill may seem inconsistent with Conservative actions later in the session. For the enumeration in section 7 of "civil rights and immunities" was not exclusive. The bill's coverage depended, therefore, on the meaning of those terms. In the subsequent debate on the Civil Rights Bill, Conservatives and others attacked similar general language as susceptible of a "latitudinarian" construction, and the leadership deemed it wise to strike it. But there are a number of explanations for these Conservative Republican votes in favor of the Freedmen's Bureau Bill. For one thing, this bill drew constitutional validity from a source — the war power — not open to the later Civil Rights Bill, which applied throughout the country. Constitutional scruples to the side, the fact that the Freedmen's Bureau Bill did not apply in the North meant that there was no occasion to worry about federal interference with practices in that part of the country, which was where constituents lived. Finally, it was not until after the vote on this bill — certainly not until after the Senate vote on January 25 — that the struggle between President and Radical Congress was publicly joined. Conservative Republicans who later sided with the President, and many Moderates as well, still entertained at this time some hope of averting the conflict. They felt that if they gave in to Radical opinion on the Freedmen's Bureau Bill their hand would be strengthened in attempts to find common ground with the Radicals, and they had reason to believe that the President would pursue the same strategy. It was for a time commonly expected that Johnson would sign the Freedmen's Bureau Bill.²⁵ The President, however, vetoed it on February 19, and the Senate, on the following day, failed to override.²⁶ The President's supporters — the party whip and illness were to deplete their ranks later — rallied around him.

In the course of debate on the Freedmen's Bureau Bill and on a predecessor proposal which was briefly before the Senate,²⁷ Charles Sumner and Henry Wilson of Massachusetts, Radicals of abolitionist antecedents, as well as John Sherman of Ohio and

²⁵ See R. HENRY, *THE STORY OF RECONSTRUCTION* 159 (1938); H. WHITE, *THE LIFE OF LYMAN TRUMBULL* 260 (1913); HYMAN, *ERA OF THE OATH* 90-91 (1954).

²⁶ *GLOBE* 915-17, 943.

²⁷ S. 9, 39th Cong., 1st Sess. (1865), introduced by Senator Wilson of Massachusetts. *GLOBE* 2, 39.

Lyman Trumbull of Illinois, Moderates, spoke in general terms of measures that would have to be taken and existing practices that would have to be eliminated, both now and in the long run, in order to better the condition of the Negro in the South. They referred, among other things, to the Negro's need for, and right to, education. In the House, Ignatius Donnelly of Minnesota moved an amendment to empower the Bureau to offer to refugees and freedmen "a common-school education."²⁸ These remarks and the Donnelly amendment are evidence of a real concern in Congress with education of the Southern Negro, of which we shall see more. But, except perhaps for Sumner's speech, none of them can be read as advocating unsegregated schools, or as assuming that the bill would lead to their establishment.²⁹ Nor, apart from a broadside

²⁸ GLOBE 513. The amendment was never voted on directly. It was lost together with a substitute bill, in which it was incorporated and which proposed other changes not here relevant. GLOBE 654, 655, 688. Section 6 of the bill, as it then stood and as finally passed, see MCPHERSON, HISTORY OF THE RECONSTRUCTION 73 (1871), in any event empowered the Bureau to provide or cause to be built suitable buildings for asylums and schools. GLOBE 210.

²⁹ Wilson enumerated the rights listed in the bill and added the freedman's right to "go into the schools and educate himself and his children." GLOBE 111. But he was speaking of rights which would obtain if Southern Black Codes, denying, as he believed, any schooling at all, were annulled by passage of this bill. And he was speaking against the background of a report on conditions in the South by a Republican politician and Union major general, the former German revolutionary Carl Schurz, which the Senate had requested from the President and had had printed. GLOBE 30, 78-80. This report dealt with "Education of the Freedmen" and discussed the opposition to it of Southern whites. It recommended education for the Negro "as an integral part of the educational systems of the States," but spoke throughout of "negro education," "colored schools," "school-houses in which colored children were taught," and the desirability only of supporting schools for freedmen out of general tax funds to which Negroes contributed and from which white schools benefited. There were no references to unsegregated schools, even as an ultimate objective, in the Schurz Report. S. EXEC. DOC. NO. 2, 39TH CONG., 1ST Sess. 2, 25-27 (1865). The problem to which Wilson was addressing himself was the establishment and maintenance of segregated schools for freedmen, which he believed to be a matter of some difficulty in the South of that day. The same is true of a reference by Sherman to "the right to be educated," GLOBE 42, and by Trumbull to the need "to educate, improve, enlighten, and Christianize the negro," GLOBE 322. Donnelly, arguing for his amendment, spoke of the value of education for both the white and colored races. Conceiving, obviously, of the separate education of the Negro, he said it would "shame the whites into an effort to educate themselves." He noted that Tennessee excluded Negroes from white schools, "while it makes no provision for their education in separate schools," that, evidently, being what he found objectionable. GLOBE 586, 587, 589.

There is no doubt that Charles Sumner favored unsegregated schools. See his argument in *Roberts v. Boston*, 59 Mass. (5 Cush.) 198, 201 (1849), and his draft of what, in amended form, became the Civil Rights Act of 1875, CONG. GLOBE,

Democratic attack in the House aimed more at future Radical objectives than at this particular bill, did the opposition so assume or argue.³⁰

The Civil Rights Bill

On January 29, 1866, before passage in the House of the Freedmen's Bureau Bill, Lyman Trumbull of Illinois brought up in the Senate the Civil Rights Bill. Section 1 of the bill contained, as had section 7 of the Freedmen's Bureau Bill, a general prohibition of "discrimination in civil rights or immunities," which preceded a specific enumeration of such rights. Section 1, after conferring citizenship on native-born Negroes, provided:

That 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

42d Cong., 2d Sess. 383-84 (1872). His general remarks on this occasion may indicate that he would have liked to see unsegregated schools started in the South at this time. However, speaking specifically of the bill before the Senate, he used more guarded language. It proposed, he said, "nothing less than to establish Equality before the Law, at least so far as civil rights are concerned, in the rebel States." *GLOBE* 91.

³⁰ Lovell Rousseau of Kentucky, the Conservative Republican who was to vote against the bill, criticized the Freedmen's Bureau for having taken over schoolhouses in Charleston for the benefit of colored children. The white children were thus deprived of instruction, unless—and this was put as a preposterous proposition—"they mix up white children with black." *GLOBE*, App. 71. This same action of the Bureau was denounced also by John W. Chanler, Democrat of New York. *GLOBE*, App. 82.

The Democratic broadside was by John L. Dawson of Pennsylvania. He accused the Radicals who sponsored this bill of hugging to their bosoms "the phantom of negro equality." The Radicals, he said,

hold that the white and black races are equal. This they maintain involves and demands social equality; that negroes should be received on an equality in white families, should be admitted to the same tables at hotels, should be permitted to occupy the same seats in railroad cars and the same pews in churches; that they should be allowed to hold offices, to sit on juries, to vote, to be eligible to seats in the State and national Legislatures, and to be judges, or to make and expound laws for the government of white men. Their children are to attend the same schools with white children, and to sit side by side with them. Following close upon this will, of course, be marriages between the races

GLOBE 541.

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

Section 2 provided, by way of enforcement power:

That any person who under color of any law . . . or custom, shall subject . . . any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine not exceeding \$1,000, or imprisonment not exceeding one year, or both³¹

In opening debate, Trumbull, who was no Radical, said that the bill was intended to "secure to all persons within the United States practical freedom." It was, he said, a question of securing "privileges which are essential to freemen." He reviewed the Slave Codes which had fallen with the proclamation of the thirteenth amendment. They restricted the movements of Negroes; they forbade them to own firearms; they punished the exercise by them of the functions of a minister of the Gospel; they excluded them from other occupations; and they made it "a highly penal offense for any person, white or colored, to teach slaves" In lieu of Slave Codes, Trumbull said, the South now had Black Codes and these "still impose upon [Negroes] . . . the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations" Section 1, Trumbull continued, was the heart of the bill; it was there that "civil liberty" was secured to the Negro, "civil liberty" being what was left of "natural liberty" after the latter had, necessarily, been circumscribed to make possible life in society. It was of the essence of civil liberty that laws be brought to bear on all persons equally, "or as much so as the nature of things will admit."

Trumbull concluded his remarks on section 1 by repeating that it would ensure for the Negro "the rights of citizens The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set

³¹ GLOBE 474, 475.

forth in this bill as appertaining to every freeman." When Trumbull had finished, James A. McDougall of California, a Democrat, asked him to return to section 1. What, again, was meant by "civil rights"? Trumbull answered by reading the enumeration of rights in section 1. That was the definition. Was there any reference to political rights, McDougall pursued? No, said Trumbull.³²

With the single exception of Lot M. Morrill of Maine, a Radical who, looking beyond the bill at hand, expounded a theory of the equality of the races,³³ others — Radicals and Moderates alike — who spoke in favor of the bill were content to rest on the points Trumbull had made. The rights to be secured by the bill were those specifically enumerated in section 1, and the necessity for extending the protection so defined was demonstrated by the Black Codes enacted by Southern legislatures.³⁴ On its merits, this argument had one or two weaknesses. It disregarded the general civil rights guaranty which preceded the enumeration of rights in section 1, and, in directing attention only to evils existing in the South, it ignored the fact that the bill was to apply throughout the nation. These weaknesses were to be skillfully seized upon. The argument probably had another, which the opposition let pass, and which does not affect the search for congressional purpose. It is very likely that Trumbull and his fellows exaggerated the severity of the Black Codes. The picture — of which this exaggeration was a feature — of a willful reign of terror instituted or threatened by fire-eating Southerners who had learned nothing and were unreconciled to defeat and to all its consequences served Radical purposes and was, with varying degrees of sincerity and of unwitting assistance from some Southern politicians, being spread broadcast by the Radical leadership. This educational campaign, as the Radicals called it, was to con-

³² *GLOBE* 474-75, 476.

³³ *GLOBE* 570.

³⁴ See the remarks of Henry Wilson, the Massachusetts Radical, who was to be Grant's Vice-President. *GLOBE* 603. Trumbull, who closed, again and in the same terms laid stress on the bill's relatively narrow purpose. *GLOBE* 605. John Sherman of Ohio, a Moderate, speaking on February 8 in justification of his votes in favor both of the Freedmen's Bureau and Civil Rights Bills, read section 1 of the latter bill as defining "what are the incidents of freedom, and [saying] that these men must be protected in certain rights, and so careful is it in its language that it goes on and defines those rights, the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and other universal incidents of freedom." *GLOBE* 744.

tinue throughout the session and beyond. But no one maintains that the impression of conditions in the South fostered by the Radicals was completely unjustified. And, in any event, what is important here is the fact of its existence and of its effectiveness, not the truth of the matter asserted. This impression is incorporated by reference into congressional statements of objectives; it plays a large part in defining those objectives, regardless of the extent to which it was founded in reality and regardless of the motives which underlay its creation.³⁵

Of the remarks in opposition in the Senate, those of three men — two of them Democrats, the other a nominal Republican, but an avowed supporter of the President — must be noted.³⁶ Willard Saulsbury of Delaware, a Democrat who had once described himself wistfully as perhaps the last slaveholder in the nation, declared that the bill was “one of the most dangerous that was ever introduced into the Senate of the United States.” He attacked its constitutionality, then asked whether the bill conferred the right to vote. Certainly, he said, Trumbull might have no intention of conferring that right. But:

The question is not what the senator means, but what is the legitimate meaning and import of the terms employed in the

³⁵ A number of Black Codes are collected in 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (1906), and in MCPHERSON, *op. cit. supra* note 28, at 29-44. The worst of them were vagrancy statutes and laws minutely regulating the master-servant relationship, which was taking the place of slavery but appeared in some respects to bear a striking resemblance to it. But there were also enactments such as an Alabama statute of December 9, 1865, permitting Negro testimony in court and a Florida statute of January 16, 1866, setting up schools of a sort for freedmen. Both of these are cited by Fleming. They are to be distinguished from an Arkansas statute of February 6, 1867, printed in the same place, which was passed after the Civil Rights Act had become effective, and which more or less followed its pattern. One of the principal instruments used to popularize the Radical picture of the South, especially in Congress, was the Schurz Report. See note 29 *supra*. In the election campaign of 1866, much use was made of records of hearings before subcommittees of the Joint Committee on Reconstruction. These, however, were not in print before Congress passed the fourteenth amendment. See notes 61, 77, 83, 97 *infra*. See also HENRY, *op. cit. supra* note 25, at 108-10, 115-16.

³⁶ There were in addition two violent harangues by Garrett Davis of Kentucky, a Democrat and a thoroughly unreconstructed one. The first was not unfairly characterized in an interruption by Senator Clark (Rep., N.H.). Said Mr. Clark: “[I]t only comes back to this, that a nigger is a nigger.” Said Mr. Davis: “That is the whole of it.” GLOBE 529. In the second, Davis argued that the bill discriminated against whites by creating special rights for Negroes. He drew from Trumbull the reply that “this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights The bill is applicable exclusively to civil rights.” GLOBE 599.

bill. . . . What are civil rights? What are the rights which you, I, or any citizen of this country enjoy? . . . [H]ere you use a generic term which in its most comprehensive signification includes every species of right that man can enjoy other than those the foundation of which rests exclusively in nature and in the law of nature.³⁷

Edgar Cowan, Republican of Pennsylvania, who was wholly at odds with the Radical leadership, also took a broad view of the effect of the bill. He said:

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 educate them there as best we can. Is this amendment [the thirteenth; the proponents of the Civil Rights Bill argued that it implemented 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.³⁸

It was quite a different thing, Cowan continued, to grant to everyone "the right to life, the right to liberty, the right to property." This he was willing to do. But it had to be by amendment to the Constitution.

