# Does the Fourteenth Amendment Incorporate the Bill of Rights?

## The Original Understanding

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*My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the Barron decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.*—Mr. Justice Black dissenting, in Adamson v. California, 332 U.S. 46, 71 (1947).

The question to be explored is, was this the understanding of the import of the privileges and immunities, due process, and equal protection clauses of Section 1 of the Fourteenth Amendment, or of any one of those clauses, at the time the Amendment was adopted? This involves an attempt to apprehend the views of the members of the Congress that proposed the Amendment, and to appreciate the significance of the action of the state legislatures when they considered ratification.

This is not a merely academic question. It presents itself insistently today because Justices of the Supreme Court are prepared to make decisions turn upon their reading of the historical record. The conclusion of the minority in the *Adamson* case,[1] in June 1947, that a fresh reading of the history warranted the overturning of a long line of decisions, was reaffirmed by the same Justices in *Wolf v. Colorado*[2] in June 1949. The line of cases is discussed by my colleague, Professor Morrison, in the article that follows.[3] The present discussion looks to events in 1866–68 or soon

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1. Adamson v. California, 332 U.S. 46 (1947).
2. 338 U.S. 25 (1949).
3. See p. 140 *infra*.

enough thereafter to be evidence of the contemporary understanding.

As Professor Morrison shows, the contention that the Fourteenth Amendment embraces the federal Bill of Rights has come up in the Court on several occasions. But now appeal is made to the history of the adoption, and a "full consideration"[4] of the evidence is urged. This inevitably requires a good deal of paper and ink. It will not suffice to run through the debates in Congress, culling the passages where someone said "bill of rights." One needs to catch the spirit of the occasion, to listen patiently to speeches referring even obliquely to our subject, to consider reflectively the necessary implication of comments on drafting that culminated in the clauses of Section 1. Then there is the matter of what was said in the summer and autumn of 1866, when the proposed Amendment was before the country, and after that the record in each state wherein the Amendment was considered.

It is in order to set out in full all the relevant evidence at hand. Summaries and paraphrases are not acceptable. For some conclusions of others will be challenged, and it is fair to permit the reader to judge for himself upon the evidence. Moreover, the marshaling of evidence from the several states has involved materials not conveniently available for consultation. It seems useful to set them out in one place.

We turn first to the background of the Amendment, in the history of the first session of the 39th Congress.

## I

On Monday, December 4, 1865, the 39th Congress convened for its first session. On that day Representative Thaddeus Stevens of Pennsylvania offered a resolution creating a Joint Committee, nine Representatives and six Senators, 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."[5] This measure was adopted on December 13,[6] and so brought into being the Joint

4. Black, J., 332 U.S. 46, 72 (1947).

5. CONG. GLOBE, 39th Cong., 1st Sess. 6 (1865–66).

6. *Id.* at 30, 47.

Committee on Reconstruction, the "Committee of Fifteen," wherein the Fourteenth Amendment originated.

On January 5, 1866, Senator Trumbull of Illinois introduced S. No. 60, to enlarge the powers of the Freedmen's Bureau, and S. No. 61, to protect all persons in the United States in their civil rights.[7] These bills were referred to the Committee on the Judiciary, of which Trumbull was chairman. They were reported on January 11.[8] The Freedmen's Bureau Bill provided (§ 7) that whenever any state formerly in rebellion denied on account of color the civil rights and immunities belonging to white persons, including the rights to contract, sue, give evidence, take, hold, and convey property, and enjoy the equal benefit of laws for the security of person and estate, it should be the duty of the President to extend military protection to the persons affected by such discrimination. The bill further provided (§ 8) that any person depriving the freedman of civil rights secured to white persons should be subject to fine and imprisonment upon conviction before the Freedmen's Bureau.[9] This measure, on being passed, was vetoed by President Johnson.[10] The Senate vote to override the veto stood 30 to 18, less than the requisite two-thirds.[11] We need to take this brief note of the Freedmen's Bureau Bill only because of its relation to the Civil Rights Bill, which in turn was intimately related to the joint resolution submitting the Fourteenth Amendment.

The Civil Rights Bill, which became the Act of April 9, 1866,[12] wrote into law that persons born in the United States and not subject to any foreign power were citizens of the United States; that such citizens, without regard to color, were entitled in every state and territory to the same right to contract, sue, give evidence, and take, hold, and convey property, and to the equal benefit of all laws for the security of person and property, as was enjoyed by white citizens; and that any person who under color of law caused any such civil right to be denied would be guilty of a federal offense.

Whereas the Freedmen's Bureau Bill had been aimed at con-

7. *Id.* at 129.
8. *Id.* at 184.
9. *Id.* at 209.
10. *Id.* at 915.
11. *Id.* at 943.
12. 14 STAT. 27 (1866).

ditions in states that had attempted to secede, and thus could invoke constitutional powers arising from the rebellion, the Civil Rights Bill operated throughout the country and so must find its authority in constitutional principles of general application. Did Congress have power, as a means of enforcing the Thirteenth Amendment or on other grounds, so far to control the civil rights within the several states as to forbid discrimination against the freedman? Obviously a debate on that question would run in terms of the privileges of citizens of the United States, the security of life, liberty, and property, and the equal protection of the laws. The same topics, of course, were being considered in framing the constitutional amendment that was to be the basis on which the Southern States would be restored to their place in the Union. Thus much that was said on the Civil Rights Bill proves meaningful in a study of the understanding on which the Fourteenth Amendment was based. (See chart facing page 134 *infra.*)

Here in chronological order are the stages to be examined:

Civil Rights Bill in the Senate—debate between January 29 and February 2, 1866.

Joint Committee on Reconstruction—discussion between January 12 and February 10, produced a draft amendment on privileges and immunities and equal protection.

Debate on this draft in the House of Representatives—February 26 to 28, ending in postponement.

Civil Rights Bill in the House of Representatives—in early March.

Joint Committee framed the Fourteenth Amendment—April 21 to 28.

Debate on the Amendment in the House of Representatives—May 8 to 10.

Debate in the Senate—May 30 and June 4 to 8.

We shall be sifting the historical evidence on a fine point of great present interest. But we must not suppose that the men who fashioned the Fourteenth Amendment were concentered upon our nice constitutional question. Whether the freedman should be given the suffrage, what should be the new basis of representation in Congress and what would be the consequences for the two parties, how could the Confederate leaders best be excluded from the councils of the nation—political questions such as these dominated the hour. No one could foresee that Section 2 would prove abortive—that the most interesting feature of Section 1, the privi-

leges and immunities clause, would be virtually read out of the Constitution in 1873[13]—that the due process clause would become, from the point of view of litigation, one of the two most important clauses in the entire Constitution—or that it would be the judiciary, not the Congress, that most concerned itself with the protection of life, liberty, and property. We know so much more about the constitutional law of the Fourteenth Amendment than the men who adopted it that we should remind ourselves not to be surprised to find them vague where we want them to prove sharp. Eighty years of adjudication has taught us distinctions and subtleties where the men of 1866 did not even perceive the need for analysis.

We need to remind ourselves, too, that that was the Age of Hate in American politics—that a tremendous struggle was going on within the party that had saved the Union and between the Congressional leaders and the President. In inducing Congress to set up a Joint Committee to establish the basis for reconstruction, the Radical leaders had stolen a march,[14] and in working out the Amendment and marshaling the Republican Party behind it these Radicals were exploiting their initial success. We shall isolate and magnify one line of constitutional development: a participant, could he have been presented with this perspective, would doubtless have thought it yielded a highly selective and artificial view of the entire episode. We should constantly make allowance for the distortion we inevitably produce by concentrating upon Section 1 of the Amendment.

## II

Certain authorities on the "privileges and immunities of citizens in the several States" (Art. IV, § 2), repeatedly quoted in the debates of 1866, will for convenience be given a critical examination at the outset. This will save time in the long run: when they are encountered their import will at once be apparent. First, of course, comes the opinion of Justice Washington on the circuit in

13. Slaughter-House Cases, 16 Wall. 36 (U.S. 1873).

14. "The Committee on Reconstruction, invented by Stevens, of Pennsylvania, and sprung upon Congress at the very opening of the session, was a shrewd trap to ensnare those republican members who are inclined to be conservative and to support the President." New York Herald, Jan. 18, 1866, p. 2, col. 3. The matter is discussed in KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 133 *et seq.* (1914); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 11 *et seq.* (1908).

*Corfield v. Coryell.*[15] Plaintiff had sailed his boat into the waters of New Jersey and there taken oysters, although a State law declared that "it shall not be lawful for any person who is not at the time an actual inhabitant or resident" so to do. His boat was seized, and he sued in trespass. Was New Jersey's reservation of its oysters inconsistent with Section 2 of Article IV? Washington, Cir. J., held the question under advisement from October term 1824 until April term 1825, and then gave this opinion, certainly one of the most famous pronouncements ever made in a circuit court:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

The words are sonorous. They have been quoted so often that one's mind may have been lulled into acquiescence. What did

15. 6 Fed. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823).

Washington mean? The actual holding was easy to state: Article IV, Section 2 did not give the citizens of other states the privilege of membership in this fishing club. The Justice might have decided that much without exploring the entire range of the constitutional provision. But no doubt it seemed important to run a preliminary survey establishing the main outlines of this Section of the new Constitution: Marshall, too, was staking out the controlling lines in such contemporary cases as *Gibbons v. Ogden*[16] and *Brown v. Maryland*.[17] But Justice Washington's preliminary sketch was badly confused. The really controlling question is, does Article IV, Section 2 take as its measure the rights enjoyed by the citizens of the state in question, merely requiring that the visitor be treated like the local citizen?[18] Or does the Section look to some national, perhaps some natural, standard?[19] Justice Washington felt "no hesitation" in confining the privileges to such as are "fundamental." Did he mean merely that of the rights being enjoyed by Marylanders, the visitor was entitled not to *all*—e.g., not to Maryland's special preserve of oysters—but only to the general range of really essential rights such as one found established throughout America? If this was the thought, then the enumeration gives an idea of which among the rights locally accorded are "fundamental" in maintaining the "mutual friendship" among the people of the different states—e.g., police protection and access to the courts, the right to hold property and to engage in trade, and nondiscriminatory treatment in taxation. Supposing this to have been the thought—and it may well be that that was all that was intended—still the language was unguarded. The visitor was entitled to engage in "professional pursuits." But think of the profession with which Justice Washington was best acquainted: certainly the attorney could not come in and practice without admission to the local bar—and did the Justice really mean that the state might not make state citizenship a requisite to admission? The list even included "the elective franchise, as regulated and established" by the local law. But surely, participation in Maryland's elections was even more intimately an affair for only Marylanders than sharing the local oysters. True enough, the citizen of

16. 9 Wheat. 1 (U.S. 1824).
17. 12 Wheat. 419 (U.S. 1827).
18. Slaughter-House Cases, 16 Wall. 36, 77 (U.S. 1873), per Miller, J.
19. *Id.*, per Field, J., dissenting, 83 at 95 *et seq.*

another state might by removing to Maryland cast off his old citizenship and, without formal naturalization, become a citizen of Maryland; then, on meeting the requirements, he could become a local voter. But if this is all that Justice Washington meant, he was really describing a situation where it was no longer a case of the citizen of one state claiming rights in a state not his own.

Portions of the passage rather suggest, however, that Justice Washington, subconsciously at least, was thinking of the rights of man as the law of nature conceives them, and was saying that Article IV, Section 2 means that every American is entitled to those rights in any state wherein he is a visitor. "Privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments"—this sounds like pure natural law. If "all free governments" was more than a careless phrase, what, in Washington's thought, were the world's free governments in 1825? Where, save in the Anglo-American jurisdictions, could one find the writ of habeas corpus, which is mentioned in his list of fundamentals?

The confusion in this authoritative discussion of the "privileges and immunities" of Article IV, Section 2 has been dwelt upon because of the importance of *Corfield v. Coryell* in the debates of 1866. If we find Congressmen relying upon that opinion without any apparent awareness of its obscurity, we may surmise that their own thinking too was obscure.

There was no ambiguity in Story's *Commentaries*[20] on this point: Article IV, Section 2 was "plain and simple in its language, and its object is not easily to be mistaken." "The intention of this clause was to confer on them [the citizens of each state], if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same States would be entitled to under the like circumstances"—i.e., the local measure, applied without discrimination.

There were, to be sure, a good many references to Article IV, Section 2 in cases reported prior to 1866. But since we seek to understand the thinking of the men of 1866, it will be well to concentrate upon what they cited, attributing to them no deeper research or reflection than is disclosed in their speeches. Two state court cases were quoted: *Campbell v. Morris*[21] and *Abbot v. Bay-*

20. 2 STORY, COMM. § 1806 (4th ed. 1873).
21. 3 H. & McH. 535 (Md. 1797).

*ley*[22]—and their partiality to these not very helpful references suggests that they knew nothing better to quote.

Campbell, a citizen of Maryland, was proceeding against Robert Morris of Pennsylvania, the great patriot and debtor. Maryland law gave the local creditor an attachment on the property of one not a citizen or resident of the State, and also upon that of a local citizen who had actually absconded. Did this deny the Pennsylvania debtor any privilege or immunity within the meaning of Article IV, Section 2? Justice Samuel Chase, sitting in the General Court, gave this construction of the clause:

> It seems agreed, from the manner of expounding, or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected. The Court are of opinion it means that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State, in the same manner as the property of the citizens of the State is protected. It means, such property shall not be liable to any taxes, or burdens which the property of the citizens is not subject to. It may also mean, that as creditors, they shall be on the same footing with the State creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights.
>
> The way to expound a clause in the general government or Constitution of the United States, is by comparing it with other parts, and considering them together; and to lay a foundation for a right exposition in the present case, it will be proper to suggest a few plain principles.
>
> 1st. That Congress can exercise no power as a legislative body but what is vested in them by the Constitution; it being under and by virtue of that instrument alone they derive their power.
>
> 2d. All power, jurisdiction, and rights of sovereignty, not granted by the people by that instrument, or relinquished, are still retained by them in their several States, and in their respective State Legislatures, according to their forms of government.
>
> Uniformity of laws in the States is contemplated by the general government only in two cases, on the subject of bankruptcies and naturalization.
>
> The legislative powers of Congress are particularly defined in the 8th section of the 1st Article.
>
> Those powers do not interfere with, or abridge, the power of the

22. 6 Pick. 89 (Mass. 1827).

> States to make local regulations, the operation of which is confined to the State.
>
> . . . . . .
>
> This proceeding by attachment is to compel an appearance, and the attachment, by the defendant's appearing and giving bail, would be dissolved; and he would be in the same situation with any citizen of this State taken on a *capias ad respondendum*, who appears and gives bail to the suit, and so will his property.
>
> It would be a strange complaint for a citizen of Pennsylvania, to make, that he was not allowed the same immunities and privileges with a citizen of Maryland, which he is informed he may enjoy by conforming to the laws of the State, in appearing and giving bail to the suit commenced against him.

Gabriel Duval, J., sat with Judge Chase.

Evidently it is the existing local system of rights, not a standard set by national or natural law, to which the citizen from out-of-state is entitled. Although the limited scope of the federal legislative power is mentioned, the case did not hold that Congress had no power to correct a situation wherein a state had failed in its duties under Article IV, Section 2. That was a great point in the debates of 1866. Representative Bingham in particular stressed the view that the want of congressional power to compel obedience to Article IV, Section 2 was a deficiency that cried for a constitutional amendment. But this problem was not involved or considered in *Campbell v. Morris*.

In *Abbot v. Bayley* a married woman resident in Massachusetts brought a suit in a state court. Her husband in New Hampshire had driven her from home, and she had established domicile in Massachusetts. Defendant argued that the privileges and immunities clause required that the Massachusetts court regard the husband in New Hampshire just as though he were present in Massachusetts, with the result that the wife could not sue as *feme sole*. In denying this far-fetched contention Chief Justice Parker said:

> The jurisdiction of the several States as such, are distinct, and in most respects foreign. The constitution of the United States makes the people of the United States subjects of one government *quoad* every thing within the national power and jurisdiction, but leaves them subjects of separate and distinct governments. The privileges and immunities secured to the people of each State in every other State, can be applied only in case of removal from one State into another. By such removal

> they become citizens of the adopted State without naturalization, and have a right to sue and be sued as citizens; and yet this privilege is qualified and not absolute, for they cannot enjoy the right of suffrage or of eligibility to office, without such term of residence as shall be prescribed by the constitution and laws of the State into which they shall remove. They shall have the privileges and immunities of citizens, that is, they shall not be deemed aliens, but may take and hold real estate, and may, according to the laws of such State, eventually enjoy the full rights of citizenship without the necessity of being naturalized. The constitutional provision referred to is necessarily limited and qualified, for it cannot be pretended that a citizen of Rhode Island coming into this State to live, is *ipso facto* entitled to the full privileges of a citizen, if any term of residence is prescribed as preliminary to the exercise of political or municipal rights. The several States then, remain sovereign to some purposes, and foreign to each other, as before the adoption of the constitution of the United States, and especially in regard to the administration of justice, and in the regulation of property and estates, the laws of marriage and divorce, and the protection of the persons of those who live under their jurisdiction. No process can go from one State into another, nor can the citizen of one State be made amenable to the laws of another, unless he come within its jurisdiction. Why then should not New Hampshire be considered a foreign state in reference to the case before us, as well as Canada or Nova Scotia?

Volume 4 of Washington's Circuit Court Reports, containing *Corfield v. Coryell*, appeared in 1827—the year *Abbot v. Bayley* was decided. Parker, C.J., did not mention the case and so far as appears had not heard of it. Article IV, Section 2 conveyed no suggestion of universal natural rights to the Massachusetts court; the facts of the case led them to emphasize the point that each state was in many respects sovereign, and that the American from out-of-state was entitled to local privileges only upon satisfying established requirements.

## III

Debate on the Civil Rights Bill began on January 29, 1866, Senator Trumbull opening with an exposition of the constitutional ground on which it rested.[23] "The basis of the whole bill" lay in its first Section which, in brief, made these provisions: (1) no discrimination in civil rights on account of race; and (2) inhabitants of every race should have the same right to contract, sue, take

23. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1865–66).

and dispose of property, and to equal benefit of all laws for the security of person and property.

The measure, Trumbull explained, was "intended to give effect" to the Thirteenth Amendment and to "secure to all persons within the United States practical freedom." Of what avail had been the abstract truths enunciated in the Declaration of Independence—Trumbull quoted the familiar phrases—to the millions of slaves? "Of what avail was it to the citizen of Massachusetts who, a few years ago, went to South Carolina to enforce a constitutional right in court,"[24] that the Constitution contained Article IV, Section 2? Of what avail would the Amendment now be if "in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?"

"It is the intention of this bill to secure these rights." (What rights? Seemingly the "inalienable rights" mentioned in the Declaration of Independence and — perhaps the same thing in Trumbull's mind—the "privileges and immunities" of Article IV, Section 2.)

Trumbull referred to recent legislation in the Southern States, discriminating against the freedmen. "Liberty and slavery are opposite terms," he said. So "an unjust encroachment upon [the citizens'] liberty" was "a badge of servitude which, by the Constitution, is prohibited." Establish what is "liberty," then a denial thereof would be "slavery" and hence within the prohibition of the Thirteenth Amendment, which Congress had authority to enforce.

To find the meaning of "liberty," Trumbull went to Blackstone, who distinguished between "natural liberty"—part of which "every man who enters society gives up"—and "civil liberty." "Civil liberty [said Blackstone] is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general advantages of the public." And, Trumbull continued, "in a note to Blackstone's *Commentaries*[25]

24. Samuel Hoar, retained by the Commonwealth of Massachusetts to test the validity of South Carolina legislation whereby Negro seamen were held in jail while their vessel was in port, with liability to be sold into slavery if the jail fees were not paid. Hoar was forced to depart under the menace of mob violence. See article on Hoar in DICTIONARY OF AM. BIOGRAPHY (1932); also 12 MEMOIRS OF JOHN QUINCY ADAMS 119 (1877).

25. Trumbull was quoting 1 BL. COMM. *125; the note appears in footnote 5 to Sharwood's edition.

it is stated that 'In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.' " So governmental action that was not as nearly equal to all "as the nature of things will admit" was a denial of liberty and thus a badge of slavery which Congress had power to abate.

It will be helpful, continued Trumbull, to inquire what are the "privileges and immunities of citizens in the several States" (Art. IV, § 2). They are "such fundamental rights as belong to every free person." Then, as though it were consistent with this proposition, the statement in Story's *Commentaries*[26] was quoted (although, as we have seen above, Story said rather that they were only the rights to which the local citizen would be entitled under the like circumstances). *Campbell v. Morris*,[27] *Abbot v. Bayley*,[28] and *Corfield v. Coryell*[29] were then quoted, quite uncritically—noting that by including the suffrage, Washington, J., had gone even beyond the Civil Rights Bill—and the conclusion was reached that "in all events he [the citizen] is entitled to the great fundamental rights of life, liberty, and the pursuit of happiness, and the right to travel, to go where he pleases. This is the right which belongs to the citizen of each State." Article IV, Section 2 prescribes the rights to be enjoyed by the citizen of one state in any state not his own; but if these rights are the great natural rights of the Declaration, then of course the citizen is no less entitled to them at home. So in Trumbull's view his next position involved, not a tremendous constitutional broad jump, but only an *a fortiori* observation:

> Now, sir, if that be so, this being the construction as settled by judicial decisions to be put upon the clause of the Constitution to which I have adverted [Recall what those cases had actually laid down!], how much more are the native-born citizens of the State itself entitled to these rights!

It followed that the rights that Trumbull had set out in Section 1 of his bill were well within the fundamental rights proclaimed in the Declaration of Independence and referred to in

26. See note 20 *supra*.
27. See note 21 *supra*.
28. See note 22 *supra*.
29. See note 15 *supra*.

Article IV, Section 2, and that Congress had authority in the Thirteenth Amendment to cause them to be recognized throughout the land.

Senator McDougall of California, Democrat, asked whether "civil rights" included "political rights"—a result that McDougall would have opposed.[30] Trumbull replied: "This bill has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man."

Senator Saulsbury of Delaware, Democrat, characterized the bill as "one of the most dangerous that was ever introduced into the Senate of the United States."[31] There had been many Negroes in Delaware, Maryland, and other states, who were free before the Thirteenth Amendment was adopted. Was the Amendment that abolished slavery so potential as to enable Congress to bestow rights upon the whole free Negro population? He went on to make a number of hard-hitting points on the implications of Trumbull's bill, and concluded that if enacted it would prove "the last act to convert a Federal Government with limited and well-defined powers into an absolute, consolidated despotism."

Senator Reverdy Johnson of Maryland, Democrat, made a number of lawyer's points against the bill—a task for which he was outstandingly qualified.[32] State laws against miscegenation would, he thought, lie within the prohibition of the bill. Senator Fessenden of Maine thought that there was no discrimination in regard to marriage where the white man was no more permitted to marry a black woman than the black man to take a white wife. Johnson felt confident that his construction was the correct one; "but whether I am wrong or not . . . . I suppose all the Senate will admit that the error is not so gross that the courts may not fall into it." He thought that there was no constitutional authority to enact such a measure; but he urged on those that felt otherwise that they should do their best to make the bill free from doubt.

On February 2, 1866, the Civil Rights Bill passed the Senate—33 for, 12 against, 5 absent.[33]

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30. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1865–66).
31. *Ibid.*
32. *Id.* at 505.
33. *Id.* at 606.

## IV

In the meantime the Joint Committee on Reconstruction had set about its mandate to inquire into the condition of the Southern States and to work out a congressional program for reconstruction.[34] The five Republicans on the delegation from the Senate comprised William Pitt Fessenden of Maine (the chairman) and James W. Grimes of Iowa—men of character and standing, who later voted to acquit President Johnson in the impeachment proceedings; also Judge Ira Harris of New York and George H. Williams of Oregon—the latter a weak character whom Grant attempted to elevate to the Chief Justiceship in 1873; and Jacob M. Howard of Michigan, a thorough Radical. It was Howard who reported the Fourteenth Amendment to the Senate, and his statement on that occasion contains the strongest piece of evidence for the view that Section 1 was designed to incorporate the provisions of the federal Bill of Rights into the Fourteenth Amendment. The lone Democrat was Reverdy Johnson of Maryland—never violent in his opinions, an advocate who had been appearing at the Supreme Court bar for forty years and whose first impression on any constitutional question was likely to be more discriminating than the best thought of most of his colleagues in the Senate.

The delegation from the House was led by Thad Stevens of Pennsylvania—astute Radical leader, propounder of the "conquered provinces" theory of reconstruction. Stevens' approach to the Fourteenth Amendment was essentially political: he "didn't care a snap of his finger" what might be put in if the rebels were not excluded for a season from voting in federal elections.[35] The most important of the Representatives, for purposes of our inquiry, was John A. Bingham of Ohio, whom Justice Black describes as the James Madison of Section 1.[36] His colleague on the Committee, Representative George S. Boutwell of Massachusetts, recalled that "The part relating to 'privileges and immunities' came from Mr. Bingham of Ohio. Its euphony and indefiniteness of meaning were a charm to him."[37] Bingham certainly had a great deal to say about arming Congress with power to compel the states to observe

34. Throughout my discussion of proceedings in the Committee I have used the JOURNAL as published with comments by BENJAMIN B. KENDRICK, *op. cit. supra*, note 14.
35. CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1865–66).
36. Adamson v. California, 332 U.S. 46, 74 (1947).
37. 2 SIXTY YEARS OF PUBLIC AFFAIRS 41 (1902).

"the immortal bill of rights," and we shall need to observe him constantly. Roscoe Conkling was another member, who displayed rather a negative interest in Bingham's proposals. Elihu B. Washburne of Illinois, Justin A. Morrill of Vermont, and Henry T. Blow of Missouri were the other Republicans. The minority members of the group from the House were Henry Grider of Kentucky and Andrew Jackson Rogers of New Jersey—the latter a pugnacious partisan who could be counted upon to close aggressively with the enemy in any debate.

At the Committee's third meeting, January 12, 1866, Bingham and Stevens each had a draft amendment. The former's ran: "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 proposed: "All laws, State or national, shall operate impartially and equally on all persons without regard to race or color." Evidently the thought in each was that the Negro should enjoy equally with the white the benefit of the laws.

The proposals were referred to the Subcommittee on the Basis of Representation—five members, including Stevens and Bingham.

On January 20 this version was reported: "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." Discussion showed that this was unsatisfactory, and the text was referred for careful review to a select subcommittee, of which Bingham was a member. On January 27 he reported a new draft which (after slight amendment in the Committee) gave Congress power, etc., "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 every State the same immunities and equal political rights and privileges."

This was certainly poor drafting. Did "full protection" mean that Congress would determine how much protection was "full" and thereupon provide it; or was the intent merely that the states be required to accord to Negroes the full measure of protection that was accorded to whites? "The same immunities": one would ask, same as what? The clause might mean the same for all

throughout the nation—or merely the same for Negroes as for whites in any state. "Political rights" stand in contrast to the "civil rights" which were the subject of all other drafts in the development of Section 1. Woefully faulty as it was, Stevens moved to report this form of constitutional amendment to Congress; but the vote was 5 to 5 and so the motion failed. Bingham voted to report, and thus was apparently satisfied with the provision as it stood. Recall, he himself had reported it to the Committee, and had participated in all the drafting up to this time. It seems beyond question that no language thus far laid before the Committee could, in Bingham's mind, have conveyed the thought that the provisions of Amendments I to VIII were being incorporated in the new amendment.

On February 3, when the Committee resumed the matter, Bingham moved to substitute the following draft of his own:

> Congress shall have power to make all laws which shall be necessary and proper to secure to 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).

This measure was accepted by the Committee, but reporting it to the Houses of Congress was postponed. At its meeting a week later the Committee voted to report—9 voting yea, 5 nay, and 1 being absent. The three Democrats, Senator Harris, and Roscoe Conkling cast the negative votes.

Doubtless the references in parentheses were inserted by Bingham merely to indicate the source of the language; they were omitted from the text as reported to the Houses.

## V

It will be helpful, before we plunge into the record of the difficulties that the Committee's proposal encountered in Congress, to make our own independent analysis of the problem. By the terms of reference, the Committee was to "inquire into the condition" of the ex-Confederate States and to "report whether they, or any of them, are entitled to be represented in either House of Congress. . . . ." So far as civil rights were concerned, the mischief to be remedied was, first of all, discrimination against the

Negro by the government of the state wherein he resided—notably in the "black codes." This was an evil against which Article IV, Section 2 had nothing to say: how the state treated its own inhabitants was beyond the purview of that provision. Far less important, though frequently mentioned as a subsidiary point, was the mistreatment that at times had been meted out in the Southern States to visitors from out-of-state; South Carolina's action in excluding Samuel Hoar of Massachusetts in 1844 was the stock example.[38] This latter type of discrimination was forbidden by Article IV, Section 2; but here the difficulty was that Congress had been given no specific power to compel obedience. Evidently a constitutional amendment that (1) required the state to accord to all its inhabitants the equal protection of its laws, and then (2) gave Congress power to enforce this requirement as well as Article IV, Section 2, would have substantially met both evils. In effect, the rights enjoyed by the white citizen in any state would be the measure of the rights of the local Negro and of the citizen of a sister state. Such an amendment would give the Federal Government no control over the civil rights within any state, save only to require that, whatever they were, they be accorded equally to all. It would have been easy to draft such an amendment.

If, however, the Constitution was to be amended to lay down some further requirement of its own as to the civil rights to be enjoyed within the several states, the problem became very difficult. Before one can draft accurately one must have a clear conception of what one wants to say. Suppose that Congress was to be empowered to enforce something more than merely equal protection under the state law. Would it be authorized to establish civil rights to be enjoyed in all the states? That would amount to a general power over the whole vast field of civil concerns—such as property, contract, and marriage—where theretofore the state had been supreme.

Again, if Congress was to be given power to do *more* than merely to prevent discrimination, yet *less* than to legislate at will upon this enormous subject, what should be the limit of its power? Should it be merely to protect the citizen in the doing of those things that are inherent in federal citizenship, such as going to the seat of the Government? Certainly Congress already had that

38. See note 24 *supra*.

power. Indeed, so far as state action interfered with the exercise of these federal rights, the Court could hold such action *ultra vires* without the aid of any Fourteenth Amendment or any Act of Congress—as was illustrated by *Crandall v. Nevada* in 1868.[39] Or turning to the opposite extreme, should the power extend to the vindication of the "inalienable rights" of 1776, "rights which are the gift of the Creator; which the law does not confer, but only recognizes"?[40] Should the line, perhaps, be so drawn as to include only what is "implicit in the concept of ordered liberty,"[41] "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"?[42] Or should congressional control over the states extend just so far as to compel them to observe the limitations which the Federal Government itself is constrained to observe—by the federal Bill of Rights? Presently we shall find Bingham stating that he wants to give Congress power to require the states to observe "the immortal bill of rights." We shall have to examine closely what that meant.

Was it a sound conception for the Committee to approach the problem from the angle of empowering *Congress* to compel states to satisfy whatever requirements the new amendment should prescribe? If, for instance, "the immortal bill of rights" ought to be obligatory upon the states, ought it not be so by direct operation of the Constitution rather than only in so far as Congress saw fit to impose it? And whatever the constitutional standard that was adopted, would it not be better to look first to a judicial determination as to whether state action had fallen short, with Congress coming in to provide the means to assure compliance? The current of thought in 1866, however, ran strongly in the direction of *congressional* action. Congress was going to shove the President out of the driver's seat; Congress was going to preside over reconstruction. When one realizes how little the men of 1866 foresaw the part the Supreme Court was going to play in working out the Fourteenth Amendment's guaranties of civil rights, it is no wonder that they did not fix their minds squarely on the question the Court had to face in 1873, and which is raised again

39. 6 Wall. 35 (U.S. 1868).
40. Field, J., dissenting, in Slaughter-House Cases, 16 Wall. 36, 83 at 105 (U.S. 1873).
41. Cardozo, J., for the Court, in Palko v. Connecticut, 302 U.S. 319, 325 (1937).
42. Van Devanter, J., for the Court, in Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

today: What is the *standard* by which to test state action alleged to violate the Fourteenth Amendment?

It is not our responsibility here to find answers to the questions that needed to be answered in 1866. It is enough that we, with the wisdom of eighty years' hindsight, have made our own analysis and have discovered the underlying issues. As we pursue the debates in Congress it will often be apparent that a speaker had a very imperfect awareness of the essential difficulty. We shall in each case be watching on two levels—to understand his conceptions, and then to refer those conceptions to the inescapable logic of the problem.

## VI

The constitutional amendment proposed by the Committee of Fifteen was introduced in each House on February 13, 1866.[43] In the Senate it was ordered to lie on the table—and there it remained. Bingham presented his measure to the House. On February 26, 27, and 28 there was a lively debate, culminating in a postponement from which the proposal never emerged. Although this draft came to naught, the debate upon it is a chapter in the evolution of Congressional thought and thus merits careful attention.

The proposal was a grant of *legislative* power—to secure

(1) to all citizens in each State all privileges and immunities of citizens in the several States; and

(2) to all persons in the several States equal protection in the rights to life, liberty, and property.

Bingham's opening speech outlined his conception of the problem.[44] Every word of the proposed amendment, he said, was already in the Constitution, save only the grant of enforcing power to Congress. (This was not literally true, of course. The opening words of the second branch of the proposal were new.)

> 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.

43. As S.R. No. 30 in the Senate, CONG. GLOBE, 39th Cong., 1st Sess. 806 (1865–66); as H.R. No. 63 in the House, *id.* at 813.

44. *Id.* at 1033.

Nothing could be plainer, Bingham continued, than that, had Congress had and exercised this power, there would have been no rebellion.

> I ask the attention of the House to the further consideration that the proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution.

For, recall, "this Constitution" has always been "the supreme law of the land."

> And, sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its continued construction, legislative, executive, and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States.

But, as the world knew, during the last five years, the officers of eleven states,

> in utter disregard of these injunctions of your Constitution, in utter disregard of that official oath which the Constitution required they should severally take and faithfully keep when they entered upon the discharge of their respective duties, have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality.

By order of the Joint Committee on Reconstruction, and "for the purpose of giving to the whole people the care in future of the unity of the Government which constitutes us one people," he proposed this amendment for adoption by the Congress and the loyal people of the whole country.

Because Bingham is a key figure in our inquiry, his point of view is of great significance. A careful reader will have remarked that he held a singular opinion on the constitutional problem. The states had all along been bound to accord the "privileges and immunities" of Article IV, Section 2, but Congress had no power to compel obedience. The states had all along been bound to protect the rights of life, liberty, and property: the Fifth Amendment recognized them and forbade the United States Government to infringe them; but again, Congress had not been given power to compel the states to observe these rights. If a state officer or legislator participated in making or enforcing a state law which,

had such action been in the federal system would have amounted to a denial of the rights of life, liberty, or property, that state officer or legislator thereby violated his oath to observe the Constitution of the United States! But he did it with impunity, because the Fathers had given Congress no power to interfere. This is a novel, and one may think a befuddled construction of the Constitution. So be it. We are trying to catch Bingham's point of view.

Consider Bingham's expression, "these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution." What is the antecedent? Evidently, the "privileges and immunities" (Art. IV, § 2), and the rights of "life, liberty, and property" of the Fifth Amendment—these comprise "the immortal bill of rights." In this spacious gesture Bingham certainly does not seem to be making any particular reference to Amendments I to VIII. Let us take note that, on this occasion at any rate, "the immortal bill of rights" is to Bingham a fine literary phrase not referring precisely to the first eight Amendments.

Had Congress had and exercised the power this amendment would confer, there would have been no rebellion: it is difficult to square this claim with *any* reading of the proposal; but pretty surely, the enforcement of the long calendar in Amendments I to VIII would not have thwarted secession.

Without exhausting the possibilities of a critique, we return to the House where both Democrats and Republicans were debating the proposal, some with ardor and some with cogency. First came Andrew Jackson Rogers, the young New Jersey Democrat and Bingham's colleague on the Committee.[45] On broad policy he opposed the amendment as "the embodiment of centralization and the disfranchisement of the States of those sacred and immutable State rights" reserved in the organic law. But he made some telling points of law against Bingham's exposition. In particular:

> That clause in the organic law which says that no person shall be deprived of life, liberty, or property without due process of law, as well as the other guarantees of the Constitution, have been repeatedly decided by the Supreme Court of the United States to apply only to cases affecting the Federal Government, and not to apply to such cases as are exercised by States. For instance, if a State should condemn a man to death without due process of law, or take his property for public use without any compensation, the clauses of the Constitution of the United

45. *Id.* at App. 133.

> States would have no application to such cases; but if the Federal Government should do the same thing, then these clauses in the organic law would apply. This position no lawyer in this House will deny.

In this he was, of course, quite right. He did not cite *Barron v. Baltimore*[46] by name.

Rogers had read *Abbot v. Bayley*,[47] and quoted it more accurately than had Senator Trumbull. It had held that the words "privileges and immunities" had a "limited extent." They were used "in a qualified sense, and subject to the local control, dominion, and the sovereignty of the States." He quoted the passage in *Campbell v. Morris*[48] wherein the court had observed that Congress had no general legislative authority over civil rights. This proposed amendment, said Rogers, was an attempt to provide constitutional props for the Civil Rights Bill which had already passed the Senate. He recalled that Justice Washington had said that "privileges and immunities" included the suffrage;[49] if that were the true view, then this amendment would give Congress authority over state laws on the suffrage. (There were many Northern Republicans who were opposed to Negro suffrage in the North.) Congressional interference with state legislation limiting the rights of married women, or forbidding mixed marriages, were other possibilities lurking in the proposed amendment.

Representative William Higby of California, Republican and —like almost all to be quoted in this survey—a lawyer, opened the debate on February 27.[50] He said that Bingham's amendment had his "hearty endorsement." The acuity of his perception of the matter may be gauged by the following passage:

> I understand this joint resolution, should it become part of the Constitution of the United States, will only have the effect to give vitality and life to portions of the Constitution that probably were in-

46. 7 Pet. 243 (U.S. 1833). "These [first eight] amendments contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them," said Marshall, C.J. (*id.* at 250).

47. See note 22 *supra*.

48. See note 21 *supra*.

49. In Corfield v. Coryell, *supra* note 15. *Cf.* the understanding of Frederick Douglass, the Negro leader, in his reference to Article IV, Section 2: ". . . . the Constitution of the United States, which declares that the citizens of each state shall enjoy all the rights and immunities of citizens of the several States,—so that a legal voter in any State shall be a legal voter in all the States." Frederick Douglass, in article on Reconstruction in 18 ATL. MONTHLY 761 at 765 (Dec. 1866).

50. CONG. GLOBE, 39th Cong., 1st Sess. 1054 (1865–66).

> tended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument. When we read this proposed amendment we will think it already embraced in the Constitution, but so scattered through different portions of it that it has no life or energy. But by condensing it, as we find it in this joint resolution, should it become a portion of the Constitution, it will then become operative and beneficial.

Evidently a sort of elixir calculated to give a general toning-up to the Constitution.

Higby explained why the proposal merely invigorated the existing law of the Constitution: Congress had power "to make all laws which shall be necessary and proper"; Article IV, Section 2, said "privileges and immunities"; and the Fifth Amendment provided for the rights of "life, liberty, and property." Representative Hale, himself a Republican, retorted that this reminded him of the demonstration that the Scriptures approve suicide: "Judas went and hanged himself;" "Go thou and do likewise."[51]

Representative Niblack, Indiana Democrat, interrupted Higby for a little heckling. Would the gentleman from California explain whether the amendment would have any effect on the condition of the Chinese in that state? Mr. Higby replied that "The Chinese are nothing but a pagan race. They are an enigma to me . . . . [T]hey even dig up their dead while decaying in their graves, strip the putrid flesh from the bones, and transport the bones back to China." But, persisted Mr. Niblack, "If a Chinaman is one of the human race, why should he be degraded below the negro?" Mr. Higby explained the difference: The Negro is not a pagan; "The negro is as much a native of this country as the gentleman or myself."[52]

This may not tell us whether the Fourteenth Amendment was intended to incorporate the federal Bill of Rights, but it does prepare us to realize that there were members of Congress who could even make a speech supporting the proposal with only the foggiest idea of what its effect might be.

Representative William D. "Pig-Iron" Kelley of Pennsylvania, Republican, favored the proposed amendment,[53]

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51. *Id.* at 1063.
52. *Id.* at 1056.
53. *Id.* at 1057.

> not because I believe it to be absolutely needed, but because there are those, and some of them on this side of the House, who doubt that the powers to be imparted by it are already to be found in the Constitution. I believe them to have been there from the hour of its adoption.

Representative Robert S. Hale, a Republican from New York and formerly a judge in that State, subjected to a tough lawyer-like examination the "extremely vague, loose, and indefinite provisions" of the proposed amendment.[54] It made, he believed, a far wider departure from our system of government than Representative Bingham had conceded. What was the import of the language?

> 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, may be repealed or abolished, and the law of Congress established instead.

Thad Stevens, in evident disagreement, asked whether the gentleman imagined that Congress could interfere with legislation that was equal and impartial. But Hale pointed out that

> It is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.

In every state, Hale observed, married women were under some legal disability. Under the wording of the proposal, Congress would be authorized to legislate to give them equal treatment. Stevens replied that "where all of the same class are dealt with in the same way then there is no pretense of inequality." Hale persisted:

> The language of the section under consideration gives to *all persons* equal protection. Now, if that means you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man. . . . . The line of distinction is, I take it, quite as broadly marked between negroes and white men as between married and unmarried women.

54. *Id.* at 1063, 1064.

Bingham took up Hale's point, and his reply is a sample of the quality of his thinking:[55]

> But, says the gentleman, if you adopt this amendment you give to Congress the power to enforce all the rights of married women in the several States. I beg the gentleman's pardon. He need not be alarmed at the condition of married women. Those rights which are universal and independent of all local State legislation belong, by the gift of God, to every woman, whether married or single. The rights of life and liberty are theirs whatever States may enact. But the gentleman's concern is as to the right of property in married women.
>
> Although this word property has been in your bill of rights from the year 1789 until this hour, who ever heard it intimated that anybody could have property protected in any State until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried thither? I undertake to say no one.
>
> As to real estate, everyone knows that its acquisition and transmision [*sic*] under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States, save under a direct grant of the United States. But suppose any person has acquired property not contrary to the laws of the States, but in accordance with its law, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection? That is the question, and the whole question, so far as that part of the case is concerned.

We are not examining Bingham on the law of property or on conflict of laws, but are pushing him on his constitutional law. If the married woman is allowed to acquire property, then she should be equally protected in its enjoyment; but, he asks, who ever doubted that her right to acquire depended exclusively upon the local law? Evidently he did not see that one might substitute "Negro" for "married woman" in his formula, and that it was incumbent upon him to explain how an amendment running to "all persons" was expected to yield opposite results in the two cases. Today we see clearly that he should have justified the discrimination against married women as resting upon a rational basis, or else have admitted that the classification was inconsistent with "equal protection." But Bingham refused to admit—and apparently did not see—that there was any problem to be met.

Note, moreover, what he says about the source of the rights of which he speaks. The rights to life and liberty, and apparently

55. *Id.* at 1089.

the right to enjoy the property one has been allowed to acquire, are "universal and independent of all local State legislation"; they are "the gift of God." The right to acquire property depends exclusively upon local law. If this thinking seems confused—again, so be it.

"The bill of rights" that Bingham invoked had been part of the Constitution since 1789. Maybe this was only a slip of the tongue. Or it may be that once again he was using the expression with careless imprecision. We are still a long way from the debate on Section 1 as it was finally adopted. But we are gaining an awareness of the apprehensions and the obscurity in the thinking of Congressmen, and are testing one of our principal witnesses.

Hale's main point was that the language of Bingham's proposal would give Congress a general power, far wider than its proponents would admit:[56]

> It is claimed that this constitutional amendment is aimed simply and purely toward the protection of "American citizens of African descent" in the States lately in rebellion. I understand that to be the whole intended practical effect of the amendment.

Bingham replied:

> It is due to the committee that I should say that it is proposed as well to protect the thousands and tens of thousands . . . . of loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment.

Mr. Hale:

> . . . . I will modify my statement and say that this amendment is intended to apply solely to the eleven States lately in rebellion, so far as any practical benefit to be derived from it is concerned. The gentleman from Ohio can correct me if I am again in error.

Mr. Bingham:

> It is to apply to other States also 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?[57]

56. *Id.* at 1065.

57. Presumably the reference was to the fact that the Indiana Constitution excluded Negroes and mulattoes from the suffrage. IND. CONST. Art. II, §§ 2, 5 (1851). These

Mr. Bingham:

> I do not know; it may be so. It applies unquestionably to the State of Oregon.[58]

Bingham had already assured Hale 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.

Let us focus upon this episode. Hale had explained what, in his view, was the natural meaning of the language of Bingham's proposal; if something different was intended, let that intended effect be disclosed. Bingham replied that, besides the freedman, the amendment would protect loyal whites from confiscation and banishment and, even outside the South, would apply where a state had legislation "in direct violation of every principle of our Constitution." Of course a state law could hardly violate *every* principle of the Constitution, and from the beginning the federal judiciary had been granting relief against laws violating *some* provision of the Constitution. Bingham's answers simply did not meet the issue. Maybe he was intentionally evasive. It seems far more likely, however, that he was exercised over the bad things he wanted to hit, without ever having thought out, inclusively and exclusively, the import of the words he had chosen.

Representative Frederick E. Woodbridge, Vermont Republican, spoke in favor of the amendment, whose object, as he understood it, was as follows:[59]

> . . . . It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State.

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provisions were abrogated by an amendment adopted in 1881. See Board of Election Comm'rs. v. Knight, 187 Ind. 108, 115, 117 N.E. 650, 652 (1917).

58. The Oregon Constitution of 1857 provided, Art. I, § 35, that "no free negro or mulatto, not residing in this state at the time of the adoption of this constitution," should come, reside within, hold real estate, contract, or sue in Oregon. This was repealed November 2, 1926, effective November 26, 1926. Ore. Laws 1927, p. 7.

59. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1865–66).

This explanation, one will observe, is rather hazy. Congress was to be given power to give to the citizen his natural and inalienable rights to life and liberty, the privileges and immunities already guaranteed to him by the Constitution, and as to his property the same protection that the local law extended to the local citizens.

Mr. Bingham made the last major speech on the proposal.[60] Here was a final opportunity to meet the questions raised during the debate.

> . . . . I repel [he said] the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to . . . . take away from any State any right that belongs to it . . . . 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." . . . .
>
> . . . . . .
>
> Gentlemen admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law; but they say, "We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed." That is the sum and substance of all the argument that we have heard on this subject. Why are gentlemen opposed to the enforcement of the bill of rights, as proposed? Because they aver it would interfere with the reserved rights of the States! Who ever before heard that any State had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States?
>
> What does the word immunity in your Constitution mean? Exemption from unequal burdens. Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States.

Bingham certainly says that the effect of his proposal is to arm Congress with power to enforce the bill of rights: it will do this and nothing more. What bill of rights? Once more he makes it

60. *Ibid.*

clear by the context: The bill of rights that says that the citizens of the United States shall be entitled to the privileges and immunities of citizens of the United States in the several states (which refers to, but misquotes, Art. IV, § 2) and that no person shall be deprived of life, liberty, or property without due process of law (which is one of the Fifth Amendment's limitations upon the Federal Government). And this measure would take from the state no authority it now enjoys under the Constitution; it would impose no obligation to which the state is not already bound.

With this repeated assurance fresh in our minds, we turn to the report of what Bingham was saying a few minutes later:[61]

> . . . . A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.
>
> Mr. Speaker, on this subject I refer the House and the country to a decision of the Supreme Court, to be found in 7 Peters, 247, in the case of *Barron vs. The Mayor and City Council of Baltimore*, involving the question whether the fifth article of the amendments to the Constitution are [*sic*] binding upon the State of Maryland and to be enforced in the Federal courts. [He quotes Marshall, C.J., in the passage concluding that "the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States."]
>
> I read one further decision on this subject—the case of the *Lessee of Livingston vs. Moore and others*, 7 Peters, page 551. [The Court said that it was settled "that those amendments do not extend to the States . . . ."]

Those cases never intimated that the various requirements of the first eight Amendments really extended to the states, but that Congress was without power to make the requirements effective: the powers of Congress never entered into the question. What the Court said, and reiterated as "now settled," was that the Fifth and Seventh Amendments in particular — and the first eight Amendments generally—were "not applicable" to the states.

Bingham, however, had been insisting that "the bill of rights as it stands in the Constitution today" that he would empower Congress to enforce against the states, had been binding upon them ever since 1789.

61. *Id.* at 1089.

How did he extricate himself? He hailed *Barron v. Baltimore* as though it were a vindication of his position, and plunged on to worse confusion:

> What have gentlemen to say to that? Sir, I stand relieved to-day from entering into any extended argument in answer to these decisions of your courts, that although as ruled the existing amendments are not applicable to and do not bind the States, they are nevertheless to be enforced and observed in States by the great utterance of that immortal man, who, while he lived, stood alone in intellectual power among the living men of his country, and now that he is dead, sleeps alone in his honored tomb by the sounding sea. I refer to that grand argument never yet answered, and never to be answered while human language shall be spoken by living men, wherein Mr. Webster says: . . . .

This holds out that Daniel Webster is going to explain how, notwithstanding *Barron v. Baltimore*, the provisions of the federal Bill of Rights are obligatory upon the states. We are offered a long quotation from 3 Webster's *Works* at 471. This proves to be a passage in a speech in the Senate on February 16, 1833. South Carolina had passed its Nullification Act against the existing tariff, and Calhoun had introduced in the Senate resolutions denying, *inter alia*, that the people of the United States were "formed into one nation or people." Webster, following Calhoun in debate, made a powerful exposition of the view that the Constitution is not a compact between sovereign states, but speaks directly to citizens. He takes up the contention that a state government, by refusing to name Senators and Electors, might bring the Federal Government to naught. Webster replies that the Constitution fastens duties directly upon individuals. Bingham quoted at length, the gist of the passage being that "It [the Constitution] incapacitates any man to sit in the Legislature of a State who shall not first have taken his solemn oath to support the Constitution of the United States. From the obligation of this no State power can discharge him." All very true, but completely irrelevant to Bingham's contention.

"[B]ut in the event of the adoption of this amendment," Bingham continued, "if they [state officials] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths . . . ."

This we know: the rights that Congress was to be empowered

to *compel* the state and its officers to respect were only the rights that they were already *obligated* to respect. Bingham said that so often and so earnestly that it cannot be gainsaid. No matter, then, what his personal views may have been as to the duty of the state and its officers to respect "the immortal bill of rights": the law had been clearly established in *Barron v. Baltimore*, to the effect that the first eight Amendments did not bind the states.

Another observation: if Bingham's object was to make the provisions of the first eight Amendments applicable to the states, why did he not say so? He was being closely pressed: What was *his* understanding of his proposal? In one single sentence he could have affirmed such a purpose with crystal clarity. And yet in all this sea of rhetoric, he never expressed so simple a proposition.

The speech ended with this peroration:[62]

> Representatives, to you I appeal, that hereafter, by your act and the approval of the loyal people of this country, every man in every State of the Union, in accordance with the written words of your Constitution, may, by the national law, be secured in the equal protection of his personal rights. Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.

This is a description of natural law, but not of the particular provisions of Amendments I to VIII.

Representative Hale was on his feet at once, to make one more attempt to pin down Bingham's answer to the old question: Did his proposal confer upon Congress a *general* power to legislate to secure to all persons protection of life, liberty, and property (as distinguished from a limited power to prevent inequality in state action)?[63] Bingham replied that it did, save that the right to real estate was dependent upon state law. Hale pointed out that this was different from Bingham's earlier response to the same ques-

62. *Id.* at 1094.
63. *Ibid.*

tion. Then Bingham switched once more: "It [the Amendment] certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons."

Before it was ever settled which interpretation Bingham really professed, Representative Conkling obtained the floor.[64] He said he had opposed the proposal in the Committee, and still opposed it. He was going to move to postpone further consideration, after yielding the floor for a moment to Mr. Hotchkiss.

Representative Giles W. Hotchkiss of New York, lawyer and original Republican, spoke concisely and with great good sense.[65] Constitutional provisions, he said, "should be so plain that the common mind can understand them." If the present purpose was to provide against excluding any class from the privileges other classes enjoyed, that right should be incorporated in the Constitution, and it should not be left dependent upon the caprice of Congress. Under Bingham's amendment, security "would depend upon the political majority of Congress." He wanted Bingham "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 a part of the organic law . . . . ?" "Let us have a little time to compare our views upon this subject, and agree upon an amendment that shall secure beyond question what the gentleman desires to secure."

Further consideration was postponed, and that was the last of this particular proposal.[66] This was February 28, 1866.

## VII

On March 1 the House turned to the Civil Rights Bill,[67] which, it will be recalled, had passed the Senate on February 2. The bill would enact (1) that there should be no discrimination in civil

64. *Ibid.*

65. *Id.* at 1095.

66. *Ibid.* "This postponement . . . . is simply a genteel way of smothering the proposition," was the accurate observation in Editorial Correspondence of the San Francisco Bulletin of April 2, 1866—a New York letter of March 1, entitled "Constitution-Tinkering Suspended." The Boston Daily Advertiser of March 14 said that it would require "a very material change in the political situation" to improve the standing of Bingham's proposal.

67. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1865–66).

rights on account of race, and (2) that inhabitants of every race should have the same right to contract, sue, etc., and to equal benefit of all laws for the security of person and property.

Discussion of the constitutionality of this measure raised questions essentially involved in Bingham's proposed amendment. If it was competent for Congress to enact the Civil Rights Bill, why amend the Constitution to confer that authority? Congress either had or did not have the power: if Yes, the amendment was needless; if No, the bill ought not to be passed until the Constitution had been amended. If Bingham's amendment had actually forbidden discrimination, one might explain that its adoption would give permanent force to the bill's principle of equality of protection. But as Hotchkiss had pointed out, Bingham's proposal did not itself establish nondiscrimination: it only empowered Congress to act. If Bingham's amendment had conferred upon Congress a *general* power to legislate on civil rights, one might explain that it went much further than the Civil Rights Bill, which merely forbade discrimination based upon race. But Bingham's first and last position had been that his purpose was to enable Congress to strike down *discrimination*. It is evident that even clearheaded members of Congress might find themselves divided along several lines—quite aside from the dominating influence of partisanship in questions of reconstruction and the Negro.

Representative James F. Wilson of Iowa, chairman of the Committee on the Judiciary, brought up the Civil Rights Bill. What fell within the term "civil rights"?[68] Not the suffrage, he explained, or eligibility for jury service, or the absence of segregation in schools. It referred to "the absolute rights of individuals," which Kent's *Commentaries* classified under the headings personal security, personal liberty, and the right to acquire and enjoy property.[69] The power to forbid discrimination in these matters was derived from the Thirteenth Amendment—reading the grant of power to enforce by the canons of liberal construction that Marshall had established in *McCulloch v. Maryland*.[70]

Representative Martin F. Thayer of Pennsylvania rose to express his "cordial assent," and in doing so made some vulnerable

68. *Id.* at 1117.

69. 1 KENT * 199.

70. 4 Wheat. 316 (U.S. 1819).

remarks.[71] He found authority to pass the bill in the enforcement clause of the Thirteenth Amendment, in the power of Congress to naturalize as applied to the freedman, and "by implication, at least, in that clause of the Constitution which guaranties to all the citizens of the United States their rights to life, liberty, and property." He did not develop this idea that the Fifth Amendment gave Congress power to forbid the states to discriminate. He said he approved Mr. Bingham's proposition to put this protection of civil rights into the Constitution (which, as we have seen, it did not), "though, according to my best judgment, it is not necessary to do so, and I have little hope that the proposition he submits will ever be carried into effect."

Representative Michael C. Kerr, Indiana Democrat, found Thayer an easy target.[72]

> The gentleman from Pennsylvania has fairly won the distinction, in this debate, of having discovered a new fountain of congressional power. He informs us in effect that the first eleven amendments to the Constitution [Thayer had referred only to the due process clause of the Fifth Amendment] are grants of power to Congress; that they contain guarantees which it is the right and duty of Congress to secure and enforce in the States. Hitherto those amendments have been supposed, by lawyers, statesmen, and courts, to contain only *limitations* on the power of Congress. . . . .

Presently Thayer interrupted Kerr to ask "of what value he supposes such a guarantee is, if, as he contends, there is no power to maintain it?" Kerr then read a long excerpt from *Barron v. Baltimore*; but Thayer insisted that he still had not been answered.

On March 9, Representative Bingham made a long speech against the Civil Rights Bill, and we should take note of some of the things he said.[73] The bill—recalling its terms once more—(1) forbade discrimination in civil rights on account of race, and (2) gave the right to contract, sue, etc., and to the equal benefit of the laws for security of person and property. Bingham wanted to have the bill recommitted with instructions to strike out the first of the two provisions above, and in lieu of the penal provisions to substitute a civil action. These changes, he seemed to believe, would meet constitutional objections—though Representative Wil-

71. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1865–66)
72. *Id.* at 1270.
73. *Id.* at 1290.

son replied, very justly, that as to the powers of Congress, there was no difference in principle between what he would strike and what he would accept.[74]

Bingham observed that the two essential provisions of the bill had appeared in the Freedmen's Bureau Bill, recently passed and vetoed. As to states in rebellion, that was quite justified; but as to states where peace prevailed, Congress must legislate within the limitation of the Constitution.

> What is that limitation, sir? Simply this, that the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. . . . .
>
> . . . . . .
>
> . . . . I have always believed that the protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States. And so I still believe.

The Civil Rights Bill was recommitted, but without the instructions Bingham had desired.[75] When the bill was again reported, Wilson explained that the prohibition against discrimination in civil rights had been dropped, leaving simply the second branch, affirming the right to contract, sue, etc.[76] "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."

So the bill passed,[77] on March 13, and next day the Senate concurred in the amendments.[78] President Johnson vetoed the measure, and on April 6 and 9, respectively, the Senate[79] and House[80] carried it over the veto. On the first passage, Bingham

74. *Id.* at 1294.
75. *Id.* at 1296.
76. *Id.* at 1366.
77. *Id.* at 1367.
78. *Id.* at 1416.
79. *Id.* at 1809.
80. *Id.* at 1861.

voted in the negative; on the second, still opposed, he was paired with two members who favored enactment.

## VIII

The Joint Committee on Reconstruction held no meeting between March 5 and April 16, 1866. So far as the problem of civil rights was concerned, it had done nothing since February 10, when it voted to report Bingham's ill-fated proposal.

When the Committee met 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." This proposal had been framed by Robert Dale Owen,[81] the English humanitarian who had been taking an active part in the political life of this country since before the war.

Here is the draft amendment:

> Section 1. No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.
>
> Sec. 2. [After July 4, 1876, no discrimination because of race in the matter of the suffrage.]
>
> Sec. 3. [Prior to that date, persons excluded because of color not to be counted for representation.]
>
> Sec. 4. [Confederate war debt and claims for emancipation of slaves not to be paid.]
>
> Sec. 5. [Enforcement clause.]

No discrimination—that had been, in effect, Stevens' proposal on January 12. Bingham sought to add the following provisions to Section 1: "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."

One wonders what advantage Bingham sought in adding an equal protection clause to the draft's provision for no discrimination: perhaps his point was that the original clause was limited to *civil* rights, or that it was only discrimination based on race that was forbidden. Again, why did Bingham pick out the provision

81. See FLACK, *op. cit. supra*, note 14, at 69; KENDRICK, *op. cit. supra*, note 14, at 296.

about taking private property as the one value in the federal Bill of Rights to be transplanted to the reconstruction amendment? At any rate, the motion was lost, 5 to 7, 3 not voting.

Presently Bingham moved to insert a new Section 5—and here at last emerges the formula that was to become a part of the Constitution:

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

This was carried, 10 to 2, 3 absent. It was the two Democratic Representatives who voted in the negative; Senator Johnson joined the Republicans.

This section was not yet, however, in the draft to stay. At the meeting on April 25 Senator Williams (who had voted to insert) moved to strike the new section. His motion carried: yeas, Harris, Howard, Johnson, Williams, Grider, Conkling, and Boutwell; nays, Stevens, Bingham, Rogers and Blow. (Rogers was in all things a Democrat; we may infer that his every move looked to the eventual embarrassment of Republican efforts for an amendment.) Then Bingham moved that the section just struck be reported as a separate article of amendment, for which he drew only 4 votes—his own and those of the three Democrats.

April 28 was the day when the Committee finally settled upon its joint resolution. In the course of a long meeting the persistent Bingham proposed to strike Section 1—no discrimination in civil rights—and insert his old Section 5. And this was carried, 10 to 3, with 2 absent. Howard—whom we shall soon find expounding this section to the Senate—and two other Republicans cast the negative votes.

Thus at long last, Bingham had a section to suit him. Unlike the proposal reported to Congress on February 13, this was not merely a grant of power to Congress: the clause itself was peremptory. There was a privileges and immunities clause, with all the uncertainties attending that vague phrase. There was an equal protection clause, from which, however, the trilogy of life, liberty, and property had been omitted. And one single clause of the federal Bill of Rights was copied into the new draft—no longer the

provision against taking private property, but the due process clause.