Reverdy Johnson, Democrat of Maryland, one of the great lawyers of his time, offered an analysis of the bill which came to the same point Saulsbury had made. The states, in the exercise

³⁷ GLOBE 476-77.

³⁸ GLOBE 500. Presumably the dire consequences Cowan feared would come about because the bill forbade discrimination in civil rights, and in Cowan's mind, as in Saulsbury's, and as in Reverdy Johnson's, see note 39 *infra*, that term was susceptible of a broad interpretation. But when, in closing, Trumbull turned on him asking whether, everything else being equal, Cowan was not in favor of extending "equal civil rights" to the Negro, Cowan, who had already said much and was to say yet more as the session progressed about the inferior place of the Negro in a society governed for and by the Caucasian race, replied, "Certainly." GLOBE 605. In this instance, he evidently accepted the narrow meaning attributed to the phrase by the majority.

of their police power, had always, and had, in Johnson's opinion, properly taken account of the prejudices of the people. When legislators failed to do that, they created the sort of situation which had resulted from the passage of the Fugitive Slave Act; they passed unenforceable legislation. "I mention that," said Johnson, "for the purpose of applying it to one of the provisions of this bill." Most states had legislated against miscegenation. Yet this bill, Johnson believed, would wipe all such legislation off the books. Trumbull, and William Pitt Fessenden of Maine, like Trumbull a Moderate, interrupted to dispute this interpretation. Negroes could not marry whites and whites could not marry Negroes, they argued; hence there could be no discrimination in an antimiscegenation statute. But neither Fessenden nor Trumbull answered Johnson's broader point, which was that even if his interpretation was wrong, the error was not "so gross a one that the courts may not fall into it."³⁹

The vote on the passage of the Civil Rights Bill in the Senate, on February 2, was 33 ayes, 12 nays. Three Republicans, Cowan, Norton of Minnesota, and Van Winkle of West Virginia, were recorded against.⁴⁰

James F. Wilson of Iowa, from the House Committee on the Judiciary, managing the bill in the House, brought it up there on March 1. This was after the President's veto of the Freedmen's Bureau Bill had been upheld. Wilson addressed himself to Section 1:

This part of the bill . . . 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? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No . . . Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not

³⁹ GLOBE 505-06.

⁴⁰ GLOBE 606-07. Reverdy Johnson was absent. So was James R. Doolittle of Wisconsin, a Republican but a close friend of the President. The veto of the Freedmen's Bureau Bill and the definitive public breach between President and Radical Congress, which it signified, were still some two weeks away. But Thaddeus Stevens in the House already spoke of the President in ominous tones. GLOBE 536-37; see note 61 *infra*. And Conservative Republicans who considered the Freedmen's Bureau Bill an appropriate concession to offer to the Radicals, evidently felt quite differently about a statute which might be applied in their constituencies.

civil rights or immunities. Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as —

· “The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.” “Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits of prescribed law.” *Kent’s Commentaries*, vol. 1, p. 199.

· . . .

But what of the term “immunities”? . . . It merely secures to citizens of the United States equality in the exemptions of the law. A colored citizen shall not, because he is colored, be subjected to obligations, duties, pains . . . This is the spirit and scope of the bill, and it goes not one step beyond.

· . . .

. . . . Laws barbaric and treatment inhuman are the rewards meted out by our white enemies to our colored friends. We should put a stop to this at once and forever.⁴¹

Wilson thus presented the Civil Rights Bill to the House as a measure of limited and definite objectives. In this he followed the lead of the majority in the Senate. Indeed, his disclaimers of wider coverage were more specific than those made in the Senate. And the line he laid down was followed by others who spoke for the bill in the House. Again, the Black Codes were referred to, and again the point was made that the term civil rights was defined by section 1, which enumerated the rights in question.⁴²

The Democratic assault on the bill commenced when George S. Shanklin of Kentucky asked Wilson to allow an amendment stating explicitly that nothing in the bill conferred the right to vote. Wilson, though he was soon to give in, refused to agree to

⁴¹ GLOBE 1117, 1118.

⁴² The Black Codes were the evil to which the bill was directed in the view of Burton C. Cook of Illinois, Russell Thayer of Pennsylvania, and William Windom of Minnesota, Radicals all. GLOBE 1123-25, 1151, 1160. Thayer added that the bill simply declared “that all men born upon the soil of the United States shall enjoy the fundamental rights of citizenship. What rights are these? Why, sir, in order to avoid any misapprehension they are stated in the bill.” And the bill could not possibly be read to confer suffrage. GLOBE 1151. Windom pointed out that the bill did not confer either political or social rights. GLOBE 1159. And John M. Broomall of Pennsylvania, another Radical, said the bill secured rights denied to the Negro in the South; he named these rights: speech, transit, domicile, to sue, to petition, and habeas corpus. GLOBE 1263.

such a provision, "as it is in the bill now."⁴³ Next came Andrew Jackson Rogers of New Jersey, a member, as we shall see, of the Joint Committee on Reconstruction, and, though under forty, a very prominent figure in the 39th Congress. Because his views were sometimes extreme and his language frequently vehement, some of the House Democrats resisted Rogers' leadership, and the Radicals, on the other hand, were often pleased to act on the bland assumption that Rogers was the official Democratic leader in the House, though he held no such position.⁴⁴ A few days previously, Rogers had had occasion to take note of the Civil Rights Bill as passed in the Senate. At that time he had seemed to favor most of what he took to be the objectives of section 1. His attack had been constitutional:

Negroes should have the channels of education opened to them by the States, and by the States they should be protected in life, liberty, and property, and by the States should be allowed all the rights of being witnesses, of suing and being sued

. . . .

Who gave the Senate the constitutional power to pass that bill guarantying equal rights to all . . . ?

In this debate he made the same constitutional point. But he took a broader and less benign view of the effect of section 1:

In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black.

⁴³ GLOBE 1120.

⁴⁴ *E.g.*: "Mr. Windom [a Radical]. . . . I was somewhat surprised yesterday in listening to the argument of the gentleman who, I believe, is the recognized leader of the Democratic party of the House—the gentleman from New Jersey

"Mr. Rogers. Mr. Speaker—

"Mr. Windom. Have I done him too much honor?

"Mr. Rogers. Mr. Speaker, I hope nobody . . . will make that assertion again. The object . . . is only to create dissatisfaction on this side of the House.

". . . .

"Mr. Marshall. I wish merely to say that we do not recognize him as our leader.

". . . .

"Mr. Windom. . . . I think every member upon this side of the House and every modest member upon the other side accords to the gentleman from New Jersey the position I assign him. [Laughter.]

". . . .

"Mr. Niblack. I desire simply to say that we on this side do not need any 'leader'. There are not enough of us. [Laughter.] Therefore every man carries on a kind of guerrilla fight." GLOBE 1157-58.

The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. . . . [T]here is nothing in the letter of the Constitution which gives . . . authority to Congress [to interfere]

. . . .

. . . . As a white man is by law authorized to marry a white woman, so does this bill compel the State to grant to the negro the same right of marrying a white woman

. . . .

All the rights that we enjoy, except our natural rights, are derived from Government. Therefore, there are really but two kinds of rights, natural rights and civil rights. This bill, then, would prevent a State from refusing negro suffrage under the broad acception of the term "civil rights and immunities."⁴⁵

These charges, with particular reference to suffrage, were pressed home for the Democrats by Anthony Thornton of Illinois:

It is said that the words "civil rights" do not include the right of suffrage, because that is a political right. . . . I do not assume . . . that [they] do . . . but with the loose and liberal mode of construction adopted in this age, who can tell what rights may not be conferred by virtue of the terms as used in this bill? Where is it to end? Who can tell how it may be defined, how it may be construed? Why not, then, if it is not intended to confer the right of suffrage upon this class, accept a proviso that no such design is entertained?⁴⁶

The leadership, which was to be unsure of its majority, and hence sensitive on the issue of suffrage throughout the session, had had enough of this. Wilson moved to amend by adding a new section, as follows:

That nothing in this act shall be so construed as to affect the laws of any State concerning the right of suffrage.

He said:

Mr. Speaker, I wish to say [that] . . . that section will not change my construction of the bill. I do not believe the term civil rights includes the right of suffrage. Some gentlemen seem to have some fear on that point.

⁴⁵ GLOBE, App. 134; GLOBE 1121-22.

⁴⁶ GLOBE 1157.

The House adopted the amendment by voice vote.⁴⁷

The Democrats were, of course, not pacified by this concession. Their concluding shot was fired by Michael C. Kerr of Indiana. Power to enact this bill was sought, he said, in the amendment abolishing slavery. But:

Is it slavery or involuntary servitude to forbid a free negro, on account of race or color, to testify against a white man? Is it either to deny to free negroes, on the same account, the privilege of engaging in certain kinds of business . . . such as retailing spirituous liquors? Is it either to deny to children of free negroes or mulattoes, on the like account, the privilege of attending the common schools of a State with the children of white men?

These were all matters, apparently, in Kerr's mind, with which the bill might be thought to deal. He himself favored letting Negroes testify and "providing facilities for the education of their children." But he thought Congress was powerless to attain these ends. And the construction which might in practice be given to the term "civil rights" was quite unpredictable and would not be controlled by disclaimers made on the floor of the House.⁴⁸

Despite its vigor, this Democratic attack might well have gone unheeded, as had the similar one in the Senate, and changes in the Senate draft might have ended with the suffrage amendment accepted by Wilson, had it not been for misgivings in the regular Republican ranks in the House as well. These came from three fairly distinct quarters. Henry J. Raymond of New York, publisher of the New York Times, and not a Radical, favored extend-

⁴⁷ GLOBE 1162.

⁴⁸ GLOBE 1268. It is not at all clear that the reference in the full paragraph quoted in the text to attendance at common schools "with the children of white men" means that Kerr thought the bill would require establishment of unsegregated schools rather than separate Negro schools, forming part of a state's educational system. Kerr's further remark can be read to imply that he took the educational objective of the bill to be segregated Negro schools, and that he favored it, subject to his constitutional scruples. But he did go on to express general apprehension concerning the meaning of the term "civil rights": "What are [civil] rights? One writer says civil rights are those which have no relation to the establishment, support, or management of the Government. Another says they are the rights of a citizen; rights due from one citizen to another, the privation of which is a *civil injury* for which redress may be sought by a *civil action*. Other authors define all these terms in different ways . . . Who shall define these terms? Their definition here by gentlemen on this floor is one thing; their definition after this bill shall have become law will be quite another thing." GLOBE 1270-71.

ing to Negroes the "rights and privileges" of citizens. By that he understood the right of free passage, to bear arms, to testify, "all those rights that tend to elevate [the Negro] and educate him for still higher reaches in the process of elevation." Giving the Negro the rights of citizenship "will teach all others of his fellow-citizens of all races to respect him more, and to aid him in his steps for constant progress and advancement in the rights and duties that belong to citizenship."⁴⁹ But Raymond thought that the bill's penal enforcement provisions rendered it unconstitutional, and he therefore opposed it as a whole, though he did not seem to subscribe to the alarmist view of the scope of section 1. Perhaps it was simply that the position he took made a close analysis of that section unnecessary.

Columbus Delano of Ohio, a Moderate, shared Raymond's constitutional difficulties. He inclined to the belief that these might be removed if the general civil rights language at the head of section 1 and the penal provisions further on were struck. But, unlike Raymond, Delano feared that the bill might be construed to outlaw a wide variety of practices prevalent in the North as well as in the South. This was a question of policy, and Delano was concerned about the entire first section, not just the sentence at the beginning. He asked Wilson whether the provision in the body of section 1 entitling Negroes "to full and equal benefit of all laws and proceedings for the security of person and property *as is enjoyed by white citizens*" (the italicized phrase was not in the bill as passed by the Senate but was added in committee in the House and appears in the statute as enacted) would not confer "upon the emancipated race the right of being jurors." Wilson thought not.

Mr. Delano. I have no doubt of the sincerity of the gentleman, and . . . I have great confidence in his legal opinions

But, with all this, I must confess that it does seem to me that this bill necessarily confers the right of being jurors

. . . .

Now, sir . . . I presume that the gentleman himself will shrink from the idea of conferring upon this race now, at this particular moment, the right of being jurors, or from so wording this bill as

⁴⁹ GLOBE 1120, 1266. To the same general effect, see remarks of Thomas T. Davis of New York. GLOBE 1265. But Davis, in the end, voted for the bill and to override the veto.

to leave it a serious question and render it debatable hereafter in the courts or elsewhere.

Moreover:

[W]e once had in the State of Ohio a law excluding the black population from any participation in the public schools That law did not, of course, place the black population upon an equal footing with the white, and would, therefore, under the terms of this bill be void⁵⁰

Here Wilson broke in with "I desire to ask the gentleman," but Delano had no further time for interruptions, and so there was no argument on this point. It is to be noted that Delano was not suggesting that Ohio would be forced to provide unsegregated schools; he was predicting only the fall of laws which excluded Negroes from schools of any sort. Despite these views, which were not met by amendment insofar as they related to provisions in the body of section 1, Delano ended up voting for the bill and to override the President's veto.