The final business on April 28 was the vote to report to the Houses, the 3 Democrats voting against the 12 Republicans.

## IX

Now we have the proposed Fourteenth Amendment, with Section 1 in its final form (save that the definition of citizenship was yet to come), ready for the consideration of the Congress. It was debated in the lower House on May 8 to 10, in the Senate on May 30 and June 4 to 8. What was said on these occasions will, of course, be of crucial importance.

Thaddeus Stevens, chairman of the delegation from the House to the Joint Committee on Reconstruction, introduced the three measures that comprised the report.[82] It fell short of his wishes, but fulfilled his hopes. The Committee did not believe that nineteen loyal states could be induced to ratify any proposition more stringent. He said nineteen (three-fourths of the number of states then represented in Congress), for he scorned the idea that any state not then acting in the Union would be counted on the question.

> Let us now refer to the provisions of the proposed amendment. [Stevens stated the first section.]
>
> 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 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. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to

82. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1865–66).

> 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. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed. . . . . [He continued in this political vein.]
>
> The second section I consider the most important in the article. It fixes the basis of representation in Congress. . . . .

As Stevens saw it, *discrimination* was the great evil, *equal* protection was the dominant purpose of Section 1. He made no reference to any other object. The Amendment would conclude with a section giving Congress a power to enforce, and, in Stevens' mind, it was Congress that was going to correct unjust state legislation. Direct application of the several clauses by the judiciary received no mention. Stevens was the leader of the Radical wing in the House, and his approach to the entire problem of reconstruction was highly political. He regarded as "most important" Section 2, on representation—which, of course, proved completely vain.

Representative William E. Finck, Ohio Democrat, thought that "a wise and enlarged statesmanship" would consult the South before altering the Constitution.[83] On Section 1 of the Amendment he commented:

> Well, all I have to say about this section is, that if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional.

Over and over in this debate, the correspondence between Section 1 of the Amendment and the Civil Rights Act is noted. The provisions of the one are treated as though they were essentially identical with those of the other. But what were the rights established by the Act: to contract, to sue, to testify, to buy, hold, and sell, to enjoy the full and equal benefit of the laws for the security of person and property. No one in debate ever runs down the list of the federal Bill of Rights: religious liberty, freedom of speech and of the press, the right to keep and bear arms, no unreasonable searches or seizures, no compulsory self-incrimination, trial jury, grand jury, etc. The due process clause, and particularly the words "life, liberty, and property" are mentioned frequently. As we shall

83. *Id.* at 2461.

see in a moment, on one occasion Bingham speaks of "cruel and unusual punishments." But never, even once, does advocate or opponent say "the first eight Amendments."

Garfield was the next to speak.[84] Because of his high standing and the clarity of his legal conceptions, one approaches his speech expectantly. With almost every proposition in the report, he said, he was more than pleased; he was delighted that "we have planted our feet . . . . on enduring and indubitable principle."

> I am glad to see this first section here which proposes to hold over every American citizen, without regard to color, the protecting shield of law. The gentleman who has just taken his seat [Mr. Finck] undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional. He was anticipated in that objection by the gentleman from Pennsylvania. [Mr. Stevens.] The civil rights bill is now a part of the law of the land. But every gentleman knows that it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.

That is all he says on Section 1. It is precisely in order to give permanence to the principles of the Civil Rights Bill that Section 1 is to be written into the Constitution.

Representative Thayer, Pennsylvania Republican — already mentioned as somewhat confused in the debate on the Civil Rights Bill—made quite a long speech in favor of the proposed Amendment.[85] But Section 1 he dismissed in a single sentence: he could not conceive that any loyal man could hold any other view upon that subject.

Representative Benjamin M. Boyer of Pennsylvania, a Democrat, said hundreds of words against the Amendment. But to Section 1 he devoted only two sentences:[86]

> The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly, the politi-

84. *Id.* at 2462.
85. *Id.* at 2464.
86. *Id.* at 2467.

> cal equality of the negro race. It is objectionable also in phraseology, being open to ambiguity and admitting of conflicting constructions.

Representative Kelley retorted that, as to Section 1, there was not a man in Boyer's district "that will not say those provisions ought to be in the Constitution if they are not already there."[87] (In his speech supporting Bingham's earlier draft, Kelley had twice expressed the view that everything in the proposal was already a part of the law, and that its effect was only to clarify.)

The next discussion of Section 1 came from another Pennsylvania Republican, John M. Broomall.[88]

> . . . . We propose, first, to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one. The fact that all who will vote for the pending measure, or whose votes are asked for it, voted for this proposition in another shape, in the civil rights bill, shows that it will meet the favor of the House. It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress? The gentleman from Ohio [Mr. Bingham] may answer this question. He says the act is unconstitutional. Now, I have the highest respect for his opinions as a lawyer, and for his integrity as a man, and while I differ from him upon the law, yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make assurance doubly sure.
>
> . . . . . .
>
> . . . . If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people.

He had thought Congress had authority to forbid discrimination in civil rights; Bingham had thought otherwise. Now the question will be settled and the provisions of the Act will surely have constitutional force. That is what Section 1 meant to Broomall.

The proposed Amendment seemed entirely wrong to Representative George S. Shanklin of Kentucky:[89] the first Section "[struck] down the reserved rights of the States," and "[invested] all power in the General Government." Then the people of the

87. *Id.* at 2468.
88. *Id.* at 2498.
89. *Id.* at 2500.

Southern States were disfranchised. "Those are the two ideas contained in this proposition."

Next comes Representative Henry J. Raymond[90] of New York—old line Whig, original Republican, publisher of the *New York Times*—clearheaded, well informed, a man of principle, long and responsibly related to the major developments in government and politics. He had voted against the Civil Rights Bill—favoring its objects, but unconvinced on the point of constitutionality. Now he explains his understanding of Section 1 of the Amendment:

> . . . . The principle of the first [Section], which secures an equality of rights among all citizens of the United States, has had a somewhat curious history. It was first embodied in a proposition introduced by the distinguished gentleman from Ohio, [Mr. Bingham] in the form of an amendment to the Constitution, giving to Congress power to secure an absolute equality of civil rights in every State of the Union. It was discussed somewhat in that form, but, encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer, and to provide for enforcing against State tribunals the prohibitions against unequal legislation. I regarded as very doubtful, to say the least, whether Congress, under the existing Constitution, had any power to enact such a law; and I thought, and still think, that very many members who voted for the bill also doubted the power of Congress to pass it, because they voted for the amendment by which that power was to be conferred. At all events, acting for myself and upon my own conviction on this subject, I did not vote for the bill when it was first passed, and when it came back to us from the President with his objections I voted against it. And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it.
>
> Now, sir, I have at all times declared myself heartily in favor of the main object which that bill was intended to secure. I was in favor of securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction; all I asked was that it should be done by the exercise of powers conferred upon Congress by the Constitution. And so believing, I shall vote very cheerfully for this proposed amendment to the Constitution, which I trust may be ratified by States enough to make it part of the fundamental law.

Once again, equality in the enjoyment of the civil rights—to contract, to sue, to hold property, etc.—is the great objective, and

90. *Id.* at 2501.

want of clear authority in Congress to achieve that end is the defect that the proposed Amendment would remedy.

Representative Rufus P. Spalding, War Democrat and former Justice of the Supreme Court of Ohio, supported every section of the Amendment.[91] Whereas some recent controversial legislation would prove ephemeral, the Amendment would, he believed, be sound and enduring. "As to the first measure proposed, a person may read it five hundred years hence without gathering from it any idea that this rebellion ever existed." Spalding was an able lawyer, and that is all he had to say on Section 1.

The next speaker was George F. Miller, Pennsylvania Republican and lawyer.[92] On the matter of our interest he said only this:

> As to the first [Section], it is so just that no State shall deprive any person of life, liberty, or property without due process of law, nor deny equal protection of the laws, 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.

The next Section, on representation, he regarded as "the most important." In summary he enumerated "the only three amendments I deem important" with no mention of the first Section.

The import of Section 1, to Thomas D. Eliot of Massachusetts, Republican and a lawyer, was that it gave constitutional security to the principle of equality of civil rights as it was declared in the Civil Rights Act:[93]

> I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred. I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.

Samuel Jackson Randall of Pennsylvania was a Democrat who

91. *Id.* at 2509.
92. *Id.* at 2510.
93. *Id.* at 2511.

eventually became Speaker of the House. Of course he opposed the entire Amendment. Here is his comment on Section 1:[94]

> 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, which in my judgment should remain and continue. They relate to matters appertaining to State citizenship, and there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of 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? . . . .

Ephraim R. Eckley, Ohio Republican, thought that three things were necessary before the Southern States could safely be restored:[95]

> 1. Equal and just representation.
> 2. Security of life, liberty, and property to all the citizens of all the States.
> 3. To reject all debts or obligations incurred in aid of the rebellion.

He directed his remarks to the disfranchisement of the Confederates. Point 2 is his understanding of the object toward which Section 1 was directed.

Rogers of New Jersey, leader among Democrats, *who sat as a member of the Joint Committee on Reconstruction*, had this to say on his understanding of Section 1:[96]

> Now, sir, I have examined these propositions with some minuteness, 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 destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence.
>
> This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which passed both Houses of Congress and was vetoed by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the

94. *Id.* at 2530.
95. *Id.* at 2534.
96. *Id.* at 2538.

> States and to take away from them the elementary principles which lie at their foundation. . . . .
>
> It provides [quoting the language]. What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities. If a negro is refused the right to be a juror, that will take away from him his privileges and immunities as a citizen of the United States, and the Federal Government will step in and interfere, and the result will be a contest between the powers of Federal Government and the powers of the States. It will result in a revolution worse than that through which we have just passed. It will rock the earth like the throes of an earthquake until its tragedy will summon the inhabitants of the world to witness its dreadful shock.

Rogers was quite right in his prophecy that the great importance of the Amendment lay in Section 1—not in the political provisions over which people were then so much excited. But like so many other members of Congress, he expected that Section 1 would receive its practical effect through *legislation*. And the legislation that he professed to foresee, and certainly feared, was of the kind already experienced in the Civil Rights Act. That the proposed Amendment was being carried through in order to require states to maintain the liberties mentioned in Amendments I to VIII seems out of accord with the world-rocking consequences Rogers predicted.

John F. Farnsworth was an important member of the Republican delegation from Illinois, and by profession a lawyer. He regretted that the proposed Amendment did not give effect to the "self-evident truth" of the Declaration by giving the ballot to the Negro. As to Section 1,[97]

> So far as this section is concerned, there is but one clause in it which is not already in the Constitution, and it might as well in my opinion read, "No State shall deny to any person within its jurisdiction the equal protection of the laws." But a reaffirmation of a good principle will do no harm, and I shall not therefore oppose it on account of what I may regard as surplusage.

97. *Id.* at 2539.

"Equal protection of the laws;" can there be any well-founded objection to this? Is not this the very foundation of a republican government? Is it not the undeniable right of every subject of the Government to receive "equal protection of the laws" with every other subject? How can he have and enjoy equal rights of "life, liberty, and the pursuit of happiness" without "equal protection of the laws?" 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.

To Farnsworth, Section 1 means equal protection, expressed with harmless surplusage.

Now Bingham, in the last major speech before the House voted the Amendment.[98]

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

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.

. . . . 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 guarantied 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

98. *Id.* at 2542.

of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.

Sir, the words of the Constitution that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" include, among other privileges, the right to bear true allegiance to the Constitution and laws of the United States, and to be protected in life, liberty, and property. Next, sir, to the allegiance which we all owe to God our Creator, is the allegiance which we owe to our common country.

The time was in our history, thirty-three years ago, when, in the State of South Carolina, by solemn ordinance adopted in a convention held under the authority of State law, it was ordained, as a part of the fundamental law of that State, that the citizens of South Carolina, being citizens of the United States as well, should abjure their allegiance to every other government or authority than that of the State of South Carolina.

. . . . . .

There was also, as gentlemen know, an attempt made at the same time by that State to nullify the revenue laws of the United States. What was the legislation of Congress in that day to meet this usurpation of authority by that State, violative alike of the rights of the national Government and of the rights of the citizen?

In that hour of danger and trial to the country there was as able a body of men in this Capitol as was ever convened in Washington, and of these were Webster, Clay, Benton, Silas Wright, John Quincy Adams, and Edward Livingston. They provided a remedy by law for the invasion of the rights of the Federal Government and for the protection of its officials and those assisting them in executing the revenue laws. (See 4 Statutes-at-Large, 632–33.) No remedy was provided to protect the citizen. Why was the act to provide for the collection of the revenue passed, and to protect all acting under it, and no protection given to secure the citizen against punishment for fidelity to his country? But one answer can be given. There was in the Constitution of the United States an express grant of power to the Federal Congress to lay and collect duties and imposts and to pass all laws necessary to carry that grant of power into execution. But, sir, that body of great and patriotic men looked in vain for any grant of power in the Constitution by which to give protection to the citizens of the United States resident in South Carolina against the infamous provision of the ordinance which required them to abjure the allegiance which they owed their country. It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. That great want

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

The necessity for the first Section, Bingham tells us, is a lesson taught by the past four years of conflict. Surely this is an inapt way to express the idea that the provisions of Amendments I to VIII should be made applicable to the states! What is the great want this Section will fill? Once more we are told, the absence of power in Congress to protect the privileges and immunities of citizens of the Republic and the inborn rights of man. The rightful authority of the state will not be diminished; it is simply that Congress hereafter will be able to repress state action inconsistent with the Constitution. "Contrary to the express letter" of the Constitution, states have inflicted "cruel and unusual punishments." Admit, very frankly, that this necessarily implies that the first eight Amendments were already limitations—though not enforceable by congressional action—upon the states. Marshall's Court had said they were not limitations on the states, Bingham somehow believes that they are—but we need not go over that again. Supposing that the cruel punishments clause was such a limitation, though not directly enforceable by Congress, why did not the victims raise the federal question and if need be carry it to the Supreme Court? Bingham did not explain. If the answer is that the Southern States were in rebellion, then of course it was the whole Constitution that was denied enforcement. Bingham asserts that these "cruel and unusual punishments" were inflicted not only for crimes, but also for lawful acts of "sacred duty," presumably of fidelity to the Union. This is a new point, unsupported by anything previously brought out in debate. Perhaps we are puzzling over a wild sentence that comes to no more than this: (1) that in the South loyal men had been made to suffer for their devotion to the Union, plus (2) that the cruel and unusual punishments clause denounced ancient wrongs which no state should perpetrate.

Section 1 has a further utility, in Bingham's view. On the occasion of nullification, Congress could legislate to protect federal officers, but seemingly could do nothing to protect the mere

citizen against being punished for his fidelity. Hereafter Section 1 (or, it would have been more accurate to say, Section 5 authorizing Congress to enforce Section 1) will supply "the great want": that is, "protection by national law from unconstitutional State enactments." "That is the extent that it [Section 1] hath, and no more."[99] Did not Section 25 of the Judiciary Act of 1789[100] serve exactly that purpose? And was it not sustained and executed in *Martin v. Hunter's Lessee*[101] and *Cohens v. Virginia*?[102] Did not Congress at all times have power to open the federal courts to "all cases . . . . arising under this Constitution. . . . ."? Was there any doubt that Congress could provide all the means necessary to carry the judgments of the federal courts into effect? Does not this speech, Bingham's last word on Section 1 before the House voted, still show great confusion? Can it possibly be said that in this final utterance he was putting the House on notice that, at least to him, Section 1 meant the provisions of the first eight Amendments? The answers seem obvious.

On May 10, 1866, the entire Amendment was passed by the House—yeas 128, nays 37, not voting 19.[103]

## X

On May 23 the Senate turned to the joint resolution proposing the Amendment. Consideration had had to be postponed because of the illness of Senator Fessenden, chairman, on the part of the Senate, of the Joint Committee. But the matter was urgent, and now Senator Jacob M. Howard of Michigan substituted for him in presenting the measure:[104]

> . . . . I can only promise to present to the Senate, in a very succinct way, the views and the motives which influenced that committee, so far as I understand those views and motives, in presenting the report which is now before us for consideration, and the ends it aims to accomplish.

Taking up Section 1 of the proposed Amendment, Howard observed that its privileges and immunities clause ran to "citizens

99. Evidently Bingham fancied the quotation. He had used it in his speech of February 28.
100. 1 STAT. 85 (1789).
101. 1 WHEAT. 304 (U.S. 1816).
102. 6 WHEAT. 264 (U.S. 1821).
103. CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1865–66).
104. *Id.* at 2765.

of the United States." It was not, perhaps, very easy to define this expression. (Later, on Howard's motion, the Senate amended Section 1 by inserting the definition that now forms the opening sentence.) Leaving that point, he continued:

> It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. I do not propose to go at any length into that question at this time. It would be a somewhat barren discussion. But it is certain the clause was inserted in the Constitution [Art. IV, § 2] for some good purpose. It has in view some results beneficial to the citizens of the several States, or it would not be found there; yet I am not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guarantied. Indeed, if my recollection serves me, that court, on a certain occasion not many years since, when this question seemed to present itself to them, very modestly declined to go into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise. But we may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington; and I will trouble the Senate but for a moment by reading what that very learned and excellent judge says about these privileges and immunities of the citizens of each State in the several States. [He quotes in full the passage in *Corfield v. Coryell*[105] where this clause was construed.]

Let us reread this language carefully. Howard starts with the "privileges and immunities" of Article IV, Section 2. (When we resume direct quotation we shall find him saying that these privileges and immunities are included within the privileges and immunities to be guaranteed by Section 1 of the proposed Amendment. That explains why he started on Article IV, Section 2.) "It would be a curious question" to say what the clause means; but we will not go very deeply into that—it would be a "barren discussion." (Surely, this is completely wrong. A discussion that really established the meaning of words already in the Constitution, and about to be repeated, would have been exceedingly useful.) Article IV, Section 2 must have been inserted for "some good purpose"; since we always assume that the Founders purposed nothing useless, we must go on saying that the clause doubtless produces some beneficial results. But the Supreme Court

105. See note 15 *supra*.

has never told us what they are, and the best we can do is to refer to Justice Washington's discussion. (As we have seen, that interpretation was ambiguous if not actually self-contradictory, and in part dead wrong.) Howard accepts it without expressing any difficulty at understanding it. From this opinion the Senators "may gather some intimation of what probably will be the opinion of the judiciary" if it ever has occasion to construe Article IV, Section 2—or the new privileges and immunities clause wherein the old will be incorporated. This statement is arresting. The Senate is considering a constitutional amendment, already accepted by the House. If the measure passes and then is finally adopted, these words will become fundamental law. In construing them, the judges may be expected to consult the legislative debates. And what will the judges find about the purpose of the founders? That the Senator who introduced it confessed his own uncertainty and—what a surprising sort of *renvoi*—recommended that Congress establish a form of words yet defer to the judiciary the settlement of what they meant.

It would be naïve, of course, to expect Howard to provide a mechanical formula for determining the content of "privileges and immunities." But hard analysis could have produced a far clearer basic conception. Was the standard to be found in the law of nature—or in national law (and if so, was it what was implicit in *federal* citizenship, or was it such civil rights as Congress might declare)—or in the law of the state, impartially applied? If the new expression, "the privileges and immunities of citizens of the United States," was to include "the privileges and immunities of citizens in the several States" (Art. IV, § 2), what did it signify that the modifying phrase was varied? (In the *Slaughter-House Cases*,[106] as we know, Justice Miller was to give decisive importance to the qualification "of the United States.") In so far as the new clause would cover the same ground as the old, it would seem superfluous. If it were answered that the new clause was to be sanctioned by Section 5, giving Congress power to enforce, then why not reach that result directly by adding in Section 5 that Congress should also have power to enforce Article IV, Section 2? This is not mere minutiae of drafting, to be dismissed impatiently. As was inevitable, these points arose in the course of litigation.

106. 16 Wall. 36, 74 (1873).

They might have been perceived by hard reflective thinking while the Amendment was being fashioned. But the air was charged with partisan feeling, the political sections were the center of interest, the clauses of Section 1 sounded excellent, and the need for rigorous analysis was not recognized.

Now back to Senator Howard's opening statement. Here comes the passage that most concerns us:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. 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 guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.
>
> Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.
>
> Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles em-

> braced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

Here at last is a clear statement that the new privileges and immunities clause is intended to incorporate the federal Bill of Rights. For the first time, "the first eight amendments" are specified. On this point Howard's statement seems full and unequivocal. It must be given very serious consideration, coming from the Senator who had the measure in charge. The question then becomes: did the Senate agree, did the House agree, did the State Legislatures that ratified the Amendment agree, that this was what the clause meant? (Presently we shall have reason to inquire, too, how should we construe Howard's statement, having regard to his subsequent conduct?)

Howard went on briefly to speak of the due process and equal protection clauses. These, he pointed out, ran not merely to the citizen but to *any* person, and abolished class legislation and the injustice of subjecting one caste of persons to a code not applicable to all. It was time, he said, that the black man was guaranteed the equal protection of the law.

If the new privileges and immunities clause incorporated the provisions of Amendments I to VIII, it must include the due process clause of Amendment V. But how can this be maintained in view of the fact that a separate due process clause was found necessary? Howard did not meet this obvious question. He did, however, note that the due process clause extended to *any person*, whereas the privileges and immunities were enjoyed by *citizens of the United States*. One who accepts Howard's view must admit the consequence, that the only essential function of the due process clause was to protect such "persons" as were not "citizens."

There were aliens—and there were corporations, which, it was held, were not "citizens" within the meaning of Article IV, Section 2, although "citizens" within the benefit of the diversity jurisdiction provision of Article III. As a matter of formal analysis, then, one might attribute to the Committee a design to give the citizen the protection of the entire Bill of Rights, and then, consciously duplicating in part, to extend to aliens, or to corporations, or to both, a particular one of the several guarantees of Amendments I to VIII. Such a view would, however, be quite unrealistic. Although it was noted in debate that "person" was wider than "citizen," no particular interest in either the alien or the corporation was expressed. They simply did not enter into the actual discussion, one way or the other. And if it was no special concern for their protection that produced the striking departure from the principles of drafting, how is Howard's statement to be squared with the presence of a due process clause in the Amendment?

One turns many pages of the *Congressional Globe* before finding anything further on "privileges and immunities," "due process," or "equal protection." The Republicans were having a good deal of difficulty among themselves, and adjourned the real discussion from the floor of the Senate to the caucus. There from Thursday May 24 to Tuesday the 29th the matter was talked out, while the Senate held short sessions or was in adjournment. As a result, we do not know what may have been said by the Senators whose votes were presently to carry the Amendment. On May 29, when the Senate returned to the joint resolution proposing to amend the Constitution, Senator Howard said,[107] "I now offer a series of amendments to the joint resolution under consideration, which I will send to the Chair."

The first item on the list was to add the definition of citizenship, which became the opening sentence of the Amendment. Other changes followed. Section 3 as it had stood just previously, excluding rebels from voting in federal elections until July 4, 1870, was struck out and the provision now to be found in the Constitution was inserted.

At this point Senator Saulsbury, Delaware Democrat, interposed:[108]

107. CONG. GLOBE, 39th Cong., 1st Sess. 2869 (1865–66).
108. *Ibid.*

> It is very well known that the majority of the members of this body who favor a proposition of this character have been in very serious deliberation for several days in reference to these amendments, and have held some four or five caucuses on the subject. Perhaps they have come to a conclusion among themselves that the amendments offered are proper to be made, but this is the first intimation that the minority of the body has had of the character of the proposed change in the constitutional amendment.

Saulsbury asked that the caucus's amendments be printed, and this was conceded.

Of course no one supposes that the Republicans went into a huddle to work out a more precise analysis of "privileges and immunities." No doubt they were talking politics. But the long consideration in caucus presumably shortened debate in the Senate. At any rate, the record throws very little light on our particular problem.

The concluding debate ran from June 4 to 8. Senator Hendricks, chiding the Republican majority, recalled that[109]

> A caucus was called, and we witnessed the astounding spectacle of the withdrawal, for the time, of a great legislative measure, touching the Constitution itself, from the Senate, that it might be decided in the secret councils of a party. For three days the Senate Chamber was silent, but the discussions were transferred to another room of the Capitol, with closed doors and darkened windows, where party leaders might safely contend for a political and party policy.

Coming to his "brief examination of the measure as it came from the caucus," he noted the definition of citizenship which had been added, and asserted:

> What citizenship is, what are its rights and duties, its obligations and liabilities, are not defined or attempted to be defined; but these vexed questions are left as unsettled as during all the course of our history, when they have occupied the attention and taxed the learning of the departments of Government.

Certainly, however, the Amendment would extend and degrade American citizenship.

Senator Poland of Vermont opened the debate on July 5.[110] Prior to coming to the Senate he had served for seventeen years

109. *Id.* at 2938.
110. *Id.* at 2961.

as Justice and Chief Justice of the Supreme Court of that State. This is, then, an able and discriminating lawyer. He said:

> The clause of the first proposed amendment, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," secures nothing beyond what was intended by the original provision in the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."
>
> But the radical difference in the social systems of the several States, and the great extent to which the doctrine of State rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, led to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became really a dead letter. The great social and political change in the southern States wrought by the amendment of the Constitution abolishing slavery and by the overthrow of the late rebellion render it eminently proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance.
>
> Now that slavery is abolished, and the whole people of the nation stand upon the basis of freedom, it seems to me that there can be no valid or reasonable objection to the residue of the first proposed amendment: [Quoting].
>
> It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress had already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.

Poland's opening sentence is quite inconsistent with Howard's speech. The new privileges and immunities clause "secures nothing beyond" what was intended by Article IV, Section 2: now, he says, after systematic evasion, the proposition is to be reaffirmed and, most important, Congress is to be given power to enforce it.

Howard had said it accomplished all this, plus the incorporation of the provisions found in Amendments I to VIII. But in the face of this statement, Poland says it imports nothing more than the clause in the original Constitution. A provision in the original Constitution, proposed in 1787 and adopted in 1789, certainly did not incorporate the provisions of amendments proposed in 1789 and adopted in 1791.

Senator Timothy O. Howe of Wisconsin, Republican, spoke on the 5th and the 6th of June.[111] He too had been a judge of the Supreme Court of his State. His main point was to reiterate his Radical theory that the Southern States had, by their rebellion, forfeited this statehood. Coming to the guarantees of Section 1 of the Amendment, he put the rhetorical question,

> Sir, does any one object to putting that proposition into the Constitution? Does any one on this floor desire to reserve to any State the right to abridge the privileges or immunities of citizens? Do you do it in the State in which you reside, sir, [Mr. Hendricks of Indiana in the chair] . . . . ? Is it done in any of the State represented here? I cannot deny it for all of them; but for many of them I do happen to know that no such abridgment of privileges or immunities is tolerated. Is it necessary, however, to incorporate such an amendment into your Constitution? Do you find in any of these communities seeking to participate in the legislation of the United States an appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws?

Yes, the Senator continued, it was necessary to amend the Constitution to prevent the gratification of that desire on the part of certain states. He cited various measures found in the black codes —denials of rights to hold land, to have legal process for collecting wages, to be heard in court as suitor or as witness. He had recently seen a Florida statute whereby Negroes alone were taxed to support Negro education in addition to general taxation for white schools.

> There, Mr. President, I have submitted to you one of the statutes in one of these States . . . . and I ask you . . . . if in view of one such fact as that you dare hesitate to put in the Constitution of the United States a positive inhibition upon exercising this power of local government to sanction such a crime as I have just portrayed.

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111. *Id.* at App. 217.

This is not much help in our inquiry, but we may observe that it was the black codes' denial of civil rights that, in Howe's thinking, was the typical evil at which the privileges and immunities clause was aimed. When he asked, does any state represented here deny the privileges and immunities, one would suppose that he was looking for discriminations against the Negro rather than for legislation inconsistent with the provisions of the federal Bill of Rights.

Senator Garrett Davis of Kentucky, a Democrat who had learned nothing, spoke for four hours. Two sentences are relevant to our inquiry.[112] The new privileges and immunities clause, he said, "is unnecessary, because that matter is provided for in article four, section two, of the Constitution . . . . This provision comprehends the same principle in better and broader language." The speech, however, was a harangue, not a fine analysis—so while this statement is inconsistent with Howard's, the point is of small significance.

John B. Henderson, the ever-independent Senator from Missouri, began his speech on the amendment in these words:[113]

> I propose to discuss the first section only so far as citizenship is involved in it. I desire to show that this section will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government. If I be right in that, it will be a loss of time to discuss the remaining provisions of the section, for they merely secure the rights that attach to citizenship in all free Governments.

Unless the first eight Amendments enumerate "rights that attach to citizenship in all free governments," Henderson's understanding is to be counted as opposed to that of Howard. Later on in his speech he refers to the effect of the Civil Rights Act as being

> to give the right to hold real and personal estate to the negro, to enable him to sue and be sued in courts, to let him be confronted by his witnesses, to have the process of the courts for his protection, and to enjoy in the respective States those fundamental rights of person and property which cannot be denied to any person without disgracing the Government itself. It was simply to carry out that provision of the Constitution which confers upon the citizens of each State the privileges and immunities of citizens in the several States. . . . .

112. *Id.* at App. 231 at 240.
113. CONG. GLOBE, 39th Cong., 1st Sess. 3031 (1865–66).

Henderson recalled that early in the session he had proposed that the Constitution be amended to forbid the states to discriminate against color in prescribing the qualifications for voting. Had the Negro been given the suffrage, Henderson declared, it would have been needless now to guarantee the privileges and immunities, due process, and equal protection: as a voter he could have protected his rights by the ballot.

It seems that Henderson's position was about this: there are certain essentials to which the citizen is entitled in any decent government; those are the values referred to in Article IV, Section 2, specified in the Civil Rights Act, and now by Section 1 sought to be secured to the Negro. He certainly did not say that everything in Amendments I to VIII was included in those essentials.

Senator Hendricks made the last extended remarks before the vote was taken.[114] Asking himself, what was meant by abridging the privileges and immunities of citizens, he made this response: "It is a little difficult to say, and I have not heard any Senator accurately define, what are the rights and immunities of citizenship. . . . ." Asking the question again, he answered, "We do not know, the Senator from Michigan says."

Reverdy Johnson of Maryland was certainly going to vote against the Amendment. But he was complaisant in politics (in a letter of that period, Justice Miller had referred to him as "that old political prostitute"),[115] accurate in his perception, and, *as a member of the Joint Committee, well informed.* Shortly before the vote was taken he made this statement:[116]

> I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law, but I think it quite objectionable to provide that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," simply because I do not understand what will be the effect of that.

At the conclusion of the debate on June 8 the vote was taken, showing yeas 33, nays 11, absent 5—more than the requisite two-thirds.[117]

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114. *Id.* at 3039.

115. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862–1890, 191 (1939).

116. CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1865–66).

117. *Id.* at 3042.

The joint resolution was returned to the House for its concurrence in the amendments. Debate was completed on a single day, June 13. Nothing was said about the federal Bill of Rights: Howard's statement on that point was not mentioned. The only comment at all pertinent to our inquiry came from Representative Aaron Harding, a Kentucky Democrat opposing the Amendment.[118] The effect of Sections 1 and 5, taken together, was, he said, to transfer all power over the citizens of a state from the state to the Federal Government. "Will not Congress then virtually hold all power of legislation over your own citizens and in defiance of you?" He thus professed to believe that the significance of the measure was to give Congress a general authority over the field of civil rights.

The House concurred in the Senate's amendments, 120 to 32, with 32 not voting.[119]

Looking back, what evidence has there been to sustain the view that Section 1 was intended to incorporate Amendments I to VIII? Bingham, as we know, did a good deal of talking about "the immortal bill of rights," and once spoke of "cruel and unusual punishments." Senator Howard, explaining the new privileges and immunities clause, said that it included the privileges and immunities of Article IV, Section 2—"whatever they may be" —and also "the personal rights guarantied and secured by the first eight amendments. . . . ." That is all. The rest of the evidence bore in the opposite direction, or was indifferent. Yet one reads in one of Justice Black's footnotes that,[120]

> A comprehensive analysis of the historical origins of the Fourteenth Amendment, Flack, The Adoption of the Fourteenth Amendment (1908), 94, concludes that "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:
>
> "1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States.
>
> "2. To give validity to the Civil Rights Bill.
>
> "3. To declare who were citizens of the United States."

We have been examining the same materials as did Flack, and have quoted far more extensively than he. How could he on that

118. *Id.* at 3147.
119. *Id.* at 3149.
120. Adamson v. California, 332 U.S. 46, 72 n. 5 (1947).

record reach the conclusion that Congress purposed by Section 1 to incorporate Amendments I to VIII? The explanation is supplied by a few sentences from his book:

> The vote then [on the Amendment, in the House] was taken immediately after Mr. Bingham had spoken, and his position must have been understood by all the members present. *His statement* of the need and purpose of the section *must, therefore, have been acquiesced in by those who supported it*, especially since Mr. Bingham was the author of it as well as a member of the Committee which ordered it to be reported, and thus could speak with authority. . . . . [Page 81. Italics supplied.]
>
> . . . . . .
>
> *His* [Senator Howard's] *interpretation of the Amendment was not questioned by any one, and* in view of his statement made at the beginning of his speech, *this interpretation must be accepted as that of the Committee*, since no member of the Committee gave a different interpretation or questioned his statements in any particular. [Page 87. Italics supplied.]

This is treated as being governed by a sort of legal presumption. The author of the measure said so and so in the House, the sponsor said it more clearly in the Senate; no one specifically contradicted. That concludes the matter: what they said must be deemed to be the purpose of the Congress.

Of course the search for historical truth is not governed by any such arbitrary presumption. What was said by the author of a measure, or by the member reporting for a committee, is ordinarily entitled to very special consideration. But others may, without challenging these views, have supported the measure for quite inconsistent reasons. We need not enter here into the large subject of extrinsic aids in constitutional interpretation. That would only complicate a fairly simple problem. Bingham said inconsistent things, and was very unsatisfactory when pressed for clarification. When other members were unable to find out what he meant, they can hardly be charged with consenting to his words. Senator Howard, however, spoke with more precision, and his interpretation carries much greater weight. While no Senator specifically contradicted him, Senator Poland's statement was certainly inconsistent with what Howard had said. Just before the vote was taken, Reverdy Johnson, also of the Committee of Fifteen, insisted that he still did not know what would be the effect of the privileges and immunities clause.

One wonders, nevertheless, why it was that the Senate did not provide a more distinguished discussion on so important a point. A dispatch from the *Chicago Tribune's* Washington correspondent, dated May 27, 1866, yields what seems to be a much clearer understanding of the Senate debate.[121]

> To a careful observer of the discussion of the report of the Committee of Fifteen in the Senate on Wednesday [May 23] and Thursday, it must have been evident that the proposed constitutional amendment did not meet any heartier support in the north wing than it has received at the opposite end of the Capitol. Neither on the former nor the latter day was there any indication of a degree of attention and interest on the part of Senators in the measure before them commensurate to its momentousness. On the contrary, there were unmistakable signs of lukewarmness, if not apathy and indifference, due either to the exhaustion of the subject in the protracted reconstruction debates in January and February, or to a general inwardly felt, though not openly expressed conviction that the proposition, as it passed the House, was, after all, not the proper solution of the great problem of the session. This conviction manifested itself in an apparent want of earnest sympathy and enthusiastic support that imparted an extraordinary dullness and languor to the discussion of the two days mentioned. There seemed to be a general indisposition on the Republican side to enlarge upon the subject, notwithstanding its inherent importance, so that each day the discussion was dropped for the remainder of the sitting, after but one Senator had spoken.
>
> So great seemed the reluctance of the Senate to take hold of the subject in good earnest, that there was an apparent probability of the debate coming to a complete stop from the disinclination of the members of the majority to join in it. Nor was this the only danger, threatening a miscarriage of the scheme of the Committee of Fifteen. As the discussion progressed, amendments became more and more frequent. Half a dozen were offered on Wednesday and Thursday. At least as many more were contemplated by Senators. The possibility of the main proposition being carried down by an overload of amendments from both sides was by no means remote. It became obvious that something had to be done to prevent a discouraging, demoralizing failure of what had required so much time and effort to mature, when it was determined, after due consideration in the course of Thursday, to call a caucus of the *bona fide* Union Republican Senators for the purpose of bringing about a clear and full understanding as to the line of action to be pursued by the majority in regard to the reconstruction report.

121. Chicago Tribune, June 1, 1866, p. 2, col. 4. The Boston Daily Advertiser of Saturday, May 26, 1866, in its Washington dispatch of the 25th, reported that the caucus had met for one hour Friday morning and nearly two hours that afternoon. The Advertiser of May 29 reported that on Monday the caucus lasted an hour and a half in the morning and two hours in the afternoon.

One result of the caucus, the correspondent continued, was that

> Republican Senators will abstain from long speech-making upon the main proposition as well as upon the modifications to be agreed upon. They are fully impressed with the necessity of acting instead of wasting any more words upon an already thoroughly discussed and understood subject and will conduct themselves accordingly.

This seems to clear up, what would otherwise have remained a matter of some curiosity, why there was not a more satisfactory debate in the Senate.

## XI

We look away from the record of debates in Congress to inquire what the country understood to be the import of Section 1 of the proposed Amendment. Mr. Flack examined a considerable number of Northern newspapers, and reported (an admission against the thesis he was defending) the following observation:[122] "There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not. . . . ." Presumably this excluded the press reports of May 24 on Senator Howard's speech of the 23d: for the *New York Herald* and the *New York Times,* which Mr. Flack had before him, did quote in full the passage where it was said that the personal rights guaranteed by the first eight amendments were among the new "privileges and immunities."[123]

Other newspaper files have been examined in preparing the present article, and no instance has been found to vary what has been set out above.

The *Chicago Tribune* had this bare mention of Howard's speech in its column "Proceedings in Congress":[124] "The [Reconstruction] resolution was finally taken up, and Mr. Howard explained the bill at length." In the first column on the front page, a potpourri called "The News," half a dozen lines were devoted to the speech, with no mention of the Bill of Rights. On May 29 the *Tribune* published a letter of May 25 from its Washington

122. FLACK, *op. cit. supra,* note 14, at 153. This is not an exhaustive statement of what Mr. Flack had to say on the general subject. That will be set out, and commented upon, later. See pp. 79–81 *infra.*

123. N.Y. Herald, p. 1, cols 2-3; N.Y. Times, p. 1, cols. 4–7.

124. May 24, 1866, p. 1, col. 3.

correspondent. He commented upon the Senate's delay in taking up the proposal, and continued:[125]

> . . . . Mr. Howard had but little time to prepare himself for his effort on this memorable occasion. Nevertheless it was a fine success and worthy of his established repute as a fluent, elegant speaker and close, logical reasoner. His argument while discussing the first section of the amendment, relative to the meaning of the term "citizens of the United States," and to the scope of their rights and immunities under the Constitution, and to the question of the constitutional provision that the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States, was very forcible and well put, and commanded the close attention of the Senate.

The *Boston Daily Advertiser* had excellent telegraphic reporting from Washington, and on the morning of May 24 carried this account of Senator Howard's speech:[126]

> The Senate having taken up the amendment, Mr. Howard explained it, section by section. The first clause of the first section was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government. There was now no power in the Constitution to enforce its guarantees of those rights. They stood simply as declarations, and the States were not restricted from violating them, except by their own local constitutions and laws. The great object of the first section, fortified by the fifth, was to compel the States to observe these guarantees, and to throw the same shield over the black man as over the white, over the humble as over the powerful. This does not give the right of suffrage which has always been regarded, not as a fundamental right, but as a creation of law.

These expressions, one sees, were collected from various passages in Howard's speech; some came from the statement about incorporating the Bill of Rights. But it could not be said that the *Advertiser's* unusually full summary gave the public any understanding that Senator Howard said that the Amendment included Amendments I to VIII.

The one statement in Howard's speech that looms so large in our present inquiry seems at the time to have sunk without leaving a trace in public discussion.

The proposed Amendment, being the central element in the congressional program for reconstruction, became the major

125. P. 2, col. 3.
126. P. 1, col. 3.

issue in the election of 1866. We look, therefore, to campaign speeches for significant comments on Section 1. Since this article has now developed in a direction quite different from that of Mr. Flack's book, it seems wise to examine independently the items he has noticed, as well as others not mentioned by him.

The *Cincinnati Commercial*, published by Murat Halstead, was a Republican journal that found space for a verbatim report of important speeches on both sides of the contest of 1866. We shall quote from it extensively. On June 21 it devoted two columns to "The Constitutional Amendment." It predicted that the election of state representatives and Congressmen would turn on this measure, and observed with satisfaction that the Amendment in its final form showed a "material modification of the Radicalism" of Thad Stevens, and was now opposed by Wendell Phillips on the one extreme and by Bourbon Democracy on the other. It gave this exposition of Section 1:[127]

> The object of this amendment is clear enough. It throws around all classes—native and naturalized—the protecting arm of the Constitution. Being citizens of the United States no legislation hostile to any class, and calculated to deprive it of the rights and immunities to which a citizen is entitled, will be valid. All will be equal before the federal law, and all citizens of a State equal before its laws. With this section engrafted upon the Constitution it will be impossible for any Legislature to enact special codes for one class of its citizens, as several of the reconstructed States have done, subjecting them to penalties from which citizens of another class are excepted if convicted of the same grade of offence, or confer privileges upon one class that it denies to another. It is evident if the great Democratic principle of equality before the law is to be enforced in this country, an amendment to the Constitution imperatively enforcing it is required.

General John A. Logan of Illinois, major figure in Republican politics, was a candidate for Representative at large. On June 28 he made a speech at Cairo, Illinois—which the *Chicago Tribune* reprinted in pamphlet form and sold in quantities as a campaign document.[128] Logan quoted the language of Section 1, and continued:

> The rights of citizenship, what are they? The rights of a citizen are to sue and be sued, to own property, to have process of court, to have

127. P. 4, col. 2.

128. Speech on p. 1. The advertisement of reprints for sale appears in the Tribune for July 17, 1866, p. 2.

> protection for life, liberty and property. But some of these men say it gives the "nigger" the right to vote. The man that asserts that this article gives the negro the right of suffrage, is a fool or a knave . . . . What further is there? That all persons shall have the protection of the law. In the name of humanity I ask the question is there a man, woman or child in this country, so hardened a wretch, that is not willing to give the protection of the law to any human being—that would not be willing that the shield of the law should be thrown about all; that would not be willing that the white or the black man should collect his debt in court; that either should own and hold property that he pays for . . . . There is all there is to that. I am for it most emphatically. . . . .

Governor Richard Oglesby of Illinois delivered a Fourth of July address at Salem, Illinois.[129] He paraphrased Section 1, and said that it meant that he was free to move throughout the land—and that so, too, could the freedmen.

> Yes, they are citizens under our amended Constitution, and can go where they please, even down to Arkansas. They are citizens and shall be entitled to equal protection from the law. Does that sound harsh and unjust to Democratic ears? can that be unfair? I see nothing in it unfair, therefore I lift up both my hands and say, "I shall vote for the first section."

Representative Jehu Baker of Illinois obtained leave of the House to print remarks on "The Reconstruction Amendment," the production being used as a campaign document.[130] This may not appear a very weighty discussion of the subject:

> This [first] section I regard as more valuable for clearing away bad interpretations and bad uses of the Constitution as it is than for any positive grant of new power which it contains. How admirable, how plainly just, are the several provisions of it!
>
> [Quoting clause by clause in turn, with commentary upon each. On the privileges and immunities clause:]
>
> What business is it of any State to do the things here forbidden? to rob the American citizen of rights thrown around him by the supreme law of the land? When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future.

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129. Chicago Tribune, July 7, 1866, p. 2, col. 5. Also reported in full in the Cincinnati Commercial, Aug. 3, 1866, p. 1.

130. Leave to print, CONG. GLOBE, 39th Cong., 1st Sess. 3683 (1865–66). The speech appeared *id.* App. 255. Reprinted in the Chicago Tribune, July 17, 1866, p. 2, cols. 7–9. The speech of Representative Farnsworth, on May 10 in Congress (CONG. GLOBE, 39th Cong., 1st Sess. 2539 [1865–66]), was reprinted in the Chicago Tribune of July 31, 1866, p. 2, cols. 4–5.

Later he referred to "the great liberties which are better secured by the first section—liberties to which the honor of the nation is pledged, and which no rational man can gainsay. . . . ."

Thus far, it will be observed, we have found not a word to suggest the incorporation of Amendments I to VIII.

On the first of August, 1866, Senator Lyman Trumbull, sponsor of the Civil Rights Bill, returned to his home near Chicago. This was the occasion for tremendous Republican demonstration, with a procession, bands, and a long speech.[131] In his comment on Section 1, Trumbull insisted that it covered the same ground as the Civil Rights Act:

> The first [Section]—and it is all one article, declares the rights of the American citizen. It is a reiteration of those rights as set forth in the "Civil Rights Bill"—an unnecessary declaration, perhaps, because all those rights belong to the citizen now, but to avoid cavil it was thought proper to put in the fundamental law the declaration that all the citizens were entitled to equal rights in this Republic, and that all—whether they were born here or came from a foreign land and were naturalized—were to be deemed citizens of the United States, and in every State where they might happen to dwell.

Senator Hendricks, Democrat, also came home, and made a major address at Indianapolis on August 8.[132] The objection he made against Section 1 was that it would confer citizenship on Negroes and Indians, and that would involve political equality with the whites.

> Are you prepared to go so far . . . . ? That question we are now to decide, for if the amendment be adopted, soon thereafter the negro will stand by your side at the polls—and claim to be voted for, to hold office, sit upon juries, to exercise all the rights and enjoy all the privileges which you now enjoy.

Postmaster General William Dennison broke with President Johnson, resigned, and came home to Columbus, Ohio. There on August 10 he made an address giving his reasons for supporting the congressional rather than the Presidential policies.[133] Dis-

131. Chicago Tribune, Aug. 2, 1866, p. 2. Trumbull gave substantially the same explanation of Section 1 of the proposed Amendment in a speech at Evanston on Aug. 31. Chicago Tribune, Sept. 6, 1866, p. 4, col. 2.

132. Cincinnati Commercial, Aug. 9, 1866, p. 1, col. 4.

133. Chicago Tribune, Aug. 13, 1866, p. 1, cols. 3–4.

cussing the provisions of the proposed Amendment, he expressed the import of Section 1 in these words: "Equal protection of civil rights to all citizens, the chief object of which is to secure the colored population of the South in the undisturbed enjoyment of their rights of person and property." Presently he said,

> I will not stop to further discuss any of the provisions of the amendment . . . . Their necessity for preserving the national faith to the loyal blacks of the South; for protecting the citizens of all the States in their civil rights; for guarding against the return to political control, in the insurrectionary States, of the leaders of the rebellion; . . . . in a word, for securing, beyond peril, the just results of the war, is too apparent for argument.

Schuyler Colfax of Indiana, Speaker of the House of Representatives, of course made important speeches during the campaign. Here is what he said during a prepared address at Indianapolis on August 7.[134] After quoting Section 1:

> I stand by every word and letter of it; it's going to be the gem of the Constitution, which it is placed there, as it will be, by this American people. I will tell you why I love it. It is because it is the Declaration of Independence placed immutably and forever in our Constitution. What does the Declaration of Independence say? . . . . It says that all men are created equal [quoting]. That's the paramount object of government, to secure the right of all men to their equality before the law. So said our fathers at the beginning of the Revolution. So say their sons to-day, in this Constitutional Amendment, the noblest clause that will be in our Constitution. It declares that every person—every man, every woman, every child, born under our flag, or naturalized under our laws, shall have a birthright in this land of ours. High or low, rich or humble, learned or unlearned, distinguished or obscure, white or black, born in a palatial residence or born in the humblest cabin in the land, this great Government says, "the aegis of protection is thrown over you; you can look up to this flag and your country, and say they are yours."

Senator Howe, Radical Republican, went back to Wisconsin and made a major address at Madison on August 10.[135] His colleague, Senator Doolittle, a conservative supporter of the Adminis-

134. Cincinnati Commercial, Aug. 9, 1866, p. 2, col. 3. A speech at South Bend on Aug. 1 was printed in full in the Chicago Tribune of Aug. 4, 1866, p. 2, cols. 4–8.

135. Chicago Tribune, Aug. 14, 1866, p. 2, col. 4.

tration, had already appealed to the voters, and Howe was replying.

> But how about this amendment which we are arraigned for having submitted to the utter extinction of the sovereignty of the States? What is that? Why, sir, it is an amendment which proposes to empower Congress with—what? The monstrous power of enforcing equal justice between all the people of the States! Is that a very bad thing to do, fellow citizens? Have you any very serious objection to "equal justice" being administered between all the people of the States? That is all we are accused of doing. . . . . The only effect of the amendment if it is adopted is to enable the National Legislature, representing the people of the United States, to enforce equal justice when the several States refuse to enforce it. . . . .

Henry S. Lane, senior Senator from Indiana, gave the principal speech at a Union Republican rally in Indianapolis on August 18.[136] Here are his remarks on Section 1:

> I will tell you, my fellow-citizens, when we passed the Constitutional Amendment, we passed a measure transcending in importance all other political questions, and it is the one upon which alone peace, lasting and honorable peace, can be brought to our country. The first clause in that Constitutional Amendment is simply a re-affirmation of the first clause in the Civil Rights Bill, declaring the citizenship of all men born in the United States, without regard to race or color. . . . .

General Robert C. Schenck, prominent Republican Congressman, was speaking in his home town, Dayton, Ohio, on August 18. He said he "would be glad to take up this amendment in detail, especially as the Union party in Ohio, narrowing the issue down to what it really and only is, have adopted that Constitutional Amendment as their platform upon which to go into the fight." He read Section 1, and asked,[137]

> Is there any Democrat here who will dare to stand up and say that this is not right and just? It is putting into the organic law of the land a declaration of those principles of liberty and equality which were understood to be in the Constitution without any such amendment, by those who framed it. It is the removal of doubt upon that question, as we sought also to remove it by the corresponding Civil Rights Bill . . . . But they [the Democrats] are afraid that it may have some concealed

136. Cincinnati Commercial, Aug. 20, 1866, p. 1, col. 4.
137. *Id.* at p. 2, col. 5.

> purpose of elevating negroes; that if you make them . . . . citizens of the United States, you necessarily make them voters. It goes to no such length. . . . . [I]t simply puts all men throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation; and if the Democrats are afraid that if the negro has removed from him the weight of inequality in regard to the right of suing and being sued, making contracts, subsisting himself, which this law will secure to him in all the States, if that will enable the negro to go ahead of him [them], then in God's name let it be so. . . . . All that is sought is that all men shall be equal before the law; and the man who opposes that fair proposition and yet calls himself a Democrat, a believer in the people and in equal rights, is a liar in his throat.

General George M. Morgan, Democratic candidate for Congressman in the Thirteenth Ohio District, spoke at Coshocton, Ohio, on August 21. His comment on Section 1 was that[138]

> This is another bold stride toward a central despotism. If the Federal Government had the power to determine who should be citizens of a State, it would be at once claimed she also had the power to define the rights of such citizens, and we should soon have negro jurors, voters, judges and legislators in Ohio, by virtue of laws of Congress.

Representative Columbus Delano, running for re-election in the same district, spoke at the same place a week later. He gave the following explanation of the function of the privileges and immunities clause:[139]

> I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the *"chivalry"* of the Southern slaveholders. I know that you remember when an able lawyer [Samuel Hoar] from Massachusetts was expelled from South Carolina by a Southern mob. And I know that we determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected, and I know you have lost your reason, every man of you, who denies the propriety of their protection.

John A. Bingham, campaigning for re-election, delivered a speech at Bowerstown, Ohio, on August 24. He dealt very fully

138. *Id.*, Aug. 23, p. 2, col. 3.
139. *Id.*, Aug. 31, p. 2, col. 3.

with each Section of the Amendment. After explaining the definition of citizenship, he read the remainder of Section 1 and continued,[140]

> It is the spirit of Christianity embodied in your legislation. It is a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every State of this Union by the combined power of all the people of every State. It takes from no State any right which hitherto pertained to the several States of the Union, but it imposes a limitation upon the States to correct their abuses of power, which hitherto did not exist within the letter of your Constitution, and which is essential to the nation's life. Look at that simple proposition. No State shall deny to any person, no matter whence he comes, or how poor, how weak, how simple—no matter how friendless—no State shall deny to any person within its jurisdiction the equal protection of the laws. If there be any man here who objects to a proposition as just as that, I would like him to rise in his place and let his neighbors look at him and see what manner of man he is. That proposition, I think, my fellow-citizens, needs no argument. No man can look his fellow-man in the face, surrounded by this clear light of heaven in which we live, and dare to utter the proposition that of right any State in the Union shall deny to any human being who behaves himself well the equal protection of the laws. Paralysis ought to strangle the utterance upon the tongue before a man should be guilty of the blasphemy of saying that he himself to the exclusion of his fellow man, should enjoy the protection of the laws. I hazard nothing, I think, in saying to the American people that the adoption of that amendment by the people, and its enforcement by the laws of the nation is, in the future, as essential to the safety and peace of this Republic, as is the air which surrounds us essential to the life of the people of the nation. Hereafter the American people can not have peace, if, as in the past, States are permitted to take away freedom of speech, and to condemn men, as felons, to the penitentiary for teaching their fellow men that there is a hereafter, and a reward for those who learn to do well.

Section 1 is "simple, strong, plain"; it is the embodiment of the spirit of Christianity—one explanation that Bingham had not given before—and includes the right to speak freely of the life to come. Take it that his illustration stands for religious liberty and for freedom of expression, values secured by Amendment I: even so, there are a good many requirements lying between Amendment II, the right to keep and bear arms, and Amendment VIII, no excessive bail, etc., that are not inherent in the

140. *Id.*, Aug. 27, p. 1, cols. 2–3.

spirit of Christianity. One wonders whether Bingham had in mind, what Justice Black rejects, a *selective* incorporation of the Bill of Rights.

The National Union Republican Committee issued a campaign address to the American people on September 19.[141] It was signed by Marcus L. Ward (Governor of New Jersey), chairman, Horace Greeley, and other party leaders. Pointing to the proposed Amendment, it asked,

> Are the conditions thus proposed intolerable or even humiliating? They are in substance these:
>
> I. All persons born or naturalized in this country are henceforth citizens of the United States, and shall enjoy all the rights of citizens evermore; and no State shall have power to contravene this most necessary and righteous provision. . . . .

General Manning F. Force, lawyer and citizen soldier distinguished for gallantry in action, speaking to the Soldiers' Convention at Chillicothe, Ohio, on September 22, said,[142] "The first section of the amendment secures to all citizens of the United States the simple rights of life, liberty and property. That is all there is in it. That is all that can be made out of it. No right-minded man can object to that."

Senator John Sherman of Ohio spoke to a large audience at Cincinnati on September 29. "The first section" of the Amendment, he said,[143]

> was an embodiment of the Civil Rights Bill, namely: that every body—man, woman and child—without regard to color, should have equal rights before the law; that is all there is to it; that every body born in this country or naturalized by our laws should stand equal before the laws—should have the right to go from county to county, and from State to State, to make contracts, to sue and be sued, to contract and be contracted with; that is the sum and substance of the first clause. . . . . [W]e should be dead to every sense of honor, and blind to every dictate of manly principle, if we leave the black race to be lorded over and governed by those unreconstructed rebels of the South. We are bound by every obligation, by their service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hour that tried our country, we are bound to protect them in all their natural rights.

141. Chicago Tribune, Sept. 22, 1866, p. 2, cols. 3–4.
142. Cincinnati Commercial, Sept. 24, 1866, p. 1, col. 4.
143. *Id.*, Sept. 29, 1866, p. 1, col. 4.

One final quotation, this from Orville H. Browning, a conservative Republican, who had recently entered President Johnson's cabinet as Secretary of the Interior.[144] Browning had written a long letter, in lieu of a campaign speech at his home in Illinois. As a supporter of the President he was, of course, opposed to the congressional plan of reconstruction expressed in the Amendment.

> If the proposed amendments of the Constitution be adopted, new and enormous power will be claimed and exercised by Congress, as warranted by such amendments, and the whole structure of our Government will perhaps gradually but yet surely be revolutionized. And so with the Judiciary. If the proposed amendments be adopted, they may and certainly will be used substantially to annihilate the State judiciaries. . . . . Be assured, if this new provision be engrafted in the Constitution, it will, in time, change the entire texture and structure of our Government, and sweep away all the guarantees of safety devised and provided by our patriotic sires of the revolution. . . . .

There seems to be no reason to suppose that further evidence would be more than corroborative. We have quoted five Senators, who presumably heard Senator Howard's speech of May 23. Not one mentioned the Bill of Rights in his comment upon Section 1. We have quoted five Representatives, including the Speaker of the House and the author of Section 1. Not one said that the privileges and immunities clause would impose Amendments I to VIII upon the states. (Bingham's reference to freedom to teach of the life hereafter was much too casual to put even his immediate audience on notice that to him Section 1 meant the Bill of Rights.) In a moment we shall turn to proceedings in the legislatures before which the Amendment was laid, and shall hear again and again that the proposal had been thoroughly explained in the campaign and was fully understood by the voters. Very certainly they had not been given to understand that Section 1 incorporated Amendments I to VIII.

At this point attention is drawn to a passage in Justice Black's historical Appendix,[145] and to a passage in Flack's *The Adoption of the Fourteenth Amendment* which the Justice cited as authority.

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144. *Id.*, Oct. 26, p. 2, col. 4, letter of Oct. 13, 1866.

145. Adamson v. California, 332 U.S. 46, 109 (1947).

Here they are, in parallel columns:

Justice Black:

> Flack, supra at 142, who canvassed newspaper coverage and speeches concerning the popular discussion of the adoption of the Fourteenth Amendment, indicates that Senator Howard's speech stating that one of the purposes of the first section was to give Congress power to enforce the Bill of Rights, as well as extracts and digests of other speeches were published widely in the press.

Mr. Flack, at p. 142:

> . . . . Mr. Howard's speech of May 23 was declared to be frank and satisfactory and his exposition of the need for securing, by constitutional Amendment, the privileges and immunities of citizens to be "cogent and clear." [Citing the *New York Times*, May 25, 1866.[146]] It was in this speech that Mr. Howard said that one of the purposes of the first section was to give Congress power to enforce the Bill of Rights. By declarations of this kind, by giving extracts or digests of the principal speeches made in Congress, the people were kept informed as to the objects and purposes of the Amendment. . . . .

First comment: An observation that (1) Howard's speech was noticed widely, and the fact that (2) in the course of his speech Howard said *X*, would *not* warrant a conclusion that it was published widely that Howard said *X*. Maybe the publications ignored that portion of the speech. Flack was writing generally about the adoption of the Amendment; but for Justice Black's purpose, the only point that is material is Howard's statement about the Bill of Rights. And while he does not *quite* assert that Flack said that *that statement* was published widely, certainly even a careful reader would so understand the sentence. If the sentence does not mean that, it is irrelevant. Flack does not even assert that *that*

146. Here is the full context of what the Times said on Section 1 in the editorial from which Flack is quoting: "With reference to the amendment, as it passed the House of Representatives, the statement of Mr. Howard, upon whom the opening task devolved, was frank and satisfactory. His exposition of the considerations which led the Committee to seek the protection, by a Constitutional declaration of ['] the privileges and immunities of the citizens of the several States of the Union,' was clear and cogent. To this, the first section of the amendment, the Union party throughout the country will yield a ready acquiescence, and the South could offer no justifiable resistance." May 25, 1866, p. 4, col. 4. Not a word about the Bill of Rights!

statement was published so much as once: he cites the *Times* for something different.

Second comment: How can Justice Black assert that Howard's speech (with or without the statement about the Bill of Rights) was published widely? Flack tells of the comment of one newspaper, and says that "by declarations of this kind" the people were kept informed, etc. Of course Howard's speech was noticed in the papers of May 24, as was pointed out above. But one relying only upon Flack at page 142 was not warranted in asserting that there had been more than a single mention in the press.

Third comment: Justice Black quotes Flack for the statement that "extracts and digests of other speeches were published widely in the press." This is certainly warranted; but how is it material to the issue—the incorporation of the Bill of Rights—until it is shown that the extracts and digests said something on *that* point?

Surely this is not being hypercritical. Sifting evidence and drawing conclusions is the everyday business of a Justice. A record of trial is not readily available throughout the country. One counts upon fairness and accuracy in the statement of the case. Here the record lay in a book easily consulted, and one can see for oneself how the evidence was handled.

As if to claim Flack's observations further in support of his contention, Justice Black continued (the italics being neither the Justice's nor Mr. Flack's, but the present writer's):

> Flack summarizes his observations that
>
> "The declarations and statements of newspapers, writers and speakers, . . . . show very clearly, . . . . [Flack had qualified here by saying "it seems"] the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. *There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not*, whether the privileges guaranteed by those Amendments were to be considered as privileges secured by the Amendment, but it may be *inferred* that this was recognized to be *the logical result by those who thought that the freedom of speech and of the press* as well as due process of law, including a jury trial, *were secured by it*." Flack, supra, 153, 154.

Flack, as a witness testifying to what he has observed, says that he has examined a good many newspapers and has not found

*any statement at all*, one way or the other, about the incorporation of the Bill of Rights. Of course, in so far as people had not heard of the idea they would not comment on it. And such as may have heard of it—Senators in particular—appear to have ignored it. Certainly that evidence, fairly presented, counts heavily against the theory of incorporation.