The final expression of Republican misgivings was the most formidable, and it was decisive. It came from John A. Bingham of Ohio, a Radical, and one of the most influential men in the 39th Congress. Bingham was speaking in support of a motion he had offered to recommit with instructions to strike the sentence at the head of section 1 which forbade all "discrimination in civil rights or immunities," and to substitute for the penal enforcement provisions of the bill language permitting a civil action by aggrieved parties.⁵¹ He tried at the start to meet an argument which he knew would be advanced against him, as indeed it was:

Mr. Speaker . . . I beg leave . . . to say, that although the objections which I urge against the bill must, in the very nature of the case, apply to the proposed instructions, I venture to say no candid man, no rightminded man, will deny that by amending as proposed the bill will be less oppressive, and therefore less objectionable. Doubting, as I do, the power of Congress to pass the bill, I urge the instructions with a view to take from the bill what seems to me its oppressive and I might say its unjust provisions.

Bingham then proceeded to examine the civil rights provision

⁵⁰ GLOBE, App. 156-58.

⁵¹ GLOBE 1266, 1271-72.

which he proposed to delete. "What are civil rights?" he asked. It seemed that,

the term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country. . . . [A]re not political rights all embraced in the term "civil rights," and must it not of necessity be so interpreted?

. . . . [T]here is scarcely a State in this Union which does not, by its constitution or by its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights.

. . . .

By the Constitution of my own State neither the right of the elective franchise nor the franchise of office can be conferred . . . save upon a white citizen of the United States.

Coming to the specific rights enumerated in that part of section 1 which his motion would have left untouched, Bingham noted that they had been denied by many states, and said: "I should remedy that 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." He had made no such statement about civil rights in general. He went on then to attack the penal enforcement provisions as unwise as well as unconstitutional. The federal government, by constitutional amendment, could protect the rights of life, liberty, and property in the manner Bingham had just described. State officials would then take an oath to observe such a prohibition as he envisioned, and Congress could somehow enforce the oath. But Congress had never, it could not, and it should not, employ "the terrors of the penal code within organized States." The Freedmen's Bureau Bill had been carefully worded to apply only in territories under military occupation. Bingham quoted de Tocqueville: "'centralized government, decentralized administration.' That, sir, coupled with your declared purpose of equal justice, is the secret of your strength and power." That should be the rule in peacetime. He quoted also from Chancellor Kent on the powers that properly belong to the states. Then occurred these passages:

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? . . . You further say that . . . there shall, as to qualification of witnesses, be no discrimination on account of race or color. I agree that . . . there should be no such discrimination.

But whence do you derive power to cure it by a congressional enactment? There should be no discrimination among citizens of the United States in the several States, of like sex, age, and condition, in regard to the franchises of office. But such a discrimination does exist in nearly every State. How do you propose to cure all this? By a congressional enactment? How? Not by saying, in so many words, which would be the bold and direct way of meeting this issue, that every discrimination of this kind . . . is hereby abolished. You propose to make it a penal offense for the judges of the States to obey the constitution and laws of their States . . . I deny your power to do this. You cannot make an official act, done under color of law . . . and from a sense of public duty, a crime.⁵²

Such was Bingham's position, and it is not lacking in ambiguity. Like Raymond, he thought the bill was unconstitutional, but he did not take the narrow ground of section 2 only; the bill for him was unconstitutional from top to bottom. Hence, unlike Delano, he made no pretense that his motion would cure the constitutional defect. With Delano, apparently unlike Raymond, and certainly unlike Wilson and his supporters, he read the general term "civil rights" broadly, or at any rate thought it was of uncertain reach. In the first half of his speech, it is perfectly clear that Bingham, while committing himself to the need for safeguarding by constitutional amendment the specific rights enumerated in the body of section 1, was anything but willing to make a similar commitment with respect to "civil rights" in general. The second half of the speech, in which Bingham bore down heavily on penal sanctions as provided in section 2, ends in some ambiguity. Bingham said first that he wanted no such sanctions applied to violations of rights which he was ready to enshrine in the Constitution. He mentioned the rights of life, liberty, and property, and the ideal of equal justice: the sort of thing enumerated in the body of

⁵² GLOBE 1290-93.

section 1. Then, in the last two paragraphs, while still pressing his fight against penal sanctions, he referred both to rights specifically listed in section 1 and to at least one other which in his view was covered by the term "civil rights." And he went on record as opposed on principle to discriminations with respect to all these rights. But was he, in these two final paragraphs, spoken just before the hammer fell, hastening to say something he had rather carefully and gingerly refrained from saying before, namely that he was prepared to write what he considered to be the substance of a general "civil rights" provision into the Constitution? On their face, and following as they do a lecture on federalism, these remarks are quite consistent with a belief that some discriminations, practiced in the North as well as in the South, though objectionable on moral principle, to be sure, should be cured by state rather than federal action. Bingham's professions here are high-flown. They call on God and the majesty of justice, and they differ rather markedly from his earlier flat and specific declaration concerning the evils he would remedy by amending the Constitution. Are these not the sort of soothing but vague and vacuous concessions Bingham was likely to offer to his Radical colleagues while trying to induce them to rebel against at least one feature of a leadership bill? Similarly, in denouncing criminal sanctions imposed, as he thought, against state officials for denying the franchise to Negroes, Bingham may seem in this passage to suggest that he would have approved a "bold and direct" congressional enactment declaring "that every discrimination of this kind . . . is hereby abolished." Yet if his speech as an entirety means anything at all, it means that he would have considered such a "bold and direct" congressional enactment unconstitutional.

These are words spoken in debate by a man not normally distinguished for precision of thought and statement. Perhaps judgments may differ about them, though they must not be taken out of context. One makes out their meaning as best one can. They are important because of Bingham's role in drafting section 1 of the fourteenth amendment and his avoidance in all his drafts of the term "civil rights." Whatever the ambiguities of his speech, one thing is certain. Unless one concludes that Bingham entertained apprehensions about the breadth of the term "civil rights" and was unwilling at this stage, as a matter of policy, not constitutional law, to extend a federal guaranty covering all that

might be included in that term, there is no rational explanation for his motion to strike it. There was no illusion in Bingham's mind of removing a constitutional infirmity in this fashion. He was endeavoring merely to make the bill less "oppressive," less "unjust." Constitutional scruples to the side, he wanted a bill that would at least be satisfactory on policy grounds. That was the object of his attempt to remove the penal provisions. What other object could he have had in mind in trying also to eliminate the comprehensive civil rights guaranty, which in his opinion would force a change in the law of his own state?

Wilson, the manager of the bill, who rose to answer Bingham, had understood the latter as objecting to the breadth of the "civil rights" provision. He defended the term "civil rights" in accordance with the line he had laid down at the beginning of debate. Bingham, he said,

tells the House that civil rights involve all the rights that citizens have under the Government . . . 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. My friend . . . 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 . . . he steps beyond what he must know to be the rule of construction which must apply here, and as a result of which this bill can only relate to matters within the control of Congress.

This misrepresented Bingham's statement in that it had him referring specifically to school and jury laws, which Bingham had not done. Wilson also implied that Bingham had argued, as Bingham had not, that his motion would remove the constitutional infirmity he saw in the bill. It could not, said Wilson. If any part of section 1 was unconstitutional, all of it had to be.⁵³

⁵³ Wilson also said:

I find in the bill of rights . . . that "no person shall be deprived of life, liberty, or property without due process of law." I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States.

GLOBE 1294-95.

Bingham complained generally, in one sentence, that "the gentleman from Iowa has taken advantage of me by misstating my position."⁵⁴ The voting then began. Wilson asked whether

⁵⁴ GLOBE 1295. Commentators who have looked into the matter have tended to oversimplify Bingham's position. In the first work on the subject, he is represented as objecting to the bill "entirely upon constitutional grounds." See FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 35 (1908). Similarly, in a recent article, Mr. Howard Jay Graham leaves the reader with the impression that the debate on the Civil Rights Bill in the House turned wholly on the issue of constitutionality, dealt, that is, entirely with means, not ends. The implication is that Wilson on the one hand and Bingham and those Republicans who held views similar to his on the other, were all along in agreement concerning the ends which the Civil Rights Bill would attain and concerning their desirability. See Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 12-18 (1954). This may be true as applied to Raymond. It is true insofar as it indicates that Bingham and Wilson were at one in their understanding of the specific ends aimed at by section 1 in its final form, and that Bingham regarded the attainment of these ends by appropriate federal action as desirable. An assertion so limited is supported by a passage from Bingham's speech which, as quoted by Mr. Graham, starts as follows: "I say, with all my heart, that [the First Section] . . . should be the law of every State . . ." *Id.* at 15. The reference in Mr. Graham's context is to "the First Section" as enacted. In the speech itself, it was to the first section as it came from the Senate, but shorn of its first sentence. Bingham, who had just been urging the elimination of the civil rights provision in that first sentence, read the section to the House without it, and immediately thereafter declared himself as quoted. "I say, with all my heart that that should be the law of every State," he said with all his heart. GLOBE 1291. This is a poor foundation for the theory Mr. Graham erects on it. Mr. Graham ignores the form in which the bill came from the Senate, Bingham's motion, the rest of Bingham's remarks, and what happened to the bill.

Messrs. John P. Frank and Robert F. Munro state that Bingham "opposed the Civil Rights Act solely because he thought it should await passage of the Fourteenth Amendment," and attribute to him also the opinion that "appropriate language should eliminate 'all discrimination between citizens on account of race or color in civil rights.'" Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 142 n.51 (1950). The brief quotation used by Messrs. Frank and Munro is from the next to last paragraph of Bingham's speech, quoted and discussed in the text above. He does not in that passage in so many words express the opinion attributed to him, nor does he do so anywhere else, and in light of the full text of his speech and of his motion, it is doubtful that he held it.

Mr. Charles Fairman understands Bingham to have believed that his motion to recommit with instructions to strike the guarantee of civil rights in section 1 and to change the enforcement provision would, if adopted, have cured the bill's constitutional defect. Fairman, *supra* note 13, at 39-40. This was Delano's view and Wilson accused Bingham of holding it. Wilson must have made the same accusation in the cloakroom as well, for, as shown in the text, Bingham started right off by entering a disclaimer. His remarks calling for a constitutional amendment to embody that part of section 1 which he did not hesitate to say he approved reinforce the point.

it was in order for him to accept Bingham's motion to recommit with instructions. He was told that he could do so only by unanimous consent. "Mr. Stevens and others objected." Bingham's motion was then defeated by a large majority. But the House voted to recommit the bill without instructions. This vote was close: 82-70. Bingham, of course, voted to recommit. So did the Democrats; also Raymond, Delano, and Thomas T. Davis of New York, a Republican who shared Raymond's view. So did a good many Radicals such as Justin Morrill of Vermont, member of the Joint Committee on Reconstruction, and even one of the leaders of the House, Robert C. Schenck of Ohio. Thaddeus Stevens voted against and Wilson followed him, as did most Radicals.⁵⁵

Wilson brought the bill back four days later, on March 13. He reported a committee amendment striking from section 1 the civil rights provision Bingham had objected to. Wilson said:

Mr. Speaker, the amendment which has just been read proposes to strike out the general terms relating to civil rights. I do not think it materially changes the bill; but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended.

The House concurred by voice vote. Wilson noted, in response to a question, that the bill as it now stood contained no proviso excluding suffrage from its application; but he thought the committee amendment just reported should take care of any apprehensions on that score. He then pressed for a vote. Bingham and others asked that the bill be printed and allowed to lay over so gentlemen could read it again. Wilson would not give in, however, and the vote was taken. The majority for passage was large. Bingham and five other Republicans were recorded against. Raymond and a few others did not vote.⁵⁶

Two days later the Senate concurred in the House amendments.⁵⁷ The President vetoed the bill on March 27. In discussing section 1, he conceded that the only rights safeguarded by it were those enumerated. He did not attack the section on the basis of any alarmist "latitudinarian" construction. His objections were

⁵⁵ GLOBE 1296.

⁵⁶ GLOBE 1366-67.

⁵⁷ But not without hearing one more violent speech by Garrett Davis, Kentucky's furious Democrat. GLOBE 1413-16; see note 36 *supra*.

constitutional.⁵⁸ The Senate took up the veto on April 4, having had a recess on account of the death of Senator Solomon Foot of Vermont. There were speeches by Trumbull, Reverdy Johnson, Cowan, and Garrett Davis, Democrat of Kentucky, who was still maintaining that the bill would abolish antimiscegenation statutes and mark the end of segregation in hotels and railroad cars and churches. Finally the Senate overrode the veto, five Republicans voting to uphold.⁵⁹ On April 9 the House also overrode, without debate. Seven Republicans, including Henry J. Raymond, voted to uphold the President. Bingham was paired in support of the veto.⁶⁰

The Bingham Amendment

While the Senate was passing the Freedmen's Bureau and Civil Rights Bills, but before the President had vetoed the former and before the House had taken up the latter, the Joint Committee on Reconstruction⁶¹ worked out and reported a proposed constitutional amendment dealing with the "privileges and immunities of

⁵⁸ GLOBE 1679-81.

⁵⁹ GLOBE 1775-80, 1782-85, 1809; GLOBE, App. 181-85.

⁶⁰ GLOBE 1861.