Mr. Flack adds that where we find a man who believed that Section 1 carried with it freedom of speech and of the press, we may infer that he recognized it to be a logical result that Section 1 would impose all of the Bill of Rights. Maybe so—or maybe such a man would have believed in a selective incorporation. In any event, the man's recognizing that this result would be logical falls far short of making it the meaning understood by the American people. In the latter part of the paragraph quoted, Mr. Flack was no longer giving testimony as to facts he had observed.

This unsatisfactory passage from the United States Reports calls to mind the tendentious use of a headline by the *Detroit Free Press*,[147] shortly after the destruction of the *Maine* in Havana harbor. A banner announced

MINES IN THE HARBOR

Then in cramped typography came this accurate report:

AGENTS OF THE UNITED STATES HAVE BEEN UNABLE TO FIND THE SLIGHTEST EVIDENCE OF THEIR EXISTENCE

## XII

The Amendment was submitted to the states under date of June 16, 1866.[148] By the end of the year the legislatures of twelve states, in regular or in special session, had acted upon it. In many cases the legislature elected in the autumn convened in early January, 1867, and was formally advised of the proposal by the Governor's message. Twelve legislatures acted in the month of January, six in February, two in March, one in June. An interval of nearly ten months ensued, broken by Iowa's ratification in April 1868. Then the reconstructed states, bowing to the requirements Congress had set for readmission to representation,[149] gave

147. Feb. 27, 1898, p. 2.
148. 14 STAT. 358 (1866).
149. 14 STAT. 429 (1867).

their ratifications, mostly in June and July 1868. On July 28, 1868, the Fourteenth Amendment was promulgated.[150]

Before taking up the proceedings in the several states in turn we should pause to consider what significant evidence one might expect to find. There will be the governor's message, and possibly a report from the legislative committees on federal relations. These documents should be examined for any construction of Section 1. The legislatures, almost without exception, kept no record of debates, but only a journal of motions and votes. We shall find a few newspaper summaries of speeches—but these are inadequate and, one comes to see, far less significant than some other lines of inquiry.

If it was understood, in the legislatures that considered the proposed Amendment, that its adoption would impose upon the state governments the provisions of the federal Bill of Rights, then almost certainly each legislature would take note of what the effect would be upon the constitutional law and practice of its own state. If, for instance, the state permitted one charged with "a capital or otherwise infamous crime" to be tried upon information rather than "on a presentment or indictment of a Grand Jury" (Amend. V), if it did not provide a common-law jury of twelve "in all criminal prosecutions" (Amend. VI), or if it failed to preserve "the right of trial by jury" "in suits at common law, where the value in controversy shall exceed twenty dollars" (Amend. VII)—if there was any state in this situation, presumably its legislature would not knowingly ratify such an Amendment without giving some thought to the implications. In some states there would be no disparity between the state bill of rights and that in the federal Constitution. Or the additional obligations might appear quite acceptable. Connecticut, the first state to ratify, had no provision against double jeopardy; New Hampshire, the second, had no specific guaranty of freedom of speech. One can easily imagine that the state legislature would have seen no objection to abiding by the federal Bill of Rights in those respects. But where the imposition of Amendments I to VIII would put a stop to some established practice, such as the mode of trial in civil or criminal cases, then surely—if the Amendment was really supposed to incorporate the Bill of Rights—one would expect to find

150. 15 STAT. 708–11 (1868).

a marked reaction. Measures would have to be taken to conform to the new order. Conversely, if we found disparity coupled with complete inaction, it would be very hard to believe the Fourteenth Amendment was understood to have that effect.

Suppose that the state's legislation was at the moment in accord with the requirements of the federal Bill of Rights: even so, the legislature could scarcely have failed to give heed to a proposal that would fasten upon the state the grand and petit jury in criminal cases, and the civil jury in all cases involving more than $20. That would mean that the state would lose its freedom to modify those features in the light of experience, and would be seriously handicapped in dealing with the administration of justice—a field wherein the state had traditionally been free to mold its institutions to conform to local needs. Not the legislature, not a constitutional convention, not even Congress, could abate these requirements: by nothing short of amending the Constitution of the United States could any state obtain release. We have been prone to recite the Seventh Amendment as uncritically as the words of a traditional creed or confession. In fact, Congress has so limited the cases of diverse citizenship triable in the federal courts that the minimum *ad damnum* has always been many times $20. (At the time the Fourteenth Amendment was adopted the jurisdictural account stood where it had been set by the original Judiciary Act—the amount in controversy must exceed $500.)[151] To make the Seventh Amendment binding upon the states—the very thought of it would have given pause to the state legislatures. Religious liberty, freedom of speech and of the press, the essentials of a fair trial—values such as these seem eternally good and true and one can imagine a legislature accepting a new obligation to observe them. There have been men so attached to the practices of the common law as to place the grand jury among these eternal values, even though by 1866 some states were prosecuting felonies upon information. But no one could reasonably hold that it was inherent in justice that the states make available a jury of twelve men in any case where more than $20 was involved. (Recall at this point the gradual decline of the purchasing price of the dollar.) The very fact that the proposed Amendment was so readily accepted by so many legislatures is on its face enough to throw

151. 1 STAT. 78 (1789).

grave doubt on the theory that it incorporated Amendments I to VIII. But we shall go on to scan the new constitutions, the statute books, the reports, for 1866 and a few years following, expecting to find strong evidence, one way or the other, on our question.

Then we recall that the Fourteenth Amendment was intended immediately as a prescription for the rebel states. They must accept the Amendment, they must frame new constitutions consistent with its terms, before Congress would declare them fit for readmission to the councils of the Union. These new constitutions, then, would fall under the scrutiny of Congress and—we may suppose—would assuredly have to measure up to the requirements of the Amendment. If it should turn out that any of those constitutions contained something at variance with the terms of the federal Bill of Rights, then we would ask whether Congress acquiesced. For it would indeed be impossible to maintain that Congress regarded the Fourteenth Amendment as incorporating the first eight Amendments if it approved a Southern constitution inconsistent with their provisions. And of course we would be most particularly interested in the attitude of Representative Bingham and Senator Howard toward any such inconsistent constitution.

*Connecticut.*—The General Assembly was in session when the proposed Amendment was submitted to the states by the Secretary of State. An attempt to remit the matter to the next legislature was defeated. On June 25, 1866, the upper chamber, by vote of 11 to 6, resolved to ratify.[152] On June 29 the House concurred, 131 to 92.[153]

The State Constitution of 1818, in Article I, the Declaration of Rights, Section 9, provided that "no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or an indictment of a grand jury. . . . ." The statutes provided that for all crimes not so punishable, the prosecution might be by complaint or information. One reads this in the General Statutes of 1866,[154] one reads it in the Revision of 1875,[155] which was begun in 1872 when the adoption of the Fourteenth Amendment was fresh in memory. In 1941 the Supreme Court of the State described procedure by

152. CONN. SEN. J. 374 (1866).
153. CONN. HOUSE J. 410 (1866).
154. Tit. 12, § 225.
155. Tit. 20, ch. 13, pt. I, § 6.

information as being "in accordance with the practice in this state for nearly two centuries and approved by our courts."[156] Does it seem possible that the legislature that embraced the Amendment so eagerly understood that adoption would impose the grand jury for every "infamous" crime?

*New Hampshire.*—The legislature was holding its regular June session of 1866 when, on June 21, it received from Governor Frederick Smyth a message transmitting the proposed Amendment. The governor commented briefly,[157] "As New-Hampshire early and nobly responded to the calls of war, I trust she will promptly and unanimously ratify this great requirement of peace."

The House of Representatives at once referred the matter to a select committee of ten on Constitutional Amendment and National Affairs. On June 26 the committee brought in majority and minority reports. The former simply presented a resolution to ratify.[158] The minority members assigned a number of reasons why the proposal should be rejected.[159] Among them the following bore on Section 1:

> 5. Because the proposed amendment is ambiguous or contradictory in its provisions, the first section prohibiting any State from abridging the privileges of citizens of the United States, the right of suffrage being claimed as one of those privileges, and the second section, by inference, allowing the States to restrict the right of suffrage if willing to submit to the consequent disabilities.
>
> 6. Because said amendment is a dangerous infringement upon the rights and independence of all the States, north as well as south, assuming as it does, to control their legislation in matters purely local in their character, and impose disabilities upon them for regulating, in their own way, the right of suffrage,—clearly a State right—a right vital to the theory of our government, and most carefully guarded by the framers of the Constitution.
>
> 13. And finally, because the only occasion and real design of the proposed amendment is to accomplish indirectly what the general government has and should have no power to do directly, namely, to interfere with the regulation of the elective franchise in the States, and thereby force negro suffrage upon an unwilling people.

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156. State v. Hayes, 127 Conn. 543, 581, 18 A.2d 895, 914 (1941). See Goddard v. State, 12 Conn. 448, 451 (1838); Romero v. State, 60 Conn. 92, 94 (1891).

157. N.H. HOUSE J. 137 (1866).

158. *Id.* at 174.

159. *Id.* at 176.

The *House Journal* indicates a rather full debate on June 26. On June 28 the vote was taken—207 yeas and 112 nays.[160]

These steps were then repeated in the Senate. A special committee of three was appointed, and the minority member reported the same set of objections as had been presented to the lower chamber.[161] The Senate heard a full discussion on July 5, and next day voted, 9 to 3, to ratify the Amendment.[162]

New Hampshire's Constitution of 1793 bore the traits of a Puritan ancestry. Article 6 of the Bill of Rights encouraged "the public worship of the Deity" and to that end empowered the legislature to authorize towns, parishes, and religious societies "to make adequate provision . . . . for the support and maintenance of public Protestant teachers of piety, religion, and morality." Only Protestants were eligible to be governor or legislator. In December 1868 the Supreme Court of New Hampshire had a case[163] involving the provision of Article 6 just quoted. Now if the Fourteenth Amendment incorporated the federal Bill of Rights, it had become fundamental law that the state "shall make no law respecting an establishment of religion." We plunge into the report to learn what the court may have said on the effect of the new Amendment.

Here is the case. "The First Unitarian Society of Christians in Dover" was rent by doctrinal dissension. Their preacher had evolved to the point where a text from Emerson was as good as one from the Bible. The wardens supported him. Hale and others, pew owners, prayed that the wardens be restrained from permitting this preacher to occupy the meeting house. The Court granted the relief. Judge Doe—a great name in American law—wrote a dissent. The report covers 276 pages. Both opinions had much to say of the history of New Hampshire's polity in ecclesiastical matters. But in neither was the least reference made to the Fourteenth Amendment. Only once was the United States Constitution mentioned: the prevailing opinion referred to the adoption of the First Amendment and quoted Story's *Commentaries* where one reads that

160. *Id.* at 231–33.
161. N.H. SEN J. 70 (1866).
162. *Id.* at 94.
163. Hale v. Everett, 53 N.H. 1 (1868).

> the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions. . . . .[164]
>
> Probably at the time of the adoption of the constitution and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as not incompatible with the private rights of conscience and the freedom of religious worship.[165]

Thus in December 1868—five months after the promulgation of the Fourteenth Amendment—the New Hampshire court regarded the matter of an establishment of religion as being still "left exclusively to the State governments."

*Tennessee.*—Governor Brownlow convened the legislature in special session on July 4, 1866, to consider the Amendment. In his address he said[166]

> By the first section, equal protection in the enjoyment of life, liberty and property, is guaranteed to all citizens. Practically, this affects mainly the negro, who having been emancipated by the rebellion, and having lost that protection which the interest of the master gave him, became by the very laws of nature, entitled to the civil rights of the citizen, and to the means of enforcing those rights.

Certainly this language contains no hint that the federal Bill of Rights was lurking in Section 1.

A joint resolution to ratify was introduced in the Senate. Senator Frazier sought to amend it by adding a proviso to the effect that the proposed Amendment should not be construed to confer upon the Negro rights to vote, to hold office, to sit upon juries, or to intermarry with whites; the states would retain "the management of their domestic concerns, as provided and secured by the present Constitution of the United States."[167]

Of course the attempt to fasten this proviso upon ratification was a hostile and futile gesture, which the friends of the constitutional Amendment would inevitably resist without much regard for the particular terms of the proviso. By a vote of 13 to 5 it was laid on the table. Then the Senate voted the joint resolution,

164. 2 STORY'S, COMM. § 1879 (4th ed. 1873).
165. *Id.* at § 1873.
166. TENN. SEN. J., Called Sess. 8 (1866).
167. *Id.* at 23.

14 to 6.[168] The lower House concurred by a vote of 39 to 15.[169] Certainly the rejection of the Frazier proviso conveys not the slightest suggestion that the Fourteenth Amendment incorporated the federal Bill of Rights.

*New Jersey.*—The General Assembly met in extra session in September 1866. Governor Marcus L. Ward, in submitting the proposed Amendment, said[170] that "every provision" was "wisely adapted to the welfare of the whole country." This was on September 10. By the close of the next day the House, by vote of 34 to 24, had adopted a resolution to ratify,[171] the Senate had concurred[172] (the 11 Republicans voting yea and the 10 Democrats abstaining), and the Governor had completed ratification.

The new General Assembly meeting in January 1868 was controlled by the Democratic party. The joint committee on Federal Relations reported a joint resolution to rescind the previous legislature's resolution of ratification. One of the objections was that the proposed Amendment was couched in "ambiguous, vague, and obscure language, the uniform resort of those who seek to encroach upon public liberty."[173] The rescinding resolution was adopted by the two Houses,[174] and when returned by Governor Ward, a Republican, was passed a second time notwithstanding his objections.[175]

The Constitution of 1844 provided (Art. I, § 7) for trial by jury: "but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men." This was done by the Act of April 16, 1846.[176] So the law stood when the legislature ratified the proposed Amendment, and so it remained and was carried out in practice—one more evidence that the Fourteenth Amendment was not regarded as bringing Amendments I to VIII in its wake.

*Oregon.*—The journals of the Legislative Assembly tell nothing of the meaning of Section 1 of the Amendment. The new

168. *Id.* at 24.
169. TENN. HOUSE J., Called Sess. 24 (1866).
170. Minutes of the Assembly, Extra Session, 1866, p. 8.
171. *Id.* at 17.
172. N.J. SEN. J., Extra Session, p. 14 (1866).
173. *Id.* at 31, 40 (1868).
174. *Id.*, at 198; Minutes of the Assembly, 1868, p. 309.
175. N.J. SEN. J. 249, 356 (1868); Minutes of the Assembly, 1868, p. 743.
176. N.J. REV. STATS. tit. VII, ch. 8, § 22 (1847); N.J. GEN. STATS., p. 1871, § 33 (1895).

governor, George L. Woods, was inaugurated on September 12, 1867. His address asked[177] "Can any truly loyal man object to, or could the rebels themselves expect less" than what the Amendment provided? The committees reported merely that the measure should be adopted, which was done by vote of 13 to 9 in the Senate,[178] 25 to 21 in the House.[179] Democrats in the House protested that minority members of the committee had not been consulted. Subsequently a resolution was introduced, declaring "that the action of the house in the adoption of the constitutional amendment did not express the will of this House as it now stands, after being purged of its illegal members." This was adopted, then reconsidered, and finally rejected by a vote of 24 to 23.[180]

The Oregon legislature of 1868 was controlled by the Democrats. When it met, in September, a resolution was offered, referring to the act of ratification and reciting that the ratifications of the seven of the reconstructed states were ineffective because their legislatures had been "created by a military despotism" and that Oregon's ratification had been effected by the votes of two persons "illegally and fraudulently returned as members"; in the light of which the earlier act was rescinded and ratification was "withdrawn and refused."[181] This was adopted by both Houses, the vote being 13 to 9 in the Senate[182] and 26 to 18 in the lower chamber.[183] This political gesture had no effect, of course, upon the obligation of the Amendment.

*Texas.*—The legislature met in regular session on August 6, 1866. Governor-elect J. W. Throckmorton addressed them, but made no mention of the proposed Amendment. In the lower House the Committee on Federal Relations reported that,[184]

> The first section proposes to deprive the States of the right which they have possessed since the revolution of 1776 to determine what shall constitute citizenship of a State, and to transfer that right to the Federal Government. Its object is, provided the section shall become a part of the Constitution, under the color of a generality, to declare negroes to be citizens of the United States, and therefore, citizens of the several

177. ORE. HOUSE J. 29 (1866).
178. ORE. SEN. J. 35 (1866).
179. ORE. HOUSE J. 77 (1866).
180. *Id.* at 228.
181. ORE. SEN. J. 32 (1868).
182. *Id.* at 131.
183. ORE. HOUSE J. 273 (1868).
184. TEX. HOUSE J. 578 (1866).

> States, and as such entitled to all "the privileges and immunities" of white citizens; in these privileges would be embraced the exercise of suffrage at the polls, participation in jury duty in all cases, bearing arms in the militia, and other matters which need not be here enumerated. It is unnecessary to appeal to the fact that in most of the original free States, negroes have been by law, and in all of them by immemorial usage, excluded from these "privileges and immunities," now sought to be forced on the Southern States, to show that the amendment proposed in this section contemplates and intends a violation not only of justice, but of the common instincts of our nature. In the opinion of your committee it is not desirable, it is not fitting, it is not demanded by the smallest show of right, that the broad, comprehensive principles which have pervaded the Constitution of the United States since its adoption more than three-fourths of a century since, should be abandoned, sacrificed and become a burlesque to gratify the vanity, the malice, the fanaticism of rivals and imitators of Anacharis Klootz [*sic*].[185]

In the understanding of the Committee, the privileges and immunities clause would entitle the Negro to participate, on an equality with the white, in voting, in jury service, and in the militia.

The Senate committee's report said that Section 1 would enable Congress to decide who were citizens and to enforce their privileges.[186]

Each House rejected the measure.[187]

*Vermont.*—The new legislature met on October 11, 1866. Governor Paul Dillingham's message discussed the proposed Amendment at some length, entirely from the political point of view. "The issue presented to the people this fall," he observed, "has been and will be this policy of Congress [expressed in the Amendment], as contrasted with that of the Executive Department of the Government."[188] The former sought to "secure to the original Union men of the South equal rights and impartial liberty"; the President's policy would leave unprotected "a minority of whites so small as to be helpless, and the entire colored race, to whom

185. Anacharsis Cloots, Jean Baptiste Cloots (1755–94), Prussian baron, and agitator during the French Revolution. In 1790 he appeared in the French National Assembly as "ambassador of the human race" to thank the French for arousing the world against slavery.

186. TEX. SEN. J. 421 (1866).

187. The House by a vote of 70 to 5. TEX. HOUSE J. 578 (1866). The Senate by a vote of 27 to 1. TEX. SEN. J. 471 (1866).

188. VT. SEN. J. 28 (1866); VT. HOUSE J. 33 (1866).

liberty has been given, and its peaceable and full enjoyment guaranteed." Concluding, he said,

> The elections already held have resulted in the triumphant approval of the Congressional policy; and there is no reasonable doubt that the elections yet to be held will pronounce as unmistakably in favor of the constitutional amendment.
>
> Vermont, as is her wont when called to any good work, led the way with a grand emphasis in the popular approval of Congress. Yet, decisive as her declaration was at the polls, the State would have welcomed, with still greater enthusiasm and with a more triumphant majority, such a reorganization of the rebellious communities, as would have given to the people, white and black, the equal civil and political rights secured to the people of this State by our Bill of Rights and Constitution, and under which peace, order, civilization, education, contentment, Christianity and liberty have shed their benign and blessed influence alike upon every home and household in our beloved Commonwealth.

The Senate, on October 23, voted to ratify, 28 yeas and no nays.[189] On October 30 the House concurred by a vote of 196 to 11.[190]

Vermont's Constitution presented no feature inconsistent with the provisions of the federal Bill of Rights.

*Arkansas.*—On November 8, 1866, three days after the legislature convened, Governor Isaac Murphy transmitted the proposed Amendment with the advice that "it is not probable that better terms will be granted."[191] The members, however, were not prepared to accept. The Senate Committee on Federal Relations took exception on many grounds, including this: the grant of power to enforce "the provisions of the first article of such amendment, in effect, takes from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the States."[192] It was voted to reject, 24 votes to 1.[193]

In the House, the committee report assigned as objections to Section 1 that Congress would be empowered to elevate the Negro to a political equality with the white race, and that it transferred to Congress jurisdiction over the local and internal affairs of the

189. VT. SEN. J. 75 (1866). The Journal says, "For Report see Appendix." But on turning to the Appendix one does not find the committee report.
190. VT. HOUSE J. 139 (1866).
191. ARK. SEN. J. 51 (1866–67); ARK. HOUSE J. 44 (1866–67).
192. ARK. SEN. J. 260 (1866–67).
193. *Id.* at 262.

States, "virtually destroying the independence of their courts, and centralizing their reserved powers in the Federal Government."[194] On December 17, 1866, by 68 votes to 2, the House concurred in the Senate resolution to reject.[195]

*Georgia.*—The General Assembly came in for its regular session on November 1, 1866. Governor Charles J. Jenkins transmitted the proposed Amendment. In four pages devoted to this subject, there was only the following comment on Section 1:[196]

> The prominent feature of the first [Section] is, that it settles definitely the right of citizenship in the several States, as political communities, thereby depriving them in the future of all discretionary power over the subject within their respective limits, and with reference to their State Governments proper. It makes all persons of color, born in the United States, citizens.

A Joint Committee on the State of the Republic recommended to the Houses that they decline to ratify. Georgia and the other Southern States were entitled to participate in Congress; an amendment proposed in their absence was not made in compliance with the Constitution: therefore there was nothing upon which to act.[197] This report was adopted on November 9, the vote in the Senate being 38 to 0, in the House 147 to 2.[198]

*Florida.*—The General Assembly met for its second session on November 14, 1866. That day it heard the message of Governor David S. Walker. Speaking of the proposed Amendment, he said:[199]

> These two Sections [1 and 5] taken together, give Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color, and leave no further use for the State governments. It is in fact a measure of consolidation entirely changing the form of the government.

Each House referred the matter to its Committee on Federal Relations. The House report, urging rejection, included this comment:[200]

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194. ARK. HOUSE J. 268 (1866–67).
195. *Id.* at 290.
196. GA. SEN. J. 6 (1866); GA. HOUSE J. 7 (1866).
197. GA. SEN. J. 65 *et seq.* (1866); GA. HOUSE J. 61 *et seq.* (1866).
198. GA. SEN. J. 72 (1866); GA. HOUSE J. 68 (1866).
199. FLA. SEN. J. 8 (1866); FLA. HOUSE J. 11 (1866).
200. FLA. HOUSE J. 76 (1866).

> The first section of this amendment, considered in connection with the fifth, is virtually an annulment of State authority in regard to rights of citizenship. It invests the Congress of the United States with extraordinary power at the expense of the States. It would so operate that under its provisions all persons, without distinction of color, would become entitled to the "privileges and immunities" of citizens of the States, and among those privileges would be embraced the elective franchise, as well as competency to discharge the duty of jurors. In addition to this, without denying to the State the power and right to legislate and to control to some extent the liberty and property of the citizen, it vests in the General Government the power to annul the laws of a State affecting the life, liberty and property of its people, if Congress should deem them subject to the objections therein specified. The change which this section proposes, affects the general interests of the people of the United States, and we are unable to see upon what grounds, independent of the fact that it was a party measure, it could have recommended itself to any State in the Union. . . . .

On December 1 the House, 49 to 0, voted to reject.[201]

The report of the Senate's committee made the same objection as had the House committee in commenting upon Section 1:[202] "From the moment of its engraftment upon the Constitution of the United States, the States would in effect cease to exist as bodies politic . . . ." Rejection came on December 3, 1866, and was unanimous, 20 to 0.[203]

*North Carolina.*—The General Assembly met in regular session on November 19, 1866. Governor Jonathan Worth's message, as it bore upon Section 1, warned that[204]

> if Congress is hereafter to become the protector of life, liberty and property in the States, and the guarantor of equal protection of the laws, and, by appropriate legislation, to declare a system of rights and remedies, which can be administered only in the Federal Courts, then the most common and familiar officres [offices, or officers?] of justice must be transferred to the few points in the State where these courts are held, and to judges and other offices [*sic*], deriving and holding their commissions, not from the authority and people of the State as heretofore, but from the President and Senate of the United States. . . . .

The Joint Select Committee on Federal Relations found the same objection, made worse by the uncertainty in scope of this

201. *Id.* at 149.
202. FLA. SEN. J. 102 (1866).
203. *Id.* at 111.
204. N.C. HOUSE J. 29 (1866–67).

new federal power.[205] Quoting the privileges and immunities clause, the report continued:

> What those privileges and immunities are, is not defined. Whether reference is had only to such privileges and immunities as may be supposed now to exist, or to all others which the Federal Government may hereafter declare to belong to it, or may choose to grant to citizens, is left in doubt, though the latter construction seems the more natural, and is one which that Government could at any time insist upon as correct and entirely consistent with the language used. With this construction placed upon it, what limit would remain to the power of that Government to interfere in the internal affairs of the States? And what becomes of the right of a State to regulate its domestic concerns in its own way? Whatever restrictions any State might think proper, for the general good, to impose upon any or all of its citizens, upon a declaration by the Federal Government that such restrictions were an abridgement of the privileges and immunities of the citizens of the Union, such State laws would at once be annulled. . . . .
>
> . . . . . .
>
> . . . . The dangerous innovation involved in the [privileges and immunities] clause . . . . , coupled with the final section, giving Congress "power to enforce [quoting]," consists in the fact that it authorizes the Federal Government to come in, as an intermeddler, between a State, and the citizens of a State, in almost all conceivable cases;—to supervise and interfere with the ordinary administration of justice in the State Courts, and to provide tribunals,—as has to some extent been already done in the Civil Rights Bill,—to which an unsuccessful litigant, or a criminal convicted in the Courts of the State, can make complaint that justice and the equal protection of the laws have been denied him, and however groundless may be his complaint, can obtain a rehearing of his cause. The tendency of all this to break down and bring into contempt the judicial tribunals of the States, and ultimately to transfer the administration of justice in criminal and civil causes, to Courts of Federal jurisdiction, is too manifest to require illustration.

These were rather detailed analyses, and one reads not a word of the federal Bill of Rights. Both Houses rejected the Amendment—the vote being 45 to 1 in the Senate and 88 to 10 in the House of Commons.[206]

*South Carolina.*—Though relatively a friend of the Union as South Carolinians went in those days, Governor James L. Orr advised the legislature, in his message of November 27, 1866, that

205. N.C. SEN. J. 96 (1866).
206. *Id. at* 138; N.C. HOUSE J. 183 (1866).

the proposed Amendment should be rejected. The substance of his objections was that it would transform a federal system of limited powers into a centralized government legislating upon the wide range of the rights of citizens of the United States.[207] On December 20 the House adopted a resolution to reject,[208] and the Senate concurred.[209]

*Virginia.*—Governor F. H. Pierpont's annual message to the legislature, on December 3, 1866, said that "There is no ambiguity in the language of the proposed amendment: it is before you for your mature consideration—for adoption or rejection: you are fully acquainted with all the circumstances which led to its proposal." If this has any bearing at all upon our problem, it counts against rather than in support of the theory of incorporating Amendments I to VIII. "The conditions are not nearly as hard as they might be," the governor said; there was no hope for better terms.[210] A resolution to reject was adopted by both Houses; in each the committee stage lasted only an instant and produced no reasoned report.[211]

*Kentucky.*—The legislature met in adjourned session on January 3, 1867. Next day Governor Thomas E. Bramlette sent his message, in the course of which he stated that he had received from the Secretary of State of the United States copy of a joint resolution proposing amendments to the Constitution, "purporting to have been submitted" by the Congress.[212] He went on to argue at length that with no delegations from the Southern States, Congress was not properly constituted and the proposal had not been voted by the requisite two-thirds of each House. So there was no need to go into detail as to objections: even if the provisions had been acceptable the proposal should still have been rejected. And reject the two Houses did, promptly and without any analysis of particular provisions.[213]

*New York.*—The legislature met in regular session on New Year's Day, and on the morrow listened to the message of Gov-

207. S.C. HOUSE J. 34 (1866).

208. *Id.* at 284. The vote was 75 to 1.

209. S.C. SEN. J. 230 (1866).

210. VA. HOUSE J., Doc. 1, pp. 34, 39 (1866–67).

211. The vote in the House was 74 to 1. VA. HOUSE J. 108 (1866–67). In the Senate, 27 to 0. VA. SEN. J. 101 (1866–67).

212. KY. SEN. J. 17 *et seq.* (1867).

213. KY. HOUSE J. 60 (1867); KY. SEN. J. 63 (1867).

ernor Reuben E. Fenton: "I cannot too earnestly recommend your prompt action" on the proposed Amendment—it was "a proposition so moderate and so just" to the erring States—"I need not discuss the features of this amendment; they have undergone the ordeal of public consideration . . . . and they are understood, appreciated and approved." "The proposed amendment seems to contain just the conditions of safety and justice indispensable to a permanent settlement."[214] There was not the least suggestion that this general understanding and approval included any idea that the Amendment would impose the provisions of the federal Bill of Rights. On January 3 the Senate promptly turned to the proposal and approved, 23 to 3; on January 11 the House concurred, 71 to 36.[215]

*Ohio.*—Governor J. D. Cox presented the proposed Amendment to the legislature at its adjourned session commencing on January 2, 1867. The measure, he observed, comprised four provisions.[216]

> The . . . . [provisions] consist, *first*, of the grant of power to the National Government to protect the citizens of the whole country in their legal privileges and immunities, should any State attempt to oppress classes or individuals, or deprive them of the equal protection of the laws. . . . .
>
> A simple statement of these propositions is their complete justification. The first was proven necessary long before the war, when it was notorious that any attempt to exercise freedom of discussion in regard to the system which was then hurrying on the rebellion, was not tolerated in the Southern States; and the State laws gave no real protection to immunities of this kind, which are of the very essence of free government. The necessity, also, of having somewhere a reserved right to protect the freedom of the slaves whom the war emancipated is too palpable for argument. If these rights are in good faith protected by State laws and State authorities, there will be no need of federal legislation on the subject, and the power will remain in abeyance; but if they are systematically violated, those who violate them will be themselves responsible for all the necessary interference of the central government.

This means that, to Governor Cox, Section 1 included freedom of speech within the State. Whether the freedom thus to be pro-

214. N.Y. ASSEMBLY J. 13 (1867); N.Y. SEN. J. 6 (1867).
215. N.Y. SEN. J. 33 (1867); N.Y. ASSEMBLY J. 77 (1867).
216. Ohio Exec. Doc., Part I, 282 (1867).

tected would, in his opinion, have been merely in respect of matters of federal cognizance does not appear.[217] (Since slavery was recognized in various provisions of the original Constitution, it was a good deal more than a local concern—as the congressional annals abundantly disclosed.) Giving to the Governor's words their fullest meaning, he was saying that Section 1 guarantees free speech and "immunities of this kind, which are of the very essence of free government." One would be vaulting rather far to conclude that these words meant that the Amendment would bring with it Amendments I to VIII.

A resolution to ratify was introduced and adopted in the Senate on January 3; next day the House concurred.[218]

Ohio's Constitution of 1851, as it stood in 1867, guaranteed the grand jury except "in cases of petit larceny and other inferior offenses" (Art. I, § 10). The penalty for petit larceny (stealing a thing of less value than $35) was twofold restitution, and a fine of not exceeding $200 or imprisonment on bread and water for not exceeding 30 days.[219] So the Constitution would have fallen within the terms of the Fifth Amendment. But in 1873–74 Ohio had a constitutional convention—over which Morrison R. Waite was presiding when he was nominated to be Chief Justice of the United States. The resulting document was not adopted, but that is immaterial to the point that the delegates felt entirely free to consider measures inconsistent with the federal Bill of Rights. Proposals were made to abolish the grand jury,[220] to qualify the guarantee of jury trials so as to allow for a jury of six in civil suits in inferior courts where not more than $100 was involved,[221] and to permit the legislature to authorize out of school funds "a *pro rata* allowance to denominational schools."[222] These were dis-

217. *Cf.* Hague v. Committee for Industrial Organization, 307 U.S. 496, Roberts, J., at 512, Stone, J., at 520, and Hughes, C.J., at 532 (1939).

218. OHIO SEN. J. 9 (1867), the vote being 21 to 12; OHIO HOUSE J. 13 (1867), the vote being 54 to 25. The Cleveland Daily Plain Dealer, a Democratic journal, reported in its issue of January 3, 1867, in "Columbus Correspondence" of January 2, "It is whispered that the Constitutional amendment is to be agreed to under the gag of the previous question. . . . . The reason assigned is that it has been already sufficiently discussed among the people, those making this excuse remembering to forget, that the Legislature that is to pass upon it, was elected before the question was presented."

219. 1 OHIO REV. STATS. 439 (Swan 1860).

220. 2 *Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio*, pt. 2, 1787 *et seq.* (1873–74).

221. *Id.* at 1794 *et seq.*

222. *Id.* at 2280 *et seq.*

cussed on their merits, and the provision to permit six-man juries was adopted. But no delegate rose to suggest that the Fourteenth Amendment had anything to do with these questions.

It should be noted that Ohio's legislature convening on January 6, 1868, being under Democratic control, promptly adopted a resolution declaring that the ratification of the proposed Amendment had been "a misrepresentation of the public sentiment of the people of Ohio, and contrary to the best interests of the white race," and purporting to rescind the act of ratification.[223] Ohio was, as we know, none the less counted among the states that had ratified the Amendment.

*Illinois.*—On January 7, 1867, Governor Richard J. Oglesby sent his message to the General Assembly, which had been elected in November. "After full and deliberate discussion," he said, the Amendment had "received a most emphatic approval and indorsement by the people of the State."[224] While it was in a measure the product of the recent struggle,

> there is not a principle asserted, a right declared, or a duty defined by it, that might not, with great propriety, have been engrafted upon the Constitution, without any reference to the war, and independently of and antecedently to it. Are not all persons born or naturalized in the United States and subject to its jurisdiction, rightfully citizens of the United States and of each State, and justly entitled to all the political and civil rights citizenship confers? and should any State possess the power to divest them of these great rights, except for treason or other infamous crime?

That was all he had to say on Section 1. The State Senate debated the matter for about two and a half hours, and voted to adopt, 17 yeas against 8 nays.[225] The House rejected a motion to refer to the Committee on Federal Relations and thereupon concurred in the Senate resolution by vote of 60 to 25.[226]

Now consider an episode that argues very persuasively that there was no contemporary understanding that the Fourteenth Amendment had incorporated the Bill of Rights. Illinois called a constitutional convention which met on December 13, 1869. Two resolutions were offered looking to the abolition of the grand

223. OHIO HOUSE J. 10 *et seq.* (1868); OHIO SEN. J. 33 (1868).
224. ILL. HOUSE J. 40 (1867); ILL. SEN. J. 40 (1867).
225. ILL. SEN. J. 76 (1867).
226. ILL. HOUSE J. 154 (1867).

jury, and another to restricting its use. On April 29, 1870, the Committee on the Bill of Rights reported this draft:[227]

> No person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases of petit larceny and offenses less than felony, in which the punishment is by fine and imprisonment otherwise than in the penitentiary . . . .

A substitute was offered, to abolish the grand jury, with a proviso that the legislature might re-establish it after 1874—so that if the experiment proved unsatisfactory the State could return to its old way.[228]

Orville H. Browning was a delegate to the convention, and he was strongly, even emotionally, attached to the grand jury. He had joined President Johnson's cabinet just after the proposed Amendment had been submitted to the states; his letter construing that measure had been a major feature in the electoral canvass of 1866. He spoke in the constitutional convention to urge the retention of the grand jury, "to which our ancestors had been accustomed" even before the foundation of our nation.[229] Evidently he put all his strength into the speech. But he never so much as suggested that the Fourteenth Amendment incorporated the federal Bill of Rights and thus had fastened the grand jury upon the several states.

Another delegate, James McCoy, spoke with deep feeling of this "bulwark," this "wall of defense," this "sheet-anchor of our liberties."[230] He knew of two states that had turned against the grand jury: "a little two-by-four State" where "they dealt in . . . . wooden nutmegs" (Connecticut), and Michigan, described as "a crown-law State." The delegate continued:

> The whole argument is in favor of the good old institution of grand juries, and I will take the lights in favor of that, as we see them. Here are only two States that have attempted to make any innovation upon the institution, while all the rest of the thirty-seven States have this system in full force today. The Constitution of the United States has declared that no man shall be put on his trial for any criminal offense, unless indicted by a grand jury. The abolition of the grand

227. *Debates and Proceedings of the Constitutional Convention of the State of Illinois convened . . . . December 13, 1869*, at 1558.

228. *Id.* at 1569.

229. *Ibid.*

230. *Id.* at 1572.

> jury is just what the criminal would want. . . . . I am in favor of this venerable institution, and I hope the good judgment of this Convention will maintain it.

Note the reference to the constitutional requirement for the United States: this was cited as merely persuasive; the United States was simply one more among the many jurisdictions whose example pointed the path Illinois should continue to follow.

The outcome of extensive discussion was that the Constitution of 1870 declared that the General Assembly may provide for the abolition of the grand jury in all cases, which remains the law today.[231]

*West Virginia.*—Governor Arthur I. Boreman, in his message of January 15, 1867, submitted and commended the proposed Amendment to the legislature:[232]

> So far as I am aware, there is serious objection to the subject matter of only two of the provisions of this amendment: the one equalizing the basis of representation in the government; the other declaring ineligible to office such participants in rebellion as had previously sworn to support the constitution of the United States. Some of the other provisions are not objected to at all; and the rest—except, perhaps, the clause regulating citizenship—are objected to only on the ground that they are proposed to be incorporated into the constitution of the United States—it being claimed that they appertain to matters that should be left to State regulation.

This is quite colorless. And one learns nothing significant from the legislative journals, which record merely that on that same day the Senate, 15 to 3, voted to ratify,[233] and that on the next day the House concurred, by a vote of 43 to 11.[234] Neither House referred the matter to committee.

*Kansas.*—The legislature met on January 8, 1867, and next day heard Governor S. J. Crawford's message:[235]

> Whilst the foregoing proposed amendment is not fully what I might desire, nor yet, what I believe the times and exigencies demand, yet, in the last canvass, from Maine to California, it was virtually the platform which was submitted to the people; the verdict was unmistakable. The

231. ILL. CONST. Art. II, § 8.
232. W.VA. SEN. J. 19 (1867).
233. *Id.* at 24.
234. W.VA. HOUSE J. 10 (1867).
235. KAN. SEN. J. 43 (1867); KAN. HOUSE J. 62 (1867).

> people have spoken on the subject, at the ballot-box, in language which cannot be misunderstood. And as we are but their servants, to do their will, it is now our unquestionable duty to accept it, and give it our cheerful and hearty support. I, therefore, hope that Kansas, in the first legislative enactment of this session, will give the unanimous vote of her Legislature in favor of this measure.

The legislature complied, and without reference to committee. The Senate was unanimous; the vote in the House was 76 to 7.[236]

If this record alone conveys to us no meaning, the following circumstances will throw light upon the transaction. The Kansas Constitution of 1859 contained no guarantee of grand jury. Prosecution upon information was an established practice, and had been sustained, against an invocation of the Fifth Amendment, by the State Supreme Court in 1865.[237] On February 20, 1868—thirteen months after it had ratified the Fourteenth Amendment, and at a time when adoption seemed assured—the legislature enacted a Code of Criminal Procedure, containing the following provisions:[238]

> § 66. Offenses may be prosecuted in the court having jurisdiction, either by indictment or information, as hereinafter provided.
>
> § 73. Grand juries shall not hereafter be drawn, summoned or required to attend the sittings of any court in any county in this state, unless ordered by the court.

Evidently, so far as the Kansas legislature understood, the impending Fourteenth Amendment did not incorporate Amendments I to VIII.

*Maine.*—The new legislature came in with a mandate to ratify the proposed Amendment, and did so promptly and with almost no opposition. Governor Joshua L. Chamberlain's message devoted six pages to a discussion of the mildness of congressional reconstruction, with not the faintest suggestion that the Amendment had any reference to Amendments I to VIII. A House resolution to ratify was adopted by vote of 126 to 12,[239] and was concurred in by a unanimous vote of the Senate.[240] On January 19, 1867, ratification was complete.

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236. KAN. SEN. J. 76, 128 (1867); KAN. HOUSE J. 79 (1867).
237. State v. Barnett, 3 Kan. 250 (1865).
238. KAN. GEN. STATS., ch. 82 (1868).
239. ME. HOUSE J. 78 (1867).
240. ME. SEN. J. 101. The vote was 30 to 0.

*Nevada.*—The legislature came together on January 7, 1867. Governor H. G. Blasdel advised them that it was their "high privilege and sacred obligation" to ratify the Amendment; he praised the measure for the "protection of life, liberty and property extended to the weak, heretofore enslaved and brutalized . . . ."[241] The House, 34 to 4, voted to ratify; the Senate concurred by vote of 11 (later 12) to 3.[242]

Once again, the context throws light on the record. Nevada had a Constitution that certainly failed to accord with the federal Bill of Rights. The Declaration of Rights (§ 3) established jury trial: but in civil cases the verdict of three-fourths of the jurors would suffice, though the legislature by two-thirds vote might require a unanimous verdict. This was, of course, not the historic "trial by jury" known to the common law and "preserved" by the Seventh Amendment.[243] Nevada ratified—and kept right on with the three-fourths verdict.

The *Official Report of the Debates and Proceedings in the Constitutional Convention of 1864* records an episode worth mentioning in this connection.[244] A motion had been made to strike out the guarantee of a grand jury. Mr. Nourse said: "This is impossible—the Fifth Amendment to the Constitution of the United States forbids." Mr. Proctor thought that provision did not apply to cases under state laws. Mr. Johnson agreed, but thought it unwise to do away with the grand jury. The motion was lost, without an authoritative answer to the federal question. Then the civil jury was taken up, and Mr. Nourse announced, "I like exceedingly this provision for a three-fourths verdict in civil cases"—seemingly with no realization that if his theory of the Fifth Amendment was valid it must apply no less to the Seventh. Here is a reminder, at a moment when the Fourteenth Amendment was not even conceived, that men might never have heard of *Barron v. Baltimore*[245] and might read the federal Bill of Rights as applying to the state as well as the Federal Government. When now and then we encounter that mistaken view in 1866 or later, we should

241. NEV. SEN. J. App. 9 (1867).

242. NEV. ASSEMBLY J. 25 (1867); NEV. SEN. J. 47 (1867). It happened rather often in action on the proposed Amendment that a legislator, absent when the vote was taken, would subsequently ask that his opinion be recorded or that the record be amended to include his vote.

243. See note 249 *infra*.

244. Pp. 196 *et seq.*

245. See note 46 *supra*.

remind ourselves that it need *not* signify a belief that the *Fourteenth Amendment* would incorporate the first eight Amendments.

*Missouri.*—The regular session of the legislature opened on January 2, 1867. Governor Thomas C. Fletcher's message said,[246]

> The first section of the proposed amendment secures to every person, born or naturalized in the United States, the rights of a citizen thereof in any of the States. It prevents a State from depriving any citizen of the United States of any of the rights conferred on him by the laws of Congress, and secures to all persons equality of protection in life, liberty and property, under the laws of the State.

The Senate, voting 26 to 6, adopted a resolution to ratify, and the lower House concurred, the vote being 85 to 34.[247]

Missouri's then existing Constitution of 1865 presented no problem of a conflict with the federal Bill of Rights. But in 1875, when a constitutional convention framed a new fundamental law, the delegates acted with no sense of being governed by Amendments I to VIII. A proposal to authorize the legislature to abolish the grand jury was heard and rejected.[248] The new Constitution provided (Art. II, § 12) that in cases less than felonies, the information and the indictment were "concurrent remedies." Trial by jury was guaranteed: but in civil and criminal trials in courts not of record, a jury of less than twelve might be authorized; and the grand jury should consist of twelve men of whom nine sufficed to indict. (Art. II, § 8.)

It would be evident, even without vouching Story's *Commentaries*, that when the Constitution speaks of grand jury and trial jury it refers to institutions known to the common law and having an accepted meaning when these provisions were framed: "A trial by jury is generally understood to mean *ex vi termini*, a trial by a jury of twelve men . . . .";[249] and as to the grand jury, ". . . . twelve, at least, must concur in every accusation."[250] In each respect Missouri's constitutional provision was out of line with the federal Bill of Rights.

*Indiana.*—On January 10, 1867, the legislature convened for

246. Mo. Sen. J. 14 (1867).
247. *Id.* at 32; Mo. House J. 50 (1867).
248. *Journal of the Missouri Constitutional Convention of 1875*, p. 293.
249. 2 Story, Comm. § 1780, p. 541, n. 2 (4th ed. 1873).
250. *Id.* at § 1784.

its regular session. Governor Oliver P. Morton's message stated the provisions of Section 1 without elaboration, and went on to other provisions. In conclusion he observed that[251]

> The cardinal principles of reconstruction should be planted in the Constitution, whence they can be uprooted only by the same process by which they were established. No public measure was ever more fully discussed before the people, better understood by them, or received a more distinct and intelligent approval.

The legislature referred the proposal to a joint committee of seven. The majority reported that "the important and salutary propositions" contained in the Amendment had been "most fully discussed" before the people, who had then "most emphatically declared in favor" of the measure; the legislature should ratify promptly.[252] The minority made these (and other) objections:[253]

> The first section places all persons, without regard to race or color, who are born in this country, and subject to its jurisdiction, upon the same political level, by constituting them "citizens of the United States, and of the State wherein they reside," thus conferring upon the negro race born in this country the same rights, civil and political, that are now enjoyed by the white race, and subject to no other conditions than such as may be imposed upon white citizens, including, as we believe, the right of suffrage.
>
> . . . . . .
>
> The fifth and last section clothes Congress with the power . . . . [quoting]. Just what power is thus conferred upon Congress, it would be difficult to say. . . . . We have seen so many instances of stretching the powers of government in the last few years, by resorting to new and startling constructions of what seemed to be plain provisions, plainly written, that we feel the time has come when proposed amendments should be freed from all ambiguity; and therefore we are unwilling to sanction any new proposal to confer upon the Federal Government, by amending the Constitution, until we know its precise scope and meaning.

What the Democrats saw in Section 1 was that it conferred civil and perhaps political equality upon the Negro, and that was obviously bad.

The *Brevier Legislative Reports* give a summary of the debates.

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251. IND. SEN. J. 42 (1867); IND. HOUSE J. 48 (1867).
252. IND. HOUSE J. 101 (1867).
253. *Id.* at 102.

A leader of the majority, opening the subject in the Senate, said that "every Republican in the State of Indiana fully understands the question—it has been discussed from every stump and school house"—and it was time to vote. "Out of respect to the minority," they should be given time to speak; but he hoped that "no Republican member [would] cause unnecessary delay by discussing the question."[254] A Democratic member made a long speech, concluding that "This whole scheme is nothing more nor less than a measure of the Northern States against the Southern States," punishing the latter and increasing the power of the former.[255] Thereupon the Senate voted to ratify, 29 to 18.[256]

In the lower chamber, the opponents harped on the contention that Section 1 gave the Negro the vote. It was a "covert attempt to subvert our form of government" by imposing Negro equality.[257] "The blacks will sit with us in the jury-box, and with our children in the common schools."[258] "[T]he partnership of an inferior race would debase the administration."[259]

The *Legislative Reports* continue:[260]

> Mr. Green took the floor and spoke half an hour in opposition, first and most especially to the first section. He held that it was insincerely drafted, and in its very terms a hypocrisy and fraud intended to destroy the power of the States to determine the status of citizenship . . . . He denounced it as a sectional, partizan effort to degrade the ballot, by conferring suffrage upon the inferior and incompetent blacks.
>
> Mr. Dunn said he would have wished this debate had been closed under the previous question; so that the ratification might go forth to the world a day earlier than it would now. The opposition here had its basis in ignorance and tyranny. . . . . Gentlemen put an interpretation one [on] one portion of this amendment diametrically opposed to another portion, claiming that suffrage is conferred on the negroes by the past [first] section. But the construction was set aside by the second section. He also quoted the declaration of the court in the case of Corfield v. Corfer [Coryell], to show the fallacy of the inference that negro suffrage is conferred by the third [first] section. He then replied to the objection that the amendment but repeats the principles of the civil rights bill. Well, we propose to make these

254. BREVIER LEGISLATIVE REPORTS 44 (1867).
255. *Id.* at 45.
256. *Ibid*; IND. SEN. J. 79 (1867).
257. BREVIER LEGISLATIVE REPORTS 79 (1867).
258. *Id.* at 80.
259. *Ibid.*
260. *Id.* at 88.

> principles permanent by writing them in the fundamental law. If you desire to keep the negro out of your State, protect him where he is. If you have not this amendment, and the civil rights bill be declared unconstitutional, the negro will be in worse condition than he was before his emancipation. . . . .

A Republican, closing the debate, assured the opponents that Section 1 did not necessarily confer the suffrage upon the Negro: "Civil rights were inherent—were of God; political rights were conferred by constitutions."[261] The House, 56 to 36, concurred in the Senate resolution.[262]

Observe that in this state where, it was said, everybody understood the Amendment, nobody, so far as appears, associated it with the federal Bill of Rights.

By the Constitution of 1851 it was provided (Art. 7, § 17) that "The General Assembly may modify, or abolish, the Grand Jury system." We learn from *Reed v. The State*,[263] in the Indiana Supreme Court in 1859, that prior to the adoption of the Constitution of 1851 the practice in respect to the grand jury had varied from locality to locality, and that many accused were put on trial without indictment; the provision quoted above was aimed at remedying that confusion. What happened to the grand jury after 1851 has been traced by the Indiana Court.[264] In 1852 provision was made for prosecuting some offenses on information; in 1875 the number of grand jurors was reduced to six; in 1879 authority to prosecute on information was enlarged; in 1881 it was enacted that "all public offenses, except treason and murder, may be prosecuted . . . . by information. . . . ."[265] In a word, Indiana has proceeded, as well after 1868 as before, in the light of local experience and with complete unconcern for the Fifth Amendment.

*Mississippi.*—Governor Benjamin G. Humphreys presented the proposed Amendment to the legislature in a message that treated the measure as unworthy of serious consideration, by reason of the centralization of power it would effect.[266] The Houses voted to reject, with not a single dissenting voice.[267]

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261. *Id.* at 90.
262. IND. HOUSE J. 184 (1867).
263. 12 Ind. 641 (1859).
264. State v. Roberts, 166 Ind. 585, 591, 77 N.E. 1093, 1094 (1906).
265. IND. REV. STATS. § 1679 (1881).
266. MISS. HOUSE J. 7 (Oct. Sess. 1866); MISS. SEN. J. 7 (1866).
267. MISS. HOUSE J. 201 (1866); MISS. SEN. J. 196 (1866).

*Minnesota.*—When the legislature met in January 1867, Governor William R. Marshall submitted the proposed Amendment, saying that[268]

> These reasonable, just and necessary conditions are offered by Congress, representing the loyal people and States that saved the government from overthrow, as the terms upon which the people and States lately in rebellion may enjoy equal and full participation in the government.

The only aspect noticed by the Governor was that the Amendment would operate upon conditions in the South. The House voted at once upon a resolution to ratify, adopting it by vote of 40 to 5;[269] the Senate refused to refer to committee, suspended the rules, and carried the resolution by vote of 16 to 5.[270]

*Rhode Island.*—The governor laid the proposed Amendment before the adjourned session of the General Assembly on January 15, 1867. Committee stage in the Senate was the work of a moment. Debate ran over several days. On February 5 the proposal was adopted, 26 to 2.[271] Two days later the House concurred, by vote of 60 to 9.[272]

Rhode Island's constitution presented nothing out of accord with the provisions of the federal Bill of Rights, and so does not detain us.

*Delaware.*—In 1901 the legislature extended a gratuitous ratification to the Thirteenth, Fourteenth and Fifteenth Amendments; but in the period with which we are concerned Delaware was solidly under the control of Democratic intransigents. Governor Gove Saulsbury—brother of the Senator Willard Saulsbury whose opposition we have already recorded—regarded the congressional reconstruction program as a flagrant usurpation of power and urged the legislature to reject the proposed Fourteenth Amendment.[273] This it did: on February 6, 1867, the House adopted an adverse report by a vote of 15 to 6,[274] and the Senate concurred next day by vote of 6 to 3.[275]

*Wisconsin.*—When we examine the relevant experience in

268. Minn. Exec. Doc. 26 (1866).
269. MINN. HOUSE J. 26 (1867).
270. MINN. SEN. J. 22, 23 (1867).
271. 25 Journal of the Senate, 1865–68, Feb. 5, 1867; 60 Acts & Resolves 54.
272. 41 Journal of the House, 1866–69, Feb. 7, 1867; 60 Acts & Resolves 54.
273. DEL. SEN. J. 76 (1867); DEL. HOUSE J. 88 (1867).
274. DEL. HOUSE J. 226 (1867).
275. DEL. SEN. J. 176 (1867).

Wisconsin we find meaning all about us. The legislature convened on January 9, 1867, and heard a message from Governor Lucius Fairchild. To say that he made no mention of any incorporation of Amendments I to VIII might imply that for our present inquiry his message had no significance. But when one scans this long paragraph a more decisive inference is suggested.[276]

> I herewith transmit for your consideration an attested copy of a resolution of Congress, proposing to the legislatures of the several states, a fourteenth article to the Constitution of the United States. This resolution has for many months been before the people, and during that time its several sections have been made the subject of earnest discussion. The people of this state are thoroughly familiar with its provisions, and with a full understanding of them in all their bearings, have by an overwhelming majority declared in favor of its immediate ratification. . . . . I need therefore urge upon you no extended argument in support of it. . . . . [I]t is the deliberate voice of the loyal masses, that before those who were so lately seeking the nation's life shall be reclothed with the political rights which they forfeited by their treason, they must assent to the proposed amendment with all its guarantees, securing to all men equality before the law; a representation based upon population, but excluding from computation all classes who are deprived of political privileges . . . . This demand is not made with a desire to appropriate to ourselves undue political power, or to oppress or humiliate the southern people. It is made because in view of the terrible events of the past five years, we deem these guarantees necessary to the life of the nation, and we insist that those who saved that life have an undeniable right to demand all guarantees essential to its future preservation.

A joint resolution to ratify the proposed Amendment was introduced in the Senate and referred to the Committee on Federal Relations, a committee of three. Eleven days later the majority reported a simple recommendation to adopt. The minority member (Senator Gerrett T. Thorne) filed an adverse report covering ten printed pages of the journal.[277] He said a great many things, but nowhere did he refer to any idea that the Amendment incorporated the first eight Amendments. In fact, a careful reading discloses one passage that is quite inconsistent with that theory.

> The apparent object of the proposed amendments is to declare the Africans lately in servitude in the southern states of this republic, citizens, and to give to the Congress of the United States the power to

276. WIS. SEN. J. 32 (1867); WIS. ASSEMBLY J. 33 (1867).
277. WIS. SEN. J. 96 *et seq.* (1867).

make them citizens of the several states wherein they reside, and thereby to extend to them the right of suffrage, and, also, to give to Congress the power to legislate for the citizens of the several states. The object accomplished, if the amendments are ratified, will be a surrender of certain rights and powers which the several states of the Union now hold by their sovereign power in trust over the persons and property of their citizens to the federal government, so as to make it the arbiter between the states and the citizens and resident[s] thereof.

The first section of the proposed amendment makes the surrender of power, and the fifth section invests Congress with authority to provide "by appropriate legislation" for the powers thus voluntarily surrendered by the states. . . . .

The first section, in connection with the fifth, will give to the federal government the supervision of all the social and domestic relations of the citizen in the state and to [*sic*] subordinate state governments to federal power.

Adopt these amendments, and if the criminal stands before our state authorities or courts on trial for his crimes or wrongs committed upon a citizen within the jurisdiction of the state, the powers of our state judiciary will no longer be supreme, but subordinate to federal authority. These amendments will have wrought a complete subvertion [*sic*] of the "fundamental principles upon which the Union was founded." Under the amendments congress will have power to appoint commissioners and provide for courts that may be authorized to say, if the state is depriving its citizens of his rights without due process of law. Will not this be a consolidation of power in the federal government?

If this was not the object of this section of the amendments, what other purpose or object was saught [*sic*] by it? Our state constitutions [*sic*] provide by article 1st, section 1st, that "all men have certain inherent rights; among these are life, liberty and the pursuit of happiness." The absolute rights of personal security, personal liberty and the right to acquire and enjoy private property, descended to the people of this government as a part of the common law of England. . . . . They were a part of the Magna Charta, the great charter of England, and form a part of the bill of rights in nearly all the constitutions of the states of this union, as well as of the federal constitution. Why, then, is it necessary to engraft into the federal constitution that part of section one [of] the amendments which says: "Nor shall any state deprive any person of life, liberty or property, without due process of law?" . . . .

"The apparent object" of the proposed Amendment was to enable Congress to give the suffrage to the freedmen and to legislate generally on the subject of civil rights. For if that was not the purpose of Section 1, what could it be? The State Constitution adequately protects "life, liberty and the pursuit of happiness," so

why need the federal Constitution duplicate to the extent of superimposing a due process clause? Note, the minority report nowhere suggests that Section 1 covers the entire ground of the state bill of rights by embodying all of the provisions of Amendments I to VIII. Evidently the report was struck out in the heat of the occasion, and one should not reason too closely from it. But very surely, if the author had understood that the privileges and immunities clause was designed to incorporate the federal Bill of Rights he would have addressed himself to that point.

Each House accepted the Amendment, the vote being 22 to 10 in the Senate, and 69 to 10 in the Assembly.[278]

We turn to a line that will prove most rewarding. Wisconsin's Constitution of 1848 (in Art. I, § 8) provided: "No person shall be held to answer for a criminal offense, unless on the presentment, or indictment of a grand jury. . . . ." On March 9, 1869—less than a year after the adoption of the Fourteenth Amendment—the legislature proposed that Section 8 be amended to read, "No person shall be held to answer for a criminal offense without due process of law. . . . ."[279] In accordance with the requirements for amending, the proposal was passed by the succeeding legislature and then submitted to the people.[280] This amendment was approved at the election in November 1870.[281]

The legislature of 1871 promptly enacted that the courts would have the same power to try prosecutions upon information for crimes, misdemeanors and offenses as in like prosecutions upon indictment.[282]

In *Rowan v. State*,[283] heard in the State Supreme Court at January term, 1872, the plaintiff in error had been tried upon information for manslaughter. He contended: (1) that "due process" in the new Section 8 required that felonies still be prosecuted only upon indictment; and (2) that "The statute, in so far as it allows a party to be put on trial for a felony merely upon an information, is in violation of the 14th Amendment to the Constitution of the United States, which provides [quoting the privileges and immunities and due process clauses]."

278. *Id.* at 119; WIS. ASSEMBLY J. 224 (1867).
279. Wis. Gen. Laws, 1869, Joint Res. No. 7, Mar. 9, 1869.
280. Wis. Gen. Laws, 1870, Joint Res. No. 3, Mar. 2, 1870, ch. 118, Mar. 17, 1870.
281. WIS. ANNOTATIONS 47 (1914).
282. Wis. Gen. Laws, 1871, ch. 137, Mar. 23, 1871.
283. 30 Wis. 129 (1872).

Cole, J., speaking for a unanimous court, said that it was "absolutely certain that the sole and only object" of amending Section 8 "was to abolish the grand jury." As to the bearing of the Fourteenth Amendment:[284]

> The historical origin of the 14th amendment to the constitution of the United States, is familiar to all persons in this country. Prior to its adoption there was a class of persons in the states which on account of the state of public sentiment were particularly exposed to oppressive and unfriendly local legislation. They were liable to be despoiled of their property, or to be deprived of their rights, privileges, and immunities in an arbitrary manner, and without *"due process of law."* And the object of this amendment was to protect this class especially from any arbitrary exercise of the powers of the state governments, and to secure for it equal and impartial justice in the administration of the law, civil and criminal. But its design was not to confine the states to a particular mode of procedure in judicial proceedings and prohibit them from prosecuting for felonies by information, instead of by indictment, if they chose to abolish the grand jury system. And the words *"due process of law,"* in this amendment, do not mean and have not the effect to limit the powers of the state governments to prosecutions for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed form and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society, and if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by informative [*sic*], there is nothing in the 14th amendment to the constitution of the United States, which prevents them from doing so.

It is thus absolutely clear that in the contemporary understanding of the Wisconsin legislature and court, the Fourteenth Amendment did not impose the federal Bill of Rights upon the states. What Justice Cole said about the State's freedom to adapt its judicial procedure to the progress of society strikes so deep a note that, one may be sure, no proposal to amend the federal Constitution "to confine the states to a particular mode" of administering justice could ever have had the smooth passage that was given to the Fourteenth Amendment by the Northern legislatures.

*Pennsylvania.*—The newly elected General Assembly met on January 1, 1867. Governor A. G. Curtin's message presented the

284. *Id.* at 148.

proposed Amendment.[285] He was happy that it had been possible, without delaying adoption, to ascertain the opinion of the people upon this measure. By the election of a large majority openly favoring it, the approval of the electorate had been abundantly expressed.

> Indeed, the amendments are so moderate and reasonable in their character, that it would have been astonishing if the people had failed to approve them. That every person, born in the United States, and free, whether by birth or manumission, is a citizen of the United States, and that no State has a right to abridge the privileges of citizens of the United States—these are principles which were never seriously doubted anywhere, until after the insane crusade in favor of slavery had been for some time in progress. . . . .