⁶¹ The Committee, known popularly as the Committee of Fifteen, came into being under the Joint Resolution of December 13, 1865. GLOBE 6, 30, 46-47. The father of the Committee was Thaddeus Stevens, one of the most powerful congressional leaders in our history, who, if he were making headlines today, would doubtless be billed in them as "Mr. Radical." Stevens possessed, as he once understated it to the House, "some will of my own," and he was at no time animated by a desire to compromise with the new President. Conservatives and Moderates in his party were. But not Stevens. He would either rule the President or fight him. He conceived of the Joint Committee as a sort of Politburo, governing the South with, or without, or against the President. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 133-54 (1914); HENRY, *op. cit. supra* note 25, at 133-42. But, as its journal shows, the Committee was never entirely Stevens' creature.

The resolution creating the Committee was a veiled reflection of Stevens' purpose. It struck the dominant political note which, on the whole, was to characterize the work of the session. And it was to some extent a poor forecast of the business with which the Committee was to deal. It instructed the Committee to "inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress, with leave to report at any time, by bill or otherwise." There were nine members from the House and six from the Senate, three of the total being Democrats: Representatives Stevens, Washburne of Illinois, Morrill of Vermont, Bingham, Conkling of New York, Boutwell of Massachusetts, and Blow of Missouri, Republicans, and Grider of Kentucky and Rogers, Democrats; Senators Fessenden of Maine, Grimes of Iowa, Harris of New York, Howard of Michigan, and Williams of Oregon, Republicans, and Reverdy Johnson, Democrat.

citizens" and with "equal protection." The principal author of this proposal, and its manager in debate, was John A. Bingham of Ohio.

The Joint Committee convened on January 6, 1866, and discussed the basis upon which the former Confederate states might again be given representation in the federal government, and the related question of negro suffrage. At the third meeting, on January 12, a subcommittee was appointed and charged with reporting on the basis of representation. It consisted of William Pitt Fessenden, the Moderate Senator from Maine, Thaddeus Stevens, Senator Jacob Howard of Michigan, a Radical, Roscoe Conkling of New York, then in the House, who generally acted with the leadership but was not a doctrinaire Radical, and Bingham. Into the hopper of the Subcommittee went the following draft, proposed by Bingham as an amendment to the Constitution:

The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property.

Stevens, in addition to a proposal on the basis of representation, submitted the following:

All laws, state and national, shall operate impartially and equally on all persons without regard to race or color.

On January 20, Fessenden, reporting to the full Committee from the Subcommittee, brought forth three proposed articles of amendment to the Constitution,

the first two as alternative propositions, one of which, with the third proposition, to be recommended to Congress for adoption:

. . . .

Article A.

Representatives and direct taxes shall be apportioned among the several States within this Union, according to the respective numbers of citizens of the United States in each State; and all provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void.

Or the following:

Article B.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, accord-

ing to their respective numbers, counting the whole number of citizens of the United States in each State; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, creed or color, all persons of such race, creed or color, shall be excluded from the basis of representation.

Article C.

Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property.

As is apparent, the combination of articles A and C amounted to an immediate grant of negro suffrage, while that of articles B and C was a prospective grant, to be realized when and if Congress felt so inclined, probably later than sooner, since an interim scheme was provided. As regards other rights, article A again acted directly and immediately, but negatively, on the states, with a reserve implementing power being lodged in Congress by article C, whereas article B made no provision but rather left the whole matter to Congress through article C. Articles A and C differed in that the latter struck at discriminations, in suffrage and other rights, whether or not based on color; that is, article C covered all classes of "citizens" and "persons," whereas article A did not. As regards the extent of the rights protected, the two articles were coterminous in the matter of suffrage, both using the words, "political rights and [or] privileges." But were they intended to be otherwise coterminous also? That is to say, in the view of the Subcommittee, did the power to protect the enjoyment of "life, liberty and property" granted by article C go the same length as the prohibition of distinctions in "civil rights or privileges" written into article A? If so, the Subcommittee's draftsmanship was, of course, terrible. This is not conclusive against the hypothesis, but it gives pause. Moreover, reasoning from the position Bingham, the author of the "life, liberty and property" language, took on the Civil Rights Bill, it is fair to conclude that he for one saw a difference between the term "civil rights" and his own formula. On the assumption that the Subcommittee understood civil rights protection to reach further than the Bingham proposal, articles A and C taken together reveal a rational purpose rather than monumentally bad draftsmanship, the purpose being to strike broadly and immediately at discriminations based on color,

leaving to Congress the less urgent problem of other unequal laws, and at the same time to make the affirmative function of Congress to take over legislative powers hitherto reserved to the states narrower than a negative provision, limiting state power, but substituting no other. Again, comparing the two packages, one would expect the proposal which went the whole way on suffrage to protect a greater range of other rights, and the one which embodied the more conservative approach to the suffrage question to be satisfied with the grant of narrower — and prospective — additional protection. On this hypothesis, the alternative proposals presented the full Committee with a real choice all the way down the line.

It is more than likely that Thaddeus Stevens personally favored the alternative which included article A. But the old gentleman was a confirmed practitioner of the art of the possible. And so he moved that article C be severed from the other two, and then that article B be considered in preference to article A. This was done. Article B, with minor changes, was reported out as the Committee's first product. It was doomed to defeat, largely because it was unacceptable to Charles Sumner, who was at this time unable to abandon the principle of immediate suffrage, though he eventually saw the light.⁶²

At the Committee's next meeting, on January 24, article C was tackled. A couple of unsuccessful attempts were made to tinker with the provision concerning political rights. Finally, by a vote of 7 to 5, it was decided to refer the proposal to a select committee consisting of Bingham, Representative George S. Boutwell of Massachusetts, a Radical, and Andrew Jackson Rogers, for re-drafting. Three days later, Bingham reported it back in this form:

Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges.

The two parts of the article had been turned around; equal pro-

⁶² The idea embodied in article B had been first suggested by James G. Blaine of Maine. *GLOBE* 136, 141-42. The House passed the proposal as reported by Stevens from the Joint Committee. *GLOBE* 538. Sumner attacked it heavily in the Senate, *GLOBE* 673-87, 1224-32, 1281-82, and the addition of his vote, and the votes of one or two other Radicals, to those of the Democrats and Conservative Republicans ensured its defeat there. *GLOBE* 1289.

tection had become full; the same political rights had become equal; and the word "immunities" appears for the first time. These would seem to be largely matters of style, though it may be remarked that "full" is presumably something different than "equal." Stevens tried to get this proposal reported out, but could not do it. Four Republicans were absent and three voted nay. When consideration was resumed on February 3, Bingham proposed the following substitute:

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 (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).

Protection in this draft had reverted back to "equal." The more notable change, however, is the elimination of any reference to political rights. The substitution was agreed to by a vote of 7 to 6, Stevens and Fessenden voting against. On February 10 it was decided, 9 to 5, to report this proposal out. Senator Ira Harris of New York, an inconspicuous Moderate, and Conkling were the only Republicans who voted nay.⁶³

Debate began in the House on February 26. Bingham in a brief opening aired the notion indicated by the parenthetical references to the Constitution. He said:

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

. . . .

Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution.⁶⁴

A number of Radicals who spoke in support of Bingham also gave vent to the idea that the proposal was in some way declarative, merely enabling Congress to enforce rights already guaranteed by the Constitution as it stood.⁶⁵ William D. "Pig-Iron" Kelley of

⁶³ KENDRICK, *op. cit. supra* note 61, at 39, 45-47, 50-53, 55-58, 61-63. These citations cover the entire course of the Committee's deliberations so far described in the text.

⁶⁴ GLOBE 1034.

⁶⁵ Thus William Higby of California thought the amendment would simply

Pennsylvania even expressed the opinion that the amendment would add no new powers whatever to those Congress already possessed, though he recognized that reasonable men might have doubts on this score which it was worthwhile to remove. Kelley at the same time appeared to think that the proposal dealt with suffrage.⁶⁶ Aside from him, however, and from Bingham, later, when he was responding to attacks, the supporters of the amendment had little if anything specific to say about the kind of state action to which it was directed. This contrasts with the speeches made in behalf of the Civil Rights Bill. The opposition was bipartisan, as in the case of the Senate draft of the Civil Rights Bill, and it was to prove effective.

For the Democrats, Rogers, having noted that the need which Bingham professed for his amendment proved that the Civil Rights Bill — then about to come up in the House — was unconstitutional, addressed himself to the equal protection clause. He for one evidently saw no difference between this formula and the comprehensive civil rights provision in the Senate draft of the Civil Rights Bill. Under this clause, he said,

Congress can pass . . . a law compelling South Carolina to grant to negroes every right accorded to white people there; and as white men there have the right to marry white women, negroes, under this amendment, would be entitled to the same right

Further:

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. . . . Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States.

. . . .

Sir, I defy any man upon the other side of the House to name to me any right of the citizen which is not included in the words "life,

give effect to parts of the Constitution which "probably were intended from the beginning to have life and vitality" *GLOBE* 1054. Frederick E. Woodbridge of Vermont said the amendment would enable Congress to "give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guarantied to him under the constitution" *GLOBE* 1088.

⁶⁶ *GLOBE* 1057, 1062-63.

liberty, property, privileges, and immunities," unless it should be the right of suffrage⁶⁷

The speech which was very likely decisive against the Bingham amendment was delivered by Robert S. Hale of New York, a lawyer and former judge, and a man who was able to make the House sit up and listen. Hale was a regular Republican. Though he was to be recorded absent for the vote on passage of the Civil Rights Bill, he was to vote to override the veto of that bill, and eventually for the fourteenth amendment. This proposal seemed to him, however, to entrust Congress with the most extraordinary powers. To begin with, Hale paid his respects to Bingham:

Listening to the remarks of the distinguished member of the committee who reported this joint resolution to the House, one would be led to think that this amendment was a subject of the most trivial consequence. He tells us, and tells us with an air of gravity that I could not but admire, that the words of the resolution are all in the Constitution as it stands, with the single exception of the power given to Congress to legislate. A very important exception, it strikes me

. . . .

What is the effect of the amendment . . . ? I submit that it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden . . . and the law of Congress established instead.

This roused Thaddeus Stevens. He asked:

Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality?

The first proposition stated by Stevens was, of course, what Hale

⁶⁷ *GLOBE*, App. 133, 134, 135. Much of the rest of Rogers' time was taken up with the kind of political small talk — the Radicals loved to bait him — into which so many of his speeches were wont to degenerate. This, of course, cannot but detract from the weight of his remarks. Thus, Samuel J. Randall, Democrat of Pennsylvania and a future Speaker of the House, felt constrained, after Rogers had finished, to state: "I wish it to be understood that the gentleman from New Jersey does not speak for me." The House reacted with laughter. Rogers modestly said, "I speak for myself." *GLOBE* 1034; *cf.* note 44 *supra*.

had meant, and he said so. This was much more than just a "provision for the equality of individual citizens before the laws of the several States." Moreover, it was important to realize the reach of this language. For example, said Hale, all states distinguished between the property rights of married women on the one hand, and of "*femmes sole*" and men on the other. Such distinctions would be outlawed by this proposal. No, said Stevens, propounding a theory of reasonable classification under the equal protection clause:

When a distinction is made between two married people or two *femmes sole*, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality.

Hale disagreed. The proposal, he said, "gives to *all persons* equal protection." If what Stevens had said were the correct construction it would be sufficient also to extend the same rights to one Negro as to another in order to satisfy the amendment. There was no further reply from Stevens. Hale next drew Bingham's fire. The latter put up to him the fact that property rights and procedural rights in courts of law had been denied by some states. (Here at last we return to the Black Codes.) Was not some protection needed? This was weak ground for Hale. The states should provide it, he said, and if Bingham found that the state of Ohio could not protect its citizens, he ought to come to New York, where things were different. Bingham pursued the matter:

I do not cast any imputation upon the State of New York. The gentleman knows full well, from conversations I have had with him, that so far as I understand this power, under no possible interpretation can it ever be made to operate in the State of New York while she occupies her present proud position.

. . . . It is to apply to other States [than those which seceded] . . . that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution.

Mr. Rogers. I suppose the gentleman refers to the State of Indiana?

Mr. Bingham. I do not know; it may be so. It applies unquestionably to the State of Oregon.⁶⁸

This is an interesting passage. Bingham here specified state

⁶⁸ GLOBE 1063-65.

enactments which his proposal would strike down. He refused to commit himself on Indiana. The reference there, as Professor Fairman has pointed out, was probably to the provision of the Indiana constitution denying suffrage to Negroes and mulattoes.⁶⁹ His own state, as Bingham remarked in the Civil Rights Bill debate, made a similar discrimination. The Oregon constitution at this time, as has also been pointed out, forbade free Negroes or mulattoes not residing in the state at the time of its adoption to come into the state, reside there, hold real estate, contract, or sue.⁷⁰ This sort of thing Bingham wanted to strike down. As for the State of New York in her then proud position, whether or not Bingham knew it, her laws permitted the establishment of separate but equal schools for colored children in the discretion of local districts. Segregated schools in fact existed at least until the year 1900. And it seems quite possible, on the face of her statutes, that New York maintained her proud position in respect of permissive segregation in rural districts till 1938.⁷¹

⁶⁹ IND. CONST. art. II, §§ 2, 5 (1851); see Fairman, *supra* note 13, at 31 n.57.

⁷⁰ ORE. CONST. art. I, § 35 (1857); see Fairman, *supra* note 13, at 32 n.58; Boudin, *supra* note 13, at 35 n.13.