The incoming Governor, John W. Geary, said in his inaugural[286] that the rebels

> must not, *shall not*, re-appear in the council chambers of the nation . . . . unless it be on conditions which will preserve our institutions from their baleful purposes and influence, and secure republican forms of government, in their purity and vigor, in every section of the country.

Seemingly neither of the Governors thought of the Amendment as having any immediate function to perform outside the Southern States.

Pennsylvania's is one legislature that preserved a verbatim record of debates. As the proposed Amendment was discussed at considerable length in each House, with a vigorous Democratic opposition, we may feel satisfied that we have here a fair sample of the views of both sides in the Northern legislatures. Not one sentence can be found suggesting that the first eight Amendments were incorporated in the proposal. Here is the pith of what was said by various Senators, in opposition and then in support, so far as Section 1 was concerned. First, comments from various opponents:

> . . . . [T]he only object, therefore, of this section, is to make negroes citizens of the United States. . . . .[287]
>
> . . . . [The privileges and immunities clause:] in other words, negroes are citizens, and no State shall say that they are not the equal

285. PA. SEN. J. 16 (1867).
286. Pa. Leg. Rec. 79 (1867).
287. *Id.* at App. p. v.

of the white man in every sense. . . . . When the power to enforce these privileges and immunities is vested in Congress, is it possible to conceive of any of the dearest rights of which we are possessed, that Congress may not bestow upon him also? . . . . If this be the power granted, what further need have we of the State government? Consolidation is accomplished . . . .[288]

. . . . [T]he language of the first clause [Section] . . . . is susceptible of two constructions. Now, if the right of suffrage is embodied in the words "privileges and immunities . . . ." then some future Congress . . . . may say that every State in the Union shall grant negroes the right of suffrage, or they shall not be entitled to representation. [He quoted *Corfield v. Coryell* as having included suffrage, and then other cases on "privileges and immunities."] I simply cite these adjudications . . . . to show that this language is susceptible of more than one construction.[289]

Quoting now from several of the Senators favoring the Amendment:

The South must be fenced in by a system of positive, strong, just legislation. The lack of this has wrought her present ruin; her future renovation can come only through pure and equitable law; law restraining the vicious and protecting the innocent, making all castes and colors equal before its solemn bar. That, sir, is the sine qua non. . . . .[290]

[The proposed Amendment] I regard as simply incidental to carrying out . . . . the amendment [XIII] of two years ago. I have no doubt that the civil rights bill is constitutional . . . . It does no harm; it gives it a sanction by putting it in the Constitution of the United States in the highest form known to our government . . . .[291]

. . . . To my mind, the justice and propriety of this provision [Section 1] is obvious, and I shall vote for it with satisfaction to my own conscience, and gratitude to Congress for squarely meeting the universal demand of the loyal States to destroy all legal caste within our borders.[292]

Coming now to the opposition in the lower House, we find the same objections as among the Democratic Senators—maybe Section 1 means Negro suffrage, maybe it means an entire consolidation of legislative power over civil matters; on either view it is entirely wrong. Here is a collection of their comments:

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288. *Id.* at xiii.
289. *Id.* at xxv.
290. *Id.* at vii.
291. *Id.* at xvii.
292. *Id.* at xxii.

> By the first section it is intended to destroy every distinction founded upon a difference in the caste, nationality, race or color of persons . . . . In all matters of civil legislation and administration there shall be perfect legal equality . . . . By this, in connection with the fifth section, the regulation of the civil relations of each State is placed under the control of the Federal Government, the States to be used simply as instruments to execute its will, and nearly their entire civil and criminal jurisprudence placed under the control of Congress. . . . .[293]
>
> In no part of the proposed article, nor in the Constitution as it now stands, is there given a catalogue of the "privileges and immunities" of citizens, which by this clause the States are prohibited from abridging. In case of dispute, where exists the authority to define these "privileges and immunities?" [Section 5], it seems to me, undoubtedly confers upon Congress the power to define what are the "privileges and immunities" of citizens, as well as to impose penalties upon all who, under the authority of any pretended State law, should deny or abridge these privileges and immunities.[294]
>
> The first amendment [Section] here submitted is simply the proposition of negro suffrage . . . . It has no other significance or meaning whatever, Mr. Speaker; and should it become a part of the Constitution, it would be claimed at once that negroes were everywhere enfranchised. And that is all that that section means. . . . .[295]
>
> Unless under cover of the loose wording of this section, it is intended to establish negro suffrage . . . . the whole section is mere surplusage, conveying no additional right or safeguard not already conveyed in better form and hedged in and surrounded by the solemn sanction of the people in every State of the Union. . . . .[296]
>
> . . . . It is very evident . . . . that the first [Section] is designed only as the basis for the rearing of the structure of universal suffrage. . . . . The dangers which must result from the proposed degredation of the ballot-box, should be apparent to even the least discriminating . . . .[297]
>
> That [privileges and immunities clause] takes all power of legislation away from Pennsylvania and gives it to the National Congress. . . . . Therefore we might almost say that the necessity of having a Legislature for this State has been practically dispensed with.[298]

What did the proponents say to allay these wild forebodings? One member replied:

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293. *Id.* at xli.
294. *Id.* at lii.
295. *Id.* at lx.
296. *Id.* at lxvii.
297. *Id.* at lxxx.
298. *Id.* at xcvii.

> I do not see how it is possible for human wisdom to frame a more perfect amendment . . . . than this section. It supplies a deficiency which every man has felt; it makes every person equal before the law; it aims to make every court in the United States what justice is represented to be, blind to the personal standing of those who come before it. . . . . The "equal protection of the law" is the talismanic charm which is to raise this Government to a position which it has never yet been able to occupy. When this country has ratified this amendment, and carries out the theory of dealing with every one of its people in accordance with the dictates of simple justice, regardless of caste or condition, then will our Government present to the downtrodden of all the earth a spectacle of greatness and endurance such as has never been equalled. . . . .[299]

Another said:

> We propose, in the first place, to write, in substance, the civil rights bill, the essence of justice, "Whatsoever ye would that men should do to you, do ye even so to them." . . . . Put in black and white in the organic law that negroes have rights which white men are bound to respect—the rights of life, liberty and property; in short, the inalienable rights enumerated in the Declaration of Independence, not to be accepted as "glittering generalities," but as original, self-evident truths, fundamental in their character and essential elements in the groundwork of our Republican system of government. . . . .[300]

Each House voted to ratify the proposed Amendment, by votes of about two to one.[301]

*Michigan.*—The journals show that the two Houses, meeting in January 1867, moved promptly to ratify, the vote being 77 to 15 in the lower chamber and 27 to 1 in the Senate.[302] But once again, a recital of the contemporary history amounts to a demonstration that there was no thought that the new Amendment incorporated Amendments I to VIII.

Michigan's second Constitution, that of 1850, omitted any provision for the grand jury. A statute of 1859 enacted that the courts had the same power to "try and determine prosecutions upon information for crimes, misdemeanors and offenses . . . . as they possess and may exercise in cases of like prosecutions upon indictment." "Grand juries shall not hereafter be drawn . . . . at the sittings of any court . . . . unless the judge thereof shall so

299. *Id.* at xlviii.
300. *Id.* at lxv.
301. PA. SEN. J. 23 (1867); PA. HOUSE J. 278 (1867).
302. MICH. HOUSE J. 181 (1867); MICH. SEN. J. 162 (1867).

direct by writing . . . ."[303] So Senator Howard's own state, which he had been serving as attorney general at the moment the above statute was enacted, was out of accord with the Fifth Amendment at the time its legislature approved the proposed Amendment.

If there was any idea among informed men in Michigan that the Fourteenth Amendment incorporated the Fifth, surely counsel would raise the point in appealing some conviction. One turns eagerly to the Michigan reports. Volume after volume, convictions prosecuted upon information are brought up, but with never a reference to the Fourteenth Amendment. Come to think of it, this is even more significant than a strong decision, since in criminal cases even the most forlorn hope would have been pursued. After examining a dozen volumes one is about to abandon the search when suddenly *Weimer v. Bunbury*,[304] an 1874 decision, is spied. This was not a criminal proceeding and had nothing to do with the absence of a grand jury. The contention was that a statute authorizing summary process against delinquent tax collectors was an infringement of the Fourth Amendment (unreasonable searches and seizures) and of the Fifth (due process of law). Note that counsel did not, so far as the report discloses, invoke the Fourteenth Amendment: they were simply renewing the contention made in *Barron v. Baltimore* in 1833.[305] And a unanimous court, speaking through the great Judge Cooley, gave its answer in two sentences:[306]

> It [the statute] is said to violate the fourth and fifth amendments to the federal constitution. There is nothing in this objection. It is settled beyond controversy, and without dissent, that these amendments are limitations upon federal, and not upon state power: [citing *Barron v. Baltimore* and the rest of that line of cases].

The theory that the Fourteenth Amendment incorporated Amendments I to VIII seems to have been utterly unknown in Michigan.

*Massachusetts.*—This is the one state wherein the discussion of the proposed Amendment might—on a superficial view—appear to support the theory that the privileges and immunities

303. Acts of 1859, No. 138; MICH. COMP. LAWS ch. 261, §§ 1, 7 (1872).
304. 30 Mich. 201 (1874).
305. See note 46 *supra*.
306. 30 Mich. 201, 208 (1874). Justice Cooley's want of any contemporary knowledge as to the Fourteenth Amendment incorporating the federal Bill of Rights is further evidenced by the absence of any mention of such a point in his treatise on Constitutional Limitations (1st ed. 1868, 2d ed. 1871, 3d ed. 1874).

clause incorporated the federal Bill of Rights. Certainly there was no such suggestion in the address of Governor Alexander H. Bullock to the legislature when it convened in January 1867. He paraphrased Section 1, and continued:[307]

> . . . . To this cardinal principle of a republican government I am unable to see how any citizen can reasonably object, who is himself in sincerity of belief a supporter of the Democratic idea. As an abstract proposition, it is so manifestly an axiom of free government as to preclude the necessity of argument. In its special application to the condition of the insurgent States, its adoption by Congress was designed to give certain and enduring effect to the provisions of the Act, commonly called the Civil Rights Bill, passed at its last session, by the constitutional majority, notwithstanding the objections of the President. Whatever reasons existed at the time for the enactment of that bill, apply with redoubled force to the incorporation of its provisions into the organic law. The denial of its benefits and immunities to a large class of citizens in those States, rendering emancipation to a great extent a nullity, now demands its affirmation in the most solemn form, to the end that neither the Executive nor the judicial power, nor the local authorities, may render inoperative the deliberate verdict of the people.

On January 25, 1867, while the proposal was awaiting the action of the legislature, the *Boston Daily Advertiser* discussed the situation in an editorial.[308] When the measure was passed by Congress it had been assumed that Massachusetts would favor; indeed there had been talk of calling a special session to ratify. The editorial went on to say that

> The general opinion of Massachusetts has undoubtedly been changed by subsequent events as regards the sufficiency of the terms then proposed, but we doubt if it has altered with respect to the excellence of the provisions of the amendment so far as they go. The democratic press as a matter of course takes open ground against it, as proposing the destruction of State rights. Almost equally as a matter of course, the ultra republicans and those who are rightly called radicals unite with their extreme opponents in working for the defeat of the measure on which the mass of republicans are agreed. . . . .
>
> We do not understand, however, that there is now any occasion to seriously renew the arguments for the amendment on which the republicans triumphantly rested their cases at the fall elections.

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307. Mass. Acts and Resolves, 1867, 789 at 820; Boston Daily Advertiser, supplement of Sat., Jan. 5, 1867.

308. P. 2, col. 1.

Massachusetts had stood, of course in the very front of Abolitionism. (In the Kentucky legislature, at the moment the proposed Amendment was there being rejected, Massachusetts was mentioned as having been—in the eyes of Border Democracy—"the leader in infamy.")[309] Now there were many who felt disappointed that the Amendment failed to confer the suffrage upon the Negro. Section 2 seemed to condone denial of the ballot and indeed to license it under the mild penalty that the Negro if excluded could not be counted for representation. A good many citizens petitioned the legislature not to ratify. The *Advertiser* reported that one argument advanced was that Massachusetts, since it allowed none of its citizens to vote for the judiciary, would be reduced to one Representative in Congress! Wendell Phillips, the Abolitionist, was said to be doing all he could to prevent ratification.[310] This point of view is reflected in the majority report of the legislature's joint Committee on Federal Relations.

On February 28, 1867, the lower House took up the proposed Amendment. It had before it a very long adverse report by four members of the joint committee; also a brief minority report, signed by three, recommending favorable action.[311] The long quotation that follows is a small portion, perhaps an eighth, of what the majority had to say against ratification.

> A change in the fundamental law of a great nation is, under ordinary circumstances, a grave matter. When such a change touches first principles, the question claims the most thoughtful consideration. It is not enough for a Massachusetts legislature that other States have ratified a proposed amendment. Massachusetts can afford to stand alone upon her convictions, but she cannot afford to "follow the multitude to do evil." . . . .
>
> . . . . . .
>
> Two questions present themselves at the outset:—
>
> First. Does it give any additional guarantees to human rights?
>
> Second. Does the proposed amendment impair or endanger any rights now recognized by the Constitution?
>
> The first section of the Article of Amendment is as follows:—[quoting in full].
>
> It is difficult to see how these provisions differ from those now existing in the Constitution. The preamble to the Constitution grandly and solemnly declares:—[quoting in full].

309. Ky. Sen. J. 69 (Jan. 9, 1867).
310. Boston Advertiser, Jan. 29, 1867, p. 2, editorial.
311. Doc. of the House of Rep., House Doc. No. 149, pp. 1 and 25 (1867).

Many of our ablest jurists agree with the opinion of the late Attorney-General Bates, that all native-born inhabitants and naturalized aliens, without distinction of color or sex, are citizens of the United States.

The Constitution (Article IV, section 2) declares,—[quoting in full].

Amendments:—

Article I. [In full.]

Article II. [In full.]

Article V. [Quoting only the due process clause.]

Article VI. [In full.]

Article VII. In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved [omitting the concluding provision against re-examining facts tried by a jury].

Nearly every one of the amendments to the Constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights.

It seems difficult to conceive how the provisions above quoted, taken in connection with the whole tenor of the instrument, could have been put into clearer language; and, upon any fair rule of interpretation, these provisions cover the whole ground of section first of the proposed amendment.

To examine the first section critically, "All persons, &c., are citizens of the United States and of the State wherein they reside." This definition of citizenship of the United States, as we have said, is practically settled quite as authoritatively as an amendment could do; indeed, probably more conclusively; for there is reason to fear that, if this matter should come before the present supreme court as a new question under this amendment, there would be danger of an adverse decision.

. . . . . .

The remainder of the first section, possibly excepting the last clause, is covered in terms by the provisions of the Constitution as it now stands, illustrated, as these express provisions are, by the whole tenor and spirit of the amendments. The last clause, no State shall "deny to any person within its jurisdiction the equal protection of the laws," though not found in these precise words in the Constitution, is inevitably inferable from its whole scope and true interpretation. The denial by any State to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights which we have quoted. If it should be said that such denial has existed heretofore in spite of these guarantees, we answer that such denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments.

We are brought to the conclusion, therefore, that this first section is, at best, mere surplusage; and that it is mischievous, inasmuch as it

> is an admission, either that the same guarantees do not exist in the present Constitution, or that if they are there, they have been disregarded, and by long usage or acquiescence, this disregard has hardened into constitutional right; and no security can be given that similar guarantees will not be disregarded hereafter.

The majority recommended "that the subject be referred to the next general court."

The minority of three reported that,

> Without entering into any argument upon the merits of the amendment, they would express the opinion that its ratification is extremely important in the present condition of our national affairs. As a measure of support to loyal men, and of protection to the property of the country, it is entitled to our cordial approval. As a declaration of the true intent and meaning of American citizenship, it appeals to freemen everywhere. And while it cannot be considered as a finality in the work of reconstructing our federal government, it is an advance in the direction of establishing unrestricted popular rights, which, when completed, will make our Constitution and laws accordant with the highest principles of free civil organization.

The majority say: the Preamble and Amendments I, II, V, VI, and VII have already established human rights; Section 1 of the proposed Amendment goes over the same ground: therefore it is needless. In their major premise they were completely wrong on a matter that had long been well established.[312] Are we readily to believe that in their minor premise they were right in an opinion which, so far as has been discovered, was expressed by no other state legislators, in Massachusetts or elsewhere? Zeal for Negro suffrage dominates the majority report, in its comment on Section 1 and on all the rest of the proposal. The drafting is not marked by precise statement, or by a critical interest in any other aspect of the problem. From the point of view of our inquiry its weight is negligible.

When the House took up the two reports, David H. Mason, one of the minority, moved to substitute the minority for the majority report.[313] Edwin G. Walker, one of the majority, renewed his opposition to the Amendment for its failure to establish Negro suffrage: if it were adopted, one could say "I stand on the Constitution; I practice my tyranny in accordance with

312. Barron v. Baltimore, 7 Pet. 243 (U.S. 1833). See note 46 *supra*.
313. Boston Daily Advertiser, Mar. 13, 1867, p. 2, col. 1.

its provisions." Francis W. Bird, another of the majority members, said he would have the legislature petition Congress to propose a new Amendment prohibiting disfranchisement on the basis of color.

The debate went over to the next day, March 13, when Richard Henry Dana, Jr. spoke in favor of the Amendment. The *Advertiser* reported his remarks as follows:[314]

> To the first article of this amendment there had been no objection brought by those who favored rejection; the gentleman from Charlestown [Mr. Walker] had passed over it with a word, remarking that it would do very well. The speaker felt that this was a most important article; by it the question of equal rights was taken from the Supreme Courts of the States and given to the Supreme Court of the United States for decision; the adoption of this article was the greatest movement that the country had made towards centralization, and was a serious and most important step. This was taken solely for the reason of obtaining protection for the colored people of the South; the white men who do not need this article and do not like it, sacrifice some of their rights for the purpose of aiding the blacks. . . . .

At the close of debate the minority report was substituted for that of the majority by the overwhelming vote of 120 to 20.[315] On March 14 the House voted to ratify the constitutional Amendment, 197 to 29.[316]

On March 20 the Senate debated the issue much more briefly —heard once more the argument that Massachusetts, which "had boasted of her love for the black man, should dare to do right," —and voted to ratify, 27 yeas to 6 nays.[317]

*Maryland.*—On January 2, 1867, the General Assembly met in regular session. Governor Thomas Swann's message had much to say of the proposed Amendment, mostly on the theme that it was unjust to impose Negro equality upon the Southern States, which had, he said, shown unparalleled good faith in accepting their defeat and its consequences. These two sentences come nearest to having significance for our inquiry: "The great obstacle in determining this vexed question of re-construction, is the future status of the negro race. The Constitutional Amendments [sic]

314. *Id.*, Mar. 14, 1867, p. 2, col. 1.
315. *Id.* at col. 2.
316. *Id.*, Mar. 15, 1867; Mass. Acts and Resolves, 1867, p. 787.
317. Boston Daily Advertiser, Mar. 21, 1867, p. 1, col. 5; Mass. Acts and Resolves, 1867, p. 787.

means this and nothing else."[318] Even as near as Annapolis, apparently nothing was known of any intent on the part of Congress to make the proposed Amendment the means of imposing Amendments I to VIII upon the states.

The two Committees on Federal Relations were directed to act jointly.[319] Their report recommended rejection of the proposal. Little was said on Section 1. The new privileges and immunities clause was dismissed with the terse statement that "In the judgment of your Committee, it is not safe to confer any additional powers upon Congress touching this subject." The due process clause, it was said, duplicated a provision found in all state constitutions. It dealt with a matter of "internal government" wherein state authority should be exclusive. To grant Congress power to enforce the due process clause "is virtually to enable Congress to abolish the State governments."[320]

On March 23 each House passed a resolution to reject, the vote in the Senate being 13 to 4 and that in the House 47 to 10.[321]

*Nebraska.*—The first session of the legislature after Nebraska's admission to the Union convened on May 16, 1867. Governor Butler's message recommended adoption of the proposed Amendment, but went into no details.[322] On June 8 the House, 26 to 11, passed a resolution to ratify.[323] On June 14 the Senate concurred by vote of 8 to 5.[324]

Probe beneath the surface, and this terse recital suddenly takes on significance. On July 27, 1866—the Amendment having been proposed in June—the two Houses of Congress voted to admit Nebraska into the Union.[325] This failed through a pocket veto. On February 9, 1867, another bill to admit Nebraska became law.[326] The Constitution of the new State is found, upon examination, to have been inconsistent with the provision of the Seventh Amendment. This argues that Congress did not regard the Amendment as incorporating the federal Bill of Rights. Con-

318. Md. House Doc., Doc. A, at 24 (1867).
319. Md. Sen. J. 635 (1867), concurring in the proposal of the House of Delegates.
320. House Doc., Doc. MM of Mar. 19, 1867, at 13, 14 (1867).
321. Md. Sen. J. 808 (1867); Md. House J. 1141 (1867).
322. Neb. House J., 3d Sess. 15 (1867).
323. *Id.* at 148.
324. Neb. Sen. J. 174 (1867).
325. S. No. 447 passed the Senate, Cong. Globe, 39th Cong., 1st Sess. 4222 (1865–66), Senator Howard voting with the majority. It passed the House, *id.* at 4275, Representative Bingham voting with the majority.
326. 14 Stat. 391 (1867).

versely, when the Nebraska legislature ratified the proposed Amendment, presumably it did not regard it as inconsistent with the State's new Constitution. Let this be explained more fully.

The Constitution of 1866, framed in preparation for statehood, provided (Art. I, § 5) that "The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men, in inferior courts." The Constitution (Art. II, § 2) also limited the suffrage to whites. (So too did the constitutions of several Northern States.)

The 39th Congress debated at great length whether to admit Nebraska with its Constitution as drawn: not because Congress had the least objection to the provision for a jury of less than twelve, but because of the exclusion of Negroes from the suffrage. It was proposed that admission be made subject to a condition that the legislature by a solemn public act renounce the discriminatory provision. Senator Howard strongly opposed the condition;[327] he voted for admission after the condition had been inserted.[328] Representative Bingham in debate also urged admission without condition.[329] Here is the first admission to statehood after the framing of the new Amendment, and Congress by its conduct showed that it was not making Amendments I to VIII the yardstick.

Nebraska had a constitutional convention in 1871. (The resulting document was defeated at the polls.) In reply to a question raised in the convention, the Committee on the Judiciary reported "that in its opinion it is Constitutional to abolish the Grand Jury system."[330] In the debate on the draft bill of rights, one member, Mr. Estabrook, quoted the Fifth Amendment to the Constitution of the United States and said:[331]

"Now I under take [*sic*] to say that in no place can a person be held for a criminal offense without being indicted; and will anybody contend here that we can adopt laws that will run counter to the laws of the United States?"

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327. CONG. GLOBE, 39th Cong., 2d Sess. 184 *et seq.*, 219, 359 (1866–67).
328. *Id.* at 847, 1096.
329. *Id.* at 449 *et seq.*, 479 *et seq.*
330. *Official Report of the Debates and Proceedings in the Nebraska Constitutional Convention 1871* [and Journal of the Constitutional Convention of 1875] in PUBLICATIONS OF THE NEBRASKA STATE HISTORICAL SOCIETY, vols. 11 (1906), 12 (1907), and 13 (1913). Speech, 11 *id.* at 87.
331. *Id.* at 222.

Another member promptly replied,[332] ". . . . I will say that the article that the gentleman reads has to do with the United States courts, but has nothing to do with the State courts."

The member who had already reported the view of the Committee on the Judiciary added,[333]

> We have the precedent in Michigan, of the entire abolition of the grand jury system, as to the question as to the right to make this change from the Constitution of the United States. I may state, for the information of the gentleman that the matter was fully discussed among the members of the Committee on Judiciary, and we found cited numerous cases where it was decided that this provision applied to the Federal courts only, and not to state courts.

No one suggested that the Fourteenth Amendment had any bearing on the problem: it was simply the old question, settled in *Barron v. Baltimore*,[334] whether the federal Bill of Rights was by its own force applicable to state action. Evidently Mr. Estabrook was convinced by the replies, for in a moment he was urging a provision to permit the legislature to dispense with the grand jury in any or all cases.[335]

Nebraska adopted a new Constitution in 1875. The debates of the convention have been lost; only the journal of votes remains.[336] The Committee on the Bill of Rights reported a draft whereby the grand jury would be maintained, subject to the power of the legislature to provide for prosecution on information, and to abolish, limit, change, amend, or otherwise regulate the grand jury system.[337] This became Article I, Section 10 of the Constitution. Pursuant to this authority, in 1885 the legislature authorized prosecution on information, and provided that the grand jury should be drawn only when ordered by the court.[338]

Thus the constitutional history of Nebraska shows that, whether viewed from the side of Congress or from the side of the State, there was no understanding that the Fourteenth Amendment imposed the federal Bill of Rights.

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332. *Ibid.*
333. *Ibid.*
334. See note 46 *supra.*
335. 11 PUBLICATIONS, *op. cit. supra,* note 330, at 228.
336. *Id.*, Preface, p. 10.
337. 13 *Id.* at 538 *et seq.*
338. Neb. Laws of 1885, ch. 108, §§ 1, 7.

*California.*—On December 2, 1867, the legislature heard the second biennial message of Governor Frederick F. Low, Republican, wherein ratification of the proposed Amendment was urged. On Section 1 the message said merely that[339] "This section declares 'equality before the law' for all citizens, in the solemn and binding form of a constitutional enactment, to which no reasonable objection can be urged." Three days later the legislature heard the inaugural address of the governor-elect, Henry H. Haight, Democrat, who roundly condemned congressional policies on reconstruction without particular attention to specific provisions of the proposed Amendment.[340] On March 4 the newly-elected lower House heard a report from its Committee on Federal Relations, recommending rejection.[341] On March 20 the Senate heard a report from its committee, urging ratification.[342] The legislature was deadlocked, and neither ratified nor rejected.

At that session bills were introduced in the Assembly to reduce the number constituting a grand jury from 23 to 5. The Committee on the Judiciary reported that nothing in the United States Constitution applied to the grand jury in state cases: "the whole subject was left to the several States . . . ." The committee recommended enactment.[343] Note that it did *not* render any such advice as this: We believe that the change to a grand jury of 5 would be desirable; since, however, it appears virtually certain the proposed Fourteenth Amendment will soon be adopted, with the consequence that the Fifth Amendment would become applicable to the states, the change is inadvisable.

*Iowa.*—Ratification was effected on April 3, 1868—almost ten months after the last preceding ratification.[344] Iowa's legislature of 1866 had adjourned on March 17—before there was a proposal to adopt—and the next regular session convened on January 13, 1868. Governor William M. Stone, transmitting the proposed Amendment, said that it was "designed to secure in a more perma-

339. CAL. SEN. J. 49 (1867–68); CAL. ASSEMBLY J. 52 (1867–68).

340. CAL. SEN. J. 96 (1867–68); CAL. ASSEMBLY J. 92 (1867–68).

341. CAL. ASSEMBLY J. 611 (1867–68).

342. CAL. SEN. J. 676 (1867–68).

343. Report of the Assembly Judiciary Committee in relation to Grand Juries, *Appendix to Journals of Senate and Assembly*, 17th Session, 1867–68, vol. 2 (undated; pages not numbered consecutively through the volume).

344. 15 STAT. 706 (1868).

nent form the dear-bought victories achieved in the mighty conflict . . . ."[345] The new Governor, Samuel Merrill, made no particular reference to the measure in his inaugural address.[346] The Senate adopted a resolution to ratify, the vote being 34 (later raised to 39) to 9.[347] The House, 68 to 12, concurred.[348] The Iowa Constitution of 1851 was in substantial accord with the federal Bill of Rights.

*The Reconstructed States.*—On March 2, 1867, the 39th Congress passed, over the President's veto, an Act for the more efficient government of the Rebel States.[349] Conditions were laid down upon which those States would be entitled to representation in Congress:

1. when the State "shall have formed a government in conformity with the Constitution of the United States in all respects . . . .
4. "and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same,
5. "and when said State . . . . shall have adopted the amendment . . . . known as article fourteen, and when said article shall have become a part of the Constitution of the United States."

It will be evident that when we look to these Southern States for evidence bearing on our inquiry, it will be what Congress said and did—rather than what transpired in state legislatures having no real choice in the matter—that merits our attention. Evidently if a state's constitution passed muster with Congress it was going to have to be "in conformity with the Constitution . . . . in all respects."

Arkansas was readmitted under an Act of June 22, 1868.[350] Its Constitution of February 11, 1868, presented no problem. The bill of rights (Art. I, § 9) guaranteed the grand jury "except . . . . in cases of petit larceny, assault, assault and battery, affray, vagrancy and such other minor cases as the general assembly shall

345. Iowa Sen. J. 32 (1868).
346. *Id.* at 42.
347. *Id.* at 265.
348. Iowa House J. 132 (1868).
349. 14 Stat. 428 (1867).
350. 15 Stat. 72 (1868).

make cognizable by justices of the peace." These were not within the Fifth Amendment's category of "infamous crimes."

North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida followed, as provided in the Act of June 25, 1868.[351] We compare their new constitutions with Amendments I to VIII. North Carolina met the test without question. Alabama's provision on the grand jury (Art. I, § 10) was almost identical with that of Arkansas, just quoted. Florida's guaranty (Art. I, § 8) was subject to a permissible exception "in cases of petit larceny, under the regulation of the Legislature." In South Carolina the grand jury rested upon no constitutional guaranty.

Louisiana's Constitution of 1868 provided: "Prosecution shall be by indictment on information."[352] This was not necessarily inconsistent with the terms of the Fifth Amendment: the statutes might secure the grand jury in case of a "capital, or otherwise infamous crime." If members of Congress had had any interest in learning whether the State's Constitution and statutes, taken together, conformed to the federal Bill of Rights—and it does not appear that there was any curiosity on this score—here is what they would have found: "Prosecutions for offenses not capital may be by information, with the consent of the court first obtained."[353] Louisiana certainly had infamous crimes that were not capital: manslaughter, for instance, brought imprisonment at hard labor for a term not exceeding twenty years.[354]

In restoring Louisiana to its place in the Union with constitution and law as set out above, Congress certainly showed by its conduct an understanding that a state might establish what was contradictory to the federal rule in the Bill of Rights and still have "a government in conformity with the Constitution of the United States in all respects."

Georgia's Constitution of 1868 enacted that, "There shall be no jury trial before the District Judge except when demanded by the accused, in which case the jury shall consist of seven."[355] In what cases did the district judge have jurisdiction? The Constitution answered, "all offenses not punishable with death or im-

351. 15 STAT. 73 (1868).
352. Art. 6. This is identical with Art. 105 of the Constitution of 1864.
353. La. Acts of 1855, p. 151, No. 121, § 1; LA. REV. STAT. LAWS § 977 (1870).
354. LA. REV. STAT. LAWS § 786 (1870).
355. Art. V, § IV, ¶ V.

prisonment in the penitentiary. . . . ."[356] The Sixth Amendment requires the Federal Government to afford a jury trial "in all criminal prosecutions." We need not enter upon any minute investigation of what was understood in 1868 to be the sweep of that requirement.[357] Undoubtedly there are some minor offenses that may be made triable without the jury. The matter remains obscure. For present purposes it is quite enough to say this: If Congress, when it examined Georgia's Constitution, had understood that the Fourteenth Amendment meant Amendments I to VIII, it must certainly have paused and debated whether the provision quoted above could meet the test.

Georgia's Constitution also provided that the superior court—the court of general jurisdiction—"shall render judgment without the verdict of a jury in all civil cases, founded on contract, where an issuable defense is not filed on oath."[358] If there were members of Congress who really believed that "privileges and immunities" included the civil jury as defined by the Seventh Amendment, then surely the provision above would have been drawn into discussion.

Now let us see what was said in Congress when these constitutions were "submitted . . . . for examination and approval." H.R. No. 1058—which became the Act admitting the six states[359] —was reported to the House on May 11, 1868.[360] Representative Bingham was constantly on his feet, urging enactment. He said:[361]

> The constitutions of these several States, in accordance with the spirit and letter of the Constitution of the United States as it stands amended by the act of the American people, secure equal political and civil rights and equal privileges to all citizens of the United States, native born and naturalized. . . . .

The committee had recommended that readmission be made subject in each case to a "fundamental condition": the state's constitution "shall never be amended to deprive of the right to

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356. Art. V, § IV, ¶ II.

357. The complexities of the subject were explored by Professor Frankfurter and Mr. Thomas G. Corcoran in *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 HARV. L. REV. 917 (1926).

358. Art. V, § III, ¶ III. This provision was construed in Craig v. Pope, 48 Ga. 551, 553 (1873).

359. See note 351 *supra.*

360. CONG. GLOBE, 40th Cong., 2d Sess. 2412 (1867–68).

361. *Id.* at 2462.

vote any citizen or class of citizens entitled to vote by the present constitution. . . . ." This would forbid any narrowing of the suffrage even if it applied to Negro and white alike. Bingham moved to substitute the following requirement:[362] "That civil and political rights and privileges shall be forever equally secured in said States to all citizens of the United States resident therein, as is now provided in said constitutions respectively." Congress, he pointed out, had power to enforce the Constitution's guaranty of privileges and immunities:[363]

> The fourteenth article of the amendments of the Constitution secures this power to the Congress of the United States. Your fundamental condition would not be worth the paper upon which it is printed but for the new grant of power which has come to Congress through the fourteenth article of the amendments, which enables the people in Congress assembled to enforce this condition. . . . . I propose to declare that the civil and political rights and privileges under these several constitutions shall be forever equally enjoyed by all citizens of the United States in so far as the same are now secured by said constitutions respectively . . . . thus leaving the people still the privilege of amending their constitutions, enlarging, if they choose, the liberties of the people, or removing restrictions, as the public exigencies may require and the public interest may demand.

The House voted down Bingham's amendment. He then joined in passing the bill as originally drawn.[364]

We follow the bill to the Senate, where we shall find Senator Howard very active in its support.

The new constitutions were evidently examined with care. Senator Howard found in Georgia's Constitution a section limiting the enforcement of any debt the consideration of which was a slave. This, he surmised, "resulted from the efforts of the debtor part of the community."[365] It amounted, he concluded, to an impairment of the obligation of a contract. So the Senate should write in a requirement that the Georgia legislature solemnly recognize its invalidity.

> Can we consistently, even by our silence, approve such a principle as this? Can we here vote an approval of this constitution, which, by its own terms, is a violation of the Constitution of the United States, which

362. *Id.* at 2413.
363. *Id.* at 2463.
364. *Id.* at 2465.
365. *Id.* at 3000. The provision was GA. CONST., Art. V, § 17 (1868).

> we have sworn to support? Sir, I cannot do this. I cannot forget my obligation to the Constitution; I cannot forget that that instrument prohibits the adoption of any such principle by a State.[366]

Howard's requirement went in, and stayed.

Senator Conkling took exception to a provision in Alabama's Constitution above navigable waterways, but after discussion that matter was dropped.[367]

The Senate added Florida to the list of states to be admitted to representation in Congress, and passed the bill as amended.[368]

The measure was returned to the House for concurrence in the Senate's amendments. Bingham took charge. A member inquired of him "whether the committee find, and whether in his judgment the fact be so, that Florida . . . . has conformed to the requirements of the acts of Congress relating to this matter?"[369] Bingham said:

> I answer him emphatically and directly that she has, and I challenge contradiction from any quarter.
>
> I agree with my colleague that we have no right to question a State about the local details of her constitution, which do not touch the general safety of the Republic and do not conflict with the requirements of the Constitution of the United States or any existing statute law. But, sir, I ask the House to consider the point upon which I was dwelling . . . . , that it does concern the safety of the Republic whether the fourteenth article of amendments shall become part of the fundamental law of the nation. The condition-precedent incorporated in this bill . . . . is that not one of the six States named in it shall come to political power save upon the condition that its Legislature shall in due form ratify the fourteenth article of amendment.[370]

So the bill was passed, and six states were restored to their normal relations within the Union. While the constitutions had been examined in detail, and one provision had been annulled, no member of Congress had evinced the slightest interest in comparing the respective bills of rights with Amendments I to VIII—though as we have seen some marked disparities were to be observed. Representative Bingham and Senator Howard were very happy about the outcome. We may conclude that neither one had

366. CONG. GLOBE, 40th Cong., 2d Sess. 3000 (1867–68).
367. *Id.* at 3018 *et seq.*
368. *Id.* at 3029.
369. *Id.* at 3094.
370. *Ibid.*

any desire to hold the states to an actual conformity to the federal Bill of Rights. Bingham said that the new constitutions were "in accordance with the spirit and letter of the Constitution . . . . as it stands amended," and insisted that Congress had no proper concern about "local details" which did not "touch the general safety of the Republic."

Virginia was admitted to representation by the Act of January 26, 1870.[371] Its Constitution of 1868 (like Virginian's historic Bill of Rights of 1776) contained no guaranty of the grand jury. The Code of 1860 had provided that "Prosecutions for offences against the commonwealth, unless otherwise provided, shall be by presentment, indictment or information."[372] A statute of July 11, 1870, provided that

> An information may be filed upon a presentment or indictment by a grand jury, or upon a complaint in writing, verified by the oath of a competent witness; but no person shall be put upon trial for any felony, unless an indictment shall have first been found by a grand jury in a court of competent jurisdiction. . . . .[373]

Mississippi came back under the Act of February 23, 1870.[374] Its Constitution of 1868 (Art. I, § 31) guaranteed the grand jury, with which, however, the legislature might dispense in cases of petit larceny, etc., enumerating about the same lesser crimes as Arkansas and Alabama.

Texas was restored by the Act of March 30, 1870.[375] Its Constitution of 1866—following the Constitution of 1845—provided that ". . . . no person shall be holden to answer for any criminal charge, but on indictment or information. . . . ."[376] This is similar to the provision in Louisiana. If one looks to the Texas statutes (which so far as appears Congress did not) one learns that felonies were prosecuted only upon indictment,[377] and that a felony was defined as an offense punishable by death or imprisonment in the penitentiary.[378] Let us take it for granted that, if

371. 16 STAT. 62 (1870).
372. VA. CODE, ch. 207, § 1 (1860); VA. CODE, ch. 201, § 1 (1873).
373. Va. Acts of 1869–70, ch. 257.
374. 16 STAT. 67 (1870).
375. 16 STAT. 80 (1870).
376. Art. I, § 8, in Constitution of 1866 as in that of 1845.
377. TEX. CODE CRIM. PROC. Art. 390 (1856); DIGEST OF LAWS Art. 2859 (Paschal, 1866).
378. TEX. CRIM. CODE Art. 56 (1856); DIGEST OF LAWS Art. 1658 (Paschal, 1866).

the question had been studied, the conclusion would have been that the law of Texas satisfied the provisions of the Fifth Amendment. At any rate it is true that once again agreement with the federal Bill of Rights was not apparent on the face of the constitution, and yet Congress showed no interest in the matter.

## XIII

If the theory that the new privileges and immunities clause incorporated Amendments I to VIII found no recognition in the practice of Congress, or in the action of state legislatures, constitutional conventions, or courts, it is not surprising that the contemporary Supreme Court knew nothing of it either. *Twitchell v. Pennsylvania*,[379] decided on April 5, 1869, is evidence that such was the case. The petitioner had been condemned to death for murder, in the courts of Pennsylvania. According to the statute, it was not necessary in an indictment for murder "to set forth the manner in which, or the means by which," the death was caused. In seeking a writ of error it was contended that this procedure violated the Fifth Amendment (indictment by grand jury) and the Sixth ("to be informed of the nature and cause of the accusation"). The Court granted leave to file a motion for the writ, and directed that notice be served on the Attorney General of Pennsylvania. No counsel appeared for the respondent.

Chief Justice Chase, in a brief opinion for a unanimous Court, said:

> We are by no means prepared to say, that if it were an open question whether the 5th and 6th Amendments of the Constitution apply to the state governments, it would not be our duty to allow the writ applied for and hear argument on the question of repugnancy. We think, indeed, that it would. But the scope and application of these amendments are no longer subjects of discussion here. [The Chief Justice quoted from *Barron v. Baltimore*, and cited later cases following it.] . . . .
>
> In the views thus stated and supported we entirely concur. They apply to the 6th as fully as to any other of the amendments. It is certain that we can acquire no jurisdiction of the case of the petitioner by writ of error. . . . .

Note that it did not occur to counsel for the petitioner to suggest that the Fourteenth Amendment, adopted less than a year

379. 7 Wall. 321 (U.S. 1869).

before, had worked any change in the law applicable to the case. Note, too, that the Attorney General of Pennsylvania saw no reason to be on hand, evidently regarding the law as being perfectly cold. Even though counsel for the petitioner had failed to invoke the *Fourteenth* Amendment, one supposes that the Court, had it been stirred by the least uncertainty, would have suggested the question and heard argument before disposing of the petition of one sentenced to death.

A side light is thrown upon our problem by the opinion of Justice Nelson in the *Justices of the Supreme Court of New York v. United States* ex rel. *Murray*,[380] decided in 1870. Murray had been sued in the courts of New York, and judgment had gone against him. A wartime Act of Congress permitted a suit such as this to be removed into the federal court. Did the Seventh Amendment's command that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States" operate on a case tried in a state court? The question "was argued on two occasions by the learned counsel, and each time with ability and care . . . ." It received "the most deliberate consideration" of the Court. Justice Nelson said:

> Another argument mainly relied upon . . . . is that the ten amendments proposed by Congress, and adopted by the States are limitations upon the powers of the Federal Government, and not upon the States; and we are referred to the cases of Barron v. The Mayor and City Council of Baltimore; and Lessee of Livingston v. Moore et al.; Twitchell v. The Commonwealth, as authorities for the position. This is admitted, and it follows that the 7th Amendment could not be invoked in a state court to prohibit it from re-examining, on a writ of error, facts that had been tried by a jury in the court below.

The Court's decision was that the Seventh Amendment meant that a court of the United States must not re-examine facts found by a jury—no matter whether the jury had been in a state or in a federal court. But in the passage quoted it asserted as "admitted" that the federal Bill of Rights did not control the states. If the Fourteenth Amendment had imposed Amendments I to VIII upon the states, the Court's answer would have come much more easily. For if the Seventh Amendment had become universal, applying in a state court as well as in a federal court, it would

380. 9 Wall. 274 (U.S. 1870).

certainly have applied to a case tried in the one and removed into the other. It seems most unlikely, if in contemporary understanding the Fourteenth Amendment had had any such meaning, that this would not have come out in the course of so full an argument.

## XIV

This mountain of evidence has become so high, one may have lost sight of the few stones and pebbles that made up the theory that the Fourteenth Amendment incorporated Amendments I to VIII. Let them be recounted.

First, Representative Bingham, author of Section 1, had much to say about "the immortal bill of rights," and referred once to "cruel and unusual punishments." Never in the reported debate on the passage of the Amendment did he refer specifically to Amendments I to VIII. On the hustings he included the right to teach of the eternal life.

Next, Senator Howard, who introduced the measure in the Senate, said that the new privileges and immunities clause included "the personal rights guaranteed and secured by the first eight amendments." That seems clear enough—and yet one can hardly believe that the Senator from Michigan ever thought that the Amendment expressing the congressional policy on reconstruction would require his own state to abandon its practice of prosecuting upon information.[381]

Even if these statements be taken at face value, Bingham and Howard promptly repudiated them by their support of the admission of Nebraska and of the restoration of the Southern States.

Mr. Flack's conclusion, it has been pointed out, rested largely on a supposed presumption that what was said by the author and

381. One reads a note to the article on Howard in the DICTIONARY OF AM. BIOGRAPHY (1932) that "the Burton Hist. Coll. in the Detroit Public Lib. has thirty bound volumes of manuscript letters, etc., by Jacob M. Howard." The staff of the Burton Historical Collection was kind enough to examine this material to see whether it contained a comment upon the meaning of Section 1. No such item was found.

Howard died on April 2, 1871. Memorial proceedings in the Supreme Court of Michigan recorded admiration, expressed however with discriminating judgment. Chief Justice Campbell's response contained this sentence, which may offer a key to understanding Howard's speech introducing the Amendment in the Senate: "If he did not, as has been suggested, possess that sort of an intellect that would enable him to wield the slender scimeter [*sic*] of Saladin to sever the gauzy veil that was not worth severing, he was able to wield the ponderous battle ax of the Lion-Hearted, before which iron and steel went down like wood." 20 Mich. at 530 (1871).

## ACTION IN CONGRESS

| | 1866 Feb. | March | April | May | June 1866 |
|---|---|---|---|---|---|
| Freedmen's Bureau Bill | → | | | | |
| Civil Rights Bill | → | | → | | |
| XIV AMENDMENT: | | | | | |
| SENATE | **13** S.R. No. 30★ (Bingham's Amendment) introduced and tabled. | | **30** S.R. No. 78▲ reported by Fessenden | **15** Fessenden not ready (ill) **23** Howard brought up **30** Howard: Amend § 1 to define citizenship. REPUB. CAUCUS | **4–8** Debated: Hendricks Poland Howe Davis Henderson Hendricks Johnson Carried: 33:11:5 |
| HOUSE | **13** H.R. No. 63■ (Bingham's Amendment) introduced by Bingham **26–28** Debated: Bingham Rogers Higby Kelley Hale Woodbridge Bingham Hotchkiss. Postponed [and never taken up] | | **30** H.R. No. 127● reported by Stevens | **8–10** Debated: Stevens Finck Garfield Broomall Shanklin Raymond Eliot Randall Rogers Farnsworth Bingham Carried: 128:37:19 | **13** Concur in amendments 120:32:32 |

### JOINT COMMITTEE ON RECONSTRUCTION

**1866 Jan. 12**
Bingham:
Congress shall have power . . . . to secure to all persons . . . . equal protection . . . . of life, liberty and property.
Stevens:
All laws . . . . shall operate impartially and equally . . . . without regard to race . . . .
Referred to subcommittee of 5 (Bingham a member)

**Jan. 20**
Subcommittee reported:
Congress shall have power . . . . to
(1) secure to all citizens of U.S. same political rights and privileges.
(2) to all persons equal protection in . . . . life, liberty and property.

**Jan. 24**
Referred to select committee of 3 (Bingham chairman)

**Jan. 27**
Bingham reported:
Congress shall power . . . . to secure
(1) to all persons . . . . full protection . . . . of life, liberty and property.
(2) to all citizens of U.S. the same immunities and equal political rights and privileges.
Motion to report to Congress.
Lost: 5:5:5

**Feb**
Bingham: sub
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# ADOPTION OF THE FOURTEENTH AMENDMENT

SS

RATIFICATION

**May**

**15**

ssenden
ready
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**23**

Howard brought up

**30**

Howard: Amend § 1 to define citizenship

REPUB. CAUCUS

**June 1866**

**4–8**

Debated:
Hendricks
Poland
Howe
Davis
Henderson
Hendricks
Johnson
Carried:
33:11:5

**8–10**

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**13**

Concur in amendments
120:32:32

| 1866 June | July | Aug. | Sept. | Oct. | Nov. | Dec. | 1867 Jan. | Feb. | Mar. | April | May | June | Jul |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 30 **Conn.** | 7 **N.H.** | | 11 **N.J.** | | 1 *Tex.* | 3 *Fla.* | 10 *Ky.* | 1 **Minn.** | 20 **Mass.** | | | 15 **Neb.** | |
| | 19 **Tenn.** | | 19 **Ore.** | | 9 **Vt.** | 4 *N.C.* | **N.Y.** | 7 **R.I.** | 23 *Md.* | | | | |
| | | | | | 13 *Ga.* | 17 *Ark.* | 11 **Ohio** | *Del.* | | | | | |
| | | | | | | 20 *S.C.* | 15 **Ill.** | 13 **Wis.** | | | | | |
| | | | | | | | 16 **W.Va.** | **Pa.** | | | | | |
| | | | | | | | 18 **Kan.** | 15 **Mich.** | | | | | |
| | | | | | | | 19 **Me.** | | | | | | |
| | | | | | | | *Va.* | | | | | | |
| | | | | | | | 22 **Nev.** | | | | | | |
| | | | | | | | 26 **Mo.** | | | | | | |
| | | | | | | | 29 **Ind.** | | | | | | |
| | | | | | | | 30 *Miss.* | | | | | | |

STATES RATIFYING:
**Bold Type**

STATES REJECTING:
*Italics*

**Jan. 27**

Bingham reported:
Congress shall power . . . . to secure
(1) to all persons . . . . full protection . . . . of life, liberty and property.
(2) to all citizens of U.S. the same immunities and equal political rights and privileges.
Motion to report to Congress.
Lost: 5:5:5

**Feb. 3**

Bingham: substitute:
Congress shall have power . . . . to secure
(1) to citizens of each State all privileges and immunities of citizens in the several States. (Art. IV, § 2)
(2) to all persons in the several States equal protection of life, liberty and property. (Amend. V)
Substitution agreed: 7:6:2
Amendment thus amended accepted: 9:4:2

**Feb. 10**

On motion to report Amendment to Congress
Carried: 9:5:1
Became:
S.R. No. 30★
H.R. No. 63■

**April 21**

Stevens' plan:
§ 1. No discriminati
States or U.S. as t
rights of persons b
of race.
§ 2. No discriminat
suffrage after July 4,
§ 3. Until then, p
discriminated again
counted for represen
§ 4. Debts.
§ 5. Congress empo
to enforce.
Bingham:
Add to § 1:
(1) nor shall any
deny any
equal protecti
laws,
(2) nor take private
erty without
compensation.
Lost: 5:7:3
Bingham:
Insert new § 5:
privileges and immu
due process, equal p
tion clauses [as
adopted].
Carried: 10:2:3

# TH AMENDMENT

## RATIFICATION BY THE STATES

| Nov. | Dec. | 1867 Jan. | Feb. | Mar. | April | May | June | July | Aug. | Sept. | Oct. | Nov. | Dec. | 1868 Jan. | Feb. | Mar. | April | May | June | July | 1869–1870 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | | | | | | | CONGRESS DECLARED ADOPTED, JULY 21<br>SEC. OF STATE PROCLAIMED, JULY 28 | | | | |
| 1<br>*Tex.* | 3<br>*Fla.* | 10<br>*Ky.* | 1<br>Minn. | 20<br>Mass. | | | 15<br>Neb. | | | | | | | *Ohio res. to withdraw* | | | 3<br>Iowa | | 9<br>Fla. | 4<br>N.C. | Oct. 15, 1868 *Ore. res. to withdraw* |
| 9<br>Vt. | 4<br>*N.C.* | N.Y. | 7<br>R.I. | 23<br>*Md.* | | | | | | | | | | | | | 6<br>Ark. | | | 9<br>La. | |
| 13<br>*Ga.* | 17<br>*Ark.* | 11<br>Ohio | *Del.* | | | | | | | | | | | | | | 27<br>*N.J. res. to withdraw* | | | S.C. | |
| | 20<br>*S.C.* | 15<br>Ill. | 13<br>Wis. | | | | | | | | | | | | | | | | | 13<br>Ala. | Oct. 8, 1869 Va. |
| | | 16<br>W.Va. | Pa. | | | | | | | | | | | | | | | | | 21<br>Ga. | Jan. 17, 1870 Miss. |
| | | 18<br>Kan. | 15<br>Mich. | | | | | | | | | | | | | | | | | | Feb. 18, 1870 Tex. |
| | | 19<br>Me. | | | | | | | | | | | | | | | | | | | |
| | | *Va.* | | | | | | | | | | | | | | | | | | | |
| | | 22<br>Nev. | | | | | | | | | | | | | | | | | | | |
| | | 26<br>Mo. | | | | | | | | | | | | | | | | | | | |
| | | 29<br>Ind. | | | | | | | | | | | | | | | | | | | |
| | | 30<br>*Miss.* | | | | | | | | | | | | | | | | | | | |

**p. 10**
to report
to Congress
:1

★
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### April 21

Stevens' plan:
§ 1. No discrimination by States or U.S. as to civil rights of persons because of race.
§ 2. No discrimination in suffrage after July 4, 1876.
§ 3. Until then, persons discriminated against not counted for representation.
§ 4. Debts.
§ 5. Congress empowered to enforce.
Bingham:
Add to § 1:
(1) nor shall any State deny any person equal protection of laws,
(2) nor take private property without just compensation.
Lost: 5:7:3
Bingham:
Insert new § 5:
privileges and immunities, due process, equal protection clauses [as finally adopted].
Carried: 10:2:3

### April 25

Williams moved:
Strike out Bingham's § 5:
Carried: 7:5:3
Vote to report to Congress.
Carried: 7:6:2
Bingham:
Report § 5 as separate Amendment.
Lost: 4:8:3
Vote to report to Congress reconsidered.
Carried: 10:2:3

### April 28 1866

Bingham:
Strike out § 1 of Stevens' plan; insert § 5: privileges and immunities, due process, and equal protection clauses.
Carried: 10:3:2
On report to Congress:
12 Repubs: 3 Dems.
Became:
S.R. No. 78▲
H.R. No. 127●

by the sponsor of a measure must, unless directly contradicted, be deemed to establish its meaning.[382]

Governor Cox of Ohio said that Section 1 would forbid such intolerance of free speech as some Southern States had practiced prior to the war.

In the Massachusetts legislature's Committee on Federal Relations, a bare majority of four members, opposing the Amendment because it failed to establish Negro suffrage, had said that Section 1 was needless surplusage because the Preamble to the Constitution and Amendments I, II, V, VI, and VII had already covered the ground. The legislature voted to substitute the minority report.

This—save for an event in 1871, next to be examined—seems to sum up the evidence for the proposition that the Fourteenth Amendment was understood, in the period when it was framed and ratified, as imposing Amendments I to VIII upon the states. Mr. Flack's case, when carefully sifted, appears to come to no more than that, and in the preparation of this article nothing more on that side was discovered.

One matter, however, has been reserved for separate consideration. In Part VII of the Appendix to his opinion in *Adamson v. California*, Mr. Justice Black says that "Formal statements subsequent to adoption of the Amendment by the congressional leaders who participated in the drafting and enactment of it are significant."[383] He turns to a debate in the House of Representatives in 1871—five years after the framing of the Amendment—quoting what Garfield said and then what "A few days earlier" Bingham had said. The quotation from Bingham is very long, and will not be reprinted here. The reader should turn to the Reports and read it carefully.[384] In part Bingham related that after his first version of a privileges and immunities clause had been debated (the debate of February 26 to 28, culminating in a postponement that was virtually a rejection),[385] he had re-examined *Barron v. Baltimore*.[386] He apprehended as never before certain words of the Chief Justice. Acting upon what he there read, he

382. See pp. 65 *et seq. supra.*
383. 332 U.S. 46, 110 (1947).
384. *Id.* at 111 to 118.
385. See pp. 24 *et seq. supra.*
386. See note 46 *supra.*

had imitated the Founders in their drafting of Article I, Section 10: he recast his proposal to begin "No State shall . . . ." What, we ask, was it that no state should do? Bingham explained:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. [He read them verbatim.]

Maybe this statement after the event accurately expresses what lay in Bingham's mind in 1866; but it is what he said and did that counts, and never in the reported debates did he refer specifically to Amendments I to VIII.

Read alone and out of context, Bingham's speech of 1871 sounds definitive. One might fancy that for the instruction of uninformed Congressmen sitting about him he was unlocking the book of History. Actually he was in the midst of a debate with Representatives Farnsworth and Garfield, Republicans, who had been there too, and who had refreshed their recollections by a study of the *Congressional Globe*. At one point Garfield retorted to Bingham, "My colleague can make but he cannot unmake history."[387] The matter before the House in 1871 was H.R. No. 320, a bill to enforce the provisions of the Fourteenth Amendment. This became the Act of April 20, 1871, commonly known as the Ku Klux Act.[388] It was aimed at Southern outrages perpetrated by the Klan. Bingham was supporting the bill as being warranted by the Fourteenth Amendment. Farnsworth was arguing that certain provisions exceeded the power of Congress.[389] (*United States v. Harris*[390] in 1883 held the Act unconstitutional at the very point on which Farnsworth had placed his finger.) He quoted from the record a number of comments already set out in this article. Farnsworth's argument was this: Congress had no authority to legislate generally on civil rights; its power was only to enforce the command that "No State shall . . . ." Bingham's first version, he recalled, had begun "Congress shall have power

387. CONG. GLOBE, 42d Cong., 1st Sess., App. 151 (1871).
388. 17 STAT. 13 (1871).
389. CONG. GLOBE, 42d Cong., 1st Sess., App. 113 (1871).
390. 106 U.S. 629 (1883).

. . . ." That was debated to a standstill. Then Bingham had made a fresh start, and had adopted the formula "No State shall . . . ." Farnsworth argued that the change had been significant, and was an evidence of the rejection in 1866 of the theory being advocated by Bingham in 1871. Here Bingham rose to give his explanation of what he had thought in 1866 and of why he had chosen the words that were finally adopted.

What Bingham said in 1871 formed no part whatsoever of the facts that produced the Fourteenth Amendment. He had had a full opportunity to express his understanding in 1866, and had said a great many things. As we have seen, some of his colleagues had tried very hard at the time to commit him to a clear statement of what he thought his proposal meant. He had made history, but his afterthoughts should not be allowed to remake it.

We have dealt with Mr. Bingham in this article on the view that, however confused, he was sincere. If for a moment one were to suppose that he was astutely endeavoring to bring a wooden horse into the Constitution, certainly the result must be clear: no such fraud on the nation could be countenanced.

As one looks up from this protracted inquiry, certain broad reflections seem controlling. If Senator Howard's statement about Amendments I to VIII had really been accepted at the time, surely one would find it caught up and repeated in contemporary discussion. "Section 1 incorporates the Bill of Rights"—an intricate subject would have been compressed into a capsule. So pat a phrase would have been passed about. The Democratic opposition, if they had understood that any such object was in view, would have sought to turn it to their advantage in states whose practice would be disturbed. And yet one does not find the thought expressed—neither in newspaper editorials or campaign speeches so far as they have been examined, nor in the messages of governors. Lawyers would have urged the contention in the courts, and if need be carried their appeals to the Supreme Court. But this simply did not occur.

The freedom that the states traditionally have exercised to develop their own systems for administering justice, repels any thought that the federal provisions on grand jury, criminal jury, and civil jury were fastened upon them in 1868. Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified. The electoral

campaign of 1866 was fought over the proposed Amendment: but the debates never took the turn of suggesting that ratification would involve major change in the administration of justice in the Northern States. Recall how the legislatures in many Northern States, obedient to the autumn mandate, had trooped to ratify the Amendment—even suspending rules, refusing to refer to committee, cutting off debate: surely all this haste was not to make Amendments V, VI, and VII the Constitution's rule for every state. As one ponders the matter, this consideration seems far more substantial than a few words uttered by Bingham and Howard in the debates of 1866—especially since we have found that their conduct denied their words.

If the founders of the Fourteenth Amendment did not intend the privileges and immunities clause to impose Amendments I to VIII, then what, it may be asked, did they mean? One cannot with grace plead that this invites a "barren discussion" or that to answer would be "more tedious than difficult." If one seeks some inclusive and exclusive definition, such that one could say, this is precisely what they had in mind—pretty clearly there never was any such clear conception. We may put to one side the utterances of the more zealous Democrats—they were magnifying the proposal to render it odious. Once it was adopted they would, of course, reverse their stand. The advocates of the measure offered illustrations of particular evils that would be repressed; they stayed away from any explanation of a fundamental principle. Some referred grandly to the spirit of the Declaration of Independence—the fundamental rights of citizens in a free government—law in its highest sense that is the perfection of reason—even the spirit of Christianity. Some, down to earth, said the privileges and immunities clause would write into the Constitution what the Civil Rights Act had put upon the statute book. Evidently they had no clear idea as to the confines of the clause, and in the main no awareness either of their own want of understanding. A few sharp minds perceived the questions to be asked, and asked them—and went unanswered. The debates never established what was to be the basis or measure of the privileges and immunities of citizens of the United States.

Congress, we know, was moved by various purposes. It meant to insure that the Negro would be accorded the same civil rights

as the white man: that was the object of the equal protection clause. It also meant to forbid state action that would deny to any citizen the faculties inherent in being a citizen *of the United States*. But it undoubtedly purposed to do still more, to establish a federal standard below which state action must not fall. At this point thinking became hazy. Brooding over the matter in the writing of this article has, however, slowly brought the conclusion that Justice Cardozo's gloss on the due process clause—what is "implicit in the concept of ordered liberty"[391]—comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause. This accommodates the fact that freedom of speech was mentioned in the discussion of 1866, and the conclusion that, according to the contemporary understanding, surely the federal requirements as to juries were not included.

When the *Slaughter-House Cases*[392] put the privileges and immunities clause to a rigorous scrutiny, its looseness became apparent. Since then it has merely lingered on, performing virtually no duty as an operative part of the Constitution. The due process clause was increasingly invoked by litigants claiming protection against state action, and in passing upon those contentions the Court has gradually established that that provision embraces certain of the rights specifically mentioned in the first eight Amendments, yet not all of them. This is the selective process against which Justice Black has rebelled. In his contention that Section 1 was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against him.

391. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
392. 16 Wall. 36 (U.S. 1873).