⁷¹ N.Y. Sess. Laws 1864, c. 555, tit. 10, provided: "Section 1. The school authorities of any city or incorporated village . . . may, when they shall deem it expedient, establish a separate school or separate schools for the instruction of children and youth of African descent, resident therein . . . and such school or schools shall be supported in the same manner and to the same extent as the school or schools supported therein for white children, and they shall be subject to the same rules and regulations, and be furnished with facilities for instruction equal to those furnished to the white schools therein.

"Section 2. The trustees of any union school district, or of any school district organized under a special act, may, when the inhabitants of any such district shall so determine . . . establish . . . separate schools for the instruction of such colored children . . . and such schools shall be supported in the same manner, and receive the same care, and be furnished with the same facilities for instruction as the white schools therein."

N.Y. Sess. Laws 1894, c. 556, tit. 15, art. 11, §§ 28, 29, reenacted the two sections of the 1864 statute quoted above. In 1900, segregation in Queens was upheld in *People ex rel. Cisco v. School Bd.*, 161 N.Y. 598, 56 N.E. 81. Following this decision, the legislature passed an act "to secure equal rights to colored children." It did so by providing that "no person shall be refused admission into or be excluded from any public school in the state of New York on account of race or color," and by repealing § 28 of the Act of 1894 (§ 1 of the Act of 1864), which permitted segregation in cities and incorporated villages. But it left undisturbed § 29 of the same Act of 1894 (§ 2 of the Act of 1864), which was the corresponding provision applicable to union school districts and districts organized under special acts, and which differed in that it permitted segregation only after a vote by the district's inhabitants. N.Y. Sess. Laws 1900, c. 492.

One hesitates to pass judgment with any feeling of confidence on this state of

The next day, Thomas T. Davis, another New York Republican, took up where Hale had left off. He, too, thought that this was an extraordinary grant of power to Congress, and he feared that the power would be used "in the establishment of perfect political equality between the colored and the white race of the South." The Negroes, he said,

must be made equal before the law, and be permitted to enjoy life, liberty, and the pursuit of happiness. I am pledged to my own conscience to favor every measure of legislation which shall be found essential to the protection of their just rights [Davis was to vote for the Civil Rights Bill], and shall most cheerfully aid in any plan for their education and elevation which may reasonably be adopted.

. . . .

Give them protection, teachers, education, and hold out to them inducements to self-improvement

But this amendment meant "centralization of power in Congress" and very likely political rights — and that was going too far.⁷²

The proposal was clearly in trouble, and Bingham, in a long speech, attempted a rescue operation. Among other things, he said:

The proposition pending before the House is simply a proposition to arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today. It "hath that extent — no more."

. . . .

the New York law. But the legislative action of 1900 cannot simply be attributed to an oversight. In the face of this partial repealer, would the declaration that no person should be refused admission to "any school" on account of color have been given effect in school districts to which the unrepealed § 29 was applicable? It is noteworthy that while all of the Act of 1864 was on the books, the legislature passed a civil rights act prohibiting trustees and other officers of "public institutions of learning" from excluding anyone on account of color "from full and equal enjoyment of any accommodation, advantage, facility or privilege." N.Y. Sess. Laws 1873, c. 186, § 1. Nevertheless, the New York Court of Appeals had no difficulty avoiding this statute and upholding school segregation in Brooklyn as provided for in the Act of 1864. *People ex rel. King v. Gallagher*, 93 N.Y. 438, 455-56 (1883). Perhaps by 1900 segregation outside cities and incorporated villages was not a problem. Perhaps it never had been much of one. Yet here was a section dealing with it, and there just is no satisfactory explanation for what looks like a deliberate failure to repeal it. *But cf. Sutherland, Segregation by Race in Public Schools Retrospect and Prospect*, 20 LAW & CONTEMP. PROB. 169, 171 (1955). The section was at last stricken from the books by N.Y. Sess. Laws 1938, c. 134.

⁷² GLOBE 1085, 1087.

. . . . [R]equirements of our Constitution have been broken; they are disregarded to-day in Oregon; they are disregarded to-day, and have been disregarded for the last five, ten, or twenty years in every one of the eleven States recently in insurrection.

. . . .

. . . . Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights. Gentlemen who oppose this amendment simply declare to these rebel States, go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to . . . the United States.⁷³

Bingham, though with singular lack of clarity, was suggesting to those of the members who were alarmed that he had some definite evils in mind, limited and distinct in their nature. His peroration pulled out all stops in an appeal to due process, "law in its highest sense."⁷⁴ But the assurances, the magic of somewhat windy eloquence, and even a political rallying cry, which Bingham also employed — all failed. Hale's argument had sunk in and was going to prevail. Bingham was followed by another New Yorker, Giles W. Hotchkiss, a Radical, who read the proposal as had his colleague Hale, and who, according to his own lights, also feared "the caprice" of future Congresses:

As I understand it, . . . [Bingham's] object in offering this resolution . . . is to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it to-day; but . . . I do not regard it as permanently securing those rights

. . . . I am unwilling that Congress shall have [the] power [this amendment confers]. . . . The object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority It is not indulging in imagination to any great stretch to suppose that we may have a Congress here who would establish such rules in my State as I should be unwilling to be governed by.

. . . .

Mr. Speaker, I make these remarks because I do not wish to be placed in the wrong upon this question. I think the gentleman from Ohio [Mr. Bingham] is not sufficiently radical in his views upon

⁷³ GLOBE 1088, 1090-91.

⁷⁴ GLOBE 1094.

this subject. I think he is a conservative. [Laughter.] I do not make the remark in any offensive sense. But I want him to go to the root of this matter.

. . . .

. . . . Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another⁷⁵

Roscoe Conkling, who had voted against reporting this proposal out of the Joint Committee, was quick to point out that he was against it for reasons "very different . . . from, if not entirely opposite to" those given by Hotchkiss. Conkling certainly thought the proposal went far enough and was sufficiently radical. He moved to postpone consideration of it to a day certain, the second Tuesday of April. A vote was first taken on a Democratic motion to postpone indefinitely. This was defeated by a party line-up, with, however, somewhat more than normal defections. Thus Davis and Hale voted with the Democrats. The Conkling motion, taken up next, carried 110-37. The Republican leadership was solidly behind it. Bingham himself voted for it. Six Republicans voted consistently against any kind of postponement—Democratic or Republican. Davis decided that if he could not have indefinite postponement, he wanted none, no doubt expressing the judgment, indicated also by the position of the leadership, that the proposal could be beaten then and there. The date of this vote was February 28.⁷⁶ The second Tuesday in April came and went with no further mention of the Bingham amendment. It was never brought up in the Senate, nor ever again in the House.

The Fourteenth Amendment

Having reported out Bingham's draft, the Joint Committee on Reconstruction did not resume consideration of proposed constitutional amendments till April 16.⁷⁷ On that day the Committee heard Senator Stewart, Republican of Nevada, expound a reconstruction plan which he and other Moderates had hoped might yet

⁷⁵ GLOBE 1095.

⁷⁶ *Ibid.*

⁷⁷ The Committee considered a measure for the readmission of Tennessee, which was controlled by anti-Johnson forces and had a special claim to Radical favor. For over a month, it did not meet. Subcommittees, however, were taking evidence on conditions in the South. KENDRICK, *op. cit. supra* note 61, at 63-81, 221-27.

provide a basis for peaceful coexistence between the Radicals and the President. The Stewart plan turned on a constitutional amendment granting equal "civil rights" to Negroes, as well as limited suffrage. The South was offered, among other things, an amnesty and the power to restrict negro suffrage so long as it did so without using race as a sole or explicit criterion.⁷⁸ Stewart and his hopes got a hearing, but nothing more, from the Joint Committee. At its next meeting on April 21,

Mr. Stevens said he had a plan of reconstruction, one not of his own framing, but which he should support, and which he submitted to the Committee for consideration.

It was read as follows:

. . . .

Whereas, It is expedient that the States lately in insurrection should . . . be restored to full participation in all political rights; therefore,

Be it resolved . . . that the following Article be proposed . . . as an amendment to the Constitution . . . :

Article —

Section 1. No discrimination shall be made by any state, nor by the United States, as to civil rights of persons because of race, color, or previous condition of servitude.

Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment . . . of the right of suffrage

Sec. 3. [Excluded all persons who were denied suffrage from the basis of representation, till 1876.]

Sec. 4. [Confederate debt and compensation for slaves.]

Sec. 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article.

And be it further resolved, [former Confederate states which ratified this amendment and enacted legislation in compliance with it, to be readmitted to the Union, when ratification of the amendment was complete.]

Provided, [that certain "rebels" be excluded from office till 1876.]⁷⁹

⁷⁸ *Id.* at 82, 252-55. Section 1 of Stewart's proposed amendment read: "All discriminations among the people because of race, color or previous condition of servitude, either in civil rights or the right of suffrage, are prohibited; but the States may exempt persons now voters from restrictions on suffrage hereafter imposed." *GLOBE* 1906.

⁷⁹ *KENDRICK, op. cit. supra* note 61, 83-84.

As Stevens said, this proposal was not his own. It had been placed before him in March by Robert Dale Owen, reformer son of a reformer father. Owen, some nine years later, described his meeting with Stevens. The latter objected to prospective suffrage, as provided in section 2. This was a frank recognition, said Owen, of the fact that the Negro was not yet ready to vote or hold office. "I hate to delay full justice so long," said Stevens. But suffrage was not now the Negro's immediate need, the younger man answered. "He thirsts after education, and will have it if we but give him a chance, and if we don't call him away from the school-room to take a seat which he is unfitted to fill in a legislative chamber." Stevens then made a quick decision in favor of the proposal. He said there was not a majority for immediate suffrage, and this could pass. Owen, as he recalled, also took his amendment around to other members of the Joint Committee. Fessenden; Representative Elihu Washburne of Illinois, Grant's friend, who was briefly to be his Secretary of State; Roscoe Conkling; Senator Jacob Howard of Michigan and Representative George S. Boutwell of Massachusetts, two Radicals — all approved with various degrees of enthusiasm, though none with the decisiveness of Stevens. "So, qualifiedly [these are Owen's words], did Bingham, observing, however, that he thought the first section ought to specify, in detail, the civil rights which we proposed to assure; he had a favorite section of his own on that subject."⁸⁰

The Committee went at the Owen proposal section by section. Bingham moved that section 1 be amended by adding the following:

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.

This motion was lost, 7 to 5. Stevens voted with Bingham. So did Rogers and Reverdy Johnson, though not Grider, the other Democrat. The Committee then voted 10 to 2 (Grider and Rogers) to adopt section 1 as it stood. Sections 2, 3, and 4 were also adopted. When the Committee reached section 5, Bingham moved the following as a substitute:

Sec. 5. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

⁸⁰ Owen, *Political Results From the Varioloid*, 35 ATLANTIC MONTHLY 660, 662-64 (1875).

nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

This is, of course, language which now appears unchanged in the fourteenth amendment. The Committee adopted it, 10 to 2 (Grider and Rogers). Section 5 of the original proposal was renumbered and also accepted. Throughout this meeting Fessenden and Conkling as well as Senator Ira Harris of New York were absent.

Two days later, the Committee, Fessenden still absent, modified the final provisions of the proposal following the numbered articles, which it severed, intending to report them out separately. At the next meeting, on April 25, Senator George H. Williams of Oregon, a Radical, moved to strike section 5, that is, the substitute which Bingham had got accepted at the meeting before last. Williams had voted for the substitution. His present motion carried, 7 to 5. Stevens was with Bingham in opposition. So was Rogers, who had voted with Bingham for equal protection language in section 1, a vote Bingham had lost, but against the substitution of the section he was now supporting. So far Rogers favored equal protection only as a losing cause. Harris, Howard, Johnson, Williams, Grider, Conkling, and Boutwell voted to strike the section. Fessenden was still absent. The Committee then voted, 7 to 6, to report the entire package. Conkling, Boutwell, and Representative Henry T. Blow of Missouri were the Republicans voting nay. Bingham, nothing daunted, promptly moved the adoption of his deleted section 5 as a separate proposed amendment to the Constitution. He was again defeated, 8 to 4, even Stevens leaving him on this one. The three Democrats were with Bingham. Williams then moved that the vote to report out the package be reconsidered. This carried 10 to 2, the only nays being Howard and Stevens. With that the Committee adjourned.

The Committee was in session again on April 28, three days later, with Fessenden now present. This time the entire proposal was reported out, but with major changes. Instead of granting suffrage prospectively, it was now decided to write a new section 2, simply eliminating from the basis of representation persons to whom the vote was denied, and a new section 3 disenfranchising, for purposes of federal elections, large numbers of Southerners till the year 1870. That done, Bingham, still trying, moved to substitute for section 1 (the civil rights section) his privileges and immunities, due process, and equal protection language, which

had once been substituted for section 5 and then been struck. This motion carried 10 to 3. All three Democrats voted for it, as did Stevens and Roscoe Conkling. The opposition consisted of Howard and Representative Justin Morrill of Vermont, both stout Radicals, and Senator James W. Grimes of Iowa, a moderate Republican of the Fessenden sort. Fessenden himself and Harris abstained. On the vote to report the resulting amendment out, only three Democrats were opposed. The Committee also reported a bill readmitting, upon the ratification of the amendment, states which had voted to ratify it, and a bill excluding from office certain Confederate officials.⁸¹

One of the puzzles to which this course of events in the Joint Committee gives rise is solved by the recollections of Robert Dale Owen. As Thaddeus Stevens told Owen, it was Fessenden's absence at the meetings of April 21, 23, and 25 which caused the Committee not to report out the draft it had approved, including a civil rights provision in section 1 and a grant of prospective suffrage in section 2, and excluding Bingham's formula. Fessenden, who was sick of the varioloid, a mild and euphonious form of smallpox which no longer distracts our politics, was chairman of the Committee on the part of the Senate. It seemed to most members (but not to Stevens and Howard, as we have seen) a lack of courtesy to report out the Committee's most important and final product in his absence. Hence the decision to do so was left in abeyance for three days. That gave a chance to the New York, Illinois, and Indiana congressional delegations to caucus and to decide that it was politically inadvisable to go to the country in 1866 on a platform having anything to do with negro suffrage, immediate or prospective. On that issue, these delegations felt, the Republicans might lose the election. This view was communicated to the Committee. As a result, when it met again, the Committee fell to rewriting section 2.⁸² Why it proceeded to redo section 1 as well, Owen was, however, unable to explain. Nor did he explain the on-again-off-again attitude toward the Bingham formula.

Section 1, as originally proposed by Owen and Stevens, was framed in terms of the sentence the House had struck from the Civil Rights Bill to avoid a "latitudinarian" construction. The language Bingham at first proposed to add to section 1 had two

⁸¹ KENDRICK, *op. cit. supra* note 61, at 85-120.

⁸² Owen, *supra* note 80, at 665-66.

apparent effects: it protected, as his own defeated amendment had done, against discriminations other than just those based on color, and it added a special property safeguard not dependent on discrimination. As regards negro rights, there is no internal indication whether the "equal protection of the laws" formula (*nota bene* — "of the laws," not "in the rights of life, liberty and property," as in the earlier Bingham amendment) was thought by the Committee to imply greater or lesser coverage than the term "civil rights." In either event, it must have been realized that the two provisions overlapped. Yet Bingham at first seemed to want both in, and the Committee, when at one point it accepted Bingham's substitute for section 5, might seem to have been prepared to submit them together. The answer to this oddity may lie in the mechanics of committee drafting. Inconsistencies, redundancies, and the vestiges of tactical maneuvers appear at some stages and remain to be combed out later. The Committee never actually gave final approval to both the civil rights provision and the Bingham proposal as parts of the same measure.

On April 30, 1866, Fessenden in the Senate and Stevens in the House introduced the Committee draft. They both announced that a report as well as testimony taken before the Committee would soon be printed and distributed.⁸³ Debate started in the House first, on May 8, under a thirty-minute rule.⁸⁴ Stevens opened. The founders, he said, had not been able to build on the uncompromising foundation of the Declaration of Independence. They had decided to wait for "a more propitious time. That time ought to be present now." Now should have been the time to build "upon the firm foundation of eternal justice." But "the public mind has been educated in error for a century. How difficult in a day to unlearn it." The new constitutional structure the Committee was erecting, Stevens said, was defective still, but it made it possible to "trust to the advancing progress of a higher morality and a purer and more intelligent principle . . ." The proposition "falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. . . . I will take all I can get in the cause of humanity and leave it to be perfected by better men in better times. It may be that that time will not come while I am here to enjoy the glorious

⁸³ GLOBE 2265, 2286.

⁸⁴ GLOBE 2433-34.

triumph; but that it will come is as certain as that there is a just God."

In all probability, the disappointment of Thaddeus Stevens centered on the failure to make any provision for negro suffrage, immediate or prospective. It was for this reason that he had called the final Committee draft a "shilly-shally, bungling thing" in conversation with Robert Dale Owen.⁸⁵ On the other hand, while he supported Bingham's formula at various drafting stages in committee, Stevens had himself proposed language (directed specifically at racial distinctions) which he might well have regarded as more sweeping, and which, as he had early had occasion to tell the House, was "the genuine proposition," "the one I love."⁸⁶ And he spoke his disappointment to the same House now in general terms. He went on then to "refer to the provisions of the proposed amendment":

The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the "equal" protection of the laws.

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution 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 punishes a white man for a crime shall punish the black man precisely in the same way Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. . . . I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will . . . crush to death the hated freedmen. Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority.⁸⁷

It will be noted that Stevens, in passing, suggested the argument

⁸⁵ Owen, *supra* note 80, at 665.

⁸⁶ GLOBE 537. See pp. 30, 41 *supra*.

⁸⁷ GLOBE 2459.

with which Bingham had supported his earlier amendment, that is, that the provisions now proposed were "asserted" elsewhere in the Constitution. But he went on to mention evils to which the proposal was directed, harking back to those which had been pointed to in support of the Civil Rights Bill. In the debate which followed, many members were heard from. But only two on either side of the aisle devoted more than the briefest sort of generality to section 1. These two were Bingham, whose generalities were not brief, and Rogers, who specified his objections. For the rest, speakers on both sides identified section 1 with the Civil Rights Act. Republicans added, following Stevens' lead, that that great enactment would now be placed beyond the power of future Congresses to repeal,⁸⁸ or remarked on the self-evident justice of the proposal, the better part of which was in the Constitution as it stood anyway.⁸⁹ One or two regretted that suffrage was not conferred.⁹⁰ Democrats jibed that in bringing forth this proposal the Radical leadership had admitted the unconstitutionality of the Civil Rights Act,⁹¹ or charged rather vaguely that the Radicals had far-reaching ultimate aims, including political equality for the

⁸⁸ M. Russell Thayer of Pennsylvania: "As I understand it, it is but incorporating in the Constitution . . . the principle of the civil rights bill . . . [so that it] shall be forever incorporated . . ." *GLOBE* 2465. To the same effect, John M. Broomall of Pennsylvania, *GLOBE* 2498, and Thomas D. Eliot of Massachusetts, *GLOBE* 2511. Henry J. Raymond, who was going to vote for this amendment, also thought the "principle" of this proposal was that embodied in the Civil Rights Bill, which he had opposed on constitutional grounds. He was further of the opinion that the same "principle" had been expressed by the Bingham amendment, concerning which Raymond had been silent and remained so now. *GLOBE* 2502.

⁸⁹ William D. Kelley of Pennsylvania: "There is not a man in Montgomery or Lehigh county [the constituency of a Pennsylvania Democrat, Benjamin M. Boyer] that will not say those provisions ought to be in the Constitution if they are not already there." *GLOBE* 2468. George F. Miller of Pennsylvania: "As to the first, it is so just . . . and so clearly within the spirit of the Declaration of Independence of the 4th of July, 1776, that no member of this House can seriously object to it." *GLOBE* 2510. John F. Farnsworth of Illinois: "This is so self-evident and just that no man whose soul is not too cramped and dwarfed to hold the smallest germ of justice can fail to see and appreciate it." *GLOBE* 2539. James A. Garfield, who discussed other parts of the amendment with his usual acuity, merely referred to "this first section here which proposes to hold over every American citizen, without regard to color, the protecting shield of law." *GLOBE* 2462.

⁹⁰ *E.g.*, Eliot of Massachusetts, *GLOBE* 2511; Farnsworth of Illinois, *GLOBE* 2539.

⁹¹ William E. Finck of Ohio: "Well, all I have to say about this section is, that if it is necessary to adopt it . . . then the civil rights bill . . . was passed without authority, and is clearly unconstitutional." *GLOBE* 2461. To the same effect, Charles A. Eldridge of Wisconsin, *GLOBE* 2506.

Negro.⁹² But the bulk of the debate turned on other sections, principally section 3. A number of the Republicans who spoke failed even to mention section 1.⁹³

To Andrew Jackson Rogers, who at least in this respect saw farther than most, section 1 was the heart of the matter. He said:

Now sir, I have examined these propositions . . . and I have come to the conclusion different to what some others have come, that the first section of this programme of disunion is the most dangerous to liberty. It saps the foundation of the Government . . . it consolidates everything

This section . . . is no more nor less than an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill

. . . .
 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. . . . It will result in a revolution worse than that through which we have just passed.

Rogers did not deal specifically with the equal protection clause. He proceeded to attack section 2, which, he said, was intended to exert indirect pressure on the South to grant negro suffrage. Then:

⁹² Boyer of Pennsylvania: "The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly, the political equality of the negro race. It is objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions." *GLOBE* 2467. Samuel J. Randall of Pennsylvania: "The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States If you have the right to interfere in behalf of one character of rights—I may say of every character of rights, save the suffrage—how soon will you be ready to tear down every barrier? It is only because you fear the people that you do not now do it." *GLOBE* 2550. See also remarks by George S. Shanklin of Kentucky and Myer Strouse of Pennsylvania, *GLOBE* 2500, 2531.

⁹³ Thus, James G. Blaine, Robert C. Schenck of Ohio, Green Clay Smith of Kentucky, a Conservative, Samuel McKee of Kentucky, Boutwell, Rufus P. Spalding of Ohio, John W. Longyear of Michigan, and Fernando C. Beaman of Michigan. *GLOBE* 2460, 2469-73, 2504-05, 2507-10, 2536-37.

Sir, I want it distinctly understood that the American people believe that this Government was made for white men and white women. They do not believe, nor can you make them believe — the edict of God Almighty is stamped against it — that there is social equality between the black race and the white.

I have no fault to find with the colored race. . . . I wish them well, and if I were in a State where they exist in large numbers I would vote to give them every right enjoyed by the white people except the right of a negro man to marry a white woman and the right to vote. But, sir this [is an] indirect way to inflict upon the people of the South negro suffrage.⁹⁴

Bingham spoke just before some few final remarks by Stevens, which, in turn, immediately preceded a vote. Bingham said:

The necessity for the first section . . . is one of the lessons that have been taught . . . by the history of the past four years There . . . remains a want now, in the Constitution . . . which the proposed amendment will supply. . . . It is the power in the people . . . 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.

. . . . [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right . . . to deny to any freeman the equal protection of the laws or to abridge the privileges and immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage

. . . . But, sir, it has been suggested, not here, but elsewhere, if this section does not confer suffrage the need of it is not perceived. To all such I beg leave again to say, that many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws . . . not only for crimes committed, but for sacred duty done

. . . .

. . . . That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied

⁹⁴ GLOBE 2538.

by the first section of this amendment. That is the extent that it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land.⁹⁵

Bingham went on to discuss section 3, about which he was more lucid and less enthusiastic.

It was to section 3 that Thaddeus Stevens addressed his closing remarks. He noted dissension about it, and pleaded for its adoption, to save the Republican party and through it the country. Unless section 3 was passed Stevens could see "that side of the House . . . filled with yelling secessionists and hissing copperheads." Section 3 was actually "too lenient for my hard heart. Not only to 1870, but to 18070, every rebel who shed the blood of loyal men should be prevented from exercising any power in this Government." Stevens conjured up the scene in the House before the war when "the men that you propose to admit" through a milder section 3 occupied the other side, among them "the mighty Toombs, with his shaggy locks . . . when weapons were drawn, and Barksdale's bowie-knife gleamed before our eyes. Would you have these men back again so soon to reënact those scenes? Wait until I am gone, I pray you. I want not to go through it again. It will be but a short time for my colleague to wait." With these searing words in its ears, the House, though by a close vote (84-79) in which some Democrats, who sought to keep the proposal as obnoxious as possible, provided the winning margin, obeyed Stevens and cut off amendments. (James A. Garfield had one changing section 3). By a vote of 128 to 37 the House then adopted the draft as reported by the Joint Committee. Lovell Rousseau of Kentucky and a few other Conservatives were in the opposition.⁹⁶ This was the afternoon of May 10. The final vote in committee had been had twelve days before.

The proposal was brought up in the Senate on May 23. Before debate started Charles Sumner made a point which had also been raised by a Democrat in the House. The testimony taken before the Joint Committee, he said, had not been published as a whole, and no report drawing the Committee's conclusions had been submitted. He thought it was a "mistake that we are asked to proceed . . . under such circumstances." Fessenden answered saying there was nothing to be gained by waiting longer.⁹⁷ Debate

⁹⁵ GLOBE 2542-43.

⁹⁶ GLOBE 2544-45.

⁹⁷ GLOBE 2763. The House Democrat who had made a complaint similar to

itself was opened by Jacob Howard, the Michigan Radical. Fessenden, victim of the varioloid, was not feeling well enough to speak at length. Howard paid due and reasonably loyal attention to section 1, whose inclusion in its present form he had opposed in committee:

To these privileges and immunities, whatever they may be — for they are not and cannot be fully defined in their entire extent and precise nature — to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution

As for the equal protection clause:

This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. . . .

But, sir, the first section of the proposed amendment does not give . . . the right of voting. The right of suffrage . . . is merely the creature of law. It [is] . . . not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves⁹⁸

Speakers who followed Howard did not address themselves to section 1, except that Benjamin F. Wade, the Ohio Radical, and one or two others wondered whether section 1 should not define national citizenship. Stewart of Nevada made a last extended plea

Sumner's was Charles A. Eldridge of Wisconsin. *GLOBE* 2506. A majority report was submitted by Fessenden in the Senate and Stevens in the House on June 8, and ordered to be printed. *GLOBE* 3038, 3051. This was a political document written by Fessenden, though evidently strongly influenced by Stevens. It did not deal with § 1. Its conclusion stated that "your committee submit it [the fourteenth amendment] to Congress as the best they could agree upon, in the hope that its imperfections may be cured, and its deficiencies supplied, by legislative wisdom . . ." See MCPHERSON, *op. cit. supra* note 28, at 84-93; KENDRICK, *op. cit. supra* note 61, at 320-26. A minority report, written by Reverdy Johnson and signed as well by Rogers and Henry Grider, was also submitted, and received and printed after an unedifying partisan hassle. *GLOBE* 3275, 3349-50, 3646-49, 3749-50, 3766-67. This report was rather an imposing paper, arguing for the reinstatement of the Southern states in their rights of representation in Congress. It made no mention of § 1. See MCPHERSON, *op. cit. supra* note 28, at 93-101.

⁹⁸ *GLOBE* 2765, 2766. This speech by Howard, together with a few less explicit remarks by Bingham, constitutes the principal reliance of those who purport to find an intention to incorporate the entire Bill of Rights in the fourteenth amendment. See note 13 *supra*; Fairman, *supra* note 13, at 65-68, 78-81.

for the plan he had advocated before the Joint Committee and elsewhere.⁹⁹ Further debate was then postponed. It had so far gone on for parts of two days. It was not resumed till four days later, on May 29, when Howard, "after consultation with some of the friends of this measure," presented some amendments which, "it has been thought . . . will be acceptable to both Houses of Congress and to the country . . ." ¹⁰⁰ In other words, a Republican caucus had been in session and had straightened out differences among the Republicans, which, as debate had revealed, centered around section 3. It was agreed to forego disenfranchising Southern whites. Instead a provision was inserted disqualifying certain Southerners for federal office; section 2, though modified, remained essentially the same; and United States citizenship was defined in section 1. Thus the amendment assumed its present form. The proceedings of the caucus were, as Thomas A. Hendricks, Democrat of Indiana, charged, so secret that "no outside Senators, not even the sharp-eyed men of the press, have been able to learn one word that was spoken, or one vote given." ¹⁰¹ They have remained secret to this day.

The Senate now engaged in a debate which lasted for several days. But, as had been the case in the House and earlier in the Senate itself, proportionately little was said about section 1 by either Democrats or Republicans. It was charged that the section gave citizenship to "savage" Indians and Gypsies and that it embodied the Civil Rights Act.¹⁰² Luke Poland, Republican from Vermont and a former Chief Justice of that state, drew attention to state laws, "some of them of very recent enactment," at which the Civil Rights Act had struck. This amendment, he implied, was also directed at the Black Codes.¹⁰³ The same implication was left with the Senate by John B. Henderson of Missouri, a Republican who enjoyed much respect, and who was no doctrinaire Radical. It would be "a loss of time," he said, "to discuss the remaining provisions of the section [other than the citizenship clause, which he held to be simply declaratory of existing law], for they merely secure the rights that attach to citizenship in all free Governments." Nevertheless, Henderson did mention the Black Codes, which formed a "system of oppression" rendering

⁹⁹ GLOBE 2768-69, 2798-803; see note 78 *supra*.

¹⁰⁰ GLOBE 2869.

¹⁰¹ GLOBE 2939; see KENDRICK, *op. cit. supra* note 61, at 316.

¹⁰² GLOBE 2896, 2939, 2891-93.

¹⁰³ GLOBE 2961.

the Negro a "degraded outcast" deprived of the "commonest rights of human nature," the right to hold property, to sue, to confront witnesses, to have the process of the courts. The Freedmen's Bureau and Civil Rights Bills and, Henderson implied, section 1 of this amendment, were all intended to cure this situation.¹⁰⁴ Timothy O. Howe of Wisconsin, a Radical, spoke in the same vein, but in richer detail. Negroes, he said, had been denied elementary rights:

The right to hold land . . . the right to collect their wages by the processes of the law . . . the right to appear in the courts as suitors . . . the right to give testimony

. . . . [B]ut, sir, these are not the only rights that can be denied I have taken considerable pains to look over the actual legislation [in the South] I read not long since a statute enacted by the Legislature of Florida for the education of her colored people. . . . They make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men.

Howe described the colored school system in Florida, which was, of course, segregated, without pointing out that fact; what he stressed was the inadequacy of the poorly supported colored schools. He implied that section 1 would render this legislation illegal, but he gave no indication that he believed its vice to lie in segregation.¹⁰⁵

Aside from a parting shot by Reverdy Johnson, nothing else was said in the Senate about section 1, and it is perhaps noteworthy that conservative Republicans like Cowan and Doolittle, Democrats like Johnson, and even Democrats of the stripe of Garrett Davis of Kentucky spoke at some length, but refrained from raising alarms concerning the reach of section 1 and the sort of local practices it would outlaw.¹⁰⁶ This contrasts with Senate and House debates on the Civil Rights Act, and with Rogers' and even some of his colleagues' more recent statements in the House.

¹⁰⁴ GLOBE 3031, 3034-35.

¹⁰⁵ GLOBE, App. 219. The Florida statute which Howe must have had in mind is the Act of January 16, 1866, Fla. Laws 1865, c. 1475. It is printed in part in *FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION* 277-79 (1906).

¹⁰⁶ GLOBE 2896, 2939, 2891-93; GLOBE, App. 240. The same may be said of McDougall of California, also a Democrat, though not of the utterly unconstructive Davis type. GLOBE 3030-31.

But the absence of purported alarm must be understood in the light of the paucity of attention generally devoted to section 1, which in turn is doubtless attributable to the evident greater political vulnerability of the Republicans with respect to other sections of the amendment. Just before the vote, Reverdy Johnson, who had spoken at length on the basis of representation,¹⁰⁷ remarked that while he saw no objection to the due process clause, he simply did not understand what would be the effect of the privileges and immunities clause, and wished it might be deleted. No one made a closing speech for the proponents. The vote followed immediately. It was 33 to 11; the date, June 8. Four Republicans — Cowan, Doolittle, Norton of Minnesota, and Van Winkle of West Virginia, the hard core of Conservatives — voted nay.¹⁰⁸

On June 13 the House, under a fifteen-minute rule, took up the amendment as returned from the Senate.¹⁰⁹ Rogers spoke first. The burden of his remarks was a complaint that the amendment had been ill-considered by a Congress cringing under the party whip. He referred in passing to section 1, repeating that it “simply embodied the gist of the civil rights bill.” His heavy artillery was concentrated on the manner in which the amendment had been pushed through the Senate by command of the secret Radical caucus.¹¹⁰ A few others spoke without mentioning section 1. Then Thaddeus Stevens moved the previous question, thus bringing on the vote. But first he had a few words to say, which are worth quoting extensively, both for their characteristic bite and because they were the launching words, the last spoken before the fourteenth amendment slid down the ways. The implacable old man was not happy:

In my youth, in my manhood, in my old age, I had fondly dreamed that when any fortunate chance should have broken up for awhile the foundation of our institutions, and released us from obligations the most tyrannical that ever man imposed in the name of freedom, that the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized

¹⁰⁷ GLOBE 3026-30.

¹⁰⁸ GLOBE 3041-42.

¹⁰⁹ GLOBE 3144.

¹¹⁰ GLOBE, App. 229.

degradation of the poor, and the superior caste of the rich. In short, that no distinction would be tolerated in this purified Republic but what arose from merit and conduct. This bright dream has vanished "like the baseless fabric of a vision." I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice, and leaving it, in many of its parts, to be swept through by the tempests, the frosts, and the storms of despotism.

Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels

Perhaps more strenuous effort might have resulted in a better plan. But Congress had had to face the hostility of the President, and this proposal met in some measure the danger of "tyranny" emanating from the White House, "the danger arising from the unscrupulous use of patronage and from the oily orations of false prophets, famous for sixty-day obligations and for protested political promises" Stevens lightly reviewed some of the changes made in the Senate. The principal one was, of course, section 3, and he disapproved. He ended by urging speedy adoption of the imperfect product. "I dread delay," he said. Then:

The danger is that before any constitutional guards shall have been adopted Congress will be flooded by rebels and rebel sympathizers. . . . Whoever has watched the feelings of this House during the tedious months of this session, listened to the impatient whispering of some and the open declarations of others; especially when able and sincere men propose to gratify personal predilections by breaking the ranks of the Union forces and presenting to the enemy a ragged front of stragglers, must be anxious to hasten the result and prevent the demoralization of our friends. Hence, I say, let us no longer delay; take what we can get now, and hope for better things in further legislation; in enabling acts or other provisions.

I now, sir, ask for the question.

The vote which followed immediately and which sent the fourteenth amendment to the country was 120 yeas, 32 nays. There were no Republican votes against. Rousseau of Kentucky and a few other Conservatives were recorded absent. Eldridge, the Democrat, said: "I desire to state that if Messrs. Brooks and Voorhees had not been expelled, they would have voted against this proposition. [Great laughter.]" And Schenck, of the Radical leadership, retorted: "And I desire to say that if Jeff. Davis were

here, he would probably also have voted the same way. [Renewed laughter.]”¹¹¹

Summary and Conclusions

As we have seen, the first approach made by the 39th Congress toward dealing with racial discrimination turned on the “civil rights” formula. The Senate Moderates, led by Trumbull and Fessenden, who sponsored this formula, assigned a limited and well-defined meaning to it. In their view it covered the right to contract, sue, give evidence in court, and inherit, hold, and dispose of real and personal property; also a right to equal protection in the literal sense of benefiting equally from laws for the security of person and property, including presumably laws permitting ownership of firearms, and to equality in the penalties and burdens provided by law. Certainly able men such as Trumbull and Fessenden realized that each of the seemingly well-bounded rights they enumerated carried about it, like an upper atmosphere, an area in which its force was uncertain. Thus it is clear that the Moderates wished also to protect rights of free movement, and a right to engage in occupations of one’s choice. They doubtless considered that their enumeration somehow accomplished this purpose. Similarly, the Moderates often argued that one of the imperative needs of the time was to educate, to “elevate,” to “Christianize” the Negro; indeed, this was almost universally-held doctrine, from which even Conservatives like Cowan and Democrats like Rogers did not dissent. Hence one may surmise that the Moderates believed they were guaranteeing a right to equal benefits from state educational systems supported by general tax funds. But there is no evidence whatever showing that for its sponsors the civil rights formula had anything to do with unsegregated public schools; Wilson, its sponsor in the House, specifically disclaimed any such notion. Similarly, it is plain that the Moderates did not intend to confer any right of intermarriage, the right to sit on juries, or the right to vote.

Civil rights protection was first extended by the Freedmen’s Bureau Bill. This was not a closely debated measure, because it was limited in duration and territorial applicability. The Conservative votes cast in its favor mark it as a sacrificial offering on the altar of Radicalism, not seriously considered on its own merits.

¹¹¹ GLOBE 3148-49.

When the same formula was next brought forth in the Civil Rights Bill, it evoked warnings from the Democratic and Conservative opposition in the Senate, which argued that the phrase "civil rights" might well be construed to include more rights than its sponsors intended to affect. One of the warnings related to segregation. The Moderates were unmoved, and the bill was carried in the Senate.

The Joint Committee in the meantime was dealing with the same problem. It elected not to use the civil rights formula and offered instead, in the Bingham amendment, equal protection "in the rights of life, liberty and property," plus a privileges and immunities clause. Given the evils represented by the Black Codes, which were foremost in the minds of all men, it must be supposed that this language was deemed to protect all the rights specifically enumerated in the Civil Rights Bill. But it is difficult to interpret the deliberate choice against using the term "civil rights" as anything but a rejection of what were deemed its wider implications.

The Bingham amendment did not act directly on the states. It was an unconditional grant of power to Congress, like the older grants of legislative power; and like them it was bolstered by a necessary and proper clause. This feature made it unacceptable to Moderates like Hale. The fact that the amendment itself gave no assurance of permanent protection cost the support of some Radicals. On these grounds the proposal went down to defeat. There were some questions raised also concerning the kind of rights covered, and Bingham rather clumsily responded by suggesting the Moderate position on the Civil Rights Bill, but this was completely secondary. Only Rogers, a partisan given to extreme accusations, spoke of this proposal as if there had been no difference between it and a "civil rights" guaranty.

The Civil Rights Bill itself, as brought from the Senate to the House, split the alliance of various shades of Moderates and Radicals which constituted the Republican majority. The bill was presented to the House as a measure of limited objectives, following Trumbull's views. But a substantial number of Republicans were troubled by the issue of constitutionality. Others were uneasy on policy grounds about the reach of section 1, but inclined to believe that the bill could be rendered constitutional by amendment, and, in any event, out of mixed motives at which one can only guess, conquered their apprehensions and voted for it in the end. Bingham, whose position was in this instance entirely self-

consistent, thought the bill incurably unconstitutional, its enforcement provisions monstrous, and the civil rights guaranty of very broad application and unwise. The concession these Republicans wrung from the leadership was the elimination of the civil rights formula and thus the avoidance of possible "latitudinarian" construction. The Moderate position that the bill dealt only with a distinct and limited set of rights was conclusively validated.

Against this backdrop, the Joint Committee on Reconstruction began framing the fourteenth amendment. In drafting section 1, it vacillated between the civil rights formula and language proposed by Bingham, finally adopting the latter. Stevens' speech opening debate on the amendment in the House presented section 1 in terms quite similar to the Moderate position on the Civil Rights Bill, though there was a rather notable absence of the disclaimers of wider coverage which usually accompanied the Moderates' statements of objectives. A few remarks made in the Senate sounded in the same vein. For the rest, however, section 1 was not really debated. Rogers, whose remarks are always subject to heavy discount, considering his shaky position in the affections of his own party colleagues, raised "latitudinarian" alarms. One or two other Democrats in the House did so also. But more and more, debate turned on section 3 and not much else. The focus of attention is well indicated by Stevens' brief address immediately before the first vote in the House. In this atmosphere, section 1 became the subject of a stock generalization: it was dismissed as embodying and, in one sense for the Republicans, in another for the Democrats and Conservatives, "constitutionalizing" the Civil Rights Act.

The obvious conclusion to which the evidence, thus summarized, easily leads is that section 1 of the fourteenth amendment, like section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation. This conclusion is supported by the blunt expression of disappointment to which Thaddeus Stevens gave vent in the House. Nothing in the election campaign of 1866 or in the ratification proceedings negates it. Section 1 received in both about the attention it had received in Congress, and in about the same terms.¹¹² One or two

¹¹² On the issues of the campaign of 1866, see BEALE, *THE CRITICAL YEAR* (1930); with specific reference to § 1 of the fourteenth amendment, see Fairman,

"reconstructed" Southern legislatures took what turned out, of course, to be temporary measures to abolish segregation.¹¹³ There is little if any indication of an impression prevailing elsewhere that the amendment required such action.

If the fourteenth amendment were a statute, a court might very well hold, on the basis of what has been said so far, that it was foreclosed from applying it to segregation in public schools. The evidence of congressional purpose is as clear as such evidence is likely to be, and no language barrier stands in the way of construing the section in conformity with it. But we are dealing with a constitutional amendment, not a statute. The tradition of a broadly worded organic law not frequently or lightly amended was well-established by 1866, and, despite the somewhat revolutionary fervor with which the Radicals were pressing their changes, it cannot be assumed that they or anyone else expected or wished the future role of the Constitution in the scheme of American government to differ from the past. Should not the search for congressional purpose, therefore, properly be twofold? One inquiry should be directed at the congressional understanding of the immediate effect of the enactment on conditions then present. Another should aim to discover what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.

That the Court saw the need for two such inquiries with respect to the original understanding on segregation is clearly indicated by the questions it propounded at the 1952 Term.¹¹⁴ The Court asked first whether Congress and the state legislatures contemplated that the fourteenth amendment would abolish segregation in public schools. It next asked whether, assuming that the immediate abolition of segregation was not contemplated, the framers nevertheless understood that Congress acting under section 5, or the Court in the exercise of the judicial function would, in light of future conditions, have power to abolish segregation.

With this double aspect of the inquiry in mind, certain other

supra note 13, at 69-78. For a survey of ratification materials, see *id.* at 84-126. The state materials are most thoroughly reviewed in the appendix to the Government's brief as amicus in the *Segregation Cases*. Appendix to the Supplemental Brief for the United States on Reargument, Nos. 1, 2, 4, 8, 10, at 160-393, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹¹³ LA. CONST. art. 135 (1868); *cf.* LA. CONST. art. 224 (1879); LA. CONST. art. 248 (1898). S.C. CONST. art. X (1868) (*semble*); *cf.* S.C. CONST. art. XI (1895).

¹¹⁴ See note 16 *supra*.

features of the legislative history — not inconsistent with the conclusion earlier stated, but complementary to it — became significant. Thus, section 1 of the fourteenth amendment, on its face, deals not only with racial discrimination, but also with discrimination whether or not based on color. This cannot have been accidental, since the alternative considered by the Joint Committee, the civil rights formula, did apply only to racial discrimination. Everyone's immediate preoccupation in the 39th Congress — insofar as it did not go to partisan questions — was, of course, with hardships being visited on the colored race. Yet the fact that the proposed constitutional amendment was couched in more general terms could not have escaped those who voted for it. And this feature of it could not have been deemed to be included in the standard identification of section 1 with the Civil Rights Act. Again, when it rejected the civil rights formula in reporting out the abortive Bingham amendment, the Joint Committee elected to submit an equal protection clause limited to the rights of life, liberty, and property, supplemented by a necessary and proper clause. Now the choice was in favor of a due process clause limited the way the equal protection clause had been in the earlier draft, but of an equal protection clause not so limited: equal protection "of the laws." Presumably the lesson taught by the defeat of the Bingham amendment had been learned. Congress was not to have unlimited discretion, and it was not to have the leeway represented by "necessary and proper" power.¹¹⁵ One would have to assume a lack of familiarity with the English language to conclude that a further difference between the Bingham amendment and the new proposal was not also perceived, namely, the difference between equal protection in the rights of life, liberty, and property, a phrase which so aptly evoked the evils uppermost in men's minds at the time, and equal protection of the laws, a clause

¹¹⁵ In 1871, in the course of the debate on the Act of April 20, 1871 (Ku Klux Act), c. 22, 17 STAT. 13, Bingham argued the contrary. He contended that Congress had no less power to legislate under the fourteenth amendment than it would have had under his own earlier, rejected proposal. In other words, he attached no significance whatever to the defeat of that proposal. That is, of course, a rather arbitrary way to deal with the materials. As James A. Garfield had occasion to tell Bingham, "my colleague can make but he cannot unmake history." CONG. GLOBE, APP., 42d Cong., 1st Sess. 83-86, 113-17, 151 (1871); see Fairman, *supra* note 13, at 136-37; FLACK, *op. cit. supra* note 54, at 226-49. Bingham's view evidently prevailed in Congress, but the Supreme Court, without reference to the legislative history and dealing simply with the language of the fourteenth amendment on its face, saw it otherwise. *United States v. Harris*, 106 U.S. 629 (1883).

which is plainly capable of being applied to all subjects of state legislation. Could the comparison have failed to leave the implication that the new phrase, while it did not necessarily, and certainly not expressly, carry greater coverage than the old, was nevertheless roomier, more receptive to "latitudinarian" construction? No one made the point with regard to this particular clause. But in opening debate in the Senate, Jacob Howard was frank to say that only the future could tell just what application the privileges and immunities provision might have. And before the vote in the Senate, Reverdy Johnson, a Democrat, to be sure, but a respected constitutional lawyer and no rabid partisan, confessed his puzzlement about the same clause. Finally, it is noteworthy that the shorthand argument characterizing the fourteenth amendment as the constitutional embodiment of the Civil Rights Act was often accompanied on the Republican side by generalities about the self-evident demands of justice and the natural rights of man. This was true both in Congress and in the course of the election which followed.¹¹⁶ To all this should be added the fact that while the Joint Committee's rejection of the civil rights formula is quite manifest, there is implicit also in its choice of language a rejection — presumably as inappropriate in a constitutional provision — of such a specific and exclusive enumeration of rights as appeared in section 1 of the Civil Rights Act.

These bits and pieces of additional evidence do not contradict and could not in any event override the direct proof showing the specific evils at which the great body of congressional opinion thought it was striking. But perhaps they provide sufficient basis for the formulation of an additional hypothesis. It remains true that an explicit provision going further than the Civil Rights Act could not have been carried in the 39th Congress; also that a plenary grant of legislative power such as the Bingham amendment would not have mustered the necessary majority. But may it not be that the Moderates and the Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances? This is thoroughly consistent with rejection of the civil rights formula and its implications. That formula could not serve the purpose of

¹¹⁶ See note 112 *supra*.

such a compromise. It had been under heavy attack at this session, and among those who had expressed fears concerning its reach were Republicans who would have to go forth and stand on the platform of the fourteenth amendment. Bingham, of course, was one of these men, and he could not be required to go on the hustings and risk being made to eat his own words. If the party was to unite behind a compromise which consisted neither of an exclusive listing of a limited series of rights, nor of a formulation dangerously vulnerable to attacks pandering to the prejudices of the people, new language had to be found. Bingham himself supplied it. It had both sweep and the appearance of a careful enumeration of rights, and it had a ring to echo in the national memory of libertarian beginnings. To put it another way, the Moderates, with a bit of timely assistance from Fessenden's varioloid, consolidated the victory they had achieved in the Civil Rights Act debate. They could go forth and honestly defend themselves against charges that on the day after ratification Negroes were going to become white men's "social equals," marry their daughters, vote in their elections, sit on their juries, and attend schools with their children. The Radicals (though they had to compromise once more on section 3) obtained what early in the session had seemed a very uncertain prize indeed: a firm alliance, under Radical leadership, with the Moderates in the struggle against the President, and thus a good, clear chance at increasing and prolonging their political power. In the future, the Radicals could, in one way or another, put through such further civil rights provisions as they thought the country would take, without being subject to the sort of effective constitutional objections which haunted them when they were forced to operate under the thirteenth amendment.

It is, of course, giving the men of the 39th Congress much more than their due to ennoble them by a comparison of their proceedings with the deliberations of the Philadelphia Convention. Yet if this was the compromise that was struck, then these men emulated the technique of the original framers, who were also responsible to an electorate only partly receptive to the fullness of their principles, and who similarly avoided the explicit grant of some powers without foreclosing their future assumption.¹¹⁷ Whatever other support this hypothesis may have, it has behind it the very authoritative voice of Thaddeus Stevens, who held it, and twice

¹¹⁷ See Thayer, *supra* note 14, at 75-78, and especially at 78 n.2.

gave notice of it in speaking on the fourteenth amendment. It was Stevens who dutifully defined section 1 more or less in the narrow terms a Trumbull or a Fessenden would have used; it fell short of his wishes. And it was Stevens, his hopes fulfilled, who powerfully and candidly emphasized the political opportunities which the amendment gained for the Radicals, and who looked to the future for better things "in further legislation, in enabling acts or other provisions." Similarly, when it at last emerged, though too late to influence debate, the report of the Joint Committee submitted the amendment "in the hope that its imperfections may be cured and its deficiencies supplied, by legislative wisdom" ¹¹⁸ It need hardly be added that in view of Stevens' remarks, and in view also of the nature of the other evidence which supports it, this hypothesis cannot be disparaged as putting forth an undisclosed, conspiratorial purpose such as has been imputed to Bingham and others with regard to protection of corporations.¹¹⁹ Indeed, no specific purpose going beyond the coverage of the Civil Rights Act is suggested; rather an awareness on the part of these framers that it was *a constitution* they were writing, which led to a choice of language capable of growth.

It is such a reading as this of the original understanding, in response to the second of the questions propounded by the Court, that the Chief Justice must have had in mind when he termed the materials "inconclusive." For up to this point they tell a clear story and are anything but inconclusive. From this point on the word is apt, since the interpretation of the evidence just set out comes only to this, that the question of giving greater protection than was extended by the Civil Rights Act was deferred, was left open, to be decided another day under a constitutional provision with more scope than the unserviceable thirteenth amendment. Some no doubt felt more certain than others that the new amendment would make possible further strides toward the ideal of equality. That remained to be decided, and there is no indication of the way in which anyone thought the decision would go on any given specific issue.¹²⁰ It depended a good deal on the trend in

¹¹⁸ See note 97 *supra*.

¹¹⁹ See note 13 *supra*.

¹²⁰ Much has been made of the abolitionist antecedents of a number of men prominent in the 39th Congress, among them Stevens, and—a little more dubiously—Bingham. And it has been contended that terms similar to those used by Bingham in § 1 of the fourteenth amendment had been widely advertised abolitionist clichés, which were well understood by the country as embodying the

public opinion. Actually, one of the things the Radicals had contended for throughout the session, and doubtless considered that they gained by the final compromise, was time and the chance to educate the public. Such expectations as the Radicals had were centered quite clearly on legislative action. At least this holds true for Stevens. These men were aware of the power the Court could exercise. They were for the most part bitterly aware of it, having long fought such decisions as the *Dred Scott* case. Most probably they had little hope that the Court would play a role in furthering their long-range objectives. But the relevant point is that the Radical leadership succeeded in obtaining a provision whose future effect was left to future determination. The fact that they themselves expected such a future determination to be made in Congress is not controlling. It merely reflects their estimate that men of their view were more likely to prevail in the legislature than in other branches of the government. It indicates no judgment about the powers and functions properly to be exercised by the other branches.

Had the Court in the *Segregation Cases* stopped short of the inconclusive answer to the second of its questions handed down at the previous term, it would have been faced with one of two unfortunate choices. It could have deemed itself bound by the legislative history showing the immediate objectives to which section 1 of the fourteenth amendment was addressed, and rather clearly demonstrating that it was not expected in 1866 to apply to segregation. The Court would in that event also have repudiated much of the provision's "line of growth." For it is as clear that section 1 was not deemed in 1866 to deal with jury service and other matters "implicit in . . . ordered liberty"¹²¹ to which the Court has since

fullness of the abolitionist doctrine. See TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610. Yet even among the abolitionists there were differences of view concerning the extent to which uncompromising egalitarian principles should be applied—suddenly and indiscriminately—to the Negro. See NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860* (1949). And it is always dangerous to assume that men—especially men of a revolutionary persuasion—who have achieved power act on principles they espoused while in violent opposition. Be that as it may, the abolitionist past of some Radicals can, in view of all the evidence, be relevant to only one facet of the compromise they accepted; it helps to indicate not what they believed they were achieving immediately, but what they hoped was open to future achievement.

¹²¹ Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

applied it.¹²² Secondly, the Court could have faced the embarrassment of going counter to what it took to be the original understanding, and of formulating, as it has not often needed to do in the past, an explicit theory rationalizing such a course. The Court, of course, made neither choice. It was able to avoid the dilemma because the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866.

¹²² *E.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Norris v. Alabama*, 294 U.S. 587 (1935) (jury service). The Court has also, in the changed circumstances created by the fifteenth amendment, applied the equal protection clause of the fourteenth to the right to vote. *Nixon v. Herndon*, 273 U.S. 536 (1927); *cf.* *Smith v. Allwright*, 321 U.S. 649 (1944).